UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Appeal No. 02-2810

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROBERT F. SCHUH,

Defendant-Appellant,

**Appeal From the Final Judgment of Conviction
Entered In The United States District Court
For The Western District of Wisconsin,
Honorable John C. Shabaz, Presiding**

**BRIEF AND APPENDIX
OF DEFENDANT-APPELLANT
ROBERT F. SCHUH**

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

The undersigned, counsel for the appellant, Robert R. Schuh, furnishes the following list in compliance with Circuit Rule 26.1 (7th Cir.):

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Dated: ___________________ _________________________________
Robert R. Henak

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

JURISDICTIONAL STATEMENT 1

STATEMENT OF ISSUE PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE
AND OF THE FACTS 2

SUMMARY OF ARGUMENT 9

ARGUMENT 10

THE DISTRICT COURT'S SENTENCE WAS
BASED ON INACCURATE INFORMATION AND
VIOLATES DUE PROCESS 10

A. Standards of Review 10

B. Because This Court Already Concluded That Schuh Was No More Culpable Nor Responsible For the Offense Than Was Any Other Participant, the District Court's Contrary Conclusion Was Inaccurate 12

C. The District Court Relied Upon the Inaccurate Inference in Imposing a Sentence 25% Longer Than Those Imposed on His Co-Participants 14

D. Given the District Court's Reliance Upon Inaccurate Information in Imposing Sentence, the Proper Remedy is Vacation of the Sentence and Remand for Resentencing 17

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Dorszynski v. United States, 418 U.S. 424 (1974) 10

Gardner v. Florida, 430 U.S. 349 (1977) 10

Townsend v. Burke, 334 U.S. 736 (1948) 11

United States ex rel. Shore v. O'Leary, 833 F.2d 663 (7th Cir.1987) 13

United States ex rel. Welch v. Lane, 738 F.2d 863 (7th Cir.1984) 11, 15-17

United States v. Anaya, 32 F.3d 308 (7th Cir. 1994) 11-12

United States v. Borrero-Isaza, 887 F.2d 1349 (9th Cir.1989) 11

United States v. Buckley, 251 F.3d 668 (7th Cir. 2001) 13

United States v. Byrd, 263 F.3d 705 (7th Cir. 2001) 10

United States v. Hart, 226 F.3d 602 (7th Cir.2000) 12

United States v. Herrera, 878 F.2d 997 (7th Cir. 1989) 10

United States v. Horton, 98 F.3d 313 (7th Cir. 1996) 18

United States v. Mustread, 42 F.3d 1097 (7th Cir. 1994) 11, 12

United States v. Polson, 285 F.3d 563 (7th Cir. 2002) 11, 17

United States v. Robert F. Schuh, Appeal No. 00-3748 2

United States v. Safirstein, 827 F.2d 1380 (9th Cir.1987) 11

United States v. Schuh, 289 F.3d 968 (7th Cir. 2002) 5, 6, 12, 13

United States v. Tucker, 404 U.S. 443 (1972) 11, 15-17

United States v. Wilke, 156 F.3d 749 (7th Cir. 1998) 18

Constitution, Rules and Statutes

18 U.S.C. §2 3

18 U.S.C. §3742(a) 1, 11

21 U.S.C. §841(a)(1) 3

21 U.S.C. §846 3

21 U.S.C. §856(a)(1) 3

21 U.S.C. §856(a)(2) 3

28 U.S.C. §1291 1

28 U.S.C. §3231 1

U.S.S.G. §2D1.1(c)(3) 4

U.S.S.G. §2D1.8(a)(1) 4

U.S.S.G. §3B1.1 . . . . 6, 12

U.S.S.G. §3B1.1(a) 4, 5

U.S.S.G. §3B1.1 note 4 5

U.S.S.G. §3E1.1 4

Fed. R. App. P. 4(b)(3) 2

Fed. R. App. P. 28(e) 1

Circuit Rule 36 (7th Cir.) 17

IN THE UNITED STATES COURT OF APPEALS

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Appeal No. 02-2810

UNITED STATES OF AMERICA

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ROBERT F. SCHUH,

Defendant-Appellant,

BRIEF OF DEFENDANT-APPELLANT
ROBERT F. SCHUH

JURISDICTIONAL STATEMENT

Robert F. Schuh appeals from the final corrected amended judgment of conviction and sentence in this criminal case entered by the district court on July 9, 2002. The district court had jurisdiction under 28 U.S.C. §3231; the Court of Appeals has jurisdiction to hear this appeal under 18 U.S.C. §3742(a) and 28 U.S.C. §1291.

Schuh filed his notice of appeal and docketing statement with the district court on July 12, 2002 (R336).[1] There are no motions for a new trial or alteration of the

[1] Throughout this brief, several abbreviations are used pursuant to Fed. R. App. P. (continued...)

judgment, or any other motion which would toll the time in which to appeal pursuant to Fed. R. App. P. 4(b)(3).

There were prior federal appellate proceedings in this case. Specifically, Mr. Schuh previously appealed his original sentence in this matter, which appeal resulted in reversal by the Court of Appeals and remand for resentencing in a decision dated May 8, 2002. *United States v. Robert F. Schuh*, Appeal No. 00-3748.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the sentence was imposed in violation of law and Schuh's rights to due process on the grounds that the sentencing court relied upon inaccurate information in imposing a sentence at the top of the applicable sentencing range.

STATEMENT OF THE CASE AND OF THE FACTS

Robert F. Schuh owned and operated the Jocko's Rocket Ship Bar in Madison, Wisconsin. From at least January, 1989 until it was closed following a police raid on December 11, 1999, Schuh allowed a number of drug dealers to use Jocko's as a place to package and sell their wares. In return, the drug dealers gave Schuh small quantities of cocaine to feed his own addiction. (R279:6-7, ¶7; *id.*:10, ¶25).

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[1] (...continued)
28(e). Documents in the record are identified by the District Court docket sheet number as "R___"; the following ":___" reference denotes the page number of the document. References to documents which are either not separately paginated (such as those sealed by the district court following sentencing) are to the document by name. When the document is reproduced in the attached appendix, the applicable appendix page number is also identified as "App. ___."

On March 22, 2000, the grand jury returned an indictment charging Schuh and seven co-defendants with various drug offenses (R1). The grand jury subsequently returned a 35-count superseding indictment against Schuh and six of the original seven co-defendants. The superceding indictment charged Schuh with maintaining a drug house in violation of 21 U.S.C. §856(a)(1) (Count 1), conspiracy to make Jocko's available for the purpose of storing, distributing and using cocaine in violation of 21 U.S.C. §§846 & 856(a)(2) and 18 U.S.C. §2 (Count 2), conspiracy to distribute cocaine in violation of 21 U.S.C. §§841(a)(1) & 846 and 18 U.S.C. §2 (Count 3), and substantive offenses of possession or distribution of cocaine in violation of 21 U.S.C. §841(a)(1) & 18 U.S.C. §2 (Counts 4-24, 26, and 28-33) (R144).

On July 31, 2000, Schuh entered a guilty plea to Count 1 of the superceding indictment (maintaining a drug house in violation of 21 U.S.C. §856(a)(1)) pursuant to a written plea agreement under which the remaining counts would be dismissed (R295:2-32).[2] The government summarized the available evidence as showing that Schuh "ran the bar on a day-to-day basis, that on a day-to-day basis cocaine was distributed at the bar with his knowledge, and that he allowed drug dealers to deal in the bar and he allowed them to cut, package and distribute their drugs in the basement area of the bar" (*Id.*:28).

The presentence author calculated that Schuh's co-defendants sold a total of

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[2] The plea agreement is attached to the Presentence Report (R279).

more than 43 kilograms of cocaine at Jocko's, resulting in a base offense level of 34 under U.S.S.G. §§2D1.8(a)(1) and 2D1.1(c)(3) (R279:23-25), and recommended both a 4-level enhancement for Schuh's role in the offense as a "leader or organizer" under U.S.S.G. §3B1.1(a) (*id.*:25-26) and a 3-level reduction for his acceptance of responsibility under U.S.S.G. §3E1.1 (*id.*:24-26), for a total offense level of 35 (*id.*:26). Schuh's two OWI convictions from the mid-1980's (one for a civil ordinance violation), resulted in a recommended criminal history score of 2 and criminal history category II (*id.*:26-29).

Both Schuh and the government objected to the recommended enhancement for role in the offense (R279:Defendant's Challenges to Presentence Report at 3-5; *id.*:AUSA Sinnott letter to Hon. John Shabaz (10/3/00); *see id.*:Addendum to Presentence Report at 1-2; R296:14-24, 25-27).[3] The District Court, Hon. John C. Shabaz, presiding, nonetheless imposed the 4-level enhancement for a leadership or organizing role under U.S.S.G. §3B1.1(a), in addition to holding Schuh liable for all of the cocaine sold at Jocko's (R296:27-41; App. 21-35).

Having adopted the Presentence Report's recommendations, the Court found a total offense level of 35, a criminal history category of II, and a resulting sentencing range of 188 to 235 months (R296:41-42; App. 35-36). The Court concluded that Schuh's drug addiction and lack of financial gain from the crime did not justify a

[3] Schuh also raised other objections to the Presentence Report not relevant to this appeal (*See* R279:Defendant's Challenges at 1-3, 6-7).

downward departure and imposed a sentence of 228 months incarceration, three years of supervised release and the $100 criminal assessment (R296:47-51; App. 37-41). The District Court entered judgment on October 13, 2000 (R262).

Mr. Schuh timely appealed the sentence and, on May 8, 2002, this Court reversed and remanded for resentencing without the enhancer for role in the offense. *United States v. Schuh*, 289 F.3d 968, 972-73 (7th Cir. 2002) (App. 42-48). Regarding the issue of relative responsibility or culpability for the offense, this Court rejected as "clearly erroneous" the District Court's perception that Mr. Schuh's position or actions made him more responsible for the offense than were any of the other participants:

> Even though the grounds given by the district court do not support the sec. 3B1.1(a) adjustment, we may affirm a sentence adjustment on any ground supported by the record. [citation omitted].. Our review of the seven role-in-the-offense factors, however, confirms that the facts are inadequate to establish Schuh as an organizer or leader. See U.S.S.G. sec. 3B1.1, comment. (n.4). First, although the scope of the illegal activity was extensive, Schuh had little decision-making authority and played a minor role in planning or organizing the offense. Schuh did not supply the cocaine to the dealers or control who sold it, when they sold it, at what price they sold it, how they acquired it, how much or to whom they sold, what type they sold, or how many dealers could sell at Jocko's at any given time. Moreover, the dealers were free to sell drugs elsewhere. Schuh's participation in the dealing was limited. He was not a regular dealer, although he occasionally steered customers to the dealers and sometimes sold cocaine for the others. There is no evidence that Schuh recruited accomplices, and, although Schuh received cocaine from the dealers, he never claimed a larger share of the fruits of the crime in relation to the dealers. Therefore, because Schuh played no greater role in the offense than any of the other participants, see Mustread, 42 F.3d at 1103, we vacate Schuh's sentence and remand for resentencing without

an adjustment for being an organizer or leader.

Id. at 973.

On remand, the parties and presentence author agreed that this Court's decision barred any upward adjustment for role in the offense under U.S.S.G. §3B1.1 (R340:Addendum to PSR (6/11/2002)). Accordingly, Schuh's total offense level was 31 (base offense level of 34 minus 3 levels for acceptance of responsibility) which, combined with a criminal history category of II, results in an applicable sentencing range of 121 to 151 months (*Id.*; R342:3-4).

The District Court, Hon. John C. Shabaz, nonetheless raised for the first time at the resentencing hearing on June 26, 2002, the possibility that, although this Court had rejected any upward adjustment for Schuh's role in the offense under U.S.S.G. §3B1.1, an upward departure might be permissible on the same grounds (R342:4-6, 8-9). Schuh objected on the grounds that such a departure would require a finding that his actions made him more culpable than the other conspirators and that this Court's decision already had rejected such a conclusion as unsupported (*id.*:6-8). Although the Government agreed that there were no grounds for a departure in this case (*id.*:8), the Court nonetheless rescheduled the sentencing hearing for further consideration of that issue (*id.*:8-10).

Prior to the rescheduled resentencing date, Schuh filed with the District Court a letter explaining in more detail why an upward departure was legally unwarranted in this matter (R340:Att'y Henak letter to Hon John Shabaz (7/2/2002)).

At the resentencing on July 3, 2002, the Court did not again address the matter of an upward departure. Rather, after hearing arguments of counsel, it imposed a prison sentence of 151 months, at the top of the applicable sentencing range. Once again, the Court placed substantial, although not exclusive, reliance on its perception that Schuh's position at Jocko's Rocket Ship called for a greater sentence than that imposed on the other participants:

> THE COURT: Defendant Robert Schuh was a member of a long-term cocaine distribution conspiracy that lasted for 11 years; January 1989 to December of 1999. He and others distributed at least 43.4 kilograms of cocaine at Jocko's Rocket Ship. Defendant is, as counsel recognizes, accountable for the total cocaine quantity because he was aware of all the drug dealers' trafficking activity at his bar; and as stated by counsel for defendant, recognizes this is reasonably foreseeable.
>
> He was the president of Jocko's Rocket Ship, Incorporated. And as an agent and employee of Jocko's he managed and controlled Jocko's, maintaining a drug house for 11 years. The Seventh Circuit Court of Appeals has determined that a role enhancement for leadership or organization is not applicable.
>
> Nonetheless, the Court believes that a sentence at the top of the guideline imprisonment range is warranted because the quantity of cocaine for which this defendant is accountable falls near the top of the range, 43.4 kilograms, and because his conduct spanned an extensive period of time involving innumerable transactions. Such a sentence will provide specific and general deterrence and hold the defendant accountable.
>
> The Court notes that his sentence at the top of the guideline range will provide imprisonment greater than that of codefendants consistent with defendant's control, operation and maintenance of the drug house, Jocko's Rocket Ship, the Court believing that without such a facility available this extensive drug trafficking could not have occurred.

> The Court then having announced its sentence and the reasons therefor now affirms all of the other provisions as set forth in the prior Judgment without enumeration. . . .

(R343:8-9; App. 15-16. *See also* R341; App. 7 ("The Court notes that this sentence at the top of the guideline range will provide imprisonment greater than that of co-defendants consistent with defendant's control, operation and maintenance of the drug house, Jocko's Rocket Ship, without which facility this extensive drug trafficking could not have occurred")).

Schuh promptly objected to this sentence on the grounds that his control and operation of Jocko's could be relevant as justifying a sentence greater than his co-participants only if it rendered him more responsible for the offense or more culpable. Because this Court already had held to the contrary, the District Court's sentencing rationale reflected that it had relied upon inaccurate information in violations of Schuh's rights to due process. (R343:9-10; App. 16-17). The District Court overruled the objection (R343:10-11; App. 17-18).

Of the other participants who were involved in this conspiracy and accepted responsibility for their conduct, none received more than 121 months incarceration, even though at least one, unlike Schuh, had prior felony convictions. Only Curtis Lane, who denied his responsibility by attempting to withdraw his guilty plea, received a longer sentence, in Lane's case, 135 months from an applicable range of 135 to 168 months. (R340:Addendum to PSR (6/11/2002) at 1-2; *see* R279:PSR at 18).

The District Court entered its amended judgment on July 5, 2002 (R334), and a corrected amended judgment on July 9, 2002 (R335; App. 1-6). Mr. Schuh timely filed his notice of appeal on July 12, 2002 (R336).

SUMMARY OF ARGUMENT

Robert Schuh was a cocaine addict who, in exchange for small quantities of cocaine, granted certain drug dealers access to his bar as a forum from which they could weigh, package, and sell their cocaine. Schuh set the terms and conditions under which he would make the bar available to the drug dealers, but did not direct or control the dealers' conduct of their businesses.

On Schuh's first appeal, this Court rejected as clearly erroneous the District Court's view that Schuh's actions or his control and ownership of Jocko's Rocket Ship somehow made him more culpable or more responsible for the offense than any other participant. On remand, however, the District Court once again relied on exactly that erroneous perception to justify a sentence for Schuh 25% longer than that imposed on any other participant in the offense who, like Schuh, had accepted responsibility for his or her conduct. The sentence accordingly was based on inaccurate information and violates Schuh's due process rights.

ARGUMENT

THE DISTRICT COURT'S SENTENCE WAS BASED ON INACCURATE INFORMATION AND VIOLATES DUE PROCESS

A. Standards of Review

Pursuant to 18 U.S.C. §3742(a), this Court must review a sentence imposed under the Sentencing Guidelines to determine whether that sentence "was imposed in violation of law." The validity of a district court's sentence turns on whether "it results from a proper application of the Sentencing Guidelines to facts not found to be clearly erroneous." *United States v. Herrera*, 878 F.2d 997, 1000 (7th Cir. 1989) (citations omitted).

"[A]bsent an error of law or misapplication of the guidelines, there is no appellate jurisdiction over a district court's choice of a sentence within an otherwise correct guideline range." *E.g.*, *United States v. Byrd*, 263 F.3d 705, 707 (7th Cir. 2001). *See also* 18 U.S.C. § 3742(a) (listing the circumstances in which a defendant may seek review of an otherwise final sentence, including if the sentence was imposed "in violation of law" or as a result of an incorrect application of the guidelines).

While a federal sentence within statutory limits ordinarily is not subject to review, *Dorszynski v. United States*, 418 U.S. 424, 431 (1974), the constitutional guarantee of due process, which continues to operate through sentencing, *Gardner v. Florida*, 430 U.S. 349, 358 (1977), circumscribes the district court's discretion.

"Although sentencing judges are accorded virtually unfettered discretion in sentencing defendants, they may not consider improper, inaccurate, or mistaken information, nor make groundless inferences in imposing sentence." *United States v. Borrero-Isaza*, 887 F.2d 1349, 1352 (9th Cir.1989); *see United States v. Safirstein*, 827 F.2d 1380, 1385 (9th Cir.1987) (abuse of discretion to impose maximum sentence based upon groundless inference of involvement in drug trafficking). *See also United States v. Tucker*, 404 U.S. 443, 447 (1972) (review available if district judge relied upon "misinformation of constitutional magnitude"); *Townsend v. Burke*, 334 U.S. 736 (1948) (Court violates due process when sentencing based upon materially untrue assumptions about defendant's criminal record). A sentence based on inaccurate information accordingly must be set aside. *United States v. Polson*, 285 F.3d 563, 567 (7th Cir. 2002), citing *United States ex rel. Welch v. Lane*, 738 F.2d 863, 865 (7th Cir.1984).

As this Court explained in *Welch*,

> [t]he foundation of that right is due process protection against arbitrary government decisions. A convicted offender does not have a constitutional right to a particular sentence available within a range of alternatives, but the offender does have a right to a fair sentencing process --one in which the court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information.

738 F.2d at 86.

"To successfully challenge her sentence the defendant must show 'that the information before the court was inaccurate, and that the court relied on it.'" *United*

States v. Anaya, 32 F.3d 308, 314 (7th Cir. 1994) (citations omitted). A district court's determination of facts during sentencing is reviewed for clear error. *United States v. Hart*, 226 F.3d 602, 604 (7th Cir.2000).

B. Because This Court Already Concluded That Schuh Was No More Culpable Nor Responsible For the Offense Than Was Any Other Participant, the District Court's Contrary Conclusion Was Inaccurate.

On Mr. Schuh's original appeal, he challenged the District Court's imposition of a 4-level enhancement for aggravated role in the offense pursuant to U.S.S.G. §3B1.1. The District Court had concluded, for a number of asserted reasons, that Mr. Schuh "was the key to allow the drug dealing to occur at Jocko's" (R296:41; App. 35). On appeal, this Court observed that "sec. 3B1.1 adjustments reflect a defendant's relative role in the offense, and '[a] defendant who had no greater role than any other participant cannot receive a sec. 3B1.1 increase.'" 289 F.3d at 972, citing *United States v. Mustread*, 42 F.3d 1097, 1103 (7th Cir. 1994). Because the issue of whether a defendant qualifies for a role enhancement is a question of fact, this Court reviewed the District Court's finding for clear error, a standard permitting reversal only when the Court is "'left with the definite and firm conviction that a mistake has been committed.'" 289 F.3d at 972 (citations omitted).

Applying these standards, this Court reversed. Of particular relevance here, the Court held that "although the scope of the illegal activity was extensive, Schuh had little decision-making authority and played a minor role in planning or organizing

the offense." 289 F.3d at 973. Based on this and a number of other factors, the Court rejected as clearly erroneous the District Court's perception that Schuh was somehow more responsible for the offense and concluded instead that "Schuh played no greater role in the offense than any of the other participants." *Id.*

This Court's holdings generally are binding on the lower courts. *See, e.g.*, *United States v. Buckley*, 251 F.3d 668, 669 (7th Cir. 2001) ("Our ruling that the defendant was not entitled to the [acceptance of responsibility] discount was the law of the case and bound the district judge unless extraordinary circumstances warranted reconsideration"); *United States ex rel. Shore v. O'Leary*, 833 F.2d 663, 667 (7th Cir.1987) ("One foundation block of our judicial system is the principle of stare decisis, which demands adherence to precedents.... A lower court owes deference to those above it; ordinarily it has no authority to reject a doctrine developed by a higher court").

This Court's express finding that Schuh "played no greater role in the offense than any of the other participants," 289 F.3d at 973, thus should have been binding on the lower court here. On remand, however, the District Court chose to ignore that finding. Instead, it expressly relied upon Schuh's ownership and operation of Jocko's Rocket Ship as showing a greater responsibility for the offense, and used this perception of a greater role in the offense to justify imposition of a sentence on him 25% higher than that imposed on any other participant who, like Schuh, had accepted responsibility for the offense. (R343:8-9; R341; App. 7, 15-16).

In response to Schuh's due process objection at the resentencing, the District Court expressed confusion regarding how this Court's decision on the first appeal could draw into question facts set forth in the indictment and presentence report (R343:10-11; App. 10-18). As Schuh made clear in his objection, however, he was not challenging the basic facts contained in those documents, but the District Court's inferences from them that Schuh's management of Jocko's somehow made him more culpable or involved a greater role in the offense than that of his codefendants (R343:9-10; App. 16-17). While the basic facts relied upon by the Court concerning Mr. Schuh's activities and operation of Jocko's may be correct, it was the *inference* from those facts that he was thus somehow more responsible for the offense than were any of his co-participants which was directly contrary to this Court's finding in the original appeal.

C. The District Court Relied Upon the Inaccurate Inference in Imposing a Sentence 25% Longer Than Those Imposed on His Co-Participants.

There can be no doubt but that the District Court, in imposing sentence, relied upon its inaccurate perception of Mr. Schuh as somehow more culpable or responsible for the offense than the others involved in it. Indeed, it expressly said so:

> The Court notes that his sentence at the top of the guideline range will provide imprisonment greater than that of codefendants consistent with defendant's control, operation and maintenance of the drug house, Jocko's Rocket Ship, the Court believing that without such a facility available this extensive drug trafficking could not have occurred.

(R343:9; App. 16; *see* R341; App. 7). It was the erroneous inference that Schuh played a greater role in the offense, and only that inference, which would explain rationally why his management of Jocko's would justify a longer sentence for Schuh than for the other participants in the offense.

It is of course irrelevant that the District Court also cited two otherwise permissible factors when imposing sentence. That Court expressly identified only Schuh's management of Jocko's as justifying the disparate sentences imposed upon Schuh and the other participants (*See* R343:9; R341; App. 7, 16). Also, as this Court has recognized, due process requires that "a sentence must be set aside where the defendant can show that false information was *part* of the basis for the sentence." *Welch*, 738 F.2d at 865 (emphasis added). The inaccurate information thus need not be the entire basis for the sentence.

Similarly irrelevant is any attempt by the Government to suggest that the sentence imposed might have been justified without regard to the inaccurate information. This Court in *Welch* rejected exactly such an argument. The state there argued "that, in light of the sentencing hearing as a whole, the false information did not form the basis for the sentence." 738 F.2d at 867. The seriousness of the offense and a number of other factors were asserted as supporting the sentence imposed. *Id.* The Court recognized, however, that that "argument simply misconceives the nature of the due process right at stake."

The Supreme Court in *United States v. Tucker*, [404 U.S. 443 (1972),]

> rejected an argument like the one advanced here. There the government argued that the sentence need not be set aside because, in light of the entire record, it was "highly unlikely" that the new, untainted sentence would be any different. 404 U.S. at 446, 92 S.Ct. at 591. The Court held that resentencing was required because it simply could not be assumed that the sentencing court would again give the same sentence. 404 U.S. at 448-49 and n. 8, 92 S.Ct. at 592-93 and n.8.
>
> It was, of course entirely proper for the sentencing court to take into consideration each of the factors noted by the respondents; each of these reasons may be relevant in selecting a sentence designed to rehabilitate the offender, protect the public and deter other crimes. *But the fact that the other information might have justified the sentence, independent of the inaccurate information, is irrelevant when the court has relied on inaccurate information as part of the basis of the sentence.*

738 F.2d at 867 (citations omitted; emphasis added). The Court went on to reject any *de novo* review of the adequacy of the remaining, accurate information as supporting the sentence imposed:

> The reviewing court cannot independently review the accurate information and conclude that the original sentence was still justified. That would be sheer speculation in reconstructing the sentencing court's thought processes.

Id. (footnote omitted).

The *Welch* Court likewise rejected any attempt to revive the same argument under the label of "harmless error:"

> The argument is misconceived because it would require us to engage in the same speculation. Once it is established that the court relied on erroneous information in passing sentence, reviewing courts cannot speculate as to whether the same result would again ensue with the error corrected. As the Supreme Court articulated the issue in *United States v. Tucker, supra,* the question is "whether the sentence ... might have been different" if the sentencing judge had been correctly

> informed. 404 U.S. at 448, 92 S.Ct. at 592. That question is best addressed in terms of whether the court relied on the erroneous information.

738 F.2d at 867-68 (footnote omitted).

D. Given the District Court's Reliance Upon Inaccurate Information in Imposing Sentence, the Proper Remedy is Vacation of the Sentence and Remand for Resentencing.

The record thus establishes that the District Court relied upon erroneous information when sentencing Mr. Schuh to 151 months, the high end of the applicable sentencing range. This Court held that the District Court's perception of Schuh as somehow more culpable or responsible for this offense was clearly erroneous. That Court nonetheless persisted in using that same erroneous perception of Schuh as grounds to sentence him to 25% more prison time than that imposed on any other participant in this offense who, like Schuh, had accepted responsibility for his or her offenses.

Where, as here, the court has relied upon inaccurate information in imposing sentence, the proper remedy is to vacate the sentence and remand for resentencing without consideration of the inaccurate information. *Polson*, 285 F.3d at 567; *Welch*, 738 F.2d at 865.

Also, because the original sentencing court appears unable to ignore its erroneous perception of Schuh as somehow more culpable or responsible for this offense than are his co-participants, Schuh respectfully asks that the Court direct that the resentencing be reassigned to a different judge pursuant to Cir. Rule 36 (7th Cir.).

See United States v. Wilke, 156 F.3d 749, 755 (7th Cir. 1998); *United States v. Horton*, 98 F.3d 313, 320 (7th Cir. 1996).

CONCLUSION

The district court erroneously relied upon inaccurate information in sentencing Mr. Schuh to the top end of the applicable guidelines range. Schuh accordingly asks that this Court again vacate the sentence imposed and remand the case for resentencing before a different judge.

Dated at Milwaukee, Wisconsin, August 23, 2002.

Respectfully submitted,

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____

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RULE 32(a)(7) CERTIFICATION

I hereby certify that this brief complies with the type volume limitations contained in Fed. R. App. P. 32(a)(7) for a principal brief produced with a proportionally-spaced font. The length of the includable portions of this brief, *see* Fed. R. App. P. 32(a)(7)(B)(iii), is 4,407 words as determined using the word count of the WordPerfect word-processing program used to prepare the brief.

____
Robert R. Henak

TABLE OF CONTENTS TO APPELLANT'S APPENDIX

Record No.	Description	Page
R335	Corrected Amended Judgment of Conviction (7/9/02)	1
R341	Statement of Reasons (7/5/02)	7
R343	Resentencing Transcript (7/3/02)	8
R296:27-42 47-51	Excerpts of Sentencing Transcript (10/10/00)	20
__	*United States v. Schuh*, 289 F.3d 968 (7th Cir. 2002)	42

CIRCUIT RULE 30(c) STATEMENT

The items required by Circuit Rules 30(a) & (b) have been bound with appellant's brief.

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Robert R. Henak

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of August, 2002, I caused 15 hard copies of the Brief and Appendix of Defendant-Appellant Robert F. Schuh to be mailed, properly addressed and postage prepaid, to the United States Court of Appeals for the Seventh Circuit, 219 South Dearborn Street, Chicago, Illinois 60604. I further certify that on the same date, I caused two hard copies of that document and one copy of the Brief on digital media to be mailed, properly addressed and postage prepaid, to counsel for the Government, AUSA Stephen Sinnott, Office of the United States Attorney, P.O. Box 1585, Madison, WI 53701-1585.

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Schuh Consol. Brf.wpd