

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

DAVID BRYAN JOHNSON,

Defendant.

**Case Nos. 12-10025-01-JTM (Criminal)
16-1239-JTM (Civil)**

MEMORANDUM AND ORDER

This case is before the court on defendant’s motion to vacate sentence pursuant to 28 U.S.C. § 2255 (Dkt. 69) and the government’s motion to dismiss (Dkt. 74). Defendant claims that the sentence enhancement based on his career offender status under U.S.S.G. § 4B1.2, is unconstitutional in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015). For the reasons set forth below, this court dismisses defendant’s motion and grants the government’s motion.

The United States Supreme Court in *Beckles v. United States*, 137 S. Ct. 886, 890 (2017), held 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. Consequently, the court finds that no new rule or constitutional law provides defendant an avenue for relief.

A certificate of appealability is not warranted in this case because reasonable jurists could not debate whether “the petition should have been resolved in a different manner or that the issues

presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal citation omitted).

IT IS THEREFORE ORDERED that defendant’s motion to vacate sentence pursuant to 28 U.S.C. § 2255 (Dkt. 69) is dismissed.

IT IS FURTHER ORDERED that government’s motion to dismiss (Dkt. 74) is granted.

IT IS FURTHER ORDERED that the court will not issue a certificate of appealability in this case.

Dated this 24th day of May, 2017, at Wichita, Kansas.

s/ J. Thomas Marten
United States District Court