

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

Vs.

Civil Case No. 06-3018-SAC
Criminal Case No. 00-40024-04-SAC

JIMMY D. MAULDIN,

Defendant/Movant.

MEMORANDUM AND ORDER

The court denied the defendant's motion to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 (Dk. 2000) as untimely. (Dk. 2004). The defendant has filed a notice of appeal and request for certificate of appealability. (Dk. 2010). The defendant asserts he has made a substantial showing of the denial of a constitutional right.

As a prerequisite to an appeal from the denial of a motion for relief under 28 U.S.C. § 2255, a certificate of appealability will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard requires a petitioner to demonstrate that "reasonable jurists could 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 quotation marks and citation omitted). When the petition has been dismissed on procedural grounds, a certificate should issue only if “jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. at 484.

The defendant submits nothing of record to show the court erred in its understanding of the facts or in its application of the law by denying his motion as untimely. Jurists of reason would not find debatable this court’s ruling on the untimeliness of the defendant’s petition. Nor can the defendant challenge his sentence under the recent decision of *United States v. Booker*, 543 U.S. 220 (2005), as the Tenth Circuit has held it does not apply retroactively to collateral petitions. *United States v. Bellamy*, 411 F.3d 1182, 1186 (10th Cir. 2005).

IT IS THEREFORE ORDERED that the defendant’s request for the issuance of a certificate of appealability is denied.

Dated this 14th day of March, 2006, Topeka, Kansas.

s/ Sam A. Crow
Sam A. Crow, U.S. District Senior Judge