

IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

Vs.

No. 05-40003-01/02-SAC

TANZITARO GUERRERO  
and ALFREDO TORRES,

Defendants.

MEMORANDUM AND ORDER

This case is before the court on the defendant's separate motions to vacate judgment pursuant to Fed. R. Crim. P. 36 ("Clerical Error) and Fed. R. Civ. P. 60(b). (Dks. 115 and 116). The defendants' motions are identical. On May 13, 2010, the court filed an order denying the defendants' nearly identical petitions for writ of error audita querela. (Dk. 114). The defendants' petitions argued in part that the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), came down after they were sentenced and that their sentences were the result of mandatory sentencing guidelines. The court noted that this argument was factually wrong. Both defendants were sentenced in March of 2006, over a year after the *Booker* decision, and the sentencing court expressly treated

the sentencing guideline range calculated in the presentence report as only “advisory.” (Dk. 108, p. 4). The court concluded that there were no gaps in post-conviction remedies to justify the writ and that the defendants were required to pursue relief through 28 U.S.C. § 2255.

The defendants’ current motions are grounded again on the erroneous premise of needing a remedy that would fill a gap and allow them to assert *Booker* retroactively. The defendants’ use of this “form” motion here is without any factual basis. They were sentenced after *Booker*, and the court followed *Booker* in sentencing them. There is nothing to be applied retroactively here. Nor do the defendants articulate any extraordinary circumstances or other cognizable grounds for relief under Rule 60(b). The defendants’ motions are devoid of merit.

IT IS THEREFORE ORDERED defendant's separate motions to vacate judgment pursuant to Fed. R. Crim. P. 36 (“Clerical Error”) and Fed. R. Civ. P. 60(b) (Dks. 115 and 116) are denied.

Dated this 16<sup>th</sup> day of June, 2010, Topeka, Kansas.

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