

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

By order filed May 13, 2010, the court denied the defendant's separate petitions for writ of error audita querela (Dks. 112 and 113). (Dk. 114). The court found that this writ was not a remedy available to the defendants because the defendants' challenges could be pursued under 28 U.S.C. § 2255 and there was "no gap in the post-conviction remedies to justify use of the writ." *Id.* at 3-4. The defendants then filed motions to vacate that order pursuant to Rules 36 and 60(b) of the Federal Rules of Civil Procedure. (Dks. 115 and 116). The court denied those motions on June 16, 2010, noting once again that the sentencing court followed *United States v. Booker*, 543 U.S. 220 (2005), in sentencing the defendants. (Dk. 117). Now the defendants have filed notices to appeal from the order

denying their petitions for writ of audita querela, (Dks. 118 and 121). Their filings also have been construed and docketed as motions seeking certificates of appealability. (Dks. 119 and 122).

If the defendant's appellate proceeding is subject to the requirements of 28 U.S.C. § 2253(c)(2) and Rule 11 of the Rules Governing Section 2254 Cases, then the court would deny the defendants a certificate of appealability for the reasons stated here. The defendants must demonstrate that jurists of reason would find the district court's procedural ruling reasonably debatable. *Slack v. McDaniel*, 529 U.S. 473, 478 (2000). Tenth Circuit precedent fully sustains the court's prior ruling, and the defendants offer nothing to challenge the precedent's controlling result on their petitions. The defendants' petitions are not available as they have remedies under 28 U.S.C. § 2255, and the defendants' arguments with regard to *Booker* are falsely premised as they were sentenced after *Booker* and in compliance with its requirements.

IT IS THEREFORE ORDERED that the defendants' motions for certificate of appealability (Dks. 119 and 122) are denied.

Dated this 22nd day of July, 2010, Topeka, Kansas.

s/ Sam A. Crow

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