No. 22-7418

ORIGINAL

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

Sammy Araya — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals for the Fourth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Sammy Araya, Reg. #73808-112
(Your Name)

3600 Guard Road
(Address)

Lompoc, CA 93436
(City, State, Zip Code)

(Phone Number)

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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

I. Whether a sentencing court is required to verify actual or intended victim losses when applying a U.S. Sentencing Guidelines ("U.S.S.G.") §2B1.1 Sentencing enhancement, where the validity of the total loss amount is undermined by the government's failure to present an actual loss amount; and, if so, what is the proper application for sentencing courts to verify the calculation of victim losses?

II. Whether the amount of "loss" attributed to a defendant who pleaded guilty in a fraud case remains the same for a defendant in a superseding indictment, who pleaded not guilty, and challenged that amount of loss -- especially where the government has not proven that uncontested amount of victim losses.

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Related Cases

United States v. Araya, No. 1:20-CV-01169-AJT, U.S. District Court for the Eastern District of Virginia. Judgement entered July 30, 2021.

United States v. Araya, No. 21-7487, U.S. Court of Appeals for the Fourth Circuit. Judgement entered December 15, 2022.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[x] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was December 15, 2022.

[ ] No petition for rehearing was timely filed in my case.

[x] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 13, 2023, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V:
"No person shall . . . be deprived of life, liberty, or porperty without due process of law . . ."

U.S. Constitution, Amendment VI:
"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, . . . and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

I. Procedural History

On April 21, 2017 Sammy Araya ("Petitioner") was convicted in the Eastern District of Virginia, Contrary to his pleas, of "one count of conspiracy to commit mail and wire fraud in violation of 18 U.S.C. §1349, five counts of wire fraud in violation of 18 U.S.C. §§ 1343 and 2, and five counts of mail fraud in violation of 18 U.S.C. §1341 and 2." App. B at 2. Petitioner was sentenced to 240 months on each of the eleven counts to run concurrently. Id. Notably, Petitioner received a 20-point sentencing enhancement under U.S.S.G. §2B1.1(b)(1)(K), contrary to his objection at trial. App. B at 9-11. However, Petitioner's appellate counsel failed to raise this meritorious assignment of error on direct appeal, which was denied by the Fourth Circuit. United States v. Seko, et al., 771 Fed. Appx. 199 (4th Cir. 2019).

On October 5, 2020, Petitioner filed a 28 U.S.C. §2255 motion challenging, inter alia, (1) ineffective assistance of counsel, and (2) errors in the application of sentencing enhancements. The district court denied Petitioner's motion on July 30, 2021, (App. B at 12), subsequently the court of appeals affirmed the lower court's opinion on December 15, 2022, (App. A), and denied a timely petition for rehearing on February 13, 2023, (App. C).

Petitioner maintains that his sentence is in violation of the U.S. Constitution and laws of the United States as explained below.

II. Sentencing Enhancement

Petitioner's U.S.S.G. §2B1.1(b)(1)(K) sentencing enhancement was based upon a purported $10,542,480.68 in total victim losses. See App. D (JA 2067). However, the government's investigative analyst for the Federal Housing Finance Agency, Rebecca Lee, testified that she did not calculate the actual total amount of money that any victim, or all victims, had lost because the prosecution

did not ask her to prepare those figures for the trial. App. D (JA 2079-80). Importantly, this is because Petitioner's case arose as a superseding indictment form United States v. Umali, 2015 U.S. Dist. LEXIS 158207 (E.D. Va. 2015). At sentencing, the government explained that in cases where the defendants plead guilty, such as Roscoe Umali, "they will move more quickly" because everybody "agrees what the losses are, agree what the guidelines are," and simply agrees to the government's proposal for sentencing. App. D (JA 2882).

Here, Umali's case "moved quickly" because he pleaded guilty and, therefore, agreed to whatever figure the government presented as "victim losses." Conversely, Petitioner and his co-defendants objected to this uncontested amount which was applied at their sentencing -- to which the district court told the government that they "never gave [the court] an exact number" for total victim losses. App. D (JA 3066). Rather, the government employed a defective method by failing to differentiate among the thousands of listed transactions, which of those were victim losses and which were legitimate business transactions. In fact, Ms. Lee testified that 57 percent of those transactions were cash withdrawls, and that she could not "rule out the possibility that a payment eventually was made to a lender" out of those thousands of withdrawls. App. D (JA 2068).

Because these transactions were made by cash or cashier's checks, there was no affirmative listing to show the payments made to actual lenders or homeowners as refunds. Moreover, Ms. Lee did not identify which transactions were company payroll or other general expenses. App. D (JA 2013-05). The prosecution did not ask Ms. Lee to prepare exact figures, nor any reasonable estimate, for the trial. Id. (JA 2080). Instead, the government unreasonably lumped all transactions as a single figure representing victim losses, and without identifying for which victim(s) those monies corresponded with. This resulted in a dollar amount that was neither proven to a jury beyond a reasonable

doubt, nor "reasonably estimated" for sentencing. App. D (JA 2068, 2079-80, 2981-83).

The lower court's failure to require the government to prove the total amount of victim losses will result in defendants for fraud cases receiving substantially longer sentences. The government will know that sentencing courts will not require them to present reliable figures representing victim losses.

REASONS FOR GRANTING THE PETITION

Granting a writ of certiorari is appropriate here for the following reasons: (See Supreme Court Rule 10).

(1) There is a conflict among the Circuit Courts in applying U.S.S.G. § 2B1.1.

(2) The Fourth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's supervisory power," by failing to verify actual or intended victim losses. The government was not compelled by the sentencing court to provide an actual precuniary victim loss amount, but instead applied an improper methodology resulting in an unreasonable calculation. Rule 10(a).

(3) Whether a sentencing court is required to have the government prove the amount of victim losses in a superseding indictment where the defendants proceed to trial, as opposed to the unchallenged amount where the defendants pleaded guilty, is "an important question of federal law that has not been, but should be, settled by this court . . ." Rule 10(b).

ARGUMENT

I. The Court Should Hold that Sentencing Courts are Required to Verify Actual or Intended Victim Losses When Applying a U.S.S.G. § 2B1.1 Sentencing Enhancement, Especially Where the Government Failed to Present an Actual Loss Amount.

The court held in United States v. Booker, 125 S. Ct. 738, 756 (2005) that "any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by the

plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." Otherwise, such a sentence would be in violation of the Sixth Amendment. Moreover, "when a sentencing factor has an extremely disproportionate effect on the sentence relative to the offense of conviction, due process requires the government prove the facts underlying the enhancement by clear and convincing evidence." United States v. Jordan, 256 F.3d 922, 926 (9th Cir. 2001).

A. Applying this 20-Point Sentencing Enhancement Should Require Proof Beyond a Reasonable Doubt.

Here, the lower Court's failure to have the government prove the amount of victim losses as exceeding $9.5 million beyond a reasonable doubt, resulted in Petitioner receiving a sentencing enhancement which violated his Fifth and Sixth Amendment rights See United States v. Alphas, 785 F.3d 775, 784 (1st Cir. 2015)(holding "the government bears the burden of proving the applicability of a sentencing enhancement by perponderant evidence"); United States v. Turgeon, 149 Fed. Appx. 144, 147 (4th Cir. 2005)(an enhanced sentence based upon judicial fact-finding violates the Sixth Amendment under Booker); United States v. Yagar, 404 F.3d 967, 969 (6th Cir. 2005)(same); and United States v. Myres, 844 Fed. Appx. 987, 990 (9th Cir. 2021)(holding "the government must prove the loss by a perponderance of the evidence")(citations omitted).

Yet despite the objections made by Petitioner and his co-defendants that victim losses, as presented at trial, should be "zero," App. D (JA 2882), the lower court did not require the government to show any reasonable estimate and simply accepted what the government presented. Id. (JA 2932-33). See also App. D (JA 2983)(defense counsel objecting that the court "instructed the government to file what each victim lost. And they haven't done that. Not for the loss.").

Thus, the $10,542,480.68 in purported victim losses was neither submitted

nor found-as-fact by the jury beyond a reasonable doubt, App. D (JA 2018-19), resulting in an illegal application of a U.S.S.G. §2B1.1 sentencing enhancement.

B. The Lack of Clarity in Applying U.S.S.G. § 2B1.1 Has Led to a Circuit Court Split.

There is a split among the courts of appeal on how those particular circuits interpret and apply a sentencing enhancement for fraud cases under U.S.S.G. § 2B1.1. This split has led to a disparity on how defendants for fraud cases are sentenced -- arbitrarily based upon their circuit's location -- with some defendants receiving a more lenient application of § 2B1.1. The core problem in causing this circuit split involves the method for calculating the amount of victim losses, and whether the Guideline creates a distinction between "actual" versus "intended" loss or, more importantly to this case, "unverified" loss.

The First Circuit has recognized that "[a]lthough this concept [in applying § 2B1.1] is easily stated, its application often has vexed sentencing courts. As in so many other instances, the devil is in the details." Alphas, 785 F.3d at 777. Moreover, the First Circuit requires a sentencing court to "determine[] whether and to what extent legitimate [transactions] were embedded in the fraud," and that legitimate transactions must be excluded in calculating the amount of attributable losses. Id. at 783-84.

The Third Circuit holds that "[t]he Guideline does not mention 'actual' versus 'intended' loss[, and] that distinction appears only in the commentary." United States v. Banks, 2022 U.S. App. LEXIS 33021, at *15 (3d Cir. 2022). Thus, the Third Circuit ultimately "accord[ed] the commentary no weight," because "the commentary expands the definition of 'loss' by explaining that generally 'loss is the greater of actual loss or intended loss.' " Id. at *17 (citing U.S.S.G. § 2B1.1 App. Note 3(A)). Thus, "intended" loss should not have been applied.

Similarly, the D.C. Circuit found that a § 2B1.1 sentencing enhancement

was applied in error where "there [was] insufficient evidence for calculating the loss," and remanded for the sentencing court "to explain how it arrived at its estimate or to recalculate the amount of the loss." United States v. Hall, 610 F.3d 727, 745 (D.C. Cir. 2010). In other words, when a defendant objects to the evidentiary basis for a victims' losses calculation, "the district court [is] obligated to make specific findings of fact to resolve the dispute and [is] not free to simply adopt the relevant portions of the [Presentence Investigation Report] as its findings of fact." United States v. Lewis, 88 Fed. Appx. 898, 901 (6th Cir. 2004).

Here in Petitioner's case, the Fourth Circuit and district court are in conflict with the above courts of appeal because:

(1) The lower court did not segregate any legitimate business transactions from the purported fraudulent transactions from Ms. Lee's calculation. App. D (JA 2103-05).

(2) The lower court erroneously focused on only purported intended victim losses, because no "actual" victim losses were calculated by Ms. Lee App. D (JA 2068, 2079-80, 3066).

(3) The lower court did not explain how it found $10,542,480.68 in purported victim losses despite that Ms. Lee testified that she was never asked by the prosecution to calculate the actual total amount. App. D (JA 2079-80). Moreover, the lower court made no effort to resolve the dispute over Petitioner's objections, and simply adopted whatever the government presented. Id. (JA 2932-33).

C. The Lower Court's Decision in Petitioner's Case Perfectly Illustrates the Need for Clarity.

1. The Government Did Not Prove a Victim Loss Amount.

On direct-examination, investigative analyst Rebecca Lee testified that the total dollar amount listed for this case was $10,542,480.68. App. D (JA 2067). However, it soon came to light that the method used for calculating victim

losses was defective -- because the total dollar amount was never verified. Ms. Lee testified that 57 percent of those transactions were cash withdrawls, and that she could not rule out the possibility that a payment eventually was made to a lender out of those thousands of withdrawls. App. D (JA 2068). Moreover, these transactions were made by cash or cashier's check, so there was no affirmative listing which showed payments made to actual lenders or refunds to homeowners.

More importantly, on cross-examination Ms. Lee confirmed that she did not calculate the actual loss amount with respect to victims' losses. Id. (JA 2079-80). This is because the government did not ask her to prepare the figures showing actual victim losses for trial and sentencing, id., thus, victim losses remained unverified. Notably, the district court told the government that they never provided "an exact number," nor any reasonable estimate, for actual losses. App. D (JA 3066); see also id. (JA 2882)(co-defendant's defense counsel explaining that actual losses "as presented" should be "zero" because those figures were not calculated).

This improper methodology of overinflating an unverified amount of purported losses is exacerbated by the fact that the 50 customers, (i.e., companies), used by Seko Direct Marketing were not investigated. App. D (JA 1451, 1462). Thus investigators never verified whether or not they were actual "victims" who suffered any losses between 2013-2014. See also id. (JA 3100)(citing 49 "fraudulent accounts" totaling a purported loss of $11,140,610.42).

And despite this defective figure, the lower court did not require the government to show any reasonable estimate and simply accepted whatever the government presented. App. D (JA 2932-33), compare to id. (JA 2981-84).

Accordingly, the Court should reverse the lower court's decision as error and resolve the noted circuit court conflict:

(1) The sentencing court must determine and exclude any legitimate business transactions from the total victims' loss calculation. Alphas, 785 F.3d at

783-84.

(2) The U.S.S.G. § 2B1.1 enhancement applies only toward actual, verified victim losses. Banks, 2022 U.S. App. LEXIS 33021, at *17.

(3) Because there was insufficient evidence for calculating and verifying victim losses, Hall, 610 F.3d at 745, the Court should remand for the sentencing court to resolve any disputed facts (i.e., no calculated losses), and may not just simply adopt the PSR as its findings of fact. Lewis, 88 Fed. Appx. at 901.

2. The 20-Point Enhancement was in Error.

The foregoing miscalculation of victim losses cannot be used to sustain Petitioner's 20-point enhancement under § 2B1.1(b)(1)(K). Especially when Ms. Lee testified that no actual dollar amount was calculated because the government never asked her to do so. App. D (JA 2068, 2079-80). The failure to prove, or provide a reasonable estimate supported by evidence, that victim losses exceeded $9.5 million before applying a 20-point enhancement violates Petitioner's Fifth Amendment right to due process, and must be overturned on remand. See Jordan, 256 F.3d at 928 (the increase of defendant's offense level greater than four and which more than doubles the length of the initial sentencing range warrants a higher burden of proof on the government). This resulted in a significantly longer sentence than what Petitioner should have received.

"[T]he improper calculation of a defendant's guideline range compromises a significant procedural error . . . [that] ordinarily requires resentencing." Alphas, 785 F.3d at 779. More importantly, even where, as here, "there is at least a possibility that the court would have imposed an even more lenient sentence had it started with a lower [Guideline Sentencing Range]," it is sufficient to find that resentencing is required. Id. at 780. Especially where, as here, "[an] amount-of-loss enhancement pursuant to U.S.S.G. § 2B1.1(b)(1) [is] based solely on judge-found facts." Yagar, 404 F.3d at 970; Turgeon, 149 Fed. Appx. at 148 (same).

Accordingly, the Court should hold that the lower court erred in applying a 20-point U.S.S.G. § 2B1.1 sentencing enhancement, and remand Petitioner's case for resentencing.

D. Petitioner's Appellate Counsel was Ineffective

Petitioner's trial attorney challenged the foregoing issues at sentencing, App. D (JA 2930-31), however, Petitioner's appellate counsel failed to raise any such argument on direct appeal. App. B at 10-11. And failed to argue that the PSR's findings were misrepresented to overinflate victim losses. App. D (JA 3100, 3112-13).

1. Appellate Counsel's Performance was Defective.

Petitioner was denied the effective assistance of counsel guaranteed by the Sixth Amendment when his appellate lawyer failed to challenge the application of U.S.S.G. § 2B1.1 on direct appeal. The constitutional right to have effective counsel extends to Petitioner's direct appeal. Evitts v. Lucey, 369 U.S. 387, 396-96 (1985). The same two-prong test under Strickland v. Washington, 466 U.S. 668, 690, 694 (1984), applies to claims of ineffective assistance of appellate counsel.

If Petitioner is correct, then his sentence was imposed "in violation of the Constitution," 28 U.S.C. § 2255(a), and he is entitled to relief. Here, Petitioner's appellate attorney's defective performance "cast him the opportunity to present his meritorious argument on direct appeal." King v. United States, 595 F.3d 844, 853 (8th Cir. 2010). There was no strategic benefit to not argue for a correct resentencing. Thus Petitioner's claim satisfies the first Strickland prong that appellate counsel's performance was deficient. 466 U.S. at 687.

2. Appellate Counsel's Error was Prejudicial

There is no doubt that Petitioner suffered prejudice from his appellate counsel's error. Had this argument been presented on direct appeal, as Petitioner told his attorney to do, Petitioner would have likely prevailed and received

a shorter resentence. "An error increasing a defendant's sentence by as little as six months can be prejudicial within the meaning of Strickland." King, 595 F.3d at 853 (citing Glover v. United States, 531 U.S. 198, 202-04 (2001)). See also United States v. Allmendinger, 894 F.3d 121, 127-31 (4th Cir. 2018)(failure to raise meritorious argument on appeal held effective assitance); United States v. Reinhart, 357 F.3d 521, 530-31 (5th Cir. 2004)(appellate counsel's failure to raise meritorious argument on appeal held ineffective assistance); United States v. Reinhart, 357 F.3d 521, 530-31 (5th Cir. 2004)(appellate counsel's failure to challenge sentencing error held ineffective assistance); Theus v. United States, 611 F.3d 441, 448-49 (8th Cir. 2010)(same).

By not raising this issue as specifically requested by Petitioner for his direct appeal, Petitioner's appellate lawyer failed to provide the effective assistance of counsel guaranteed by the Constitution. Thus, Petitioner's claim satisfies the second prong for prejudice under Strickland, 466 U.S. at 694.

II. The Court Should Hold that an Unchallenged Victims' Loss Amount Where a Defendant Pleads Guilty, Does Not Analogously Remain the Same for a Superseding Indictment Where a Defendant Challenges that Amount at Trial.

A. Roscoe Umali Pleaded Guilty.

The government's application of Roscoe Umali's $1,255,179.18 in attributable victims' losses should not have been applied toward Petitioner's attributable vicitms' losses. App. D (JA 3100); see also Umali, 2015 U.S. Dist. LEXIS 158207, at *5-*8 (the lower court describing Umali as the "ringleader" of "his business"). Umali pleaded guilty and did not challenge the amount presented by the government.

During Petitioner's sentencing, the government explained that in cases where the defendant pleads guilty, "they will move more quickly" because all parties "agree[] what the losses are [and] agree what the guidelines are." App. D (JA 2882). Moreover, the defendant simply agrees to whatever the government presents at sentencing.

B. Petitioner Challenged the Amount of Victim Losses.

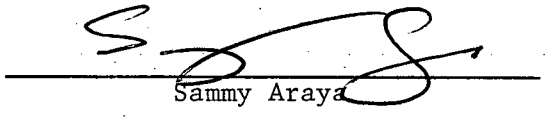
Here, Petitioner and his co-defendants objected to this amount noting that losses, as presented, should be "zero." App. D (JA 2882). Again, this is because the government did not ask Rebecca Lee to calculate the actual figure for victim losses. Id. (JA 2079-80, 2981-83, 3066). Therefore, this unverified -- and unchallenged -- amount which Umali pleaded guilty to should have not been analogously applied toward Petitioner's sentencing. Rather, the lower court should have remanded for the sentencing court to resolve these disputed figures and to explain how it arrived at its estimate. Lewis, 88 Fed. Appx. at 901; Hall, 610 F.3d at 745. Without resolution on these disputed and unverified figures, teh Court cannot conclude that Petitioner's § 2B1.1 enhancement was based upon a reasonable estimate.

Accordingly, the Court should reverse the lower court's decision for resentencing, and hold that an unchallenged loss amount -- for a defendant who pleaded guilty -- does not analogously apply to a defendant who challenged the loss amount at trial in a superseding indictment. The government must be required to prove any victims' loss amount beyond a reasonable doubt, and not merely copy and paste an earlier unchallenged loss amount as what happened here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Sammy Araya

Date: 4-25-2023

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-7387

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SAMMY REDI ARAYA, a/k/a Samaraii, a/k/a Samaraii Rainmaker,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Anthony John Trenga, Senior District Judge. (1:15-cr-00301-AJT-7; 1:20-cv-01169-AJT)

Submitted: November 18, 2022 Decided: December 15, 2022

Before WILKINSON, RICHARDSON, and QUATTLEBAUM, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Sammy Redi Araya, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Sammy Redi Araya seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2255 motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the motion states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Araya has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED