UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 22-5932

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD WAYNE JOHNSON,

Defendant-Appellant.

Before: MOORE, GRIFFIN, and READLER, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Kentucky at Louisville.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

NOT RECOMMENDED FOR PUBLICATION

No. 22-5932

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE WESTERN DISTRICT OF
RICHARD WAYNE JOHNSON,	)	KENTUCKY
	)	
Defendant-Appellant.	)	

ORDER

Before: MOORE, GRIFFIN, and READLER, Circuit Judges.

Richard Wayne Johnson, a federal prisoner proceeding pro se, appeals an order of the district court denying his "Motion for Modification of an Imposed Term of Imprisonment and Other Appropriate Relief," filed pursuant to 18 U.S.C. § 3582(c)(1)(A). This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). Because the district properly denied relief under § 3582(c)(1)(A), we affirm the court's order.

Johnson pleaded guilty to three child pornography offenses: transportation in interstate commerce, in violation of 18 U.S.C. § 2252A(a)(1); advertisement, in violation of 18 U.S.C. § 2251(d)(1); and possession, in violation of 18 U.S.C. § 2252A(a)(5)(B). In June 2018, the district court sentenced Johnson to a total term of 360 months' imprisonment and a life term of supervised release. Johnson did not appeal.

Four years later, Johnson moved to modify his sentence based on "extraordinary and compelling reasons" under § 3582(c)(1)(A) (the "compassionate release" provision). Johnson argued that his convictions and sentence were invalid because the district court lacked jurisdiction

to convict him of any crime, the Government suffered no injury from his alleged conduct, and Congress lacked constitutional authority to enact the criminal laws at issue. The district court denied Johnson's motion, explaining that constitutional challenges to his sentence should be brought under 28 U.S.C. § 2255, not 18 U.S.C. § 3582(c)(1)(A). The court therefore construed Johnson's motion as a § 2255 motion and denied it as time-barred. *See* 28 U.S.C. § 2255(f). Additionally, the court noted that, even if it were to consider Johnson's motion under § 3582(c)(1)(A), it would deny relief because Johnson did not demonstrate that he exhausted his administrative remedies, that extraordinary and compelling reasons justify a sentence reduction, or that the relevant sentencing factors set forth under 18 U.S.C. § 3553(a) weigh in favor of relief. Johnson then filed a § 2255 motion, which remains pending.

Johnson now appeals. He argues that the district court erred by not considering his claims under § 3582(c)(1)(A), insisting that his challenge to the district court's jurisdiction can be raised at any point, including in a § 3582(c) motion. He contends that his invalid conviction amounts to an "extraordinary and compelling" reason for granting relief.

We review a district court's denial of a § 3582(c)(1)(A) motion for an abuse of discretion. *United States v. Ruffin*, 978 F.3d 1000, 1005 (6th Cir. 2020). An abuse of discretion occurs when the district court "relies on clearly erroneous findings of fact, applies the law improperly, or uses an erroneous legal standard." *United States v. Jones*, 980 F.3d 1098, 1112 (6th Cir. 2020) (quoting *United States v. Pembrook*, 609 F.3d 381, 383 (6th Cir. 2010)).

To the extent the district court denied Johnson relief under § 3582(c)(1)(A), it did not abuse its discretion. All the arguments Johnson raised in support of his motion challenged the validity of his conviction. A § 3582(c)(1)(A) motion "is not the proper vehicle for arguments 'that were or could have been raised on direct appeal or in a § 2255 motion.'" *United States v. Majors*, No. 21-5687, 2022 WL 2836741, at *3 (6th Cir. Feb. 16, 2022) (order) (alteration omitted) (quoting *United States v. Mattice*, No. 20-3668, 2020 WL 7587155, at *2 (6th Cir. Oct. 7, 2020) (order)); *see United States v. Hunter*, 12 F.4th 555, 567 (6th Cir. 2021) (finding no indication that "Congress intended to allow prisoners to avoid the specific habeas restrictions by resorting to compassionate release"), *cert. denied*, 142 S. Ct. 2771 (2022); *United States v. Handerhan*, 789 F.

App'x 924, 926 (3d Cir. 2019) (per curiam) (noting that § 3582(c)(1)(A) is a "mechanism to seek a reduction in the term of a sentence, not to challenge its validity"). Johnson's attacks on the validity of his convictions could have been raised on direct appeal or in a § 2255 motion; they therefore do not constitute extraordinary and compelling reasons for compassionate release.

Although Johnson raised claims in his § 3582(c)(1)(A) motion that should have been raised in a § 2255 motion, the district court erred by construing the motion as a § 2255 motion and denying it as untimely without notice to Johnson. A pro se pleading may not be re-characterized as an initial § 2255 motion unless the litigant is advised of the court's intention to re-characterize it, warned that the re-characterization could adversely affect the ability to seek future relief under § 2255, and allowed an opportunity to withdraw or amend the pleading. *See Castro v. United States*, 540 U.S. 375, 383 (2003). The district court thus erred by construing Johnson's motion as an initial § 2255 motion without giving him the warnings required by *Castro*. *Id.*; *see also Gooden v. United States*, 627 F.3d 846, 849 (11th Cir. 2010) ("In light of *Castro*'s unqualified holding, we hold that a district court must provide the requisite notice and warning mandated by *Castro*, even where the court determines that the re-characterized motion is untimely."). The § 2255 motion that is currently pending in the district court should be considered Johnson's first § 2255 motion.

For these reasons, we **AFFIRM** the district court's denial of Johnson's motion for modification of his sentence under § 3582(c)(1)(A). However, we clarify that the denial of Johnson's § 3582(c) motion does not count as the denial of an initial § 2255 motion. *See, e.g.*, *Foster v. Warden Chillicothe Corr. Inst.*, 522 F. App'x 319, 322 (6th Cir. 2013) (per curiam).

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE

UNITED STATES OF AMERICA,	)	
	)	
v.	)	
	)	
RICHARD JOHNSON,	)	Case No. 3:15-cr-00065 (TBR)
	)	
	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

This matter comes before the Court upon Richard Johnson's Motion for Modification of an Imposed Term of Imprisonment, (Mot.), Dkt. 60. The Government has responded, (Resp.), Dkt. 63. Johnson has replied, (Reply), Dkt. 64. As such, the matter is ripe.

For the reasons that follow, Johnson's Mot., Dkt. 60, is **DENIED**.

I. FACTUAL BACKGROUND

A federal grand jury sitting in Louisville, Kentucky, returned a three-count Indictment against Richard Johnson charging him with advertising, distributing, and possessing child pornography—in violation of 18 U.S.C. §§ 2251(d)(1)(A), 2251(d)(2)(B), 2252A(a)(1), 2252A(a)(5)(B), 2252A(b)(1), and 2252A(a)(5)(B). Plea Agreement, Dkt. 27, ¶ 1. Johnson entered a voluntary plea of guilty to those charges. *See id.* ¶ 3. Johnson and the Government agreed to the following factual basis for the plea:

> A Cybertip from AOL indicated that a user was transferring child pornography by e:mail. The e:mail traced back to Johnson. He transported child pornography via e:mail on January 19, 2012.
>
> Further review of Johnson's e:mail account (which he later admitted was his), traced to an online group where Johnson was posting requests for the trading of child pornography. One of the advertisements occurred on September 13, 2013.

> In the posts, Johnson included "albums" (folders filled with images of child pornography). He provided descriptions of the contents in the message - but a password was required to open the albums. Individuals interested in trading child pornography with Johnson had to contact him directly to obtain the password for Johnson's "album."
>
> Law enforcement officials executed a state search warrant at Johnson's home on or about September 17, 2013. Forensic examination of Johnson's computers, and other digital devices, revealed thousands of images of child pornography (still and video). He had obtained the child pornography from the Internet.
>
> Johnson engaged in all of the conduct described above while in Oldham County, Kentucky. The images transported, possessed and advertised involved the use of children under the age of 18 engaging in sexually explicit conduct.

Id. ¶ 3.

This Court accepted the plea agreement and sentenced Johnson to a total of 360 months in prison followed by a life term of Supervised Release. *See* Judgment, Dkt. 58. Johnson did not seek an appeal and is projected for release on September 10, 2046. *See* Resp. at 3. Johnson now asks the Court to modify his sentence. *See* Mot.

II. DISCUSSION

Johnson moves the Court to modify his sentence under 18 U.S.C. § 3582. *See* Mot. at 1. In reality, however, Johnson challenges Congress' authority to pass the statutes to which he pled guilty and argues that the Government lacked standing to bring these charges.[1] *See id.* First, Johnson contends that because "the 'judicial power' of the United States does not extend to criminal cases," and "sexual exploitation of minors [is not] mentioned in the Constitution for nationwide federal regulation," his present sentence should be "render[ed] . . . 'void' and 'is a

[1] Even if the Court conducted an 18 U.S.C. § 3582 analysis, it still would not modify Johnson's sentence. That statute requires a movant to show that he exhausted his administrative remedies, that extraordinary and compelling reasons justify a reduction of his sentence, and that the relevant sentencing factors set forth in 18 U.S.C. § 3553(a) weigh in favor of relief. *See United States v. Elias*, 984 F.3d 516 (6th Cir. 2021). Johnson has not demonstrated that his case satisfies any of those requirements. *See id.* at 518; *see also* Mot.; Reply.

legal nullity.' " Reply at 5–7. Johnson also claims that the Government has not alleged "to have suffered any injury, much less an 'injury in fact' by [his] alleged conduct, therefore . . . this Court lacks the capacity to be conferred with criminal case jurisdiction."[2] Reply at 6.

Habeas challenges (like Johnson's) to the legality of a sentence based upon constitutional grounds should be brought under 28 U.S.C. § 2255. *United States v. Peterman*, 249 F.3d 458, 461 (6th Cir. 2001) ("Section 2255 is the primary avenue for relief for federal prisoners protesting the legality of their sentence."). Motions under § 2255 are governed by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). AEDPA, which became effective in April 1996 and therefore governs this case, imposes a one-year statute of limitations for a motion to vacate a sentence: "A 1–year period of limitation shall apply to a motion under this section." 28 U.S.C. § 2255(f). The limitation period runs from "the date on which the judgment of conviction becomes final." § 2255(f)(1).

Johnson's judgment issued on June 11, 2018. *See* Judgment. Federal Rule of Appellate Procedure 4(b)(1)(A) gave Johnson fourteen days to file a notice of appeal. Johnson did not file a notice of appeal in that two-week window. Therefore, on June 25, 2018, Johnson's judgment became final. *Sanchez-Castellano v. United States*, 358 F.3d 424, 427 (6th Cir. 2004) ("[T]he judgment becomes final upon the expiration of the period in which the defendant could have appealed to the court of appeals, even when no notice of appeal was filed."). The AEDPA

[2] Johnson suggests here that the Court lacks jurisdiction. *See* Mot. at 6. However, the substance of Johnson's arguments "deal not with *our* power to hear a case but with *Congress's* authority to regulate certain conduct." *United States v. Al-Maliki*, 787 F.3d 784, 791 (6th Cir. 2015); *see also Rice v. Farley*, No. CIV. 14-31, 2014 WL 2441260, at *2 (E.D. Ky. May 30, 2014) ("While individualized injury is necessary for private plaintiffs to have standing in private litigation, diffuse injuries to the general public are enough to create standing between the public (the government) and criminal defendants.") (quotation omitted).

statute of limitations on Johnson's case thus expired one year later, meaning that Johnson had until June 25, 2019, to file any timely § 2255 motion and any amendments to the motion.

Johnson's current motion is, in reality, a § 2255 motion. The motion was filed on June 13, 2022, almost three years after AEDPA's statute of limitations had run. The motion is therefore time-barred.

III. CONCLUSION

For the above stated reasons, **IT IS HEREBY ORDERED** Johnson's Mot., Dkt. 60, is **DENIED.**

IT IS SO ORDERED

Thomas B. Russell

Thomas B. Russell, Senior Judge
United States District Court
August 19, 2022

cc: Richard Wayne Johnson
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