

UNITED STATES)

V.)

CHARLES E. HUTTO)
SERGEANT)
US ARMY)

MEMORANDUM OF AUTHORITY IN OPPOSITION
TO DEFENSE MOTION TO DISMISS

Comes now the United States, through counsel, in the above-styled case, to file this Memorandum of Authority in Opposition to the Defense Motion to Dismiss filed with this court-martial on 2 November 1970.

I

THE MILITARY DUE PROCESS RIGHT TO SPEEDY TRIAL DEPENDS ON THE FACTS AND CIRCUMSTANCES OF EACH CASE.

A.

The constitutional right to a speedy trial embodied within the Sixth Amendment to the Constitution of the United States has been codified within the military justice system through Articles 10, 30, 33, and 98, UCMJ, paragraphs 681 and 215e, MCM, 1969 (Rev. ed.) and numerous decisions of the Court of Military Appeals and Courts of Military Review. The right to speedy trial protects three basic demands of criminal justice: "to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation, and to limit possibilities that long delay will impair the ability of an accused to defend himself." United States v. Ewell, 383 U.S. 116, 120 (1964). However, the right to a speedy trial is not a sword for a defendant's escape from trial or punishment. United States v. Lustman, 258 F. 2d 475 (2d Cir. 1958), cert. denied, 358 U.S. 880 (1958).

When dealing with the question of an accused's right to a speedy trial, it must be remembered that this "right is relative and must be determined in light of all the circumstances." United States v. Brown, 13 U.S.C.M.A. 11, 32 C.M.R. 11, 13 (1962). A determination of an alleged denial of speedy trial is predicated upon considerations of whether the delay in coming to

trial (1) was the result of oppressive design on the part of the Government; (2) constituted a substantial period resulting from the absence of reasonable diligence; or (3) resulted in substantial prejudice to the accused. United States v. Davis, 11 U.S.C.M.A. 410, 29 CMR 226 (1960), paragraph 215a, WCM, 1969 (Rev.ed.).

B.

While the burden of proof rests with the Government to explain delays which are objected to, the Government is entitled to estimate reasonable amounts of time in obtaining the evidence against the accused and in preparing for case for trial. United States v. Williams, 14 U.S.C.M.A. 361, 34 C.M.R. 141 (1964). Brief periods of inactivity in an otherwise active prosecution do not constitute a denial of speedy trial. "[I]n conclusive for measurement of compliance with the provisions of the Uniform Code is not constitution, but reasonable diligence in bringing the charges to trial." United States v. Tibbs, 15 U.S.C.M.A. 350, 35 C.M.R. 321, 325 (1965).

IX

THE RIGHT OF THE ACCUSED TO BE TRIED SPEEDILY HAS NOT BEEN VIOLATED.

A.

The accountability of the Government to explain pretrial delays commences from the date charges are preferred or from the date the accused is placed in pretrial restraint, whichever is earlier. United States v. Williams, 16 U.S.C.M.A. 389, 37 C.M.R. 209 (1967); United States v. Williams, 16 U.S.C.M.A. 81, 30 C.M.R. 81 (1961). This proposition is clearly stated in paragraph 215a, WCM, 1969 (Rev.ed):

... Ordinarily, only the time after the inception of the accused's restraint or after the preferring of charges is considered for this purpose. AND ANY delay in preferring charges, if the accused has not been restrained, is considered only in connection with the starting of limitations. . . . When the accused's right to a speedy trial is in issue, the prosecution has the burden of accounting for the time which it took to bring the accused to trial. Generally, imposition of restraint or preferring of charges, whichever was first, starts the period of time for which the Government must account for proceeding with reasonable dispatch in bringing the accused to trial. (Emphasis added)

The Defense motion asserts, however, that the Government should be held accountable for pretrial delays prior to the preferring of charges in this case. The gravamen of this argument is that there was an "illegal coverup" of the My Lai incident and the alleged offenses in this case. This claim is rebutted, however, by the intensive investigation of the My Lai incident conducted by the Government once it was brought to the attention of responsible officials.

The Code, the Manual, and the cases are clear that the remedy for delay prior to charges or pretrial restraint is the statute of limitations. Article 43, UCMJ; paragraph 215d, MCM, 1969 (Rev.ed.). See also United States v. Ewell, *supra*; Nichols v. United States, 323 F. 2d 808 (D. C. Cir. 1963); and Harlow v. United States, 301 F. 2d 361 (5th Cir. 1962), cert denied, 371 U.S. 814.

C.

Recently, a series of cases beginning with Ross v. United States, 349 F. 2d 210 (1965), have held that the statute of limitations is not controlling where there has been an unreasonable delay between the offense and complaint or arrest. This application of due process has been limited, for the most part, to a "... very narrow and specialized class of narcotics cases," Ross, *supra*, at 215, where police undercover activities have been questioned. But see Jones v. United States, 402 F. 2d 639 (1968).

Application of the Ross theory should be confined to the type case for which it was created. Thus it is clear that the general rule remains intact that the remedy for delay between the offense and restraint or charges is the statute of limitations.

D.

In the instant case, the facts clearly indicate that reasonable diligence on the part of the Government has been demonstrated. The accused was offered counsel prior to the preferring of charges and was furnished counsel prior to the preferring of the additional charge. There has been no pretrial restraint. Ample opportunity has been and will be accorded to the Defense in preparing

the defense and conferring with the accused. Certainly the preponderance of the evidence clearly shows an absence of prejudice to the accused. Paragraph 67e, MCM, 1969 (Rev. ed.). Thus, there has been no denial of the accused's rights to speedy trial and military due process of law. Oral argument is requested at the time a hearing is held on this motion.

Respectfully submitted,

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