

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 01-4205

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UNITED STATES OF AMERICA

v.

LAWRENCE TITCHELL,

Appellant

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Appeal from the United States District Court  
for the Western District of Pennsylvania  
(D.C. Criminal No. 98-cr-00111-3)  
District Judge: Honorable Gary L. Lancaster

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Argued June 27, 2002

Before: AMBRO and STAPLETON, Circuit Judges  
O'NEILL\*, District Judge

(Opinion filed October 18, 2002)

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\* Honorable Thomas N. O'Neill, Senior United States District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION

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AMBRO, Circuit Judge

This is the second time we consider Lawrence Titchell's challenge to his sentence for mail fraud and conspiracy to commit mail fraud. In United States v. Titchell, 261 F.3d 348 (3d Cir. 2001) (Titchell I), we upheld Titchell's convictions under 18 U.S.C. §§ 371 (one count) and 1341 (two counts), but vacated his sentence of 37 months imprisonment and remanded his case to the Western District of Pennsylvania for resentencing. We did so upon concluding that, in contravention of United States v. Geevers, 226 F.3d 186 (3d Cir.

2000), the District Court had miscalculated Titchell's sentence under the United States Sentencing Guidelines (USSG).<sup>1</sup> More specifically, the District Court equated the loss Titchell potentially could have caused as the loss he intended to cause without performing the "deeper analysis" required to compare the two. Titchell I, 261 F.3d at 354. On remand, the District Court sentenced Titchell to 30 months imprisonment on each count, to be served concurrently. Titchell now appeals this sentence, advancing the sole argument that the District Court again improperly determined the loss he intended to inflict through his criminal scheme. We have jurisdiction pursuant to 18 U.S.C. § 3742(a) and shall affirm.

## I.

We begin with a brief review of our decision in Titchell I and the District Court's resentencing on remand. Two codefendants enlisted Titchell's help in mailing fictitious invoices to renew "Yellow Pages" telephone book advertising. Their plan was ambitious in scope; the one bulk mailing (of eleven) in which Titchell personally participated involved sending 119,575 fraudulent renewal notices, each for a \$147 fee, or \$17,577,525 in total. The Government seized approximately \$647,000 in checks, which means about 3% of recipients returned payment. Only a single \$147 check was actually cashed. Thus, we stated that "the record demonstrates a *potential* loss from Titchell's scam of \$17,577,525; Titchell argues that his *intended* loss was only \$647,000 (or something closely

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<sup>1</sup>We note again that Geevers was decided on August 18, 2000, several months after Titchell's sentencing on February 4, 2000, but prior to oral argument in Titchell I on April 23, 2001. Titchell I, 261 F.3d at 353 n.4.

approximating that amount, because he only expected a 3% return on his mailing); and the actual loss that the government has identified is a mere \$147.” Id. at 352-53.

Much depends on these respective loss calculations. Titchell was sentenced under § 2F1.1 of the Sentencing Guidelines, which provides a base offense level of six, and increases incrementally with the amount of monetary loss incurred.<sup>2</sup> The Application Notes instruct that “if an intended loss that the defendant was attempting to inflict can be determined, this figure will be used if it is greater than the actual loss.” Titchell I, 261 F.3d at 353 (quoting USSG § 2F1.1, cmt. n.8). The District Court determined that Titchell’s intended loss was \$17,577,525 – the potential loss he would have caused if every bogus invoice was paid – and enhanced his sentenced accordingly.

On appeal, we first reiterated the rule established in Geevers, that “intended and potential loss *may* be the same (and a district court can draw an inference to that effect), but it is error for a district court simply to equate the two without ‘deeper analysis.’” Id. at 354. We then concluded that the District Court erred by accepting Titchell’s potential loss as his intended loss without setting out the necessary justification for doing so.

At Titchell’s resentencing hearing, the District Court again determined that the \$17.5 million potential loss constituted the intended loss. The Court acknowledged that Geevers was controlling, and found that case to be factually analogous to Titchell’s circumstances. Geevers involved a check kiting scheme, and the defendant argued that no

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<sup>2</sup>Section 2F1.1 was deleted effective November 1, 2001, and incorporated into § 2B1.1.

reasonable check kiter could expect to abscond with the full face value of all the worthless checks. Our Court rejected this argument, because “expectation is not synonymous with intent when a criminal does not know what he may expect to obtain, but intends to take what he can.” Geevers, 226 F.3d at 193. Therefore, “a sentencing court may plausibly conclude that a defendant like Geevers would likely have taken the full amount of the deposited checks if that were possible.” Id.

Applying this reasoning to Titchell’s case, the District Court stated it “ha[d] not simply equated potential loss with intended loss,” but “ha[d] found that [Titchell] intended to bilk every single person that [he] sent these invoices to.” App. at 181. Ascertaining intent is a factual question, and the District Court “inferred from the fact that they sent these identical invoices out to these people that he fully intended to bilk every single one of them.” Id. at 182. Put another way, while Titchell may not have expected that all 120,000 businesses he targeted would respond, the District Court found that he nonetheless intended for the ruse to succeed in each instance. For this reason, the District Court increased Titchell’s base offense score by 15 levels, to 21. Following a two-level increase for more than minimal planning and a two-level decrease for having a minor role in the conspiracy, the District Court departed downward from the Guidelines range of 37 to 46 months imprisonment and imposed a sentence of 30 months. The Court stated that although it believed the Guidelines range was factually correct, “the score, frankly, does overstate the seriousness of [Titchell’s] involvement in this offense.” App. at 196. Titchell contends that the result of this proceeding also was incorrect.

## II.

Our review of the District Court’s interpretation and application of the Sentencing Guidelines is plenary, but we will reverse the District Court’s factual conclusions only if clearly erroneous. See Titchell I, 261 F.3d at 353; Geevers, 226 F.3d at 189. Titchell’s dual challenges to his sentence are related: the Government did not satisfy its burden of proving that the potential loss also represented the intended loss, and the District Court did not perform the “deeper analysis” required to support such a finding. Both arguments attack the evidentiary foundation of Titchell’s sentence. Both also assume that Geevers requires more than it does. Neither suffices to disturb Titchell’s sentence.

Titchell claims that the Government did not produce, nor did the District Court rely on, any evidence that he intended to defraud each and every entity to which he sent an invoice. Geevers noted that the relevant Guidelines commentary “makes clear that ‘losses need not be determined with precision.’” 226 F.3d at 188 (quoting USSG § 2F1.1, cmt. n.3). It followed that in determining a defendant’s subjective intent to inflict loss, a district court may “draw inferences from the nature of the crime that he sought to perpetuate.” Id. at 192. Titchell mailed almost 120,000 identical notices soliciting payment for nonexistent advertising. More specific substantiation of Titchell’s intentions may not have been available, but it was not necessary. The nature of Titchell’s criminal scheme provided a sufficient basis to infer that he intended every invoice to prompt a return payment, and it was not clearly erroneous for the District Court to make this finding.

Titchell also alleges that the District Court’s determination that the potential and

intended loss were the same improperly shifted the burden of proving subjective intent from the prosecution to the defendant; *i.e.*, inferring intent from limited evidence required Titchell to disprove the extent of his culpability. He is incorrect on both legal and factual grounds. Geevers stated that courts may infer from the face value of kited checks that the defendant intended to cause the entire possible loss. Once the Government has established its *prima facie* case by introducing the amounts on the checks, the burden of production shifts to the defendant to convince the court that the intended loss was less. In the absence of such a showing, the court may accept the Government's proffered figure as sufficient evidence of the defendant's intended loss. Id. at 192-94. Here, the Government met its *prima facie* burden by producing the face value of the invoices as evidence of Titchell's intended loss. Titchell's rebuttal argument was that he intended to receive an approximately 3.5% return on his mailings. This bare assertion that he sought to gain roughly the same amount of money that he actually did receive is more convenient than credible, and is not "persuasive evidence . . . that his intent was to steal a lesser amount."<sup>3</sup>

Titchell's final claim is that the District Court implicitly admitted error in remarking that the Guidelines score overstated the seriousness of Titchell's involvement in

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<sup>3</sup>Id. at 194. Also on the topic of return percentages, Titchell objects to the Government's attempted introduction of evidence from a separate civil suit that demonstrated the response rate to a legitimate Yellow Pages solicitation is approximately 58%. The District Court accepted the Government's proffer at the resentencing hearing, but stated that "these numbers probably will be given little, if any, weight in my determination," and did not refer to this evidence in deciding the amount of Titchell's intended loss. App. at 174. Accordingly, we need not address this issue.

the offense. This argument is unpersuasive. The District Court's statement came in response to Titchell's request for a downward departure, and the language was taken, in part, verbatim from the Guidelines application notes on departure considerations. Furthermore, immediately prior to this statement the District Court reiterated its belief that the calculated range was correct. We decline to conclude that the District Court's accession to Titchell's plea for leniency is grounds for granting him additional relief.

III.

For the reasons stated, we shall affirm the judgment of the District Court.

By the Court,

/s/ Thomas L. Ambro

Circuit Judge