

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**

**REPLY BRIEF
OF DEFENDANT-APPELLANT
ROBERT F. SCHUH**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

 THE DISTRICT COURT’S SENTENCE WAS
 BASED ON INACCURATE INFORMATION AND
 VIOLATES DUE PROCESS 1

CONCLUSION 4

TABLE OF AUTHORITIES

Cases

United States ex rel. Welch v. Lane, 738 F.2d 863 (7th Cir.1984)	4
United States v. Anaya, 32 F.3d 308 (7th Cir. 1994)	2
United States v. Polson, 285 F.3d 563 (7th Cir. 2002)	2
United States v. Schuh, 289 F.3d 968 (7th Cir. 2002)	3

Constitution, Rules and Statutes

18 U.S.C. §3742(a)	2
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ARGUMENT

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

Mr. Schuh's opening brief demonstrates that, in resentencing him, the District Court relied upon information or inferences which this Court had squarely rejected as clearly erroneous on Schuh's initial appeal. On that appeal, this Court held that Schuh was no more culpable nor more responsible than was any of the other participants in the offense. In imposing a sentence on Schuh 25% higher than that

received by any other participant who, like Schuh, had accepted responsibility for his misconduct, the District Court expressly relied on its contrary view that Schuh's ownership and operation of Jocko's Rocket Ship made him more responsible for the offense. (R341; R343:8-9; App. 7, 15-16). That Court thus relied on inaccurate information in imposing sentence, in violation of Schuh's rights to due process.

The government claims that this Court has no jurisdiction over Schuh's challenge to his sentence. Yet, it concedes, as it must, that a sentence imposed in violation of law within the meaning of 18 U.S.C. §3742(a). *See* Government's Brief at 10 n.3. Because a sentence based upon inaccurate information violates due process and thus is imposed in violation of the law, *e.g.*, *United States v. Polson*, 285 F.3d 563, 567 (7th Cir. 2002), it would be frivolous to suggest that this Court is without jurisdiction to consider Schuh's appeal. The issue before the Court thus is not one of jurisdiction, but of whether the District Court in fact violated Schuh's due process rights by relying upon inaccurate information in imposing sentence.

"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). The government summarily asserts that Schuh failed to meet either prong of this standard. The government is wrong.

As Schuh's opening brief makes clear, but the government chooses to ignore, the erroneous fact finding relied upon by the District Court in imposing

sentence was its conclusion that Mr. Schuh's activities in relation to Jocko's Rocket Ship somehow rendered him more responsible for the offense or more culpable than his codefendants. This Court had found directly to the contrary on Schuh's initial appeal. *United States v. Schuh*, 289 F.3d 968, 973 (7th Cir. 2002) ("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"); *id.* ("Schuh played no greater role in the offense than any of the other participants").

As further discussed in Schuh's opening brief, the record likewise is absolutely clear that the District Court imposed a sentence on Schuh at least 25% longer than that imposed on any of the other defendants who had accepted responsibility, expressly because it concluded that his actions regarding Jocko's made him more responsible for the offense and thus more culpable. That court so stated at sentencing:

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). That court reiterated its reliance upon this factor in its "Statement of Reasons" attached to the judgment:

. . . 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.

(R341; App. 7).

Given the District Court's express reliance upon the inaccurate information to justify a sentence longer than that received by Schuh's co-defendants, the government's suggestion that the court did not do so is utterly meritless. That court's reference to other factors as bolstering its conclusion does not change the fact that it squarely relied upon inaccurate information on the central question at sentencing: whether Schuh should receive a greater sentence than did his co-defendants. *E.g., United States ex rel. Welch v. Lane*, 738 F.2d 863, 867-68 (7th Cir.1984) (sentencing court's reliance upon inaccurate information not mitigated by possibility other factors may have justified the same sentence); *see* Schuh's Brief at 15-16.

CONCLUSION

This Court expressly held on Schuh's initial appeal that here was no basis in the record for concluding that Mr. Schuh was any more responsible for this offense or any more culpable than was any of his co-defendants. The Court thus concluded that any contrary finding would be clearly erroneous. The District Court nonetheless expressly relied upon just that contrary conclusion in resentencing Schuh. The resulting sentence accordingly violated Schuh's rights to due process, mandating

resentencing. For the reasons stated in Schuh's opening brief at 17-18, that resentencing should be before a different judge.

Dated at Milwaukee, Wisconsin, October 11, 2002.

Respectfully submitted,

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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 reply 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 828 words as determined using the word count of the WordPerfect word-processing program used to prepare the brief.

Robert R. Henak

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of October, 2002, I caused 15 hard copies of the Reply Brief 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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