

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

**KERRY LUCERO,**

**Petitioner,**

**v.**

**CASE NO. 08-3062-SAC**

**DAVID McKUNE, Warden,  
Lansing Correctional Facility, et al.,**

**Respondents.**

**ORDER**

This matter is a petition for writ of habeas corpus under 28 U.S.C. § 2241. On November 3, 2009, this Court entered an Order (Doc. 24) and Judgment (Doc. 25) dismissing this action without prejudice per the instructions on remand from the Tenth Circuit Court of Appeals. On May 20, 2019, Petitioner filed a Motion to Correct Under Rule 60(b) (Doc. 26). On June 19, 2019, the Court entered an Order (Doc. 28) denying Petitioner’s Rule 60(b) motion. Petitioner filed a Notice of Appeal on June 26, 2019 (Doc. 29). This matter is before the Court on limited remand from the Tenth Circuit Court of Appeals to consider whether to issue a certificate of appealability (“COA”) for the appeal. (Doc. 32.)

Petitioner seeks to appeal the Court’s denial of his Fed. R. Civ. P. 60(b) motion filed in his 28 U.S.C. § 2241 proceeding. Petitioner must first obtain a COA. 28 U.S.C. § 2253(c)(1). Under Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, “[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant.” A certificate of appealability should issue “only if the applicant has made a substantial showing of the denial of a constitutional right,” and the Court identifies the specific issue that meets that showing. 28 U.S.C. § 2253(c)(2) and (3).

Where, as here, the Court’s decision is based on a procedural ground without reaching the petitioner’s underlying constitutional claim, the petitioner must show “that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Court concludes that the present record does not warrant the issuance of a COA. The denial is based upon procedural grounds, and the ruling that this Court was bound by the Tenth Circuit’s instructions on remand is not reasonably debatable. Accordingly,

**IT IS THEREFORE ORDERED BY THE COURT** that no certificate of appealability will issue.

**IT IS SO ORDERED.**

**Dated this 2nd day of July, 2019, at Topeka, Kansas.**

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