In the

Supreme Court of the United States

UNITED STATES OF AMERICA,	)	
	)	
Petitioner,	)	C-/
	)	
vs.	)	No. 75-1844
	)	
EUGENE LOVASCO, SR.,	)	
	)	
Respondent.	)	

Washington, D.C.
March 21, 1977

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Petitioner, v. EUGENE LOVASCO, SR., Respondent.	No. 75-1844

Washington, D. C.

Monday, March 21, 1977

The above-entitled matter came on for argument at 2:24 p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

JOHN P. RUPP, Esq., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530, for the Petitioner.

LOUIS GILDEN, Esq., 722 Chestnut Street, Suite 1501, St. Louis, Missouri 63101, for the Respondent.

I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 75-1844, United States against Lovasco.

Mr. Rupp, I think you may proceed.

ORAL ARGUMENT OF JOHN P. RUPP

ON BEHALF OF THE PETITIONER

MR. RUPP. Mr. Chief Justice, and may it please the Court: The government petitioned for writ of certiorari in this case after a divided panel of the Court of Appeals for the Eighth Circuit had approved a dismissal of three counts of the indictment. Unlike the district court, the Court of Appeals based its decision on the Due Process Clause of the Fifth Amendment, holding that respondent had satisfied what the majority characterized as the two basic elements essential to a claim of impermissible pre-accusation delay--unreasonableness on the part of the government and prejudiced his ability to defend against the charges.

Because we believe the decision in this case to be incorrect and because that decision conflicts with the approach taken by several other courts of appeals on two recurring issues of substantial importance, we sought further review by this Court.

I should like to begin this afternoon by outlining as briefly as I can the context in which the issues presented here arose. Respondent was indicted on March 6, 1975, on

three counts of unlawful possession of materials stolen from the mails and one count of dealing in firearms without a license. The indictment referred specifically to eight handguns that respondent allegedly had possessed and sold between July 25 and August 31, 1973.

Six days after his indictment respondent moved under Rule 48 of the Federal Rules of Criminal Procedure and the Sixth Amendment to have the charges against him dismissed. He alleged in that motion that the government had not obtained any information relating to the charges in the indictment after September of 1973, that the ensuing delay of approximately 18 months was unreasonable, that that delay had caused him to experience anxiety and concern. He did not claim that the delay had impaired his ability to defend against the charges.

The parties stipulated at the outset of the hearing held on the motion to dismiss that a postal inspector had interviewed respondent in September of 1973 about a series of thefts from the Terminal Railroad Association facility in St. Louis. The parties also stipulated that investigation of the thefts had continued thereafter but that the government had discovered only one witness after September of 1973 who might have bolstered its case.

Respondent attempted to support his claim that the government had possessed sufficient evidence as of September of 1973 to warrant presenting that evidence to the grand jury

by introducing the report that had been prepared by the postal inspector. That report described a series of purchases of semi-automatic handguns from two men in August and September of 1973, all of which had been stolen after mailing from the Terminal Railroad Association in St. Louis. The report stated that the agents had traced the weapons to a man named Joe Boaz and that Boaz had admitted that he had obtained the weapons from respondent. The report further indicated that the postal inspector had interviewed respondent in the presence of respondent's attorney on September 26, 1973.

Respondent, who was then working as a switchman for the Terminal Railroad Association and would not have had access to insured mail parcels in the normal course of his duties, admitted to the postal inspector that he had sold Boaz four or five weapons. Respondent attempted to explain his possession of those guns by claiming that he had found them in a sack in the back seat of his automobile after having gone to the Terminal Railroad Association to visit his son who worked there as a mail handler. The report noted, finally, that although respondent's son had cashed four or five of the checks given by Boaz as payment for the guns, the postal inspectors had no direct evidence that respondent's son was responsible for the thefts.

Respondent testified at the hearing on the motion to dismiss that two "possible" witnesses on his behalf had died

during the 18-month delay referred to in his motion -- his brother and a man named Tom Stewart. According to respondent, his brother had died approximately one year before the hearing, had worked at the same place of business as Boaz, and had been present when he had made arrangements by telephone to sell the guns to Boaz. Respondent claimed that Stewart was his source for two or three of the guns and that Stewart had died approximately six months before the hearing. Again, however, respondent stated for the first time that he had not disclosed Stewart's involvement earlier because of fear of retaliation from Stewart.

Respondent's testimony obviously raised a number of questions. For example, the fact that respondent had told the postal inspector that he had sold Boaz only the guns he had found in the back seat of his car and no more was inconsistent with his assertion at the hearing that he had obtained two or three of those guns from Stewart. Similarly, fear of retaliation from Stewart could hardly have accounted for respondent's failure to mention, at the time he filed his motion to dismiss, Stewart's involvement since, according to respondent, Stewart had been dead at that time for approximately six months. And, furthermore, at no time during the hearing on the motion to dismiss did respondent indicate what exculpatory testimony his brother or Stewart might have provided.

Despite these problems, the district court dismissed

all counts of the indictment.

QUESTION: Who was the judge, Mr. Rupp?

MR. RUPP: Judge Regan.

The court based its dismissal on Rule 48 of the Federal Rules of Criminal Procedure, finding that the government had not adequately justified the 18-month delay referred to in the motion to dismiss and that respondent had been prejudiced by the death of Tom Stewart, whom the court characterized as a material witness on his behalf.

A divided panel of the court of appeals affirmed dismissal of the possession counts and reversed dismissal of the account of the indictment charging respondent with having dealt in firearms without a license. Although the majority credited the government's explanation for the delay as stemming from an effort on its part to discover persons in addition to respondent who may have been responsible for the thefts, the court majority nevertheless concluded that the government had not sufficiently justified the delay and then that delay was therefore unreasonable.

The court also accepted the district court's finding that respondent had been prejudiced by the death of Tom Stewart, adding, without any basis, that were Stewart's testimony available, it would have supported respondent's claim that he did not know that the guns had been stolen from the mails.

It may be worth mentioning, since respondent has

raised the matter, at least briefly, that there is no impediment to this Court's reaching the issues presented in the petition. It is true that the thrust of the government's opening brief on appeal was not directed at those issues, but the reason for that was that the district court had based its decision not on the Fifth Amendment but on Rule 48 of the Federal Rules of Criminal Procedure, which, of course, is not applicable to the pre-accusatory phase of criminal proceedings.

Thus, more importantly, as the opinions in this case make clear, the panel expressly considered the issues presented to this Court relying ultimately upon the view of the Due Process Clause that the government disputed on rehearing in that court and which is before this Court.

The decision in this case imposes upon the government, via the Due Process Clause of the Fifth Amendment, a duty of speedy accusation, roughly equivalent to, in some respects more stringent than, the speedy trial obligations specifically imposed by the Sixth Amendment. The standard employed here for measuring the permissibility of pre-accusation delay cannot be squared with this Court's decision in Marion. Indeed, it renders that decision largely meaningless.

Our position with respect to cases of this sort remains what it was at the time Marion was decided. That is that the Due Process Clause is not violated by delay in the institution of formal criminal proceedings unless that delay

was part of an effort on the government's part to prejudice the defense or perhaps, alternatively, was engaged in by the government in reckless disregard of known risks of prejudice to the defense and actually caused such prejudice.

At the heart of the decision in Marion was this Court's conclusion that the disability suffered by potential defendants did not in the vast majority of cases begin to compare with the disability suffered by those who are actual defendants. The potential defendant is not required to live under the stigma that almost inevitably attends formal public accusation. The differences are even more dramatic in the case of defendants who are incarcerated prior to trial.

Unlike the pre-accusatory period, furthermore, delay in formal accusation until the government has completed its investigation may benefit the defendant and society in a variety of ways. Investigation beyond the point of mere probable cause, for example, may result in the discovery of evidence exculpating the defendant, thereby avoiding unwarranted or ill-considered charges of criminal conduct. It may lead to the discovery of ameliorating evidence and a discretionary decision not to prosecute. It may lead to the discovery of evidence indicating that the person originally under suspicion probably also committed other crimes or that additional persons were involved, thus facilitating the resolution of related charges against all in a single

proceeding. It has often made possible the shortening of the time between formal accusation and trial. These interests are far from insubstantial. They cannot be ignored in assessing the scope of the government's duty under the Due Process Clause.

It is an exceedingly serious matter to immunize from trial one whom the government has reason to believe is guilty of criminal conduct. A remedy so stringent, in our judgment, should be reserved for those cases of affirmative governmental misconduct. That is not to say that the Due Process Clause is never violated without proof of affirmative governmental misconduct. Brady and Agurs stand to the contrary. But the remedy for violation of the government's duty to provide the defense with exculpatory testimony in a Brady or Agurs context is not the very stringent remedy of dismissing all charges immunizing the defendant from further prosecution but remanding the case for a new trial.

I want to emphasize here as clearly as I can that so long as formal accusation is delayed pending further investigation, as it was in this case, we believe that delay can never be considered unjustified, should never be held to constitute a breach of the government's duty to a particular defendant. As Mr. Justice Powell pointed out in Watson, good police practice often requires postponing an arrest even after probable cause has been established in order to develop further evidence to prove guilt to a jury. Hoffa is to the same effect.

As Mr. Justice Stewart stated for the Court in that case, law enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to establish guilt to a jury.

We do not mean to suggest, however, that the public policies making delay in the institution of formal criminal proceedings an inevitable and desirable part of the criminal process necessarily eliminates all concern with the expeditious enforcement of the criminal laws. There may be times, hopefully they will be rare, when delay in formal accusation is the result of efforts on the government's part to prejudice the defense and such prejudice occurs. There may also be times, we hope equally rare, when the government engages in delay in reckless disregard of known risks of prejudice to the defense and such prejudice occurs. As we acknowledged in Marion the Due Process Clause is available to remedy abuses of those sorts which injure society as well as the criminal accused. But in other than those rare cases, we do not believe that the Due Process Clause requires courts to consider the timeliness on an ad hoc basis of criminal charges brought within the applicable statute of limitations.

As this Court pointed out in United States v. Ewell, statutes of limitation stand as the primary guarantee against

the bringing of overly stale criminal charges. They represent a legislative balancing of society's interest in equitable law enforcement and the interests of potential defendants in being freed from having to defend themselves against charges of long past criminal conduct. To be sure, statutes of limitation were never intended to immunize from judicial scrutiny prosecutorial misconduct however unfair occurring within the applicable limitations period, but they do take into account the fact that the timing of decisions to prosecute should be or necessarily are affected both by the need to proceed with care and deliberateness and by a variety of institutional factors, the need to assign priorities, for example, to the prosecution of some cases rather than others.

A standard for measuring the permissibility of pre-accusation delay, such as that employed here, would involve the courts in the same process in which Congress is engaged in enacting statutes of limitations. More importantly, we believe the courts should avoid the kind of ad hoc inquiry into the permissibility of pre-accusation delay that was engaged in here for a variety of eminently practical considerations.

First, if the standard in this case were to be used widely, courts would be required in perhaps a majority of cases to attempt to determine the point at which the government was obligated to take its case to the grand jury, whether

measured against a standard of probable cause or some other standard. A determination of that sort would involve nearly insuperable problems of proof.

Second, it would make little sense, if the duty is so conceived, to limit it to government prosecutors. If the Due Process Clause is construed as embodying a prompt accusation requirement, that duty presumably would extend to government investigators generally. We believe that judicial efforts to supervise the conduct of criminal investigations by reviewing them at the behest of individual defendants would have very serious import for the administration of criminal justice.

Third, a prompt accusation requirement would necessitate the holding of lengthy hearings, trial before the trial, in almost every case before the required determinations could be made with any assurance. The prosecutor would have to document in detail the course of the investigation leading to the charges and particularly if the hearing were held before trial of the general issue, the prosecutor would have to provide a dress rehearsal of his case in an effort to show that the time consumed by the investigation was reasonable under circumstances. At the same time, the courts would be required to attempt to resolve in the context of the particular case a variety of essentially policy disputes that transcend the individual case whether available prosecutory resources were appropriately devoted to the prosecution of one matter rather

than another, whether the importance of continuing an agent in an undercover capacity was more important than proceeding with the prosecution of the particular defendant whose involvement was known. It is no answer to suggest that delay for any of these reasons is avoidable and is therefore chargeable to the government. In fact, they are relevant to determining under the Due Process Clause whether in light of all the circumstances the government has proceeded consistently with shared notions of fair play and fundamental decency.

We thus submit that the courts below erred in dismissing three counts of the indictment in this case on the basis of pre-accusation delay. The indictment was returned within 20 months of the offenses charged, well within the applicable 5-year statute of limitations. Respondent neither alleged nor sought to show that the government had delayed in order to gain an impermissible tactical advantage. Neither has respondent ever suggested that the government proceeded in reckless disregard of known risks of prejudice to him.

QUESTION: Mr. Rupp, at that point, do you feel that what you have just said now should be the burden of the defendant?

MR. RUPP: Yes, I do, Mr. Justice Blackmun.

QUESTION: Isn't this material that is specifically within the control and knowledge and awareness of the government?

MR. RUPP: The first standard, the standard that we

specifically suggested in Marion, the prosecutory misconduct standard, is to some extent a subjective test, and the evidence that would be needed to sustain it, at least to some extent, would be within the hands of the government, although the United States attorneys or assistant United States attorneys responsible for delay could be, and I assume would be, called to the stand and asked to explain the reasons for the delay. I don't think that we can assume that government counsel would not answer those questions candidly.

The second alternative, or perhaps supplemental standard is a good deal more objective, government proceeding with known risks of prejudice to the defendant. Now, that standard and the evidence needed to sustain a case under that standard would not necessarily be within the exclusive control of the government. If, for example, a defendant had communicated, as this respondent did not, that evidence in his possession needed for any defense he might have to put on was disappearing and the government, despite that knowledge, proceeded to delay or continued to delay, such evidence would go a long way toward making out a case.

QUESTION: Mr. Rupp, may I follow up on Mr. Justice Blackmun's question? I wonder if you have given sufficient consideration to your answer that the government prosecutor would readily take the stand in discovery in connection with such a pretrial motion. Is that a considered position of the

government or one you just felt was an appropriate answer to a question you might not have thought through?

MR. RUPP: Well, I have not discussed it with others.

QUESTION: Because that would be a rather dramatic departure from what I understand the normal practice of prosecutors to be if they are asked to testify about their investigation of charges and the like.

MR. RUPP: Well, I certainly am prepared to go back to the Justice Department and obtain the government's position.

QUESTION: In fact, it's my concern about the undesirability of such discovery and that type of practice that makes me question the wisdom of the test that the government advances in this particular case.

MR. RUPP: Well, in this case government counsel entered into with respondent a stipulation which encompassed these matters. I would assume that in many cases such factors could be stipulated to.

Now, the governmental misconduct standard, we fully anticipate that the case would be exceedingly rare in which government counsel has affirmatively engaged in the kind of misconduct we think alone would violate the Due Process Clause.

QUESTION: I must confess that although the words sound persuasive when you give them, I have some difficulty thinking of concrete examples that fit your test. And the government normally I suppose wants to convict people it

believes are guilty of crimes. What is the kind of misconduct that might justify --

MR. RUPP: Perhaps all of the conduct that might be encompassed under the governmental misconduct standard would also be encompassed, I think it probably would be encompassed, within the standard of proceeding in view of known risks of prejudice to the defense.

QUESTION: Well, supposing one of the witnesses is an elderly man and the government believes he is going to testify falsely to an alibi. Falsely. They are satisfied the crime was committed as alleged. If they delayed a couple of months because they thought he might not be available as a witness when he was going to be a false witness, would that justify dismissal of the indictment?

(Pause.)

MR. RUPP: The elderly gentleman is not the defendant but a witness or prospective witness in the case?

QUESTION: Mr. Lovasco's grandfather.

(Pause.)

MR. RUPP: I suppose it would. And the reason is that it will seldom be true that the government will know with 100 percent assurance that the anticipated testimony of a witness is going to be false. That is the decision to be made by the jury, and if the government is 98 percent sure that someone is going to testify falsely and it will be difficult to

overcome that testimony and it proceeds to delay with the full intent to prosecute at some later time when that witness may not be available, I think that that is the kind of governmental misconduct the standard would encompass. But I also think that it would be encompassed by the risk alternative formulation, that is, the government proceeding despite its knowledge that the defendant suffers a very real chance of being prejudiced by any delay.

Now, in the event that evidence the defendant feels is needed is in the process of disappearing, one of the things he can do, of course, is to contact the United States attorney and inform him of that fact. In this case, respondents could hardly have claimed that the government proceeded recklessly with respect to the two witnesses he testified at the hearing would have been available earlier --

QUESTION: May I understand you correctly, you think it's the criminal's responsibility to insist that he be indicted?

MR. RUPP: No. Of course not.

QUESTION: Well, what is it you are talking about? You said he should get in touch with the prosecutor.

MR. RUPP: A conversation of that sort might go something as follows: "I am innocent --

QUESTION: I can't find any place in the Constitution that puts a burden on a man to get indicted.

MR. RUPP: We are not suggesting for the moment that respondent here should call the United States attorney and say, "Indict me." What respondent might have done is to say that "I am innocent, the evidence, or some of the evidence I need to establish my innocence may not be available at some point in the future. If you are ever going to indict me, indict me now."

QUESTION: He doesn't need to establish his innocence. He is innocent.

MR. RUPP: To defend against the evidence.

QUESTION: He is innocent until he is convicted.

MR. RUPP: Yes, he is.

QUESTION: And he is certainly innocent until he is indicted.

MR. RUPP: Of course that's true, Mr. Justice Marshall.

QUESTION: The court doesn't have to overturn any conviction which is achieved by a jury on a charge of tactics such as were made in this case unless it is satisfied that it's in the interest of justice to do so, too.

MR. RUPP: That is correct.

QUESTION: Is there any case in this Court that says it's the responsibility of a person allegedly about to be charged with a crime to get in touch with the U.S. attorney?

MR. RUPP: No. And we are not contending for that for the moment. The government, for example, may learn from third parties wholly unrelated to the defense that there is some

risk that evidence relevant to the case is about to be lost. If the government nonetheless proceeds to delay, and it could proceed, that would in our judgment fall under the test that we are contending for here.

QUESTION: How would the defendant find out that the government had that information?

MR. RUPP: Presumably it would come from third parties associated with the case. In the vast majority of cases those people would be as accessible to the defendant as they will be to the government, and often more accessible to the defendant.

QUESTION: I don't understand this at all, why the responsibility is on the person that is about to be indicted to come forth and say, "You know, I'm about to be indicted and I wish you would hurry up."

MR. RUPP: Well, again, we are not suggesting that a defendant put pressure on the government to indict him. What the defendant might do is suggest that evidence relevant to his defense is about to be lost. And, again, that evidence can come from third parties and it's going to be a rare case in which the government engages in such misconduct.

I would like to reserve the balance of my time, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Mr. Gilden.

ORAL ARGUMENT OF LOUIS GILDEN

ON BEHALF OF THE DEFENDANT

MR. GILDEN: Mr. Chief Justice, and may it please the Court: I do want to clarify a few statements the Solicitor has made which I don't think are borne out in the record. Judge Regan did not decide his case under Rule 48, Mr. Justice Blackmun. He decided it merely on Fifth Amendment essentials as set forth in Marion that there was pre-indictment delay and subsequent prejudice to the defendant.

I might say the government has made all kinds of arguments about why they didn't win this motion, and that's what they are confronted with today. Mr. Justice Marshall, when they talk about the defendant has to give up all of his evidence to the government, tell the government what his case is going to be is sort of silly and nonsense. It is contrary to law. When the defendant came in with his witnesses to the trial court in the pretrial motion, he presented his evidence that two of his witnesses had died. I know nothing in any kind of law in this country that says that the defendant has to signal his testimony to the government about what his evidence is going to be. And the government at no time asked for a delay. They didn't ask for a continuance to check out the veracity of the defendant's statement to the court. They never said, "We don't believe this man, that these two witnesses died, and therefore we want to check it out and see whether or not they would support

your statement that would exculpate you in the commission of this crime of stolen mail matter."

I might say the government runs all over the turf here with respect to all kinds of allegations. They said nothing in the pretrial motion. They were mute on why they failed to indict this man within 17 months, and what they were doing --

QUESTION: Why should they say anything?

MR. GILDEN: Well, they have some obligation to the --

QUESTION: Under what authority?

MR. GILDEN: Let me say this --

QUESTION: Under what authority?

MR. GILDEN: Under the Marion case.

QUESTION: And precisely what language in Marion do you rely on for them to have any duty to speak?

MR. GILDEN: The pre-accusation delay, 17, 18 months, the substance of material actual prejudice that this Court has stated would be a Fifth Amendment violation in Marion.

I might say, Mr. Justice Rehnquist, that in Marion there was no evidence of the government delaying deliberately to get a tactical advantage over the defendant. There was governmental negligence.

QUESTION: But the indictment wasn't dismissed in Marion either.

MR. GILDEN: Well, it was sent back by this Court to

see whether the defendant could prove actual prejudice. That's all.

QUESTION: And wasn't there also language in Marion that talked about tactical advantage to the government?

MR. GILDEN: All they said was we understand that the government concedes to that. That's all this Court said.

QUESTION: Unless the defendant comes in on his motion, and presumably he has the burden of proof on a motion like that, and makes a prima facie case that the Marion requirements are there, why is the burden on the government to go forward and do anything?

MR. GILDEN: We didn't say the government had any burden. We assumed the burden at the motion. The government didn't do anything. The government talks about all the bad things that are going to happen to them in the event this Court decides that the indictment should be dismissed. It's going to interfere with their investigation of crimes, and society, and the defendant. Everybody is going -- the whole administration of justice is going to collapse. All they had to do, Mr. Justice Rehnquist, was come in and say, "We moved our finger from A to B." They didn't say that.

QUESTION: But your position, if my understanding of Marion is correct, if the case you made out on your burden of proof satisfied all the elements of Marion, but if any of those elements were left in dispute, then the government could

stand mute and quite conceivably properly win the motion.

MR. GILDEN: I am saying that my reading of Marion is certainly different than the Solicitor's reading of Marion. And maybe I -- I read Marion, and it says very definitely, if the defendant can go back to trial and can at the trial prove actual prejudice, then he should win his case on the motion to dismiss the indictment.

QUESTION: And you say that proof that a witness had died without proof as to what that witness would testify is a proof of actual prejudice?

MR. GILDEN: Well, let me say this, Mr. Justice Rehnquist, that the government never appealed the essential finding that Tom Stewart would have testified that Lovasco did not know the guns were stolen at the time that he supplied the guns to Lovasco.

Now, that is essential testimony under an 18 U.S.C. 1708, the knowledge that I know these guns were stolen, that's essential testimony. It's the bare guts of a defense to that kind of a case. And I might say that that is a finding of the Eighth Circuit. The government hasn't appealed that material prejudice that the defendant has suffered as a result of this delay to this Court. That's a finding this Court has to accept.

QUESTION: How much delay does there have to be before a defendant is entitled to dismissal on the basis of actual

prejudice?

MR. GILDEN: I wouldn't want to set up any standards on that.

QUESTION: In other words, there can be great prejudice. Let's assume an alleged bank robbery on one day and the key witness for the defendants whose defense is an alibi, let's say, dies the day after the robbery. That's terrible prejudice, and that's caused by delay, by delay in the fact the indictment wasn't brought on the afternoon of the robbery.

MR. GILDEN: That would be an extreme situation. I might say that this Court --

QUESTION: Generally delays -- Congress has set statutes of limitations which are presumptively the period during which an indictment need be returned. Is that correct?

MR. GILDEN: This Court in Marion said that doesn't set up all the standards with respect to where there is a constitutional right involved, and this Court specifically stated that when the Fifth Amendment due process question is involved, pre-accusation delays, that's a matter that can be asserted and the courts will listen to it.

QUESTION: How much delay?

MR. GILDEN: I'm not going to say how much delay. But I believe this Court could say reasonable delay based on --

QUESTION: Reasonable is presumably the statute of

limitation, isn't it?

MR. GILDEN: No, I don't think so, not when there is a question of prejudice to the defendant. I think, based -- this Court doesn't really have to deal with the amount of time. And I might say that in Dickey --

QUESTION: It certainly does.

MR. GILDEN: In Dickey and in Marion and in Barker, ... the Court didn't set out of the amendments that this is particularly the situation of Barker v. Wingo, Justice Powell didn't say that we are going to say that all these things have to be proved in order to show a Sixth Amendment violation of the Constitution. It said these are the things we should consider and the trial court should be given certain latitude to make these decisions based upon what he finds, based upon the facts in front of him. And I feel that in this kind of a situation where Lovasco kept calling the government, Mr. Justice Marshall, and saying -- he says, "I want to be indicted, do something, let me know if I am innocent or I am going to be indicted." He did it. So even though criminals or defendants are not called upon to ask that question, in this case Lovasco kept calling the inspector and saying, "What are you going to do with me? I gave you a statement, what are you going to do? I'm concerned about what's going to happen to me." And at no time did the government come back and do anything about it. In fact --

QUESTION: Don't you think that if he did that more than once or twice, that the prosecutor would have said, "There is something going on around here, we better look into it," because that doesn't happen every day.

MR. GILDEN: I would think so.

QUESTION: And wouldn't the prosecutor say, "We have got to take another look at this"?

MR. GILDEN: I would think so. They didn't do anything.

QUESTION: That's what they did, they took another look.

MR. GILDEN: Seventeen months later they took another look.

QUESTION: When did he start calling?

MR. GILDEN: He called immediately, right after his statement to the government. He came in and gave them a full statement in front of his attorney. And I might say that he kept calling. He expressed his anxiety.

And let me say this. When the government talks about a stipulation made with the defendant's attorney, that stipulation was that we had no further evidence in this matter. The only time he secured some additional evidence was after the grand jury had returned their indictment against him.

QUESTION: That is "we" the government.

MR. GILDEN: We the government. That's right. We had

nothing else. We hadn't done anything. And they stated -- there was no evidence at all to the court as to what they had done for 17 months.

QUESTION: What is the statute of limitations on this offense?

MR. GILDEN: I believe it's a 5-year statute of limitations.

QUESTION: You are quite a bit short of the 5 years.

MR. GILDEN: It is. But let me say that this Court has definitely stated, both in Dickey and also in Marion, that when a constitutional right becomes in some way triggered by the facts, that that is something this Court is going to listen to and decide whether or not this person should be protected based upon these intervening constitutional rights.

QUESTION: Here you have less than a third of the time that Congress has said is a reasonable time in which to bring it.

MR. CHIEF JUSTICE BURGER: We will resume there at 10 in the morning.

MR. GILDEN: Thank you.

[Whereupon, at 3 p.m., the oral argument was recessed, to reconvene at 10 a.m.,,Tuesday, March 22, 1977.]