IN THE SUPREME COURT OF THE UNITED STATES

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

Washington, D. C.

Tuesday, March 22, 1977

Argument in the above-entitled matter was resumed at 10:10 a.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.

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in United States against Lovasco.

Mr. Gilden.

ORAL ARGUMENT OF LOUIS GILDEN

ON BEHALF OF THE RESPONDENT (Resumed)

MR. GILDEN: Mr. Chief Justice, and may it please the Court: Continuing my argument in this matter, I might say that the government at no time before in the district court or in the Eighth Circuit ever contended that the defendant had to prove the governmental misconduct, the tactical advantage secured by the government by delaying prosecution. This is the first time it has been raised, that is in this Court. The government conceded before the district court that all you had to do is prove the prejudicial delay and the subsequent resultant material prejudice, and both elements were proved in the district court and affirmed by the Eighth Circuit Court of Appeals.

It's a little bit unusual to come at this late date and say the Eighth Circuit was in error when the Eighth Circuit didn't even have these fundamentals before them at the time that the government argued its case and presented its brief to the Eighth Circuit when they said all Marion required was the delay was unreasonable and the subsequent resultant material prejudice.

QUESTION: And that you concede is the defendant's burden.

MR. GILDEN: That was our burden, and we proved that burden by showing the 17-months delay, by proving that the defendant had called the government from time to time on five or six occasions and said, "What's going on?" The government conceded that he had anxiety about his situation. And then the resultant prejudice in the death of -- well, we might say that there were two witnesses that died. However, the district court laid its fundamentals of material prejudice on the death of Stewart, and the Eighth Circuit affirmed the finding that there was material prejudice in the death of Stewart. So there was the resultant material prejudice.

QUESTION: Just -- Mr. Stewart had to do only with some of the guns, didn't he?

MR. GILDEN: That's correct. But it was never isolated as to where the guns -- the government never isolated -- of course the government didn't know which ones came from Stewart and which ones came from finding the guns in the car at the erminal ailroad mail facility. However, the court concluded that the very essentials, the very essential element, which is the question did Lovasco know that the guns were stolen would be something that would be deprived of him by a trial without having this material evidence present at a trial by the death of a witness. And the court concluded that -- what is really

essential, Mr. Justice Blackmun, is the question that the government didn't do anything for 17 months.

QUESTION: This is my next question. Does your position depend on what the government's investigation uncovers in the interim? Suppose they had done something and it either did or did not produce something additional. Is your position different then?

MR. GILDEN: No -- well, our position would be different. I think that if the government had just showed that they were trying to do something for 17 months, my position would be totally different before this Court. It would have been different, I think, at the proceedings before the district court, because --

QUESTION: Totally different in what respect? Would it have met your case?

MR. GILDEN: It would have met the standards that they were continuing their investigation, and then showed nothing about the continuous nature of their investigation.

QUESTION: What you are saying is if they had proved that much --

MR. GILDEN: That's correct.

QUESTION: -- if they had proved that much, notwithstanding the prejudice that you had proved --

MR. GILDEN: I say --

QUESTION: -- nevertheless, that you would lose on the

motion.

MR. GILDEN: I think that within the framework of the statute of limitations and the question of foreseeability, I don't think that the defendant can hold the government to that kind of strict proof, you know, and hold that they are sort of confined within a box that way. That is not what I am asking this Court to do.

QUESTION: What if there is no suggestion of any deliberate delay to hurt you and no negligence, but simply the desire of the government to keep an undercover agent under cover?

MR. GILDEN: Well, that was never developed --

QUESTION: I know, but let's assume it were so.

MR. GILDEN: If that were the case, like a continuous narcotics investigation, I think that that would satisfy --

QUESTION: It wouldn't be a continuous investigation of you or your client, it would simply be that this agent was in place and he might be making other cases.

MR. GILDEN: But had they presented that evidence, that would satisfy the criteria.

QUESTION: Do you think that also would --

MR. GILDEN: That would satisfy the criteria as well. I don't want to hamstring the government in terms of --

QUESTION: But you would think that as long as you are prejudiced, even a negligent, even inattention, just

inattention,and negligence would -- you wouldn't even need to show that, I take it. You would just show the delay and the prejudice, and then the government must explain it.

MR. GILDEN: Well, say something.

QUESTION: In other words, any reasonable explanation --

MR. GILDEN: Right.

QUESTION: -- by the government.

MR. GILDEN: Right.

QUESTION: Let me see if I get this. The defendant concedes that it would have the burden of showing both delay and prejudice.

MR. GILDEN: Correct.

QUESTION: And the government can successfully meet that showing merely by showing some reasonable explanation of why the delay?

MR. GILDEN: That's correct. That's all I am asking for before this Court. I don't think that I am asking for any principles which nail the government into a justification which might meet the merits of the case or getting into the substance of the issues of the case, just showing some consideration with respect to the fact that there has been a completed investigation and now we want to get some more evidence.

I might say that this Court should see the potentiality of what the Government has done here. In the

district court the government argued -- and there was never any proof in the record about this -- the government argued that they were trying to get evidence that the son was implicated, the defendant's son, and they wanted to nail him. They didn't feel the defendant was guilty, but they thought the son was guilty.

Then in the Eighth Circuit they changed that argument and they said, "We wanted to find out who stole the mail."

Then the government comes before this Court and abandons both of those arguments and says to this Court, "We wanted to continue the investigation to nail the defendant, we wanted to get more evidence on him."

So now they have got three arguments. And none of those are supported by the record in the district court. So I wonder, with all these voluntary --

QUESTION: Suppose any one or all three had been the subject of some government testimony in the district court, would you be here?

MR. GILDEN: I wouldn't be here. I would have lost my motion. I think the court would have conceded that they gave some reason or justification for the delay, and the court found that there was no reason or justification for the delay, and I wouldn't be before this Court -- well, I would try to appeal the issue, but I still wouldn't have gotten very far.

I think that based upon the record below, there is

an absence of any reason or justification.

QUESTION: Aren't you really arguing that we are bound, we must read the statute of limitations as though Congress had said the action may be brought within five years, but provided that it must be brought sooner unless the government shows that it could not have been brought sooner. Isn't that really what you are arguing about, the application of the statute?

MR. GILDEN: No. I just say that it's not a question of that. I am just saying that if the government just showed that they had moved their little finger one inch, that would be sufficient to show that they were doing something.

QUESTION: Doesn't the statute say that they can move within five years?

MR. GILDEN: Well, I know, but if there are interceding constitutional rights that affect the defendant by reason of the government -- let me say this: The government states before this Court, and this is the interesting proposition, that they have a right of inertia.

What troubles me so much --

QUESTION: What they are saying is that Congress gave them five years of inertia in the statute of limitations.

MR. GILDEN: They may be entitled to inertia, but I think that if intervening constitutional rights come into play, as here, with the death of material witnesses, and due

process comes into the picture, I don't think they have that right any more. I think they had that responsibility to foresee that within the framework of the statute of limitations, that there may be some resultant prejudice and they better do something about getting this case to trial.

QUESTION: What about a civil case where the government is given a period to bring an action against a private individual by a statute of limitations, and you can make the same showing in a civil case. Is the Due Process Clause violated there?

MR. GILDEN: I don't think the due process -- I think you would have questions of latches there. I think that is the theory you would have there, Mr. Justice Rehnquist.

QUESTION: The Due Process Clause talks about deprivation of life, liberty, or property. Presumably a civil defendant could be deprived of property just as surely as a criminal defendant could be deprived of liberty by unwarranted government delay that was still within the limitations period.

MR. GILDEN: I think this Court is much more concerned about fundamental constitutional rights of criminal cases than they are in civil.

QUESTION: What is the fundamental constitutional right you are talking about other than the right not to be deprived of liberty without due process of law?

MR. GILDEN: The fundamental right is the right to a fair trial, Mr. Justice Rehnquist. If you don't have all your witnesses at trial, you haven't had a fair trial. And how can you go to trial if you have lost your evidence, and the government --

QUESTION: If Stewart had died the day after the crime, what would you have?

MR. GILDEN: I might say that that was the question that was presented yesterday, and I can't say that certain --

QUESTION: I think it still is.

MR. GILDEN: What, sir?

QUESTION: I think it still is.

MR. GILDEN: Well, it may well be, but I think that certainly the district court can deal with that issue, Mr. Justice Marshall. It can say that certainly that is something the government has no control over. But the government had control over these proceedings.

And what is so interesting is, that really bothers me so much, is the government --

QUESTION: Who determines how much evidence is available for prosecution other than the U.S. attorney?

MR. GILDEN: Well, he is the only one.

QUESTION: Isn't that his prerogative and nobody else's?

MR. GILDEN: True. But let me say this, this is all --

QUESTION: If he wants a little bit, he just wants one more witness --

MR. GILDEN: Well, he didn't say that to the district court.

QUESTION: Would that have been enough?

MR. GILDEN: That would have been enough, he was trying to find somebody.

QUESTION: Can't you assume that?

MR. GILDEN: Oh, I can --

QUESTION: You don't assume that he did it deliberately, do you?

MR. GILDEN: Well, no. Let me say this. I believe it was done deliberately, certainly. I believe that when --

QUESTION: What good is it to hold up prosecution deliberately?

MR. GILDEN: Courts have held -- this Court has --

QUESTION: I was told in law school that delay was for the benefit of the defendant, because he could always rely on the prosecutor's witness dying.

MR. GILDEN: Well, that's true.

QUESTION: Weren't you taught that in law school?

MR. GILDEN: I was taught the same thing, your Honor. But I might say, too, that it is a double-edged sword, it can work against the defendant as well. It worked against him here. And I think that certainly delay does benefit the

defendant, but, you know, I think two things have to be considered here. The Court has supervisory jurisdiction over some proceedings. And let me say this, the Court when it feels there has been a lack of prosecution or want of prosecution, it has the right to dismss a case for want of prosecution. And I might say there are many cases that hold that as well.

QUESTION: Mr. Gilden, suppose in this case the prosecutor had come in, the U.S. attorney had come in and testified, "We have a very large calendar in this district. We just don't have enough personnel, enough resources, to put everything on as we might want to accomplish what we might want; we have to select out the most important, and in the exercise of our discretion, prosecutorial discretion, this case sat on the back burner for a while." Would that be enough?

MR. GILDEN: That bothers me now. I think that would be enough to have it dismissed. The reason that bothers me --

QUESTION: You think you would still prevail if that is the only proof?

MR. GILDEN: Yes, I think so.

QUESTION: But as a practical matter, isn't that true in many districts?

MR. GILDEN: True. But what troubles me so much, Mr. Justice Brennan, is that we now operate at the gunshot of the prosecutor, both courts and defendants now.

QUESTION: I suppose his pretrial, though --

MR. GILDEN: Right.

QUESTION: -- might have a bearing on it.

MR. GILDEN: That's what troubles me so much. Mr. Justice Rehnquist talked about the cause of delay in this, and the Assistant Attorney General. I might say that the prosecutor shoots the gun and now the courts have to get ready for trial within 60 days and defendants have to get ready for trial within 60 days. Now, we have judicial accountability, the courts do, and the defendants. What the government wants to do is remove judicial accountability for their actions.

QUESTION: Isn't the Speedy Trial Act going to put pressure on the government not to bring its indictments until it is sure that it is all ready to go to trial?

MR. GILDEN: Well, certainly, because they are going to have all of their evidence. I think that is what they want to do. But --

QUESTION: Well, the Justice Department didn't sponsor the Speedy Trial Act.

MR. GILDEN: No, I understand. But I think there should be judicial accountability for their inaction and inertia. We are accountable -- courts and defendants. I mean, we have to jump at the will and at the trigger of the government. So it seems to me that in view of the velocity of the Speedy Trial Act and the policy statement of Congress in passing it --

QUESTION: I am not sure what you mean by that, but I think if you would look at the records, you would find that infinitely more cases are continued and postponed at the request of defendants by a ratio of 3 or 4 to 1 than are continued and postponed at the request of the prosecution.

MR. GILDEN: I would say this is probably true. But what is interesting here is that Lovasco kept calling the government and saying, "What are you going to do?" This isn't a man who sort of took off and thought that the whole matter was going to wash away and that nothing was going to happen to him and he was hoping for delay and all that sort of thing. He wanted a resolution. I would say certainly many defendants, people who are guilty, do not want to be brought to trial, they don't want to go to jail. I think that people that are concerned about their innocence and people who are concerned about their anxiety systems and all that are concerned about immediate resolutions of their problem.

QUESTION: Mr. Gilden, in the government's brief they make a second argument that the decision on the delay should have been made after trial rather than in advance of trial. Did they ask the court to postpone the decision in --

MR. GILDEN: No, they never did. This is merely an advisory opinion of asking this Court to rule on. They never asked the court for the exercise of this discretion in delaying the matter until the close of the jury trial.

QUESTION: What do you think about the suggestion as a procedural matter?

MR. GILDEN: I think that's a bad one. I feel that when you get into pre-accusation delay and you raise the question of Fifth Amendment due process, how can you go to trial when you have lost material evidence? The district court has to make that determination before you go to trial. If you have lost your evidence and you have lost somebody who could prove your innocence and he finds that there is a violation of due process, it seems to me you can't have a fair trial. Why go through all that charade and then at the close of the trial have the court rule on whether or not you had a fair trial. It seems to me that you are saving two things: You are saving the government money for the trial, you are saving judicial time, judicial economy of time with crowded dockets, and you are certainly saving the defendant a lot of counsel fees that he has to pay for a trial of a case that might take two or three or four days or a week, depending upon the circumstances.

QUESTION: Once again, Mr. Gilden, what good is the statute of limitations? Rather, what use is it?

MR. GILDEN: I think it is something -- and I might say it's something the Court can be concerned about, and I think it's something that, as I raised before, I would say the statute of limitations would be a factor in this matter had the government said anything at all, had the government

come through with any evidence at all to show that it was justifying its delay.

QUESTION: What part of the Constitution or statute tells the prosecuting attorney that he must get his indictment within a certain number of months?

MR. GILDEN: There is nothing in the Constitution, there is nothing in any law except the statute of limitations.

QUESTION: How are you injured?

MR. GILDEN: What, sir?

QUESTION: How are you injured?

MR. GILDEN: We are injured by the death of two witnesses.

QUESTION: But I mean, who guarantees you those witnesses?

MR. GILDEN: No one guarantees it, but it's my burden to prove, under Marion, that I have been prejudiced, and I say that we assumed that burden and satisfied the district court that we had been prejudiced, and certainly that under Marion we are entitled to show that prejudice.

QUESTION: You are entitled to show it, but I don't know whether you are entitled to win.

MR. GILDEN: Well, the district court felt that I should --

QUESTION: Under Marion, how many months do you think are necessary?

MR. GILDEN: I don't want to limit that.

QUESTION: Of course you can't, because --

MR. GILDEN: I can't.

QUESTION: I mean, you can get a narcotics indictment in about 16 minutes and you can get an involved conspiracy indictment in about 2 years, right?

MR. GILDEN: That's true.

QUESTION: So there is no line to draw.

MR. GILDEN: I think the district court can analyze the type of case, it can analyze whether it is a complex conspiracy case, it can analyze whether it is a simple event, like here, did he steal the guns or didn't he steal the guns, did he know they were stolen, didn't he, and I think that's a very simple proposition, and I think --

QUESTION: Would the gravity of the offense play any part in the kind of calculus you are suggesting? For example, a typical state law, there is no statute of limitations for murder, whereas for ordinary theft, larceny, the statute may be 3 years, 4 years. Would you say that the government's time could be longer depending on the seriousness of the offense?

MR. GILDEN: I would say that certainly a district judge would certainly, or a state judge, would certainly weigh very heavily a dismissal of an indictment based upon a murder allegation. And I say that that is something to be

concerned about with respect to the exercise of discretion by the district judge as to whether or not it was prejudicial delay and material prejudice to the defendant.

I say that no one can set up standards as to this crime deserves this amount of prejudicial delay and this one sets up another standard of time. I think it is something for the district court or the state court to decide within the framework of what is the delay, what was the reason for it, and how was the defendant in any way prejudiced by the delay.

QUESTION: Mr. Gilden, are you behind in your criminal calendars in the Eastern District?

MR. GILDEN: Oh, I think that we can get to trial within 60 days. We are not behind at all.

QUESTION: Have you had many cases like this out there where motions of this kind have been made?

MR. GILDEN: One more, a case called Barkett. It was a 48-month delay, I believe, and it went to the Eighth Circuit and came out of Kansas City. Are you talking about the Eastern District or the Western --

QUESTION: Both.

MR. GILDEN: And the district judge in Kansas City dismissed the indictment for a 48-month delay.

QUESTION: Who was the judge on that one, do you know?

MR. GILDEN: In the appellate court? Judge Gibson wrote the opinion.

QUESTION: OK.

MR. GILDEN: So I would say that from what I know and in perusing all the cases, it is very unusual, certainly, for a district judge to dismiss a case based upon prejudicial delay and material resultant prejudice, and you will find that the courts are not receptive to that kind of motion.

So I think what we are saying here is that the government is certainly exercising a lot of concern about the administration of justice, but I don't think the administration of justice is going to be in any way affected by a decision of this Court that the defendant was prejudiced when the government did nothing to explain or justify its delay.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Gilden.

Mr. Rupp, do you have anything further?

REBUTTAL ARGUMENT OF JOHN P. RUPP

ON BEHALF OF THE PETITIONER

MR. RUPP: A couple of brief comments, Mr. Chief Justice.

Mr. Gilden suggested if the government had done anything here, perhaps this case shouldn't be here. Well, then maybe it shouldn't be here. At the hearing on the motion to dismiss, the United States attorney, in response to questions indicated that, furthermore, as to additional witnesses received after the date of September 26, 1973, that is true,

that is that there were few additional witnesses discovered, but not as to the investigation itself. The Eighth Circuit expressly credited that representation and nevertheless held that the indictment in this case should be dismissed, finding that that wasn't a sufficient justification for the 18-month delay that occurred here.

Mr. Justice Stevens, as I recall, yesterday you expressed some concern about having government counsel testify routinely in response to motions such as respondent's. I should point out that that is a much greater problem under the Eighth Circuit's formulation than under what we believe the Due Process Clause means. Whenever the defendant under the Eighth Circuit's formulation has been able to make a facially credible allegation of prejudice, the Eighth Circuit would have the government come in and attempt to affirmatively justify any delay that occurred. The only way that could be done is by having the United States attorney or the assistant United States attorney come in, attempt to document the course of the investigation in detail, saying who was doing what at what time for what reason. Government counsel might also have to take the stand under the Due Process Clause as we believe it should be construed, but the inquiry would be much more limited. Government counsel already takes the stand in a number of contexts. The one that most readily comes to mind are motions that deal with some aspect of plea bargaining

negotiations.

With respect to the questions that you asked yesterday, Mr. Justice Marshall, the government's position is not that a potential defendant has an obligation to ask to be indicted. He may, of course, do nothing. The question here is under what circumstances the defendant is entitled to come into court and say,"Guilty or not, the Due Process Clause prevents the government from trying me."

Now, we have suggested that a defendant may make the required showing in any of several ways. And all my response to your question yesterday was intended to indicate is that if a defendant, a potential defendant, had indicated that if the government delayed in reaching a decision whether to prosecute, he might be prejudiced, he would be in a stronger position to claim immunity from prosecution.

QUESTION: Isn't it true that he did in this case? Is that true or not?

MR. RUPP: The record is a bit unclear. The record certainly is clear that Mr. Lovasco called the postal inspector on several occasions. Now, the record indicates --

QUESTION: Isn't that the answer to my question?

MR. RUPP: That he --

QUESTION: That he did do it?

MR. RUPP: No, I think the record is precisely to the contrary. What the record shows is that Mr. Lovasco said

when he was interviewed that the only guns he had sold were the guns he had found in the back seat of his car. Not until the motion on the hearing to dismiss did he mention, and then for the first time, that there were two additional people, Stewart and his brother, and that the guns in fact, or at least two or three of them, came from some other source.

QUESTION: Do you say he never called the prosecutor and said, "Why don't you do something about this case?"

MR. RUPP: He did not call the prosecutor; he called the postal inspector. I think it is the same thing.

QUESTION: Well, that's the government.

MR. RUPP: Yes, that's right.

QUESTION: He did do that.

MR. RUPP: He did, but he did not say anything --

QUESTION: He did what you wanted him to do?

MR. RUPP: No, he didn't. What he did is say, I assume, is, "I am anxious about this." What he didn't do is give the government any cause to believe that he was about to be prejudiced, his ability to defend himself at trial would be prejudiced were any delay to occur.

QUESTION: He certainly couldn't have told them, "I am afraid that Mr. Stewart is going to die."

MR. RUPP: He couldn't have said that because he had said earlier that he had found all of the guns he had sold to Boaz in the back seat of his car.

QUESTION: Mr. Rupp, before you sit down, your opponent has said that in the lower courts the government took the position that all that the defendant needed to show was prejudice and unreasonable delay. Has he correctly characterized the record?

MR. RUPP: That's incorrect, your Honor. As I indicated during my presentation yesterday, the district court -- and, again, I can only refer you to the district court's order. The district court based its dismissal in this case on Rule 48 of the Federal Rules of Criminal Procedure. To some extent that skewed the proceedings during the opening round of briefs in the court of appeals. The issues presented here, though, were argued to the court of appeals, and then when the court of appeals issued its decision, the government petitioned for rehearing, arguing both the issues that we present here precisely as we present them here and arguing that the district court should have delayed reaching a decision until after trial. The reason that wasn't done earlier is that the motion itself was facially inadequate. The motion does not contain an assertion that Lovasco would have been prejudiced at trial. It only claimed anxiety and concern and an unelaborated assertion of prejudice.

QUESTION: Mr. Rupp, as to that argument of yours in part II of your brief that you just discussed that when a trial judge is met with a motion of this kind by the defendant

that he should defer a ruling on it until after trial, do you mean after a verdict or at the conclusion of all the evidence? Which? It wasn't clear to me from the --

MR. RUPP: Actually, it could come at either point.

QUESTION: It could come, certainly. It could come before trial. What is your argument?

MR. RUPP: If the court is satisfied, after having heard the evidence, that the defendant has suffered material prejudice and wants to avoid having a verdict returned which may cause some prejice, I think that's appropriate. All we are concerned here with is having these motions disposed of, and particularly the prejudice aspect of the motion disposed of, before trial of the general issue, before the court has a real opportunity to know precisely what this case is about.

QUESTION: I understand your reasoning, but what is your argument? Before or after verdict?

MR. RUPP: Our position is that if the court is satisfied before the verdict that the defendant has been prejudiced, we feel he can appropriately dismiss the indictment at that point and not permit --

QUESTION: Even though the jury might acquit him.

MR. RUPP: Even though the jury might acquit.

QUESTION: Even though if you appeal from the dismissal before verdict and the court of appeals decides you are right, then you may not be able to prosecute him ...

MR. RUPP: I am sorry. Let me amend that. Yes, that's right, and I am sorry. That would present a problem. If the court would rule on --

QUESTION: That is what prompted my question.

MR. RUPP: Yes, and I am sorry. Our position then would be that he should wait until, as we indicated in the brief, after the verdict is returned and before judgment has been entered on the verdict.

QUESTION: That's what Marion seems to contemplate.

MR. RUPP: That is precisely what Marion seems to contemplate.

QUESTION: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 10:38 a.m., arguments in the above-entitled matter were concluded.]