

**21-50269**  
**IN THE**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff and Appellee,	)	D.C. No.: 2:21-CR-00081-VAP
	)	Central California, Los Angeles
v.	)	
	)	
HASSAN SHABAN KANYIKE,	)	
	)	
Defendant and Appellant.	)	
	)	
_____	)	

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**APPELLANT’S OPENING BRIEF**

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Honorable Virginia A. Phillips  
United States District Judge

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## **STATEMENT OF JURISDICTION**

This is an appeal by Mr. Hassan Kanyike of his final judgment of conviction that disposes of all parties' claims. The district court had jurisdiction over his case pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

The district court entered judgment against Mr. Kanyike on November 16, 2021. (ER<sup>1</sup> 6). This appeal is timely under Federal Rule of Appellate Procedure 4, Kanyike having filed his notice of appeal on November 24, 201. (ER 196).

## **STATEMENT OF ISSUES ON APPEAL**

1) Was appellant denied the effective assistance of counsel as guaranteed by the Sixth Amendment when his attorney failed to effectively argue to the district court the reasons why the two-level “sophisticated means” enhancement under USSG §2B1.1(b)(10)(C) did not apply to his sentence?

2) Was appellant denied the effective assistance of counsel as guaranteed by the Sixth Amendment when his attorney failed to challenge

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<sup>1</sup> “ER” will be the designation used to refer to the Excerpts of Record.

the two-level enhancement for gross receipts over \$1,000,000 from financial institutions pursuant to USSG §2B1.1(b)(17)(A)?

## **STATEMENT OF THE CASE**

### **FACTS PERTAINING TO THE OFFENSE**

Mr. Kanyike owned and worked at Falcon Motors Inc. (“Falcon Motors”), a small used car dealership in Van Nuys, California, which he solely owned. He was its Chief Executive Officer and Chief Financial Officer. According to the California Employment Development Department (“EDD”), Kanyike has no employer records on file for tax year 2019 and 2020. He also had no employee wage information on file with the EDD. (ER 148). Kanyike was the sole proprietor of HK Development International (“HK Development”), a purported business located at the same address as Kanyike’s Santa Clarita residence. It is unclear what this business did other than it was involved in “retail.” (ER 151, 175-178).

Beginning in April 2020, and continuing through June 2020, Kanyike submitted eight false and fraudulent applications and supporting documents in the names of Falcon Motors and HK Development to obtain Paycheck Protection Program loans and Economic Injury Disaster Loan proceeds from the Small Business Administration (“SBA”) and various banks. In these applications, he provided materially false information as to the number of

employees employed and the gross revenues of his businesses. In all, and as further detailed below, Kanyike fraudulently obtained loan proceeds totaling approximately \$1,302,550. (ER 115, 148, 177.)

1. The Paycheck Protection Program

The Coronavirus Aid, Relief, and Economic Security (“CARES”) Act was a federal law enacted in or about March 2020 that was designed to provide emergency financial assistance to Americans suffering economic harm as a result of the COVID-19 pandemic. One form of assistance provided by the CARES Act was the authorization of United States taxpayer funds in forgivable loans to small businesses for job retention and certain other expenses, through a program referred to as the Paycheck Protection Program (“PPP”). PPP loan proceeds were to be used by the business only for payment of certain permissible expenses: payroll costs, interest on mortgages, rent, and utilities. (ER 172-173).

In order to obtain a PPP loan, a qualifying business was required to submit a PPP loan application signed by an authorized representative of the business. The PPP loan application required the applicant business (through its authorized representative) to acknowledge the program rules and make certain affirmative certifications in order to be eligible to obtain the PPP loan. (ER 172-176.)

In the PPP loan application, the applicant was required to state, among other things, the business's: (a) average monthly payroll expenses; and (b) number of employees. In addition, the applicant was required to provide documentation showing its payroll expenses. (ER 173).

A small business's PPP loan application was received and processed by a participating lender approved by the Small Business Administration ("SBA"). If a PPP loan application was approved, the participating lender would fund the PPP loan using its own monies, which were guaranteed by the SBA. (ER 173).

2. The EIDL Program

The SBA's Economic Injury Disaster Loan ("EIDL") program provided low interest financing to small businesses, renters, and homeowners in regions affected by declared disasters. The CARES Act authorized the SBA to provide EIDLs to eligible small businesses experiencing substantial financial disruption due to the COVID-19 pandemic. (ER 174).

In order to obtain an EIDL, a qualifying small business had to submit an application to the SBA and provide information about its operations, such as the number of employees, gross revenues for the 12-month period preceding the disaster, and cost of goods sold in the 12-month period

preceding the disaster. In the case of EIDLs for COVID-19 relief, the 12-month period ran from January 31, 2019, to January 31, 2020. The applicant had to also certify that all of the information in the application was true and correct to the best of the applicant's knowledge. (ER 174).

EIDL applications were submitted directly to the SBA. Any funds issued under an EIDL were issued directly by the SBA. EIDL funds could be used for payroll expense, sick leave, production costs, and business obligations, such as debts, rent, and mortgage payments. If the applicant also obtained a PPP loan, the EIDL proceeds could be used for the same purpose as the PPP funds. (ER 174-175).

3. Funded PPP Loan Applications

JPMorgan Chase, Celtic Bank, Ready Capital/Customers Bank ("Ready Capital"), and United Business Bank were financial institutions and SBA-approved participating lenders of PPP loans. BSD Capital, a non-bank finance company, was an SBA-approved participating lender of PPP loans. These entities were all based in the United States. (ER 176-179).

Kanyike controlled a business checking account in the name of Falcon Motors Inc., maintained at a branch of JPMorgan Chase, ("Chase"). He also controlled a personal checking account in his own name, maintained at a branch of Wells Fargo ("Wells Fargo"). (ER 176).

In April and May 2020, Kanyike submitted five separate false and fraudulent PPP applications on behalf of Falcon Motors and/or HK Development to Chase, Celtic Bank, Ready Capital, United Business Bank, and BSD Capital. In these PPP applications, Kanyike misrepresented, among other things, the total number of employees and payroll expenses for Falcon Motors. In support of these applications, Kanyike also submitted false and fraudulent documents, such as fake federal payroll tax returns, payroll registers, and bank records. (ER 177-179, 182-192).

Kanyike used four different Employer Identification Numbers (“EINs”) in connection with the five PPP loan applications he submitted in the name of Falcon Motors. EIN 83-094XXXX was issued by the IRS for Falcon Motors, Inc. in 2018, the same year Falcon Motors, Inc. was incorporated. The other three EINs associated with “Falcon Motors” (Falcon Motors, Falcon Motors Lux, and Falcon Motors Sales) used by Kanyike in PPP loan applications were not issued by the IRS until April and May 2020. Kanyike secured these three EINs from the IRS in April and May 2020 in order to facilitate Kanyike’s fraudulently obtaining multiple PPP loans for the same Falcon Motors used car business. (ER 178-179).

Kanyike certified in the PPP loan applications that he, as authorized representative of Falcon Motors and HK Development, knew and

understood the terms and rules of the PPP loan program, which provided that PPP loan proceeds were to be used by the recipient to pay only certain authorized business expenses—such as payroll, mortgage interest, lease, and utilities. Instead of using PPP loan proceeds for their stated and authorized business purposes consistent with PPP rules, Kanyike knowingly misapplied and used a substantial portion of the PPP loan proceeds for his own personal benefit, including sending hundreds of thousands of dollars in PPP loan proceeds to Uganda. (ER 16, 96, 123-113).

For example, in April 2020, Kanyike submitted to Celtic Bank a PPP loan application dated April 30, 2020, signed by Kanyike, and supporting documentation, for a PPP loan to Falcon Motors in the amount of \$420,000, for the stated purpose of paying payroll for Falcon Motors. Kanyike represented in the application that Falcon Motors was in operation on February 15, 2020, and had 26 employees for whom it paid salaries and payroll taxes, with an Average Monthly Payroll of \$168,000. In this application, Kanyike knowingly made several false and fraudulent statements. (ER 113-114).

Kanyike falsely represented that applicant Falcon Motors had 26 employees and an average monthly payroll of \$168,000, when Kanyike had

no employees verifiable through the California Employment Development Department. (ER 114).

Kanyike falsely represented that applicant Falcon Motors was in operation as of February 15, 2020, and had employees for whom it paid salaries and payroll taxes using Employer Identification Number (“EIN”) 85-080XXXX, when, in fact, EIN 85-080XXXX was not issued by the IRS until April 23, 2020, and the purported IRS Form SS-4 assigning EIN 85-080XXXX to Falcon Motors that Kanyike submitted to Celtic Bank on April 24, 2020, was altered to show a false EIN issue date of April 23, 2018.

Kanyike falsely represented that applicant Falcon Motors with EIN 85-080XXXX had paid employees in 2019 a total of \$2,022,300, as shown in a purported IRS Form 940 annual tax return for 2019, and had paid employees \$504,000 during the first quarter of 2020, as shown in a purported Form 941 quarterly tax return, which tax return forms Kanyike submitted to Celtic Bank as proof of payroll expenses paid by Falcon Motors, when Falcon Motors had not paid such payroll expenses, and these tax return forms were fabricated and never filed with the IRS. (ER 114.)

Kanyike falsely certified that Falcon Motors would not receive another loan under the PPP during 2020, when, in fact, at the time of the PPP application to Celtic Bank, Kanyike had previously submitted an active

PPP application for Falcon Motors to Ready Capital. Kanyike also concealed from Celtic Bank that, on the same day Kanyike submitted the PPP application to Celtic Bank, Kanyike also signed and submitted a PPP application for Falcon Motors to BSD Capital. (ER 114-115.)

Kanyike falsely certified that the funds sought in the PPP Application submitted to Celtic Bank would be used to retain workers and maintain payroll or make mortgage-interest payments, lease payments, and utility payments, when, in fact, as Kanyike then knew, Kanyike intended to misapply and use the funds for purposes unrelated to Falcon Motors, including sending a substantial portion of the funds to Uganda. (ER 115.)

In reliance on Kanyike's materially false and fraudulent statements and his concealment of material facts, Celtic Bank approved and funded a \$420,000 PPP loan to Falcon Motors. Kanyike caused Celtic Bank to transmit on May 8, 2020, by means of wire communications in interstate commerce, approximately \$420,000 from an account maintained by Celtic Bank in Salt Lake City, Utah, to the Falcon Motors Chase Account. (ER 115.)

During this same time frame, Kanyike used substantially similar fraudulent tactics and materially false information in submitting Falcon Motors' applications for PPP Loans with Ready Capital and BSD Capital, as

well as second loan application with Celtic Bank for HK Development.

Ready Capital funded a \$137,500 PPP loan to Falcon Motors. BSD Capital funded a \$346,300 PPP loan to Falcon Motors. Celtic Bank funded a \$98,750 loan to HK Development. (ER 179.)

In addition, Kanyike submitted a false and fraudulent loan application to United Business Bank for a PPP loan to Falcon Motors for \$473,125. This application was declined. (ER 192.)

4. Funded EIDL Applications

On April 6, 2020, Kanyike signed and submitted to the SBA an EIDL application for a \$150,000 loan to Falcon Motors. In this application, Kanyike falsely represented that Falcon Motors had gross revenues of \$3,685,100 and costs of goods sold of \$2,765,450, for the period between January 31, 2019, and January 31, 2020. (ER 111, 113, 146.)

On June 15, 2020, Kanyike signed and submitted to the SBA an EIDL application for a \$150,000 loan for HK Development. In this application, Kanyike falsely represented that HK Development had gross revenues of \$1,600,000 and costs of goods sold of \$820,000, for the period between January 31, 2019, and January 31, 2020. (ER 188-189.)

Kanyike knew that the gross revenues and costs of goods sold for this period were substantially less than he represented for both Falcon Motors and HK Development. (ER 114, 147.)

5. Transfers of Loan Funds to Uganda

Kanyike caused approximately \$1,053,800 in PPP loans and EIDL funds to be deposited into the Chase account between May 6, 2020, and June 9, 2020, as described above. Kanyike misapplied a substantial portion of these PPP loan proceeds for his own personal use and benefit, and transferred most of these funds offshore, to a bank account in his home country of Uganda. Specifically, between May 7, 2020, and June 22, 2020, Kanyike made numerous online international wire transfers totaling approximately \$762,000 from the Chase account to Equity Bank Uganda Ltd in Kampala, Uganda, for the benefit of an entity in the name of Kanyike's father, which transfers were typically described in bank account statements as "construction funding investments." Kanyike knew his transfers of these funds to an offshore entity had no business purpose related to the operation of Falcon Motors and were made in violation of the terms of the PPP loan program and EIDL program. (ERT 179-193.)

6. Actual and Intended Loss

According to the Probation Officer, Kanyike's actions involved his submission of fraudulent loan applications seeking \$1,775,675 in loan proceeds. This resulted in actual losses of \$1,302,550. (ER 78, 93).

**RELEVANT PROCEDURAL HISTORY**

Based on these facts, on December 8, 2020, a complaint was filed charging Mr. Kanyike with a single count of bank fraud in violation of 18 U.S.C. § 1344(2). (ER 169). Thereafter, on February 25, 2021, an Information was filed charging Mr. Kanyike with a single count of wire fraud in violation of 18 U.S.C. § 1343. (ER 108). On March 29, 2021, pursuant to a plea agreement, Kanyike pled guilty to the single charge of wire fraud. (ER 107).

Under the terms of the plea agreement, the parties stipulated to the following relevant sentencing factors: Pursuant to U.S.S.G. §2B1.1(a), the base offense level is 7. Pursuant to U.S.S.G. §2B1.1(b)(1)(I)], the base offense level is increased 16 levels, for loss amount of \$1,500,000, but not more than \$3,500,000. Pursuant to U.S.S.G. § 3E1.1(b), a decrease of three levels for Acceptance of Responsibility, resulting in a Total Offense Level of 20. (ER 130). There was no agreement as to Appellant's Criminal History Category, but there was no dispute that he no criminal history, so the

resulting category was Criminal History Category I. (ER 131). The parties agreed not to seek, argue, or suggest in any way, either orally or in writing, that any other specific offense characteristics, adjustments, or departures relating to the offense level be imposed. (ER 130).

With respect to appellate and post-conviction rights, Mr. Kanyike waived, them, except based on a claim of ineffective assistance of counsel or an explicitly retroactive change in the applicable Sentencing Guidelines, sentencing statutes, or statutes of conviction. (ER 132-134).

The Probation Officer's calculations matched the plea agreement, except that the Probation Officer found applicable a two-level enhancement for sophisticated means pursuant to USSG §2B1.1(b)(10)(C), and the two-level enhancement for gross receipts over \$1,000,000 from financial institutions pursuant to USSG §2B1.1(b)(17)(A).

Likewise, the Court's calculations at sentencing also matched the plea agreement, except the Court adopted the findings of the Probation Officer in the Presentence Report with respect to the above-referenced enhancements. If the plea agreement was followed, the sentencing range would have been 33 to 41 months, based upon a total offense level of 20 and Criminal History Category I. Instead, the Court's findings resulted in a sentencing range of 51

to 63, based upon a total offense level of 23 and Criminal History Category I. (ER 16).

The Court sentenced Mr. Kanyike to a total term of imprisonment of 51 months, the low end of the presumptive sentencing range. (ER 21).

Pursuant to Circuit Rule 28-2.4, Mr. Kanyike is currently in custody at Victorville Medium I FCI. His projected release date is September 19, 2025.

### **SUMMARY OF THE ARGUMENT**

Mr. Kanyike raises two arguments that his defense attorney was ineffective at sentencing.

First, his attorney was ineffective in failing to properly and comprehensively argue to the district court that the two-level “sophisticated means” enhancement under USSG §2B1.1(b)(10)(C) should not be applied by failing to cite relevant case law that would have buttressed his argument. Specifically, although counsel factually tried to convince the district court that there was nothing sophisticated about wiring money; creating phony EIN numbers; or filling out loan applications, he failed to cite authority that sophistication requires more than the concealment or complexities inherent in fraud and that fraud per se is inadequate for demonstrating the complexity required for enhancement.

Second, Mr. Kanyike’s attorney was ineffective in failing to challenge the two-level “gross receipts” enhancement under §2B1.1(b)(17)(A). The district court based its decision to impose this enhancement on the recommendation of the probation officer in the PSR. In calculating the amount that financial institutions lost, the probation officer came to a total figure of \$1,002,500, which barely qualified for the \$1,000,000 threshold amount for the §2B1.1(b)(17)(A) enhancement to apply. Given the probation officer was uncertain of the exact amount each of the financial institutions lost – considering the probation officer used the word “approximately” when referring to the amounts – and given how close the \$1,002,500 figure was to the threshold amount, it was incumbent upon defense counsel to challenge the applicability of the gross receipts enhancement.

## **ARGUMENT**

### **I**

#### **MR. KANYIKE SUFFERED INEFFECTIVE ASSISTANCE OF COUNSEL IN THAT HIS ATTORNEY AT SENTENCING FAILED TO PROVIDE THE COURT WITH SUFFICIENT AUTHORITY REGARDING THE “SOPHISTICATED MEANS” ENHANCEMENTS THAT WOULD HAVE ALLOWED THE COURT TO PROPERLY FIND THAT IT DID NOT APPLY IN THIS CASE**

##### **A. Introduction And Relevant Facts And Proceedings**

There was nothing in the plea agreement about a two-level “sophisticated means” enhancement pursuant to USSG §2B1.1(b)(10)(C).

Yet, the probation officer concluded as follows:

*Pursuant to USSG §2B1.1(b)(10)(C), if the offense involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means, increase by 2 levels. Application Note 9(B) clarifies that conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means. Here, Kanyike transferred approximately \$762,000 to an offshore account located in Uganda, indicating sophisticated means. He also utilized multiple EINs and falsified IRS forms, demonstrating sophisticated means. Therefore, the 2-level increase applies.*

In his written objections to the presentencing report, defense counsel argued that it does not require any degree of sophistication to obtain false EIN numbers and to apply for fraudulent loans above and beyond that inherent in the offense itself. Furthermore, counsel argued that it does not require any

degree of sophistication to wire money overseas. (ER 102-104). Counsel reiterated these two main points during the sentencing hearing. (ER 24-27). Unfortunately for Mr. Kanyike, trial defense counsel did not cite any law to back up his argument. The trial court rejected the defense's argument, adopted the probation officer's recommendation, and adjusted the total offense level accordingly. (ER 49).

### **B. The Law Pertaining To The Sophisticated Means Enhancement**

USSG § 2B1.1(b)(10)(C) prescribes a two-level enhancement when “the offense . . . involved sophisticated means and the defendant intentionally engaged in or caused the conduct constituting sophisticated means.” To qualify as “sophisticated” the means must involve “especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense.” *Id.* § 2B1.1, comment. (n.9)(B)).

It is true that the enhancement does not require “a brilliant scheme.” But it still must “display[] a greater level of planning or concealment than” that inherent in the offense itself. *United States v. Jennings*, 711 F.3d 1144, 1146 (9th Cir. 2013). It must be “more intricate than that of the garden-variety [offense].” *United States v. Norwood*, 774 F.3d 476, 480 (8<sup>th</sup> Cir. 2014). In 2015, section 2B1.1(b)(10)(C) was amended to direct courts to focus less on whether the overall scheme was sophisticated and "more on the

individual's own conduct to determine whether the offense involved sophisticated means." *United States v. Presendieu*, 880 F.3d 1228, 1244 (11th Cir. 2018). Importantly, "sophistication requires more than the concealment or complexities inherent in fraud. [Citation]. Thus, fraud per se is inadequate for demonstrating the complexity required for enhancement under U.S.S.G. § 2B1.1(b)(10)(C)." *United States v. Adepoju*, 756 F.3d 250, 257 (4th Cir. 2014).

### **C. Ineffective Assistance Of Counsel**

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel at trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A claim of ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. *United States v. Angelone*, 894 F.2d 1129, 1130 (9<sup>th</sup> Cir. 1990). To prevail on such a claim under *Strickland*, a petitioner must establish (a) that his counsel's representation was outside the wide range of professionally competent assistance, and (b) that he was prejudiced by reason of his counsel's representation. *Strickland*, 466 U.S. at 687-88. An attorney's performance is deficient if it falls below an "objective standard of reasonableness." *Strickland*, 466 U.S. at 688.

The second prong of the *Strickland* test, prejudice, requires a showing of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694-95. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Id.*

This applies to the sentencing hearing as well. Indeed, "[i]neffective assistance at sentencing is scarcely limited to not investigating or presenting mitigating evidence. Failure to raise an argument that could reduce petitioner's sentence may also constitute deficient performance." *Phillips v. White*, 851 F.3d 567, 578 (6th Cir. 2017). "To meet the prejudice prong of *Strickland* in an ineffective assistance at sentencing claim, [the defendant] must show that but for counsel's unprofessional error, there is a reasonable probability that the results would have been different." *Berkey v. United States*, 318 F.3d 768, 773-74 (7th Cir. 2003).

Normally, claims of ineffective assistance of counsel are raised collaterally under 28 U.S.C. § 2255. *United States v. Lillard*, 354 F.3d 850, 856 (9th Cir. 2003). But that does not mean defendants are precluded from raising such claims on direct appeal. *Massaro v. United States*, 538 U.S. 500, 508 (2003). In some cases, the record is sufficiently developed that an appellate court can decide the issue on direct appeal. *See United States v.*

*Alferahin*, 433 F.3d 1148, 1160 n.6 (9th Cir. 2006); see *United States v. Liu*, 731 F.3d 982, 998 (9th Cir. 2013) (finding ineffective assistance in case where counsel failed to raise “obvious” defense that created “unquestionabl[e] prejudice[ ]”).

**D. The District Court’s Decision To Impose The Two-Level Sophisticated Means Enhancement Must Be Vacated Due To Trial Counsel’s Failure To Properly Argue The Matter**

Applying this to Mr. Kanyike’s case, the two-level sophisticated means enhancement must be vacated due to trial counsel’s failure to make the district court aware of the law cited above through a proper argument. This is one of those cases in which counsel failed to raise an “obvious” defense that created “unquestionable prejudice.” *Liu*, 731 F.3d at 998.

It is true that he argued the matter and tried to make the case, both in writing and verbally, that Kanyike’s scheme did not utilize sophisticated means given that there is nothing sophisticated about obtaining EIN numbers; filling out loan applications; or wiring money overseas.

However, counsel failed to cite any of the law referenced above. Particularly, he failed to inform the district court that “sophistication requires more than the concealment or complexities inherent in fraud. [Citation]. Thus, fraud per se is inadequate for demonstrating the complexity required for enhancement under U.S.S.G. § 2B1.1(b)(10)(C).” *Adepoju*, 756

F.3d at 257. There is no legitimate tactical reason for failing to do so. It only would have strengthened his argument for not imposing the two-level enhancement.

It also is reasonably probable that the district court would have changed its mind regarding the enhancement had counsel cited the law, as he should have. There is nothing particularly sophisticated about what Mr. Kanyike did beyond that inherent in the wire fraud itself. It is reasonably probable that the district court would have been persuaded had counsel cited the law that holds that “sophistication requires more than the concealment or complexities inherent in fraud. [Citation]. Thus, fraud per se is inadequate for demonstrating the complexity required for enhancement under U.S.S.G. § 2B1.1(b)(10)(C).” *Adepoju*, 756 F.3d at 257.

Accordingly, the district court’s decision to impose the two-level enhancements should be vacated due to counsel’s ineffectiveness in failing to properly argue the matter.

**II.**  
**APPELLANT SUFFERED INEFFECTIVE ASSISTANCE OF  
COUNSEL AT SENTENCING WHEN HIS ATTORNEY FAILED TO  
CONTEST THE TWO-LEVEL “GROSS RECEIPTS  
ENHANCEMENT UNDER USSG §2B1.1(b)(17)(A)**

**A. Introduction And Relevant Facts And Proceedings**

The presentence report (PSR) indicates that, as the result of Kanyike’s actions, the following financial institutions lost the following amounts of money: 1) Chase Bank lost \$518,750 (two loans of \$420,00 and \$98,750); 2) Ready Capital lost \$137,500; and BSD Capital lost \$346,300. (PSR at 9-10; ¶ 40). The total amount of these losses is \$1,002,500, a figure with which the probation officer agreed. (PSR at 12; ¶ 53). Based on this figure, the probation officer recommended a two-level increase pursuant to USSG §2B1.1(b)(17)(A), which contributed to a total adjusted offense level of 24. (PSR at 12; ¶ 53). The district court accepted this recommendation. (ER 17, 49). Defense counsel did not contest or otherwise challenge the \$1,002,500 figure or the two-level increase.

**B. The Two-Level Increase Pursuant To USSG §2B1.1(b)(17)(A)**

“The United States Sentencing Guidelines provide a two-level enhancement when ‘the defendant derived more than \$1,000,000 in gross receipts from one or more financial institutions as a result of the offense.’”

*United States v. Muho*, 978 F.3d 1212, 1221 (11<sup>th</sup> Cir. 2020); USSG

§2B1.1(b)(17)(A). To qualify for this enhancement, money must flow “from a financial institution into the defendant's coffers.” *United States v. Van Alstyne*, 584 F.3d 803, 819 (9th Cir. 2009). The enhancement applies where a “financial institution suffers some type of loss or liability in providing the requisite funds.” *United States v. Huggins*, 844 F.3d 118, 122-24 (2nd Cir. 2016).

**C. The Two-Level “Gross Receipts” Enhancement Under §2B1.1(b)(17)(A) Must Be Vacated Due To Trial Counsel’s Ineffectiveness In Failing To Challenge It**

The district court’s application of the two-level “gross receipts” enhancement under §2B1.1(b)(17)(A) must be vacated due to Mr. Kanyike’s attorney’s failure to challenge it. Mr. Kanyike does not dispute that Chase Bank, Ready Capital or BSD Capital are “financial institutions” within the meaning of the Guidelines. Nor is he challenging the application of the enhancement per se, as that would admittedly violate the terms of the appellate waiver in his plea agreement. (ER 129-130).

His challenge, rather, is that his attorney was ineffective within the meaning of *Strickland* and the Sixth Amendment when he failed to challenge the court’s imposition of the “gross receipts” enhancement under §2B1.1(b)(17)(A). As noted in the previous section, to prevail on such a claim under *Strickland*, a petitioner must establish (a) that his counsel's

representation was outside the wide range of professionally competent assistance, and (b) that he was prejudiced by reason of his counsel's representation. *Strickland*, 466 U.S. at 687-88. An attorney's performance is deficient if it falls below an "objective standard of reasonableness." *Strickland*, 466 U.S. at 688.

For a sentencing enhancement under the Guidelines to apply, the government must prove its application by a preponderance of the evidence. *United States v. Valle*, 940 F.3d 473, 479 (9<sup>th</sup> Cir. 2019). That burden may be met by facts set for the by the probation officer in the PSR. And if the defendant fails to object to those facts, he is deemed to have admitted them. *United States v. Bennett*, 472 F.3d 825, 832, 833-34 (11<sup>th</sup> Cir. 2006).

That was the situation here. The PSR recommended the two-level enhancement under §2B1.1(b)(17)(A) based on the amount of loss that the various financial institutions suffered. The probation officer calculated that total amount to be \$1,002,500, thus qualifying Mr. Kanyike for the §2B1.1(b)(17)(A) enhancement. However, in referencing the dollar figures, he used the word “*approximately*” multiple times throughout the PSR. (PSR at 4, 5, 8, 9, 11; ¶ 5, 11, 31, 38, 40, 51). This suggests a certain degree of uncertainty as to whether the total amount did in fact exceed \$1,000,000.

Had the total amount far exceeded the \$1,000,000 threshold for the §2B1.1(b)(17)(A) enhancement, it may not have been an issue. However, as this Court can see, the total dollar figure barely was above the threshold figure. Given the probation officer's uncertainty as to that precise dollar figure and given that the district court relied on that dollar figure and the probation officer's recommendation to impose the two-level enhancement, it behooved defense counsel to challenge it. There is no conceivable reason not to do so. His failure to do so qualified as ineffective assistance of counsel and it is reasonably probable that the court would have taken a different approach towards the enhancement had counsel done so.

Accordingly, the two-level enhancement under §2B1.1(b)(17)(A) should be vacated.

**CONCLUSION**

For all the foregoing reasons, Mr. Kanyike respectfully requests that this Honorable Court vacate the two-level sophisticated means enhancement and the two-level gross-receipts enhancement based on his attorney's ineffectiveness and remand the matter back to the district court for resentencing.

DATED: March 17, 2022

Respectfully submitted,  
MARK HAUSHALTER

By: s/ Mark Haushalter  
Mark Haushalter  
Attorney for Appellant

**CERTIFICATE OF COMPLIANCE PURSUANT  
TO CIRCUIT RULE 32-1**

Case No 21-50269

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Date: March 17, 2022

s/ Mark Haushalter  
Mark Haushalter  
Attorney For Appellant  
Hassan Kanyike

**CERTIFICATE OF SERVICE**

I hereby certify that on March 17, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

DATED: March 17, 2022

Respectfully submitted,

s/ Mark Haushalter  
Mark Haushalter