SOLDIERS: Right of Civil Authorities to try soldier
CRIMINAL LAW: for Civil offense in time of war.

August 3, 1943

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Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion under date of July 28, 1943. Restating your request for the sake of brevity, you inquire if a person now a member of the armed forces in this country, home on a furlough and indicted for murder may be apprehended while on his furlough for the crime committed by him, as shown by the indictment, prior to his induction into the armed forces? Also, does the fact that he enlisted, pending the return of the indictment, grant him any immunity?

Under date of August 18, 1941, this department rendered an opinion to Honorable James L. Paul, Prosecuting Attorney of McDonald County, holding that civil courts have jurisdiction concurrent with military courts to try for violations of civil laws. However, this opinion deals only with conditions during times of peace since, at that time, there had been no declaration of war by Congress.

It is conceded that military courts are created primarily for punishment of military offenses. However, the decisions hold that this does not give the exclusive jurisdiction to such courts but that they often have concurrent jurisdiction for civil offenses. As a rule, for civil offenses, the decisions generally hold that whichever court, the military or civil, that first takes jurisdiction for the offense, will not be disturbed by the other court for the same offense.

In Caldwell v. Parker, 40 S. Ct. 388, 252 U. S. 376, 64 L. Ed. 621, the Court, in a very comprehensive opinion, held that under Section 1546, Article 74 of the Articles of

War, it did not give the military authorities exclusive jurisdiction in time of war of offenses committed in violation of State laws, by persons in the military service, but that the State Courts also have jurisdiction. In so holding the Court said:

> "It follows, therefore, that the contention as to the enlargement of military power, as the mere result of a state of war, and the consequent complete destruction of state authority, are without merit, and that the court was right in so deciding and hence its judgment must be and it is affirmed."

In Ex parte Koester, 206 Pac. 116, 56 Calif. App. 621, the Court held that notwithstanding Article 74 of the Articles of War, requiring a soldier to be delivered to civil authorities for trial for an alleged crime, except in time of war, the jurisdiction of military courts over a soldier is not exclusive of the civil court even during time of war, if the soldier was stationed within one of the states where the civil courts were functioning and where no actual hostilities were in progress. In the Articles of War contained in Chapter 36, Title 10, U.S.C.A. are numerous acts which come under civil offenses and are not specifically regulated are covered by two very broad provisions, namely Sections1567 and 1568. Section 1567 (article 95) reads:

> "Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service."

Section 1568 (article 96) reads as follows:

> "Though not mentioned in those articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of

> by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

It was held in Carter v. Roberts, 20 S. Ct. 713, 177 U. S. 496, 44 L. Ed. 861, that where an offense is specifically provided for in any Articles of War prior to Article 96, the grant of jurisdiction to a court-martial to try and punish such offense is conferred by the particular Article which mentions it and not by Article 96 providing for trial and punishment of all offenses, not capital, and all disorders though not mentioned in previous Articles. All offenses not capital or otherwise provided for under Section 1568, supra, Article 96, come under the jurisdiction of the military authorities.

Another provision contained in the Articles of War, hereinabove referred to, clearly indicates that civil courts have a right to punish soldiers for civil offenses. Section 1546 reads:

> "When any person subject to military law, except one who is held by the military authorities to answer, or who is awaiting trial or result of trial, or who is undergoing sentence for a crime or offense punishable under these articles, is accused of a crime or offense committed within the geographical limits of the States of the Union and the District of Columbia, and punishable by the laws of the land, the commanding officer is required, except in time of war, upon application duly made, to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. Any commanding officer who upon such application refuses or willfully neglects, except in time of war, to deliver over such accused person to the civil authorities or to aid the officers of justice in apprehending and securing him shall

> be dismissed from the serive or suffer such other punishment as a court-martial may direct.
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> "When, under the provisions of this article, delivery is made to the civil authorities of an offender undergoing sentence of a court-martial, such delivery, if followed by conviction, shall be held to interrupt the execution of the sentence of the court-martial, and the offender shall be returned to military custody, after having answered to the civil authorities for his offense, for the completion of the said court-martial sentence."

Section 1564 of the same Articles provides that such persons who commit rape or murder are subject to death or imprisonment for life as a court-martial may direct, but that such crimes committed in times of peace, within the State, shall not be tried by court-martial. Section 1564 provides:

> "Any person subject to military law who commits murder or rape shall suffer death or imprisonment for life, as a court-martial may direct; but no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace."

However, the Courts have held that under such a provision and also Section 1546, supra, that the military courts do not have exclusive jurisdiction over such crimes in time of war. In U. S. v. Hirsch (D.C.) 254 Fed. 109, 110, it was said that:

> "* * * Under this law both courts-martial and civil courts necessarily respected the jurisdiction which was being exercised by the other, and the court first apprehending the defendant was thus able to proceed with a trial, without reference to the concurrent jurisdiction of the other. In the same way double jeopardy was avoided. * * * * * * * * "

In McKittrick v. Brown, 85 S. W. (2d) 385, l. c. 390 and 391, the Court, in reviewing decisions of the Supreme Court of the United States on the phrase "except in time of war", contained in certain provisions in the Articles of War, held that the decisions indicate that such Articles confer upon the States a prior jurisdiction to try such persons for criminal offenses cognizable by them, except in areas affected by military operations or where military law has been declared or where civil authority is totally suspended or obstructed. In so holding the Court said:

> "It would seem that the instant case comes squarely within the first exception in the above article. The prisoner is a person subject to military law; he is held by the military authorities to answer for a crime punishable under the articles of war; he is awaiting trial. We cannot find that this particular part of the article has ever been judicially construed. But in Caldwell v. Parker, supra, the Supreme Court of the United States reviewed the history of the articles of war and declared the meaning and effect of the other exception 'except in time of war' appearing in article 74. The opinion (252 U. S. 376, loc. cit. 387, 40 S. Ct. 388, loc. cit. 391, 64 L. Ed. 621, loc. cit. 625) expresses grave doubt 'whether it was the purpose of Congress, by the words "except in time of war" * * * to do more than to recognize the right of the military authorities, in time of war, within the areas affected by military operations or where martial law was controlling, or where civil authority was either totally suspended or obstructed, to deal with the crimes specified -- a doubt which, if solved against the assumption of general military power, would demonstrate, not only the jurisdiction of the state courts (in the case under adjudication), but the entire absence of jurisdiction in the military tribunals.' In other words, the opinion indicates a view that the spirit and purpose of the articles of war was to confer upon the state courts a prior or paramount jurisdiction to try

> persons in the military service for criminal offenses cognizable by them, except in areas affected by military operations, or where martial law had been declared, or where civil authority is totally suspended or obstructed. And if this be true in time or war, all the more should it be true where the only reason supporting the military authorities in retaining jurisdiction against the state courts is that they had first asserted it."

Just recently, in United States et al. v. Matthews, Vol. 49 Fed. Supp., page 203, l. c. 205-206, a United States District Court handed down a decision which holds that the existence of war does not give military courts exclusive jurisdiction over proceedings against a soldier who had been arrested and held in custody by State officers on a charge of rape, and that State officers could not be deprived of their custody by habeas corpus. Of course, in that case the military authorities had not instituted any proceedings against the soldier for the same crime or intimated that they intended to do so, or that by the civil authorities assuming custody of said soldier did it in any manner interfere with the prosecution of the crime. Had the military authorities exercised any such authority, then, no doubt, the military authorities would have precedence over the State. In so holding the Court said:

> "In the argument on behalf of the petitioners it is urged that in Argicle 74 of the Articles of War, as set out in Section 1546 of 10 U.S.C.A., priority is bestowed on the Military Authorities to have custody of all persons in the military service in time of war regardless of any crimes such persons may commit while engaged in such military service against the peace and dignity of the State. Much emphasis is placed on the words in this section 'except in time of war.'
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> "This section and its history shows unmistakenly to this court that the section was designated only to modify what had theretofore been the absolute and unqualified duty of the military authorities to surrender over to the State authorities on demand, in

time of peace and war, persons in the military service who were charged with certain offenses against the laws of the State. This language, 'except in time of war,' only relieved the military authorities of what had theretofore been its duty, upon proper application by the State, to use its utmost endeavor to deliver over such accused person to the civil authorities.

"It is not contended on behalf of the petitioners that the military courts have the exclusive jurisdiction to bring a soldier to trial for the crime of rape. It is conceded that the State has jurisdiction to try him, but it is contended that by reason of the language in the statute 'except in time of war,' the jurisdiction of the State must be suspended or vacated on the demand of the military authorities for the custody of the soldier.

"* * * * * * * * * * *

"'It follows, therefore, that the contention as to the enlargement of military power, as the mere result of a state of war, and the consequent complete destruction of state authority, are without merit and that the court was right in so deciding and hence its judgment must be and it is affirmed.'"

CONCLUSION

Therefore, it is the opinion of this department that a soldier on furlough, during a period while this country is at war, who has been charged with committing such an offense against the State, may be taken into custody if the military authorities have not charged him with the same offense. There may be some extenuating circumstances wherein the military authorities may be entitled to the custody of such sol-

dier.

Respectfully submitted,

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APPROVED:

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