SCHNEJER Z. **GURARY**, NOCHUM STERNBERG, AND ESTHER STERNBERG, PETITIONERS V. UNITED STATES OF AMERICA

No. 88-1252

In the Supreme **Court** of the United States

October Term, 1988

On Petition for a Writ of Certiorari to the United States **Court** of Appeals for the Second Circuit

Brief for the United States in Opposition

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OPINION BELOW

The opinion of the **court** of appeals (Pet. App. 1a-16a) is reported at 860 F.2d 521.

JURISDICTION

The judgment of the **court** of appeals was entered on October 24, 1988. Petitions for rehearing were denied on November 18 and November 30, 1988, respectively. Pet. App. 17a, 18a. The petition for a writ of certiorari was filed on January 30, 1989 (a Monday). The jurisdiction of this **Court** is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to prove that petitioners intended to violate the tax laws.

2. Whether the **district court** properly gave the jury a "conscious avoidance" instruction.

3. Whether the **district court** complied with the requirement of the

Speedy Trial Act, 18 U.S.C. 3161(h)(8)(A), that the **court** set forth its reasons for granting an "ends of justice" continuance.

STATEMENT

Following a jury trial in the United States **District Court** for the Southern **District** of New York, petitioners were convicted on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371, and on 44 counts of aiding and abetting the filing of false corporate and personal income tax returns, in violation of 26 U.S.C. 7206(2). Petitioner **Gurary** was sentenced to a three-year term of imprisonment, five years' probation to begin upon his release, and fines of $2 million. Petitioner Nochum Sternberg was sentenced to 18 months' imprisonment, five years' probation, and fines of $1 million. Petitioner Esther Sternberg was sentenced to 120 days' imprisonment and a five-year term of probation. She was also held jointly and severally liable for the fines imposed on Nochum Sternberg.

1. The evidence at trial is summarized in the **court** of appeals' opinion, Pet. App. 3a, 5a-8a, and in the government's brief in the **court** of appeals, Gov't C.A. Br. 3-35. It showed that from 1978 to 1986 petitioners created and controlled approximately 36 companies that purported to be engaged in the sale of textiles, gems and other merchandise to legitimate businesses. In fact, petitioners sold sham invoices to the principals of other businesses (the "invoice-purchasing companies"). Each sham invoice falsely reflected that one of petitioners' companies had sold goods to an invoice-purchasing company. The principals of the invoice-purchasing company would then provide petitioners with a check drawn on their company and payable to petitioners' company. Petitioners would then give the principals cash or bonds in the amount of the check less a "commission" of 5 to 15 percent, which petitioners retained. The invoice supplied by petitioners falsely stated that petitioners' company had sold goods in the amount of the check received, but in fact the invoice-purchasing company did not receive and had no expectation of receiving any goods from petitioners' company. The invoice purchasers would then record the sham invoices in its books and records as a legitimate purchase of goods. Petitioners deposited the checks received from the invoice purchasers in bank accounts held in the names of petitioners' individual companies. Gov't C.A. Br. 4-5.

The tax consequences of petitioners' scheme were two-fold. First, the purchases reflected on the false invoices were recorded on the invoice-purchasing company's federal income tax returns for the relevant fiscal year as part of the cost of goods sold and the cost of merchandise bought for manufacture and sale by the companies. Thus, the amounts on petitioners' sham company invoices were fraudulently deducted from the amounts of the invoice-purchasing company's gross receipts for the fiscal year, thereby reducing the company's tax liabilities. Second, the principals of the invoice-purchasing companies kept for themselves all or a substantial portion of the cash they received from the defendants, and they failed to report those cash receipts on their individual income tax returns. Gov't C.A. Br. 5-6.

Petitioner **Gurary** was the mastermind in the scheme, exerting authority and control over petitioners' companies and everyone associated with them. He set the amounts of the commissions paid by the invoice-purchasing companies, and he recruited and supervised two individuals who sold phony invoices for petitioners' companies.

Nochum Sternberg was the salesman and delivery man. He arranged the details of transactions with particular invoice purchasers, including the amount of the invoices and cash to be purchased, and the method and time of delivery of the invoices and cash. Esther Sternberg acted as the bookkeeper for petitioners' companies. She created the invoices, she dealt with bookkeepers of the invoice-purchasing companies regarding the delivery of invoices and their contents, she dealt with bank employees with regard to petitioners' company bank accounts, and she kept track of expenses incurred in connection with the scheme. On occasion, she also arranged the details of the transactions with particular invoice purchasers. Gov't C.A. Br. 6.

In their defense, petitioners argued that they did not intend to violate the tax laws. Petitioners asserted that they had no reason to know that the invoice-purchasing companies were using the fictitious invoices to file fraudulent returns, or that the corporate principals were misappropriating the cash and failing to report it as income. Pet. App. 4a.

2. The **court** of appeals affirmed. Pet. App. 1a-16a. With respect to the sufficiency of the evidence, the **court** of appeals held that the government presented evidence "from which the jury could infer that (petitioners) knew their scheme would result in the filing of false corporate and individual tax returns, and deliberately proceeded with their scheme in the face of that knowledge." Id. at 5a. The **court** of appeals also held that the trial judge properly gave the jury an instruction on "conscious avoidance." Id. at 11a-12a. Finally, the **court** of appeals rejected petitioners' claim that the trial judge violated the Speedy Trial Act, 18 U.S.C. 3161(h)(8)(A), by granting an "ends of justice" continuance without setting forth with sufficient particularity his reasons for doing so. Pet. App. 13a-16a.

ARGUMENT

1. Petitioners argue (Pet. 9-13) that the evidence was insufficient to establish their intent to violate the tax laws and that their convictions under 26 U.S.C. 7206(2) must therefore be set aside. /1/ Sufficiency of the evidence claims generally are for the courts of appeals, not this **Court**, to resolve, see Hamling v. United States, 418 U.S. 87, 124 (1974), but in any event the **court** of appeals correctly rejected petitioners' argument. The government introduced ample evidence, both direct and circumstantial, from which the jury was entitled to infer that petitioners had supplied the fictitious invoices to buyers with the understanding that the buyers would use the invoices to prepare fraudulent tax returns.

Over an eight-year period, petitioners sold a total of more than $136 million in fictitious invoices and charged a fee for that service. The invoices were sold through 36 different corporations created by petitioners, and those corporations conducted no business other than selling invoices and providing cash for a commission. Petitioners prepared the invoices in accordance with each purchaser's specifications, and each purchaser who testified at trial indicated that the fictitious invoices were used to calculate the "cost-of-goods-sold on their corporate tax returns." Pet. App. 5a. To avoid detection of their scheme, petitioners did not use their own names in forming the companies, and the companies were created and dissolved on a rotating basis. Tr. 722, 725, 1568, 1805-1806, 2814-2819; GX 3000. /2/ The tax returns filed for petitioners' companies falsely indicated that the companies were in the "wholesale trade, durable goods" business. Tr. 2920-2910. Petitioners also

opened a total of 55 bank accounts, each of which was active for one to two-and-one-half years. Tr. 2812-2813, 2819; GX 801. The bulk of disbursements for each bank account were in the form of an official check or bank check drawn on the company account and payable to a Swiss bank account. Tr. 2856-2865; GX 300H, 400H, 600H.

In addition to this circumstantial evidence, there was also direct evidence of petitioners' knowledge and intent. One witness, a middleman in petitioners' sales of fictitious invoices, recounted a conversation in which petitioner **Gurary** explained why people would want to buy such invoices. **Gurary** stated that "invoice purchasers could 'save money on taxes by building up the inventory, or . . . buy piece goods and get the dollar amount back and use it either to pay off buyers or expand (the purchaser's) business or keep it personally.'" Pet. App. 5a, quoting Tr. 1934. Petitioner **Gurary's** statement that an invoice purchaser could save on taxes by building up inventory demonstrates an awareness that the invoices were being used to evade taxes. Similarly, from **Gurary's** statement that the invoice purchaser could "keep (the cash) personally" and from the other evidence presented the jury could reasonably infer that **Gurary** knew that corporate officers were misappropriating the cash and failing to include it on their personal returns.

Another witness, a purchaser of the fictitious invoices, testified that petitioner Nochum Sternberg called him to a meeting with **Gurary.** At the meeting, **Gurary** noted in Sternberg's presence that one of the witness's partners was in trouble with the Internal Revenue Service. **Gurary** questioned the witness as to whether his partner intended to disclose to the IRS the source of his cash. Pet. App. 5a-6a. That evidence provides a firm basis for the jury to infer that **Gurary** and Sternberg were aware that their actions violated the tax laws.

In addition, several employees of a different invoice purchaser testified that they instructed petitioner Esther Sternberg on various matters relating to the invoices, including the correlation of checks with invoices and the completion of the fictitious invoices to ensure that the goods listed on the invoices comported with the type of goods regularly purchased by the company. Pet. App. 6a. Esther Sternberg had "hundreds" of conversations with the middlemen regarding the invoices, Tr. 743-744, 1945-1946, and both Nochum and Esther Sternberg knew that the phony invoices were recorded in the accounting books of the corporations that had purchased them, Tr. 1015, 1406, 1640, 1687-1688. That evidence amply supports an inference that the Sternbergs knew they were aiding in tax evasion. Finally, petitioners' knowledge and intent could also be inferred from the fact that they offered to sell fraudulent charitable deductions to individuals by providing fictitious receipts in return for cash in the amount of 90 percent of the face value of the receipts. Tr. 726, 728-730, 1961, 2359-2360.

The cases on which petitioners rely in challenging the sufficiency of the evidence are completely inapposite. In Ingram v. United States, 360 U.S. 672 (1959), this **Court** reversed the conspiracy convictions of two employees of an illegal gambling operation because they lacked personal knowledge of the tax liability of the entrepreneurs of the operation and were unaware that they were helping the persons in charge of the operation to evade the payment of taxes. 360 U.S. at 678-679. Here, by contrast, there was ample evidence from which the jury could reasonably infer that petitioners supplied documents to other companies with knowledge that the documents would be used to prepare false returns. /3/

Similarly, in United States v. Falcone, 311 U.S. 205 (1940), unlike in this case, there was no evidence that the defendants contemplated a violation of the law. The defendants in Falcone were wholesale suppliers of sugar. On the basis of evidence that they sold sugar to the operators of illegal stills, the defendants were convicted of conspiring to operate the stills. This **Court** reversed on the ground that, even assuming the defendants knew of the use being made of the sugar, their knowledge was insufficient to support their convictions, because "(t)he evidence respecting the volume of sales * * * is too vague and inconclusive" to show that the defendants knew of the bootlegging conspiracy. 311 U.S. at 210. This case is different from Falcone for the simple reason that the Falcone defendants were selling an ordinary household item, whereas petitioners were engaged in the sale of fictitious invoices and the provision of large amounts of unrecorded cash. The act of supplying these items supports the inference, which was also supported by other evidence in the record, that the suppliers expected the purchasers to use the items to file fraudulent returns. As this **Court** later noted in Direct Sales Co. v. United States, 319 U.S. 703, 710 (1943), "(a)ll articles of commerce may be put to illegal ends(,), (b)ut all do not have inherently the same susceptibility to harmful and illegal use." Rather, different items, "from their very nature," embody different capacities for giving the seller notice that the purchaser will use them unlawfully. Ibid. Here, it is difficult to imagine any purpose for the fictitious invoices other than to provide the basis for fraudulent tax returns. Petitioners, therefore, are not in the same position as the defendants in Falcone.

Nor does the decision of the **court** of appeals "extend() the criminal tax laws far beyond their intended scope," as petitioners assert (Pet. 10). To the contrary, the decision below is consistent with a well-established line of cases holding that, to prove that defendants aided and assisted the preparation of fraudulent tax returns, the government need only demonstrate that the defendants intentionally engaged in conduct that they knew would result in the filing of a false return. See, e.g., United States v. Nealy, 729 F.2d 961, 962-963 (4th Cir. 1984) (defendant supervised the production of a fraudulent engineering report that was included in memoranda distributed to potential investors in a coal tax shelter); United States v. Kopituk, 690 F.2d 1289, 1333 (11th Cir. 1982), cert. denied, 463 U.S. 1209 (1983) (defendants compiled records indicating that amounts actually constituting illegal payoffs to union officials were legitimate business expenses, and records were used by accountants in preparing corporate returns); United States v. Wolfson, 573 F.2d 216, 224-225 (5th Cir. 1978) (defendant prepared inflated appraisals, which taxpayers subsequently used to claim charitable deductions); United States v. Perez, 565 F.2d 1227, 1233-1234 (2d Cir. 1977) (defendant submitted form falsely indicating that he held winning ticket, and racetrack used form to report winnings to IRS); United States v. Crum, 529 F.2d 1380, 1382 (9th Cir. 1976) (defendant provided backdated beaver purchase contracts, which taxpayers subsequently used to claim fraudulent depreciation deductions); United States v. Maistrow, 451 F.2d 1342 (2d Cir. 1971) (defendants who held winning tickets at racetrack procured services of another person to complete false verification form used by racetrack in reporting winnings to IRS). /4/

2. Petitioners also content (Pet. 13-16) that the trial judge erroneously charged the jury by giving a "conscious avoidance" instruction. They allege that the instruction in this case

impermissibly asked the jury to infer knowledge of illegal conduct that would occur only in the future. The **court** of appeals properly rejected that claim, ruling that, on the facts of this case, the "conscious avoidance" charge was appropriate.

As the **court** of appeals explained, petitioners' argument ignores the fact that petitioners had been selling false invoices and cash since at least 1978. Pet. App. 10a-11a. Thus, while the trial judge's instruction referred to petitioners' closing their eyes to "the use to which invoices and the cash would be put," Tr. 3609, that reference was to ongoing conduct by the invoice purchasers, contemporaneous with petitioners' sales of the invoices. What petitioners may have consciously avoided learning was that the invoices and cash were being used every day over an eight-year period by each invoice purchaser to take fraudulent deductions and obtain tax-free income. The "conscious avoidance" charge thus related to knowledge of a present fact, not the possibility of future events. /5/

Petitioners contend (Pet. 15-16) that there was no evidence that they deliberately avoided learning that their customers either used the fictitious invoices to support fraudulent deductions on their corporate tax returns or failed to report the cash as income on their individual tax returns. They assert, therefore, that there was no basis for the "conscious avoidance" charge in this case. But petitioners' entire defense was based on the theory that, although they knew their conduct was illegal, they did not realize they were assisting the preparation of fraudulent tax returns. In view of petitioners' defense, and in light of the government's evidence that it was highly probable petitioners knew of the use to which the invoices were being put, the jury was entitled to conclude that if petitioners were not aware of the illegal tax aspects of their scheme, it was only because they deliberately chose to avoid gaining that knowledge. Under those circumstances, a conscious avoidance instruction was appropriate. See, e.g., United States v. Peddle, 821 F.2d 1521, 1524-1525 (11th Cir. 1987); United States v. McAllister, 747 F.2d 1273, 1275-1276 (9th Cir. 1984), cert. denied, 474 U.S. 829 (1985); United States v. Holloway, 731 F.2d 378, 380-381, after remand, 740 F.2d 1373 (6th Cir.), cert. denied, 469 U.S. 1021 (1984); United States v. Glick, 710 F.2d 639, 642 (10th Cir. 1983), cert. denied, 465 U.S. 1005 (1984); United States v. Mohabir, 624 F.2d 1140, 1154 (2d Cir. 1980). /6/

3. Petitioners urge this **Court** (Pet. 16-18) to reverse their convictions on the ground that the **district court** violated the Speedy Trial Act, 18 U.S.C. 3161-3174, by granting the government's request for a pre-indictment 60-day "ends-of-justice" continuance without adequately setting forth the reasons for the continuance. /7/ The **court** of appeals found no error, and its decision was correct.

Petitioners **Gurary** and Nochum Sternberg were arrested on April 2, 1986. Pet. App. 13a. On April 17, the government requested a 60-day extension of time to return an indictment and hold a preliminary hearing. C.A. App. 58-65. In support of the motion for a continuance, the government submitted sealed affidavits explaining the charges in the complaint and setting forth in detail the reasons why the government was seeking the extension. Pet. App. 15a-16a. The affidavits set forth the following facts: The government had received information indicating that petitioners would flee the jurisdiction, information that required the immediate arrest of two of the petitioners; /8/ petitioners' scheme was highly complex, and the

government anticipated bringing charges more extensive than the ones that were listed in the complaint; /9/ and petitioner **Gurary's** recalcitrance in complying with grand jury subpoenas issued 18 months earlier had delayed the grand jury's investigation. Pet. App. 15a-16a; C.A. App. 58-65, 201-204; Gov't C.A. Br. 127-131.

After reviewing submissions from the parties and hearing oral argument, the **district court** granted the government's request for a continuance. The **court** found that the "granting of such a continuance best serves the ends of justice and outweighs the best interests of the public and the defendant in a speedy trial." The **court** further found that "'extraordinary circumstances'" exist, and that delaying the preliminary hearing was "'indispensable to the interests of justice.'" Pet. App. 25a-26a. /10/ On June 18, 1986, the grand jury returned a 35-count indictment against petitioners. C.A. App. 110-129. A superseding indictment was filed on November 17, charging additional counts. C.A. App. 87-109. On January 16, 1987, petitioners moved for dismissal of certain counts contained in the superseding indictments, claiming that the **district court** had failed to set forth particular reasons for granting the continuance. Three months later, on April 14, 1987, the **district court** entered an order setting forth additional findings supporting its earlier order. Pet. App. 27a-28a. /11/

Petitioners contend (Pet. 17) that the findings set forth in the **district court's** April 14, 1987, order are not sufficiently particularized because they "merely tracked some of the statutory language, without identifying a single fact from this case that justified the delay." That contention is meritless. The April 14 order specifically noted that the case was "unusual" and "complex" and that "the arrest of the defendants occurred at a time such that it was unreasonable to expect return and filing of the Indictment within the period specified in 18 U.S.C. 3161(b)." Pet. App. 28a. In addition, the order incorporated the government's ex parte affidavit, which indicated that there was a well-founded concern that petitioners might flee, a concern that prompted the immediate arrests of petitioners **Gurary** and Nochum Sternberg. Pet. App. 15a-16a. That affidavit also indicated that **Gurary's** own conduct had frustrated the grand jury's investigation. C.A. App. 77-78. Those facts were clearly sufficient to satisfy the requirements of 18 U.S.C. 3161(h)(8)(A). /12/

Petitioners' reliance on United States v. Perez-Reveles, 715 F.2d 1348 (9th Cir. 1983), is misplaced. In that case, the **district court** granted the defendant's request for a continuance without making any findings whatsoever. When the defendant later moved to dismiss the indictment for a violation of the Speedy Trial Act, the **district court** denied the motion to dismiss "'because of the complexity of the trial and also the settlement pending.'" 715 F.2d at 1352 (quoting **district court's** order). The Ninth Circuit reversed. It held that the pendency of plea negotiations is not a factor that permits an exclusion of time under Section 3161(h)(8)(B), and that the **district court** had erred in finding that the case was complex. 715 F.2d at 1352-1353. By contrast, in this case the **district court's** finding that the case was complex was only one of the factors set forth in support of its order. Moreover, unlike Perez-Reveles, which involved a single defendant who was charged with a simple violation of the narcotics laws that resulted in a two-day trial, the extensive record in this six-week trial amply supports the **district court's** finding that this prosecution was complex. /13/

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1989

/1/ Petitioners have apparently abandoned their claim, raised in the **court** of appeals, that the evidence was insufficient to establish their intent to defraud the United States under 18 U.S.C. 371. See Pet. (I), 12-13.

/2/ The citations to the record are taken from the government's brief in the **court** of appeals.

/3/ For the same reason, petitioners' reliance on United States v. Williams, 809 F.2d 1072, 1095 (5th Cir.), cert. denied, 108 S.Ct. 228 (1987), is unavailing.

/4/ Petitioners contend (Pet. 10) that the **court** of appeals' decision is the first to "extend() the reach of 26 U.S.C. 7206(2) beyond individuals who participate in the preparation of a tax return or provide documents explicitly designed for use in connection with a tax return." That contention ignores the purpose served by the fictitious invoices that petitioners marketed. The invoices provided by petitioners were "designed for use in connection with a tax return" to the same degree as the documents supporting the convictions in the cases listed above. In fact, petitioners' involvement in their customers' tax evasion was even greater than in many of the cited cases. In those cases, the defendants often simply provided documents to aid in tax fraud. In this case, by contrast, petitioners did more than assist in their customers' fraud; in essence, they promoted the fraud by marketing a device whose only use was to provide the false appearance of legitimate expenditures and to generate untraceable cash.

/5/ In any event, it is not clear why a "conscious avoidance" charge should be more suspect when applied to knowledge of future plans than when applied to matters occurring in the present or the past. A person who supplies a getaway car to a bank robber, but willfully avoids learning of the robbery, is equally culpable whether he provides the car as the robbers enter the bank or as they leave.

/6/ Only one of the cases cited by petitioners held that it was error (albeit harmless) to use a conscious avoidance instruction. The facts of that case, which involved the smuggling of narcotics into this country from abroad on one occasion, differed markedly from this

one. United States v. Alvarado, 838 F.2d 311, 312-313, 314-316 (9th Cir.) (error to give a conscious avoidance instruction when all of the evidence pointed towards actual knowledge by the defendants that a suitcase held cocaine), cert. denied, 108 S. Ct. 2880 (1988).

/7/ Because petitioner Esther Sternberg was arrested after the indictment was returned, the Section 3161(b) time limit does not apply to her. Pet. App. 14a.

/8/ Among the circumstances giving rise to the government's concern that petitioners might flee, as set forth in the government's sealed affidavit, were the following: First, in October 1985 one of the middlemen in petitioners' scheme pleaded guilty and began cooperating with the government. He informed the government that petitioner **Gurary** had once suggested to him that he should leave the country in order to avoid a related fraud investigation. Second, an analysis of bank records received pursuant to grand jury subpoena revealed that petitioners' companies had transferred approximately $30 million to Swiss bank accounts from 1975 to 1985. Third, in negotiations conducted with petitioners' counsel prior to the government's decision to arrest petitioners, the government requested the voluntary surrender of petitioners' passports to the government. Petitioners declined. Fourth, another middleman in petitioners' scheme informed the United States Attorney's Office that petitioner **Gurary** had told the middleman in substance that he would flee if the investigation became "too hot." Gov't C.A. Br. 127-129.

/9/ The complaint set forth a complex series of transactions involving at least 170 companies engaged in a variety of industries in the New York area whose checks in excess of $150 million had been deposited in petitioners' company bank accounts. One middleman had also been cooperating with the government, and he had engaged in numerous taped telephone conversations with false-invoice purchasers whom he referred to petitioners for false-invoice transactions. Many of those conversations implicated petitioners, and could therefore have served as the basis for new charges against them and against other defendants as well. Gov't C.A. Br. 130-131.

/10/ Petitioner **Gurary** appealed the order, but the appeal was dismissed as interlocutory. United States v. **Gurary**, 793 F.2d 468 (2d Cir. 1986).

/11/ Every **court** of appeals that has considered the question has held that a **district court** need not set forth the precise reasons for its decision at the time a continuance is granted and may issue its explanation later. United States v. Tunnessen, 763 F.2d 74, 78-79 (2d Cir. 1985); United States v. Wiehoff, 748 F.2d 1158, 1160 (7th Cir. 1984); United States v. Bryant, 726 F.2d 510, 511-512 (9th Cir. 1984); United States v. Brooks, 697 F.2d 517, 522 (3d Cir. 1982), cert. denied, 460 U.S. 1073 (1983); United States v. Clifford, 664 F.2d 1090, 1095 (8th Cir. 1981); United States v. Edwards, 627 F.2d 460, 461 (D.C. Cir.), cert. denied, 449 U.S. 872 (1980).

/12/ To the extent that petitioners argue that the **district court** was not entitled to base its findings on affidavits that the **court** incorporated by reference, petitioners' argument is not supported by the case law. See, e.g., United States v. Mitchell, 723 F.2d 1040, 1044 (1st Cir. 1983); United States v. Guerrero, 667 F.2d 862, 866-867 (10th Cir. 1981), cert. denied, 456 U.S. 964 (1982). Petitioners cite no case holding to the contrary.

/13/ The remaining cases cited by petitioners do not support their claim that the **district court** failed to set forth its findings with sufficient particularity. In each case, the **court** of appeals rejected the defendant's claims that the lower **court's** findings were insufficient. United States v. Wiehoff, 748 F.2d 1158, 1160 (7th Cir. 1984); United States v. Bryant, 726 F.2d 510, 511-512 (9th Cir. 1984); United States v. Brooks, 697 F.2d 517, 521-522 (3d Cir. 1982), cert. denied, 460 U.S. 1073 (1983).