

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**FRANKLIN LANDAVAZO,**

**Defendant.**

**Case No. 10-20005-01-CM**

**MEMORANDUM AND ORDER**

This case is before the court on defendant Franklin Landavazo’s motion for appointment of counsel to assist him in filing a motion under 28 U.S.C. § 2255 (Doc. 26). Defendant claims that the sentence enhancement based on his career offender status under U.S.S.G. § 4B1.1, is unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015).

The court finds that appointment of counsel is unwarranted. Defendant filed his current motion on June 30, 2016, almost six years after judgment was entered. Defendant’s sentence enhancement was based on U.S.S.G. § 4B1.1, not the residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii). *See Johnson*, 135 S. Ct. at 2563 (finding the residual clause of § 924(e)(2)(B)(ii) unconstitutionally vague).

The Supreme Court recently held in *Beckles v. United States*, 137 S. Ct. 886, 890 (2017), that the residual clause under U.S.S.G. § 4B1. 2(a)(2)—“defining a ‘crime of violence’ as an offense that ‘involves conduct that presents a serious potential risk of physical injury to another[]’”—was not unconstitutional. *Beckles*, 137 S. Ct. at 890 (holding that the advisory sentencing guidelines are not subject to vagueness challenges under the due process clause). *Beckles* abrogated the Tenth Circuit’s decision in *United States v. Madrid*, 805 F.3d 1204, 1210 (10th Cir. 2015). *Beckles*, 137 S. Ct. at 886.

A potential motion filed under 28 U.S.C. § 2255 would be untimely. And *Beckles* foreclosed recognition of a new constitutional right applicable to defendant's case—thus, 28 U.S.C. § 2255(f)(3) cannot save defendant's claim.

**IT IS THEREFORE ORDERED** that defendant Franklin Landavazo's motion for appointment of counsel (Doc. 26) is denied.

Dated this 26<sup>th</sup> day of April, 2017, at Kansas City, Kansas.

s/ Carlos Murguia  
**CARLOS MURGUIA**  
**United States District Judge**