

**UNREPORTED/NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 00-2712  
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UNITED STATES OF AMERICA

v.

BERTHILL THOMAS,  
Appellant

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF THE VIRGIN ISLANDS  
D.C. Crim. No. 98-cr-0228-1  
District Judge: Honorable Thomas K. Moore

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Argued: May 14, 2001  
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Before: McKEE, RENDELL, BARRY, Circuit Judges

(Opinion Filed: June 8, 2001)  
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Treston E. Moore, Esquire (Argued)  
P.O. Box 310, E.G.S.  
Charlotte Amalie, St. Thomas  
United States Virgin Islands 00804

Attorney for Appellant

Hugh P. Mabe, III (Argued)  
Assistant U.S. Attorney  
Office of the United States Attorney  
United States Courthouse  
5500 Veterans Building, Suite 260  
Charlotte Amalie, St. Thomas  
United States Virgin Islands 00804

Attorney for Appellee

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MEMORANDUM OPINION OF THE COURT

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BARRY, Circuit Judge

On March 15, 1999, Berthill Thomas was convicted by a jury sitting in the District Court for the Virgin Islands on charges of making false statements within the jurisdiction of a federal agency in violation of 18 U.S.C. § 1001 and presenting false claims in violation of 18 U.S.C. § 287. These convictions related to his involvement with Ann Abramson, the Commissioner of Public Works, in the presentation and payment of grossly inflated invoices associated with repair work that Thomas performed on the roof of the Finance Department Building in St. Thomas while serving as a government contractor. On September 29, 1999, Thomas entered a guilty plea to a charge that he violated 18 U.S.C. § 1001 by submitting grossly inflated invoices associated with repair work he performed on the roof of the Arthur Richards School in St. Croix where, again, he was involved with Abramson. Thomas now appeals, contending that the District Court erroneously applied the Sentencing Guidelines with respect to (1) acceptance of responsibility, (2) loss calculation under U.S.S.G. § 2F1.1, and (3) more than minimal

planning. Additionally, Thomas contends that the District Court abused its discretion when it denied his motion for a continuance on the day of his sentencing. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). After a careful review of the record,<sup>1</sup> we will affirm.

## I.

### A. Acceptance of Responsibility

Thomas's first claim is that the District Court clearly erred when it determined, contrary to the recommendation of the government and probation, that he had not accepted responsibility so as to qualify for a two-level reduction under U.S.S.G. § 3E1.1.<sup>2</sup> We disagree. Thomas was convicted following a jury trial of false statements and claims regarding the Finance Department Building repair work. The guidelines provide that the "acceptance of responsibility adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." U.S.S.G. § 3E1.1, Application Note 2. While Thomas's act of putting the government to its proof is not an automatic bar to an acceptance of responsibility reduction, his case does not fall within

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<sup>1</sup>The facts underlying Thomas's case are well-known to the parties involved and will not be repeated here.

<sup>2</sup>Thomas bears the burden of proving that he was entitled to acceptance of responsibility; that is, he must show that it was clear error for the District Court to have found that he did not demonstrate his acceptance of responsibility. See United States v. Bennett, 161 F.3d 171, 196 (3d Cir. 1998).

one of the rare situations<sup>3</sup> in which a defendant may elect to exercise his or her right to trial yet remain eligible for a reduction under U.S.S.G. § 3E1.1. Accordingly, we find that the District Court did not err when it denied Thomas a two-level reduction for acceptance of responsibility.<sup>4</sup>

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<sup>3</sup>The rare situations in which a defendant may exercise his or her right to trial and remain eligible for the acceptance of responsibility reduction include: (1) challenges to a statute on constitutional grounds, (2) challenges founded upon jurisdictional questions, (3) challenges where a defendant raises legal issues like an insanity defense or an entrapment defense, or (4) challenges where a defendant admits all of the relevant conduct but contests whether that conduct actually constitutes the offense set out in the relevant statute. See U.S.S.G. § 3E1.1, Application Note 2; see also United States v. Ellis, 168 F.3d 558, 564 (1st Cir. 1999). None of those situations is applicable here.

<sup>4</sup>Aside from the fact that Thomas put the government to its burden of proof at trial, there are other reasons why the District Court correctly denied the two-level reduction for acceptance of responsibility. First, in his direct testimony, Thomas denied that he had ever submitted any fraudulently inflated invoices. (A1218). Indeed, Thomas attempted to blame the inflated invoices on the clerical mistakes of some of his younger crewmembers who, he suggested, probably measured the roof incorrectly. (A1212-13). Thomas reiterated the gist of his defense of blamelessness on cross-examination when he stated that he took the measurements that were given to him and merely transcribed them on a yellow sheet that he happened to sign. (A266-67). He also testified that he did not feel that he should be held responsible for what was written down incorrectly, (A272-73) and that “[a]ll I did I signed these [sic] stuff which could be a mistake I make by just not looking over the stuff . . .” (A275). Finally, on redirect examination, Thomas again disavowed any plan to defraud anyone by means of the invoices. (A309, 314).

Second, Thomas expressly denied his relevant conduct – namely, the bribery and conspiracy counts (of which he was acquitted) concerning Abramson, the Finance Department Building job, and the \$6,500.00 payment made to her. (A260). The Sentencing Guidelines provide that a defendant must truthfully admit the conduct comprising the offense(s) of conviction, and *must truthfully admit or not falsely deny any additional relevant conduct* for which that defendant is accountable under § 1B1.3. See U.S.S.G. § 3E1.1(a), Application Note 1(a) (emphasis added); see also United States v. Frierson, 945 F.2d 650, 663-64 (3d Cir. 1991). The District Court held him accountable here, and the evidence supported that conclusion.

Third, and finally, at sentencing Thomas stated, “*There’s a lot of things that have*

## B. District Court's Denial of Appellant's Motion for Continuance

Thomas argues that the District Court erred in denying, on the morning set for sentencing, his motion for a continuance of his sentencing date, contending that a continuance was warranted because (1) further time was necessary to develop information pertinent to the loss calculation and/or (2) his trial counsel was unable to appear on the scheduled date. As we have stated before, “a trial court’s decision to deny a continuance will only be reversed if an abuse of discretion is shown.” United States v. Fisher, 10 F.3d 115, 117 (3d Cir. 1993). Because we find that the District Court did not abuse its discretion in denying the continuance, Thomas’s claim must fail. See United States v. Kikumura, 947 F.2d 72, 79 (3d Cir. 1991).

With respect to the first ground asserted by Thomas, the District Court had already amassed much documentary and testimonial evidence from which it could ascertain a value of the work performed by Thomas on each job. This evidence included the testimony of Larrison Stevens, one of the workers on the Arthur Richards School job, who proffered approximations of the relevant square footage and linear footage involved with the repairs made by Thomas’s crew at that site. With regard to the Finance Department Building, the evidence featured the inspection report of FEMA Inspector Jose

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*been said and done here that I haven't done.*” (A1157) (emphasis added). This comment and the overall vague nature of Thomas’s allocution with respect to his conduct support the District Court’s decision. Indeed, it is well-established that “[t]he sentencing judge is in a unique position to evaluate a defendant’s acceptance of responsibility.” U.S.S.G. § 3E1.1, Application Note 5.

Lopez, who took actual measurements of the areas where galvanized roof replacement and top coat (hypalon) work was done. (A911-12). The District Court's reliance on this evidence and its refusal to grant the continuance for "destructive testing" was certainly proper. Moreover, extensive work had been done on both roofs since the time of Thomas's work such that any expert whom Thomas might have retained to "destructively test" those roofs would not have been testing Thomas's work product. (A1054-55).

With respect to the second ground, it should be noted that "a court, considering all of the facts of a particular case, may refuse to grant a continuance even if to do so results in the deprivation of a defendant's chosen counsel." Kikumura, 947 F.2d at 78. There was certainly no wrongful deprivation here. Significantly, new counsel had informed the Court that he had discussed the matter with Thomas's trial counsel and that he had been involved with trial counsel on the matter for several weeks, since the beginning of August. (A1046). New counsel also stated that he had reviewed the amended PSI with Thomas and Thomas's trial counsel. (A1046). In light of these facts, and since "there is no indication that the attorney who did represent [Thomas] at the [ ]sentencing proceeding was less than fully competent," we find that the District Court, after having scheduled sentencing months earlier and having continued it once before, did not abuse its discretion. Kikumura, 947 F.2d at 79.

### C. District Court's Loss Calculation

Thomas has also raised a two-pronged challenge to the District Court's loss calculation under U.S.S.G. § 2F1.1. The first prong of Thomas's challenge is a legal

attack that focuses on the District Court’s construction of the Sentencing Guidelines; thus, our review is plenary. See United States v. Mobley, 956 F.2d 450, 451-52 (3d Cir. 1992). Thomas asserts that the gross value of the loss associated with the Finance Department Building component of the total loss should have been the actual loss he had caused by the “point of detection” of the criminal conduct – i.e., the \$40,000.00 he collected and not the \$47,400 he initially attempted to collect. Thomas’s argument is flawed for two reasons. First of all, the determination of a “point of detection” is only necessary (and, indeed, the concept is only relevant) where a defendant has made restitution by returning something taken at some point after the commission of the offense but prior to the date of sentencing.<sup>5</sup> In Thomas’s case, however, there never was any “restitution” made since Thomas did not return any money to the government but rather merely took less money than he originally tried to take. Second, the concept of a “point of detection” is only relevant when dealing with the *actual* loss occasioned by a defendant, not the *intended* loss. In Thomas’s case, the District Court was entirely correct in using the \$47,400.00 invoice as a proxy for intended loss because that invoice was direct proof of the loss that Thomas *intended* to visit upon the government and

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<sup>5</sup>If the restitution is made prior to detection, then the defendant is given a credit against the actual loss; if the restitution is made after detection, then the defendant is treated as having acted “after the fact” and only out self-preservation. See United States v. Shaffer, 35 F.3d 110, 115 (3d Cir. 1994) (stating that a sentencing court must ordinarily calculate the actual amount of loss as it exists at the time the crime was detected, rather than as it exists at the time of sentencing, or else there might be unfair discrimination in the favor of those with greater financial resources).

because an intended loss figure is to be used whenever the amount that a defendant was attempting to obtain is both determinable and greater than the actual loss occasioned. See U.S.S.G. § 2F1.1, Application Note 8; see also United States v. Torres, 209 F.3d 308, 311 (3d Cir. 2000). Accordingly, we reject Thomas's argument and find that the District Court did not err in utilizing the \$47,400.00 figure.

The second prong of Thomas's challenge is factual in nature; therefore, we review the District Court's findings for clear error. See United States v. Miele, 989 F.2d 659, 663 (3d Cir. 1993). Thomas summarily argues that the District Court should have credited him with having provided more of a benefit than it did as an offset to the loss figure. By relying upon the documentary and testimonial evidence that came in the form of the testimony of Stevens and the inspection report of FEMA Inspector Lopez, the District Court carefully calculated a value for the work performed by Thomas for each job. In so doing, Thomas was given the benefit of the doubt as to several figures and the prices of some materials. (A1146-49). Accordingly, we find that the District Court did not err, much less clearly err, in ascertaining the credit that Thomas should receive against the loss figure.

#### D. District Court's Finding of More than Minimal Planning

Thomas's final challenge concerns the enhancement he received for more than minimal planning under U.S.S.G. § 2F1.1(a)(2)(A). Again, the District Court did not err, much less clearly err, in assigning this two-level enhancement to Thomas.

Thomas and Abramson were only able to effect their offense involving the Arthur

Richards School after (1) several sets of invoices were produced by Thomas (and adjusted to comply with the contracted hourly billing rate of \$35 per hour), (2) the normal procedure regarding approval of bills was circumvented when the invoices were repeatedly sent directly to Abramson for her approval, and (3) Abramson's subordinate was directed to identify some accounts that could pay out the necessary funds to cover the invoices.<sup>6</sup> Similarly, the Finance Department Building offense was only accomplished after (1) Abramson brought Thomas to St. Thomas to take on the job, (2) three separate invoices were sent by Thomas to the Finance Department for payment, (3) several telephone calls were made by Thomas to Walter Challenger – the person charged with reviewing the invoices – in an attempt to “coax” him into approving the payment, (4) contact was made by Abramson and some of her subordinates to Commissioner of Finance Gwendolyn Adams regarding payment of the bill, and (5) Abramson's subordinate was enlisted to pick up Thomas's check after his invoice was approved (at a time when Commissioner Adams was out of the office). We find that these steps were more than enough to constitute more than minimal planning, and, thus, we find that the District Court did not clearly err in assigning this two-level enhancement.

## II.

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<sup>6</sup>As stated in U.S.S.G. § 1B1.3(a)(1)(B), “relevant conduct” includes, “in the case of a jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.” U.S.S.G. § 1B1.3(a)(1)(B). As such, it is the combined conduct of Thomas and Abramson that is the appropriate subject of inquiry in determining whether the “more than minimal planning” adjustment should be applied.

For the foregoing reasons, we will affirm the judgment of the District Court.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Memorandum Opinion.

          /s/ Maryanne Trump Barry            
Circuit Judge

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JUDGMENT

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This cause came to be heard on the record from the United States District Court for the District of the Virgin Islands and was argued on May 14, 2001,

After consideration of all contentions raised by the appellant, it is

ADJUDGED and ORDERED that the judgment of the District Court be and is hereby

affirmed.

ATTEST:

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Marcia M. Waldron, Clerk

Dated: 8 June 2001