

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2008

4 (Submitted: November 20, 2008 Decided: March 12, 2009)

5 Docket No. 08-1105-cr

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7 UNITED STATES OF AMERICA,

8 Appellee,

9 - v. -

10 LUIS H. YAURI,

11 Defendant-Appellant.
12 -----

13 Before: SACK and WESLEY, Circuit Judges, and KAHN, District
14 Judge.*

15 Appeal from a judgment of the United States District
16 Court for the Eastern District of New York. The district court
17 (Sterling Johnson, Jr., Judge) sentenced the defendant
18 principally to a 51-month term of incarceration pursuant to his
19 plea of guilty to one count of money laundering. On appeal, the
20 defendant argues that the assistance of his sentencing counsel
21 was unconstitutionally ineffective because counsel failed to
22 challenge two aspects of the pre-sentence report: (1) its
23 omission of a two-level global plea reduction and (2) its

* The Honorable Lawrence E. Kahn, of the United States District Court for the Northern District of New York, sitting by designation.

1 calculation of the loss amount. We agree with the parties that
2 it is appropriate to vacate and remand for resentencing because
3 of the first error. We direct the district court to consider the
4 second ineffectiveness claim on remand.

5 Vacated and remanded.

6 BENTON J. CAMPBELL, United States
7 Attorney, Eastern District of New York
8 (David C. James, Bonnie S. Klapper,
9 Assistant United States Attorneys, of
10 counsel), Brooklyn, New York, for
11 Appellee.

12 GLENN A. OBEDIN, Bassett & Bassett,
13 P.C., Central Islip, New York, for
14 Appellant.

15 PER CURIAM:

16 Luis H. Yauri appeals from a judgment of the United
17 States District Court for the Eastern District of New York
18 (Sterling Johnson, Jr., Judge). The court entered the judgment
19 of conviction following Yauri's guilty plea to one count of money
20 laundering in violation of 18 U.S.C. § 1956(a)(2)(B)(i). The
21 court sentenced Yauri principally to a 51-month term of
22 incarceration. On appeal, Yauri argues that his sentencing
23 counsel's assistance was unconstitutionally ineffective because
24 counsel failed to challenge two aspects of the pre-sentence
25 report: (1) its omission of a two-level global plea reduction and
26 (2) its calculation of the loss amount. The government concedes
27 that the former omission constituted ineffective assistance. The
28 parties ask us to vacate and remand the cause to the district
29 court for resentencing. We will do so. We also direct the

1 district court to consider the second ineffectiveness claim on
2 remand.

3 **BACKGROUND**

4 Yauri was the proprietor of a money remitting business
5 that assisted in the structured transfer of drug proceeds from
6 Queens, New York to Colombia between September 2, 2003, and June
7 19, 2006. In February 2007, Yauri was arrested along with 20
8 other defendants implicated in money laundering. He was charged
9 with money laundering in violation of 18 U.S.C.
10 § 1956(a) (2) (B) (i).

11 In March 2007, the government extended a "global" plea
12 offer to the defendants, which Yauri accepted. According to
13 their plea agreement, the "estimate[d] . . . likely adjusted
14 offense level under the Guidelines [was] . . . level 18,"
15 including offense calculations based on a loss amount of "more
16 than \$30,000" in laundered funds and a two-level reduction in the
17 event of a "global disposition."** The estimated offense level
18 corresponds to a range of imprisonment of 27 to 33 months.

19 On June 15, 2007, Yauri pleaded guilty pursuant to the
20 plea agreement before Magistrate Judge Steven M. Gold. The
21 government acknowledged that the "global disposition" condition
22 specified in the plea agreement had been satisfied. Loss amount
23 was not discussed during the plea proceedings.

** There was a "global disposition" for purposes of the plea agreement if ten or more identified and separately indicted defendants pleading guilty on or before May 1, 2007.

1 A Pre-Sentence Investigation Report ("PSR") was then
2 prepared by the probation office. The PSR reflected a
3 calculation of a total offense level of 23. The difference
4 between that level and the offense level of 18 referred to in the
5 plea agreement resulted from (1) an increase of ten levels for
6 loss amount (rather than six, as in the plea agreement), on the
7 rationale that "[t]he defendant is accountable for the laundering
8 of \$154,108"; (2) omission of the two-point global disposition
9 reduction; and (3) a three-point (rather than a two-point)
10 reduction for timely acceptance of responsibility. According to
11 the PSR calculations, the defendant's criminal history category
12 was II because he committed the instant offense while serving a
13 sentence for a state conviction. The applicable Guidelines range
14 was 51 to 63 months.

15 On January 8, 2008, a sentencing hearing was held
16 before the district court. Neither the government's nor the
17 defendant's counsel at the sentencing hearing had attended the
18 plea hearing. Yauri's sentencing counsel made three arguments:
19 (1) the defendant should be in criminal history category I, not
20 II; (2) the district court should downwardly depart from the
21 applicable Guidelines range in light of the defendant's family
22 circumstances; and (3) the district court should downwardly
23 depart from the applicable Guidelines range in light of various
24 aspects of the offense conduct. The court rejected those
25 arguments.

1 Yauri's counsel failed to challenge the PSR's omission
2 of a two-point reduction for the occurrence of a "global
3 disposition," however. With respect to loss amount, counsel
4 stated that "[t]he amount of structuring that [Yauri] is guilty
5 of and which he actually pled guilty to is \$154,000" -- the
6 amount stated in the PSR -- even though the plea agreement set
7 the amount of laundered funds only at "more than \$30,000" and the
8 defendant never allocuted to a specific loss amount.

9 The district court sentenced the defendant to a 51-
10 month term of incarceration, to be followed by a 3-year term of
11 supervised release, and a \$100 special assessment. Yauri
12 appeals.

13 **DISCUSSION**

14 Yauri and the government agree that the failure of
15 Yauri's counsel to call the sentencing court's attention to the
16 applicable two-level reduction for "global disposition"
17 constitutes an unconstitutionally ineffective assistance of
18 counsel. They therefore agree that this cause should be remanded
19 to the district court for resentencing of the defendant. We,
20 too, agree and we therefore remand. The government does not
21 concede ineffectiveness with respect to the second alleged
22 failure of sentencing counsel, however.

23 Despite a "baseline aversion to resolving
24 ineffectiveness claims on direct review," United States v.
25 Williams, 205 F.3d 23, 35 (2d Cir.), cert. denied, 531 U.S. 885
26 (2000) (quoting United States v. Salameh, 152 F.3d 88, 160-61 (2d

1 Cir. 1998)), we "may, in [our] discretion, entertain an
2 ineffective assistance of trial counsel claim on direct appeal in
3 a narrow category of cases where: (1) as here, the defendant has
4 a new counsel on appeal; and (2) argues no ground of
5 ineffectiveness that is not fully developed in the trial record,"
6 id. (internal quotation marks omitted).

7 We have before us an insufficient record upon which to
8 resolve the loss amount ineffectiveness claim. The resolution of
9 the claim is not therefore "beyond any doubt," nor have we been
10 given any reason to conclude that direct review is required "in
11 the interest of justice." United States v. Khedr, 343 F.3d 96,
12 100 (2d Cir. 2003) (internal quotation marks omitted). We
13 therefore decline to exercise direct review of the claim.

14 Ordinarily, we would not remand the claim to the
15 district court either. A collateral proceeding under 18 U.S.C.
16 § 2255 is the preferred method for such a challenge. See United
17 States v. Doe, 365 F.3d 150, 152 (2d Cir.), cert. denied, 543
18 U.S. 975 (2004). We acknowledged in Doe, however, that
19 "circumstances may arise in which a remand for further
20 factfinding . . . might be the better way to address an
21 ineffectiveness claim." Id. at 155. We think this case presents
22 such a circumstance. Inasmuch as it is already being returned to
23 the district court, with the government's consent, for
24 consideration of one ineffectiveness of counsel claim, we think
25 that efficiency will be served if the court addresses the second
26 ineffectiveness claim too. That seems to us preferable to

1 requiring separate, perhaps otherwise unnecessary, proceedings to
2 resolve the second claim.

3 We therefore remand the loss amount ineffectiveness
4 claim for development of the record and adjudication by the
5 district court in the first instance.

6 **CONCLUSION**

7 For the foregoing reasons, the cause is remanded to the
8 district court for consideration of both claims of ineffective
9 assistance of counsel, and for resentencing to the extent the
10 district court deems warranted.