IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-1102

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LAWRENCE IKE CHUCKS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CR-352-R-01)

(November 15 1993)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[*]

Appellant Lawrence Ike Chucks pled guilty in federal district court to one count of possession of counterfeited securities in violation of 18 U.S.C. § 513. He was sentenced to a term of imprisonment of 46 months, to be followed by a two-year term of supervised release. He appeals both his conviction and his sentence.

---

[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I.

Factual Background

The evidence adduced at Chucks' sentencing hearing revealed the following facts. On June 17, 1989, an individual purchased a cashier's check in the amount of $1,900 from Gibraltar Savings in Dallas, Texas, through an account opened in the name of Lawrence Chucks. This check was never cashed; it was, however, used as a pattern for counterfeiting additional cashier's checks, each of which bore the same serial number as the authentic check. Government investigators later discovered that the account had been opened by the use of false information. It also developed that the person who opened the account had done so with a check that was backed by insufficient funds and was later returned to Gibraltar Savings as nonpayable. In all, $27,727.95 worth of counterfeited Gibraltar checks were passed, and another $10,688.85 worth of such counterfeited checks were seized by the government before they could be passed.

On October 4, 1989, a person using the name "Dean Zook" purchased a cashier's check from First Interstate Bank in Reno, Nevada. Around the same time, Zook also purchased a cashier's check from California Federal Bank, also in Reno, Nevada. These checks were also used as patterns for counterfeited checks. Those responsible for the counterfeiting transposed the serial numbers from these checks, so that all the counterfeited First Interstate checks bore the serial number from the California Federal check and vice versa. Dean Zook's account at California

Federal was also opened by the use of false information. "Zook" was later discovered to use several aliases, including "Peter Phillips."

The net first began to tighten around the counterfeiters in January 1990, when the United States Customs Service in New York seized two counterfeited First Interstate checks, one in the amount of $101,625 and the other in the amount of $92,120.53. In the same seizure the Service discovered several blank checks drawn on Wells Fargo Bank of Sacramento, California, in the name of John Kyshek. On April 19, 1990, Secret Service agents arrested Kyshek in Sacramento for the passing of counterfeited California Federal and First Interstate checks; "John Kyshek," it turned out, was an alias of Lawrence Chucks. On May 2, 1991, the state of California issued a probation violation warrant for Chucks, as his whereabouts were unknown.

Some time after the disappearance of Chucks, Secret Service agents arrested an unnamed Nigerian national in Birmingham, Alabama, for passing counterfeited California Federal and First Interstate checks. In the search of that person's apartment, agents discovered a photograph of an unidentified individual later discovered to be Chucks. The unnamed person told the agents that someone named "Lawrence" had come from Brooklyn and brought him the counterfeited checks, and that the photograph was a picture of Lawrence. Meanwhile, during October 1991, numerous counterfeited California Federal and First Interstate checks were passed in the Seattle area; among those counterfeited checks was

one made payable to "Robert Youngblood" by remitter "Joseph Youngblood."

The next step in the investigation was the arrest of McAnthony Jeremiah, a Nigerian national, in Dallas by Secret Service agents. He was arrested for possession of counterfeited checks patterned after the check bought by Chucks from Gibraltar Savings on June 17, 1989. Jeremiah admitted that he was involved in the group that was counterfeiting checks from First Interstate and California Federal. It was Jeremiah who revealed that "Zook" also used the name Peter Phillips. According to Jeremiah, Phillips actually counterfeited the checks in Ottawa, Canada, while Chucks both delivered checks to Jeremiah and passed them himself.

The fourth named member of the counterfeiting ring was Alfred Opara. He was arrested by the Secret Service in Dallas in April 1992, and he agreed to assist the government as a confidential informant. Opara called Phillips in Canada several times, attempting to persuade Phillips to come to Dallas by offering to give Phillips credit cards in exchange for counterfeited checks. Phillips refused, saying that there was an outstanding warrant for his arrest in Dallas. Finally Phillips agreed to have his cousin, who supposedly lived in Brooklyn, deliver some counterfeited checks to Dallas.

In July 1992, an individual who identified himself as "Lawrence" and as Phillips' cousin called Opara and arranged a meeting in Dallas. At that meeting, which was observed by

government agents, "Lawrence" turned out to be Lawrence Chucks. He showed Opara one counterfeited check and agreed to return later with additional checks. When he returned on July 18, 1992, he was arrested. Some $55,000 worth of counterfeited First Interstate and California Federal checks were on Chucks' person at the time of his arrest. Although most of the checks were blank, one bore the names "Robert Youngblood" and "Joseph Youngblood." This enabled the investigators to connect Chucks to the numerous counterfeited First Interstate and California Federal checks that were passed in the Seattle area in October 1991.

An itemized list from First Interstate revealed that the institution had received $605,470.68 in counterfeited cashier's checks bearing the California Federal serial number. A similar list from California Federal revealed that it received $481,928.43 in counterfeited checks bearing the First Interstate serial number.

Procedural History

On August 11, 1992, Chucks was charged in a one-count indictment with possession of counterfeited securities in violation of 18 U.S.C. § 513. His pretrial motion to suppress illegally obtained evidence was denied. On September 23, 1992, Chucks pled guilty to the indictment. The guilty plea was entered without a plea agreement; all parties did agree to a brief factual resume in which Chucks admitted that at the time of

his arrest he possessed six counterfeited cashier's checks with the intent to deceive another person or organization.

A presentence report was prepared, and Chucks filed several objections to the report. An evidentiary hearing was held on January 20, 1993. At the conclusion of the hearing the district court made oral findings and denied Chucks' objections. Chucks was sentenced to 46 months in prison, to be followed by two years of supervised release. Chucks timely filed his notice of appeal on January 29, 1993.

II.

Standard of Review

Chucks seeks to withdraw his guilty plea because of violations of Federal Rule of Criminal Procedure 11 at his arraignment. Such violations are reviewable for harmless error. Fed. R. Crim. P. 11(h).

Chucks also challenges the district court's findings of "relevant conduct" at his sentencing hearing for the purpose of enhancing his punishment under the sentencing guidelines. The government is not required to establish relevant conduct beyond a reasonable doubt. Rather, the government must prove such conduct by a preponderance of the evidence, and these findings are subject to the clearly erroneous standard of review on appeal. United States v. Buckhalter, 986 F.2d 875, 879 (5th Cir.), cert. denied, 62 U.S.L.W. 3249 (U.S. Oct. 4, 1993).

Finally, Chucks challenges the district court's refusal to decrease his offense level by two levels for acceptance of responsibility. Because the sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility, "the determination of the sentencing judge is entitled to great deference on review." United States Sentencing Commission, Guidelines Manual, § 3E1.1 cmt. n.5 (Nov. 1992). We have said that this standard of review is even more deferential than the "clearly erroneous" standard. United States v. Brigman, 953 F.2d 906, 909 (5th Cir.), petition for cert. filed (U.S. Aug. 4, 1992) (No. 92-5417).

III.

A. *May Chucks Withdraw His Guilty Plea?*

We turn first to Chucks' argument that defects in the plea colloquy constituted such a complete miscarriage of justice that he should be allowed to withdraw his plea. Specifically, Chucks directs our attention to the district court's failure to adhere to the requirements of Federal Rule of Criminal Procedure 11(c). Under Rule 11(c)(1), before the court may accept a guilty plea it must inform the defendant of and determine that he understands

> the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release terms . . . .

We have recognized that Rule 11 addresses three core concerns: whether the guilty plea was coerced, whether the defendant

understands the nature of the charges, and whether the defendant understands the consequences of his plea. United States v. Johnson, 1 F.3d 296, 300 (5th Cir. 1993) (en banc); United States v. Bachynsky, 934 F.2d 1349, 1354 (5th Cir.) (en banc), cert. denied, 112 S. Ct. 402, on remand, 949 F.2d 722 (5th Cir. 1991), cert. denied, 113 S. Ct. 150 (1992). If a district court erroneously departs from the procedures required by Rule 11, we review for harmless error under Rule 11(h). Johnson, 1 F.3d at 302; Fed. R. Crim. P. 11(h) ("Any variance from procedures required by this rule which does not affect substantial rights shall be disregarded.").

Chucks argues that the second and third core concerns of Rule 11 identified in Bachynsky were not sufficiently addressed at the plea colloquy. Although the district court asked Chucks in open court if he understood the charges against him and Chucks said that he understood that he was pleading guilty to a charge of counterfeited securities, the district court did not inform Chucks of the elements of the offense. The court also did not explain the nature of supervised release to Chucks. Chucks argues that the facts that he is a Nigerian citizen and has no more than a high school education aggravate the impact of these defects on the voluntariness of his plea.

We proceed to the two-part "harmless error" analysis set forth in Johnson: (1) Did the sentencing court in fact vary from the procedures required by Rule 11, and (2) if so, did such variance affect substantial rights of the defendant? Johnson, 1

F.3d at 298. In the instant case the district court did not read the elements of the offense to Chucks; although Chucks stated that he understood he was being charged with possession of counterfeited securities, the plea colloquy does not indicate his awareness that intent to deceive another was an element of the offense. We will assume that this constitutes an error under Rule 11. See United States v. Dayton, 604 F.2d 931, 938 (5th Cir. 1979) (en banc) (noting that, for simple charges, a reading of the indictment plus an opportunity for the defendant to ask questions about it suffices to inform him of the "nature of the charge" under Rule 11), cert. denied, 445 U.S. 904, and cert. denied, 445 U.S. 971 (1980); see also United States v. Syal, 963 F.2d 900, 904-05 (6th Cir. 1992) (noting that a defendant must have knowledge of all elements of an offense if he is to plead guilty to it). The failure of the district court to explain the possibility and effect of supervised release to Chucks clearly constitutes error under Rule 11(c)(1).

"To determine whether a Rule 11 error is harmless (i.e., whether the error affects substantial rights), we focus on whether the defendant's knowledge and comprehension of the full and correct information would have been likely to affect his willingness to plead guilty." Johnson, 1 F.3d at 302. Under this standard, we think it clear that Chucks was not prejudiced by the failure of the district court to determine whether Chucks knew that intent to deceive was an element of the offense to which he was pleading. In the factual resume, Chucks admitted

that he possessed the counterfeited checks with the intent to deceive another person or organization. During the plea colloquy Chucks again affirmed his agreement with the facts stated in the resume. Chucks does not explain how he was prejudiced by the failure to inform him during the plea colloquy of the intent element of the offense of possession of counterfeited securities. We conclude that this error was harmless.

We next consider whether the district court's failure to explain the possibility and effects of supervised release constituted harmless error. Chucks refers us to our decision in United States v. Garcia-Garcia, 939 F.2d 230 (5th Cir. 1991), for support. In that case, the defendant pled guilty to illegal reentry into the United States after deportation subsequent to a felony conviction. Id. at 231. As in the instant case, no mention of supervised release was made at the plea hearing. Id. at 231-32. We observed that the defendant was a foreigner who spoke no English, had only a sixth grade education, and pled guilty without the benefit of a plea bargain. Id. at 233. Significantly, the district court in Garcia-Garcia informed the defendant that he faced a maximum sentence of five years, but the supervised release period imposed actually created the possibility of incarceration for over five years and the potential for restraint on the defendant's liberty for over eight years. Id. at 232-33. Thus, one of the core concerns of Rule 11 -- ensuring that the defendant understands the consequences of

his plea -- was not addressed in Garcia-Garcia. We concluded that the error was not harmless. Id. at 233.

The instant case is distinguishable from Garcia-Garcia, as Chucks admits, in that the sentence actually imposed on Chucks cannot exceed the ten-year maximum sentence of which he was informed by the district court. Chucks emphasizes the similarities between his foreign background and poor education and that of the defendant in Garcia-Garcia. We do not find these similarities especially striking; there is no indication in the record that Chucks has difficulty with the English language and his educational background is markedly superior to that of the defendant in Garcia-Garcia. The distinction between Garcia-Garcia and the instant case, however, is compelling. Chucks was informed that his maximum sentence would be ten years, and his actual sentence, even assuming revocation of his supervised release on the last day of that term, amounts to less than ten years.

We believe the instant case is comparable to Bachynsky, in which we found the failure to explain supervised release harmless error where the "worst case" scenario was likewise less than the maximum sentence of which the defendant was informed. Bachynsky, 934 F.2d at 1353, 1361. Admittedly we also took note of Bachynsky's extensive education, able defense counsel, and complicated plea agreement, stating "that under significantly less imposing facts and circumstances, we might well find that a district court's failure to explain supervised release does

affect substantial interests of a defendant and thus is not harmless error." Id. at 1361. Nevertheless, we are satisfied that the harmless error rule should apply to Chucks, a defendant whose sophistication is significantly greater than that of the defendant in Garcia-Garcia. His sentence is well within the maximum sentence of which he was informed, and we see nothing in this record to indicate that Chucks' decision was materially influenced by the district court's failure to explain supervised release.

We affirm Chucks' conviction.

B. *Sentencing*

Chucks argues in the alternative that his case should be remanded for resentencing because of errors committed during his sentencing. He argues that (1) the district court erred in determining the relevant conduct attributable to him, (2) the district court erred by relying on evidence that did not have sufficient "indicia of reliability" in determining the relevant conduct attributable to Chucks, and (3) the district court erred in denying Chucks a reduction of his sentencing guideline offense level for acceptance of responsibility. We consider his first two points together.

1. *Relevant Conduct Under the Guidelines*

At sentencing, the district court accepted and adopted the findings contained in the presentence investigation report. That report ascribed over $1,000,000 in counterfeited checks to Chucks. The sentencing court therefore found that Chucks could

be sentenced for involvement in the counterfeiting of checks in excess of $800,000. Under the United States Sentencing Guidelines effective November 1, 1991, this added eleven levels to Chucks' base offense level of six. U.S.S.G. § 2F1.1(a) & (b)(1)(L) (Nov. 1991). The sentencing court ascribed to Chucks a total base offense level of nineteen, in accordance with the presentence investigation report. Chucks argues that the sentencing court erred by finding that the relevant conduct attributable to him under the guidelines exceeded $800,000, when he possessed only some $55,000 of counterfeited checks at the time of his arrest.

We begin by noting that the presentence investigation report and thus the district court by adoption purported to apply the version of the sentencing guidelines effective from November 1, 1991, to November 1, 1992. The parties agree that the district court should have applied the version of the guidelines effective after November 1, 1992, because that was the version in effect on January 20, 1993, when Chucks was sentenced. United States v. Gross, 979 F.2d 1048, 1050-51 (5th Cir. 1992) (citing 18 U.S.C. § 3553(a)(4)). Under both versions of the guidelines, offenses involving counterfeited instruments other than counterfeited bearer obligations of the United States are punishable the same as offenses involving fraud and deceit under section 2F1.1 of the guidelines. U.S.S.G. § 2B1.5 (Nov. 1991) and U.S.S.G. § 2B1.5 (Nov. 1992). Likewise, the text of section 2F1.1 is identical in both versions of the guidelines. We will, of course, conduct our

analysis under the version of the guidelines effective November 1, 1992.

Under the sentencing guidelines, a defendant's sentence is based on all "relevant conduct" found by the sentencing court, and not merely the conduct for which the defendant is convicted. The guidelines provide that specific offense characteristics, such as the amount of loss in a fraud or deceit offense under section 2F1.1, shall be determined on the basis of "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant," U.S.S.G. § 1B1.3(a)(1)(A) (Nov. 1992), as well as "all reasonably foreseeable acts and omissions of others in furtherance of . . . jointly undertaken criminal activity," whether or not charged as a conspiracy. U.S.S.G. § 1B1.3(a)(1)(B) (Nov. 1992). The commentary tells us that "[i]n order to determine the defendant's accountability for the conduct of others under [§ 1B1.3(a)(1)(B)], the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake." U.S.S.G. § 1B1.3 cmt. n.2 (Nov. 1992). The district court thus held Chucks responsible for all counterfeited checks forged from the original California Federal and First Interstate checks, noting that he was "a part of" or "the source of most, if not all, of these checks."

Chucks argues first that, under this court's decision in United States v. Evbuomwan, 992 F.2d 70 (5th Cir. 1993), the sentencing court did not make adequate findings that Chucks'

conduct was jointly undertaken criminal activity and that Chucks' crime of possession of counterfeited securities was within the scope of a joint agreement to engage in such activity. In Evbuomwan, defendant Joe Evbuomwan pled guilty to one count of credit card fraud, which caused a loss of $1,500. Id. at 72. However, he was sentenced according to an offense level based on a loss of some $90,000, at least $66,000 of which was attributable to a check fraud scheme perpetrated by two other persons, Michael Aakhideno and Mark Dorenuma. Id. The district court found that the participation in the check fraud scheme by Aakhideno and Dorenuma was reasonably foreseeable to Evbuomwan, but it did not find that the check fraud scheme was within the scope of Evbuomwan's agreement to jointly undertake criminal activities with Aakhideno and Dorenuma. Id. at 72-73. We held that the latter finding is "an absolute prerequisite" to calculating the base offense level from relevant conduct under section 1B1.3. Id. at 74; see also id. ("To hold a defendant accountable for the crime of a third person, the government must establish that the defendant agreed to jointly undertake criminal activities with the third person, and that the particular crime was within the scope of that agreement."). We therefore remanded for an explicit ruling on whether Evbuomwan agreed to jointly undertake any criminal activity, and if so, whether the check fraud scheme was within the scope of that agreement. Id.

The government responds that the sentencing court sufficiently found that Chucks was part of the scheme to

distribute all the California Federal and First Interstate counterfeited checks to survive the requirements of Evbuomwan. We note that "[i]n determining the scope of the criminal activity that the particular defendant agreed to jointly undertake . . ., the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others." U.S.S.G. § 1B1.3 cmt. n.2 (Nov. 1992). The sentencing court found that Chucks was "the source of most, if not all" of the checks counterfeited from the original California Federal and First Interstate checks. The court also stated that it was "obvious" that Chucks did not want to "get out of this scheme" to pass counterfeited checks, based on the evidence obtained from the unnamed person in Birmingham in November 1991. Although the court's finding of the scope of the jointly undertaken criminal activity could have been clearer, we think it sufficiently clear that the sentencing court found that Chucks agreed to be a part of the entire scheme to distribute and pass counterfeited checks made from the California Federal and First Interstate originals.

In determining whether this finding was clearly erroneous, we note that the government could not carry its burden of showing Chucks' agreement to the scope of the entire counterfeiting enterprise merely by showing that Chucks' possessed checks counterfeited from the First Interstate and California Federal originals. This fact alone would tend to prove Chucks' connection to the source of all the counterfeited checks, but it would not show that he agreed to jointly undertake the criminal

possession and passing of counterfeited checks by other persons potentially unknown to him. This situation would be analogous to an example provided by the guidelines:

> Defendant O knows about her boyfriend's ongoing drug trafficking activity, but agrees to participate on only one occasion by making a delivery for him at his request when he was ill. Defendant O is accountable under [§ 1B1.3(a)(1)(A)] for the drug quantity involved on that one occasion. Defendant O is not accountable for the other drug sales made by her boyfriend because those sales were not in furtherance of her jointly undertaken criminal activity (i.e., the one delivery).

U.S.S.G. § 1B1.3 cmt. n.2, illus. (c)(5) (Nov. 1992).

However, given the evidence adduced by the government in the instant case, we do not believe that the sentencing court's finding that Chucks agreed to participate in the entire scope of the counterfeiting scheme was clearly erroneous. As we have noted, the checks in Chucks' possession at the time of his arrest were counterfeited from the California Federal and First Interstate originals, thus closely connecting Chucks to the source of all checks counterfeited from those originals. Additionally, one of the checks in Chucks' possession at the time of his arrest bore the names "Robert Youngblood" and "Joseph Youngblood," both of which had been used by a person or persons in the Seattle area to pass counterfeited First Interstate and California Federal checks in October 1991. This tended to connect Chucks with a larger, ongoing criminal enterprise. Chucks' ongoing participation in the enterprise was also evidenced by his April 1990 arrest in California for passing counterfeited California Federal and First Interstate checks.

Jeremiah and the unnamed informant in Birmingham also identified Chucks as a distributor of counterfeited checks in a nationwide criminal scheme. We conclude that the district court's finding that Chucks agreed to be involved in the whole scope of the counterfeiting enterprise is not clearly erroneous.

Chucks next argues that the sentencing court should not have relied upon certain unreliable evidence to establish the relevant conduct used to increase Chucks' base offense level. Under the guidelines, the sentencing court's findings may be based on information without regard to its admissibility under the federal rules of evidence; however, the information must have "sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3(a) (Nov. 1992). The district court has significant discretion in evaluating reliability. United States v. Young, 981 F.2d 180, 185 (5th Cir. 1992), cert. denied, 113 S. Ct. 2454, and cert. denied, 113 S. Ct. 2983 (1993). A defendant who objects to the use of information bears the burden of proving that it is "materially untrue, inaccurate or unreliable." United States v. Kinder, 946 F.2d 362, 366 (5th Cir. 1991) (citation omitted), cert. denied, 112 S. Ct. 1677, and cert. denied, 112 S. Ct. 2290, appeal after remand, 980 F.2d 961 (5th Cir. 1992), cert. denied, 113 S. Ct. 2376 (1993).

As Chucks points out, all testimony regarding relevant conduct at the sentencing hearing was presented by Secret Service Agent David H. Clark. He, in turn, relied on several sources for his testimony, primarily three other persons with connections to

the counterfeiting enterprise. One of these, Jeremiah, identified himself, Phillips, Opara, and Chucks as members of the counterfeiting ring, and he provided the phone number that was later used by Opara to contact Phillips in Canada. When Opara contacted Phillips, admitted by Chucks to be the person most frequently connected to the pattern of counterfeiting activity, Phillips sent Chucks to be the distributor of counterfeited checks in Dallas. This chain of events tends to connect Chucks to the larger criminal enterprise at issue in the instant case in a reliable way. Additionally, the unnamed Nigerian national in Birmingham also identified Chucks from a photograph in his possession as a distributor of counterfeited California Federal and First Interstate checks operating out of Brooklyn. We hold that Chucks has not shown the unreliability of the information relied upon by the sentencing court.

We do not find persuasive the authorities cited by Chucks for the proposition that the evidence presented by the government in the instant case was too unreliable to be used for sentencing purposes. Both cases cited by Chucks involve the difficulties attendant upon sentencing defendants convicted of drug dealing when the exact amount of drugs dealt by the defendant is unknown. United States v. Ortiz, 993 F.2d 204 (10th Cir. 1993); United States v. Walton, 908 F.2d 1289 (6th Cir.), cert. denied, 498 U.S. 906, and cert. denied, 498 U.S. 989, and cert. denied, 498 U.S. 990 (1990). These cases are inapposite because in the instant case there is little or no question as to the minimum

range of loss caused by the counterfeiting enterprise of which Chucks was a part. The government informants were not relied on by the sentencing court to establish the loss caused by the counterfeiters, but rather to establish Chucks' role as distributor in the counterfeiting enterprise. The reliability of the information they supplied in this connection is self-evident, as it led to Chucks' apprehension while acting as a courier with counterfeited checks on his person. Additionally, the evidence in the instant case was much superior to that presented by the government in Ortiz and Walton. Ortiz, 993 F.2d at 208 (holding that an uncorroborated out-of-court statement by an informant that the defendant distributed three pounds of marijuana per week for eighteen months was insufficiently reliable); Walton, 908 F.2d at 1302-03 (holding that the court could not sentence defendants on the assumption that they distributed cocaine for over two years when the only reliable evidence showed that they distributed cocaine for five months).

In sum, we hold that the sentencing court's findings with respect to the relevant conduct attributable to Chucks were not clearly erroneous.

2. *Acceptance of Responsibility*

Chucks next argues that the sentencing court erred by failing to grant him a two-level reduction of his offense level for acceptance of responsibility. The guidelines direct the sentencing court to decrease the offense level by two levels if the defendant "clearly demonstrates acceptance of responsibility

for his offense." U.S.S.G. § 3E1.1(a) (Nov. 1992). Chucks cites the commentary to this section, which provides as follows:

> 1. In determining whether a defendant qualifies under [§ 3E1.1(a)], appropriate considerations include, but are not limited to, the following:
>
> (a) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under [§ 3E1.1(a)]. A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility[.]

U.S.S.G. § 3E1.1 cmt. n.1 (Nov. 1992). Chucks argues that the sentencing court incorrectly applied the pre-November 1992 version of this section, which required the defendant to "clearly demonstrate[] a recognition and affirmative acceptance of personal responsibility for his criminal conduct." U.S.S.G. § 3E1.1(a) (Nov. 1991). The government disagrees, arguing that the district court applied the correct version of the guidelines.

We agree with the government that the sentencing court applied the correct version of the guidelines in determining the acceptance of responsibility issue. Although the presentence investigation report purports to apply the November 1991 version of the guidelines, the section of the report dealing with Chucks' acceptance of responsibility objection is plainly couched in the

terms of the November 1992 version. Likewise, the sentencing court's remarks in denying the reduction for acceptance of responsibility use the terminology of the commentary to the November 1992 version of the guidelines. We therefore apply our deferential standard of review to the sentencing court's decision to deny Chucks a two-level reduction of offense level.

The guidelines' application notes quoted above tell us that a defendant may be entitled to the reduction for acceptance of responsibility if he truthfully admits or simply does not falsely deny relevant conduct. U.S.S.G. § 3E1.1 cmt. n.1(a) (Nov. 1992). A false denial or frivolous contest of relevant conduct, however, justifies denial of the reduction. Id. In the instant case, the court explicitly found that "[Chucks] doesn't have the duty to affirmatively admit any relevant conduct, but he has been questioned about it and he's in fact affirmatively denying it." According to the government's brief, Chucks told his probation officer that he did not pass counterfeited checks after his release from prison in California (which occurred sometime before May 2, 1991); although we find no support for this in the record, we do note that Chucks repeated this denial before the sentencing court.[1] We will not reverse the district court's decision not to

[1] According to the transcript of the sentencing hearing, Chucks denied involvement in passing counterfeited checks after the sentencing court observed that Chucks was "affirmatively denying" his involvement. This tends to substantiate the charge made in the government's brief that Chucks also denied his involvement in the counterfeiting scheme prior to the sentencing hearing.

grant a reduction for acceptance of responsibility on this record.

IV.

For the foregoing reasons, we AFFIRM the defendant's conviction and sentence.