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ARTICLE: Civilian Versus Military Justice in the United States: A Comparative Analysis

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BIO:

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LEXISNEXIS SUMMARY:

... While the American public is generally unaware of military matters, they are especially uninformed about the military justice system. ... Using the Commonwealth of Virginia as a representative jurisdiction, this article will examine how the same hypothetical offenses would be handled in the United States Air Force (USAF) military justice system and the Virginia state criminal justice system. ... The commander must then make the decision, that night, whether to place Sergeant Johnson into pretrial confinement or release her under some lesser form of restriction or no restriction at all. ... Back to *Sergeant Johnson* and the issue of pretrial confinement. ... If the commander approves continued confinement, her decision will be provided to Sergeant Johnson and a reviewing officer. ... In *Sergeant Johnson's* case, the special court-martial convening authority will direct a pretrial investigation under Article 32 of the UCMJ, which is required before charges may be referred to a general court-martial. ... The prosecutor for Sergeant Johnson's case will be a judge advocate assigned to the base legal office at Langley Air Force Base. ... The UCMJ gives court members a much broader range of sentencing options than are available in the civilian justice system. ... In *Sergeant Johnson's* case, the maximum punishment includes a dishonorable or bad conduct discharge, confinement for life, and other authorized punishments other than death. ...

HIGHLIGHT: *Military court, compared to most civilian courts, is refreshing in many respects...The pretrial discovery features are the best and most complete of any system...Military juries are nearly always made up of intelligent commissioned officers...There are no hung juries, and verdicts are usually reached swiftly...I still try courts-martial on a regular basis, and still enjoy them more than any other trials.*

-F. Lee Bailey n1

TEXT:

[*213] **I. INTRODUCTION**

After more than a quarter century of an all-volunteer force, America's armed forces are largely unknown to the American public. Unlike previous generations, fewer Americans have personal experience with the military and fewer of them have family members, friends or neighbors who have served in the military. While the American public is gen-

erally unaware of military matters, they are especially uninformed about the military justice system. They know very little about the military's system of discipline or its criminal law process.

This article will explain the military criminal law process, known as the military justice system, and it will contrast the military justice system with the civilian criminal justice process familiar to most Americans. Using the Commonwealth of Virginia² as a representative jurisdiction, this article will [*214] examine how the same hypothetical offenses would be handled in the United States Air Force (USAF) military justice system and the Virginia state criminal justice system.

II. FRAMEWORK FOR ANALYSIS

This article will analyze the hypothetical case of Heather Johnson. Assume that Heather Johnson consumed too many alcoholic beverages at the Enlisted Club on Langley Air Force Base, Virginia, then gets into her car to drive home. Before exiting the base, she drives across the centerline of the road, crashes head-on into another car, and kills the driver. The crash takes place in an area of the base where the United States has proprietary jurisdiction, but the state of Virginia retains legislative authority and criminal jurisdiction.³

Air Force Security Forces and medical personnel respond to the scene. They find a loaded handgun and more than a pound of marijuana on the floorboard of Johnson's car. The medics determine that the other driver is dead and transport Heather Johnson to the hospital. After treating Johnson for minor injuries, they turn her over to the Security Forces.

III. THE SYSTEMS COMPARED

The story now diverges and follows the prosecution of Heather Johnson on two different tracks. One is the state criminal process that will follow if *Miss.* Heather Johnson is a civilian not subject to the Uniform Code of Military Justice (UCMJ).⁴ The other is the military justice process that will follow if *Staff Sergeant (Sergeant)* Heather Johnson is an active duty, uniformed member of the United States Air Force.

[*215] A. Nature of Criminal Jurisdiction

Miss. Johnson is subject to the criminal jurisdiction of the state of Virginia because the alleged offenses took place in Virginia.⁵ She is not subject to military criminal jurisdiction, so the Security Forces will detain her only long enough to be turned over to civilian authorities.

Unlike state criminal jurisdiction, which is based on the location of the offense, military jurisdiction under the Uniform Code of Military Justice is predicated on the status of the offender.⁶ Because *Sergeant* Johnson is an active duty member of the Air Force, she is subject to court-martial under the UCMJ regardless of where the offenses occur.⁷ This assures commanders that they have the disciplinary tools they need wherever United States troops may be deployed. Note that while the offenses in this case are crimes common to the civilian and military justice systems, the UCMJ also includes uniquely military offenses, the prohibition of which is critical to the maintenance of good order and discipline in the armed forces.⁸

B. Rights Advisement

After being turned over to civilian authorities, *Miss.* Johnson will be on her way to the local police station and jail.⁹ The civilian investigators who are handling her case will read her the *Miranda* warning¹⁰ prior to any questioning. [*216] Assume *Miss.* Johnson exercises her rights and requests an attorney. She will then be escorted to her cell to await a hearing to determine whether she should be released.

Sergeant Johnson will initially remain in the custody of military investigators. They will read her her rights pursuant to Article 31 of the UCMJ.¹¹ Article 31 safeguards extend beyond *Miranda* in that they apply even to non-custodial questioning and require that the suspect also be informed of the nature of the accusation against her. Assume *Sergeant* Johnson exercises her rights and asks for an attorney. The interview will be terminated and *Sergeant* Johnson's commander will be called and briefed on the situation. The commander must then make the decision, that night, whether to place *Sergeant* Johnson into pretrial confinement or release her under some lesser form of restriction or no restriction at all.¹² If *Sergeant* Johnson is ordered into pretrial confinement, two additional reviews, discussed below, will take place to determine whether the confinement will continue.

C. Right to Counsel

Back to *Miss.* Johnson and her right to an attorney. Unless *Miss.* Johnson is indigent, she must either hire an attorney at her own expense or represent herself. Virginia evaluates indigence by determining whether the family's available

funds (income plus assets minus exceptional expenses) are above 125% of the federal poverty income guidelines. n13 For a family of four within the continental United States, the 2001 poverty guideline is \$ 17,650. n14 Thus, assuming Miss. Johnson has a husband and two children, she must provide her own attorney unless her family's available funds are less than \$ 22,063.

If Miss. Johnson *is* indigent, she will be entitled to the services of a court-appointed defense counsel. n15 Her counsel will be compensated based on [*217] the time and effort she puts into the case, but the maximum compensation is fixed by statute according to the seriousness of the offenses. n16 Because Miss. Johnson will be charged with three felonies, none of which is punishable by more than twenty years of confinement, her counsel will be paid a maximum of \$ 1335 in attorney fees (\$ 445 for each offense). n17 The Virginia Court of Appeals has ruled that this compensation scheme is adequate. The Court held that it does not operate to deny a defendant her right to conflict-free and effective assistance of counsel on the grounds that it creates a financial disincentive for a lawyer to effectively represent her client. n18

Contrast this with *Sergeant* Johnson's right to representation by military counsel. Regardless of her income and assets, Sergeant Johnson is entitled to representation by a military defense counsel free of charge. n19 Her counsel must be a member of the bar of a federal court or the highest court of a state, who has been certified by The Judge Advocate General n20 of the Air Force as competent to perform duties as counsel in courts-martial. n21

Military defense counsel are well-qualified, completely independent attorneys whose full-time duty is to represent military members to the best of their professional abilities. In the Air Force, the Area Defense Counsel (ADC) is the attorney who performs this function. n22 The ADC is typically chosen from the base legal office after gaining experience prosecuting cases. She manages an office, which includes a Defense Paralegal. n23 The ADC office is physically separate from the base legal office, and the ADC does not fall in the base chain-of-command. n24 She reports to a Chief Circuit Defense Counsel, who manages defense services in a geographic region and reports in a judge advocate (military attorney) chain of supervision. n25

Unlike the civilian attorney appointed to represent *Miss. Johnson* if she is indigent, the ADC representing *Sergeant Johnson* will not have a financial incentive to limit the amount of time she spends on the case. Because the ADC is an active duty officer and full-time defense counsel, she can focus on representing her clients without the need to consider the business aspects of a [*218] private law practice. On average, each ADC defends about ten courts-martial per year, n26 so they can devote a substantial amount of time to each client's case. In addition, a number of more experienced defense counsel (Circuit Defense Counsel, or CDCs) serve as co-counsel in the more complex cases and provide training and advice to ADCs. n27

D. Charging Mechanism

Miss. Johnson was arrested immediately following the alleged offenses, without an arrest warrant. Within 48 hours, she will be brought before a magistrate, who will examine the arresting officer under oath and determine whether there is probable cause to believe that *Miss. Johnson* committed the alleged offenses. n28 If the magistrate finds probable cause, she will issue an arrest warrant.

In this case, *Miss. Johnson* will be charged with three offenses under Virginia law: aggravated involuntary manslaughter, n29 possession of marijuana with intent to distribute, n30 and possession of a firearm while committing the offense of possession of more than one pound of marijuana with intent to distribute. n31

Sergeant Johnson will be charged with similar offenses under the Uniform Code of Military Justice: murder by engaging in an act inherently dangerous to another, in violation of Article 118, wrongful possession of marijuana with intent to distribute, in violation of Article 112a, and unlawful possession of a loaded firearm on Langley Air Force Base, in violation of Article 92. n32

The process of bringing charges under the UCMJ is called "preferral." n33 Although any person subject to the UCMJ may do so, the immediate [*219] commander of the accused typically prefers charges in Air Force practice. n34 The commander then forwards the charges to the special court-martial convening authority (SPCMCA), a commander authorized to direct that charges be tried by special court-martial. n35 If the SPCMCA concludes a more serious general court-martial may be warranted, she will direct a pretrial investigation under Article 32 of the UCMJ, as discussed below.

E. Pretrial Confinement and Bail

The magistrate who found probable cause to believe *Miss. Johnson* committed the alleged offenses will also set the terms for her pretrial release. She will authorize her release under specified conditions unless she finds probable cause to believe that she will not appear for further proceedings or her liberty will impose an unreasonable danger to herself or the public. n36 Because *Miss. Johnson* is charged with possession of a firearm while committing the offense of possession of more than one pound of marijuana with intent to distribute--an offense carrying a minimum, mandatory sentence of five years imprisonment--there is a presumption under Virginia law that no condition or combination of conditions will reasonably assure her appearance or public safety. n37 In other words, there is a presumption that *Miss. Johnson* should remain confined pending trial and not be released under any bail conditions. Notwithstanding this presumption, the magistrate may decide to release *Miss. Johnson* on a secured bond. If so, she must either produce the cash bond amount or use the services of a bail bondsman. The services of a bail bondsman typically cost about 10% of the bond amount. n38 This money will not be reimbursed to *Miss. Johnson* regardless of the outcome of her case. It is the price of freedom pending trial in state court.

Back to *Sergeant Johnson* and the issue of pretrial confinement. Assuming she was ordered into confinement the night of the alleged offenses, her commander has 48 hours to decide whether to continue the confinement. n39 This decision must be in writing, including an explanation of the reason for continued confinement. Confinement is justified only if the commander finds [*220] probable cause to believe: (1) a court-martial offense has been committed, (2) the prisoner committed it, (3) confinement is necessary because it is foreseeable that the prisoner will not appear at further proceedings or will engage in serious criminal misconduct, and (4) less severe forms of restraint are inadequate. n40

If the commander approves continued confinement, her decision will be provided to *Sergeant Johnson* and a reviewing officer. n41 Within seven days of the imposition of confinement, the reviewing officer will conduct a pretrial confinement hearing to evaluate the necessity for continued pretrial confinement. At the hearing, *Sergeant Johnson* and her counsel will have the opportunity to present written matters and make a statement. Upon completion of the review, the reviewing officer will either approve continued confinement or order *Sergeant Johnson's* immediate release. n42 If *Sergeant Johnson* is released, that decision may not be reversed. If she remains in confinement, the reviewing officer may reconsider the decision based on new information. In addition, a military judge may review the decision after the charges are referred to trial. n43

If *Miss. Johnson* is not offered bail or is unable to post the required bond, she will remain in jail. Her job may be in jeopardy should she fail to go to work. If she does get out of jail and needs to work with her attorney to prepare for her defense, she can only hope her employer will allow her time to meet those appointments. There is no obligation for the employer to give *Miss. Johnson* time off, and there is normally nothing to prohibit the employer from firing *Miss. Johnson* for failing to work.

Sergeant Johnson, on the other hand, will continue to receive full pay and allowances whether she is in pretrial confinement or not. In no event will she be required to post bail to secure her release. She also will be given ample time to meet with her defense counsel to prepare her defense.

F. Pretrial Investigation or Grand Jury

The next step in *Miss. Johnson's* case will be a preliminary hearing to determine whether there is sufficient cause to charge her with the alleged offenses. n44 The hearing will be held before a district court judge, with *Miss. Johnson* and her counsel present. The judge will question witnesses for and against *Miss. Johnson*, who will also have an opportunity to call witnesses in her own behalf. However, the prosecution is only required to produce a prima facie case, and need not present all evidence that might be used at trial. Therefore, the preliminary hearing will have limited value to *Miss. Johnson* as [*221] a discovery tool. n45 Following the hearing, the judge will either dismiss the charges or certify them to the circuit court for grand jury consideration. n46

Assuming the charges are certified, the grand jury process will follow. A regular grand jury will consider bills of indictment prepared by the commonwealth's attorney to determine whether there is probable cause to return "true bills" and thereby formally accuse *Miss. Johnson*. n47 The grand jury contains five to seven members. n48 Its proceedings are conducted in secret, n49 with no opportunity for *Miss. Johnson* or her counsel to cross-examine witnesses or present defense evidence or witnesses. Once the grand jury has indicted *Miss. Johnson*, the trial process will begin.

In *Sergeant Johnson's* case, the special court-martial convening authority will direct a pretrial investigation under Article 32 of the UCMJ, which is required before charges may be referred to a general court-martial. n50 The Article 32 investigation is similar in purpose to a grand jury, but it provides substantially broader benefits to the accused. n51 *Sergeant Johnson* and her counsel will have the opportunity to fully prepare for the investigation and will be present

throughout the hearing. All reasonably available witnesses, whose testimony is relevant and not cumulative, will be called to testify and subject to examination by Sergeant Johnson's counsel. n52 This includes witnesses requested by Sergeant Johnson; the investigating officer n53 will arrange their attendance. In addition, all relevant evidence under government control will be produced if reasonably available. n54

Sergeant Johnson and her counsel can choose from a variety of tactics at the Article 32 hearing. They may elect to "litigate" the case in an attempt to show that she is not guilty, that she should be charged with lesser offenses, or that her case should be disposed of through a proceeding less severe than a general court-martial (i.e., a felony trial). In addition to questioning government witnesses and presenting her own witnesses, Sergeant Johnson may testify and present any evidence she desires.

The Article 32 investigation gives Sergeant Johnson the benefit of discovering the prosecution's case against her. All witness testimony will be summarized or recorded verbatim. Should the case be referred to a court-martial, [*222] the information developed at the Article 32 investigation can be used for cross-examination and other purposes at trial.

After the pretrial investigation, the investigating officer will submit a written report. It will contain her conclusions as to whether reasonable grounds exist to believe Sergeant Johnson committed the alleged offenses. The report will also include recommendations for disposition of the charges. n55 If the special court-martial convening authority, after reviewing the report from the Article 32 investigation, believes a general court-martial is warranted, she will forward that recommendation to the general court-martial convening authority (GCMCA). n56 If the GCMCA concurs, she will "refer" the charges to a general court-martial. n57 Once the charges against Sergeant Johnson have been referred to a general court-martial, the trial process begins.

G. Discovery

Discovery is the process by which the accused obtains information about the prosecution's case against her. *Miss. Johnson's* discovery privilege is outlined in Rule 3A:11 of the Rules of the Supreme Court of Virginia. n58 Upon her request, she is entitled to receive copies of any written statements she has made that are in the government's possession, as well as the substance of any oral statements she made to any law enforcement officer. She will also be provided copies of reports from any scientific analyses that have been performed, such as autopsies and blood, urine, and breath tests. In addition, she may obtain copies of other books, papers, and documents in the possession of the government, provided the request is reasonable and the items sought may be material to the preparation of her defense. There is also a constitutional right that applies in all criminal cases, which requires the prosecution to disclose any evidence that is favorable to the accused and material to either guilt or punishment. n59

There are significant items that *Miss. Johnson* is not entitled to under the Virginia discovery rules. The prosecution is not required to provide a list of witnesses it intends to call or a list of all known eyewitnesses. Nor is there a requirement to provide statements made by prospective government witnesses to police officers in connection with the investigation or prosecution of the [*223] case. n60 The absence of comprehensive discovery may result in surprises at trial that can negatively affect *Miss. Johnson's* case.

Sergeant Johnson, on the other hand, will receive virtually all information in the government's possession and will know exactly how the prosecution intends to prove its case well before trial. The discovery process begins when charges are preferred. At that time the defense counsel will be given a copy of any reports of investigation and witness statements pertaining to the alleged offenses. n61 The Article 32 investigation, discussed above, provides another opportunity for expansive discovery. *Sergeant Johnson* and her counsel are free to question prosecution and defense witnesses in detail. Sworn testimony of witnesses (usually in summarized format) will be included with the Article 32 report. It can enhance impeachment and be used for other purposes at trial.

After the charges have been referred for trial, the government is obligated to provide full and complete discovery even absent a defense request. The trial counsel (prosecutor) must provide any witness statements not previously provided, a list of witnesses to be called by the prosecution (either in the case-in-chief or to rebut affirmative defenses), notice of any prior convictions of the accused, and notice of any evidence that tends to negate the guilt of the accused, reduce the degree of guilt, or reduce the punishment. n62 If specifically requested by *Sergeant Johnson*, the prosecution must also permit the defense to inspect any evidence or information that is material to the preparation of the defense or intended for use as evidence at trial. n63

In short, the comprehensive discovery rules under the UCMJ discourage surprise tactics and ensure that both parties to the trial are able to prepare their cases with the benefit of all relevant information. *Sergeant Johnson's* counsel is thus

in a better position than *Miss. Johnson's* counsel to thoroughly prepare her defense and effectively respond to testimony and evidence presented by the prosecution at trial.

H. Parties to Trial

To better understand the trial process, it is necessary to know who the players are and how they are appointed. Defense counsel are discussed above. The other major trial participants are the judge and the prosecutor.

[*224] In *Miss. Johnson's* case, the presiding judge will be a circuit court judge who has been chosen by majority vote of each house of the Virginia General Assembly to serve a term of eight years. n64 To be eligible for election, the judge must have been a member of the Virginia bar for at least five years. n65 The chief prosecuting attorney, called the Commonwealth's Attorney, is also an elected official, but she is elected directly by the voters of the city, for a four-year term. n66 An Assistant Commonwealth's Attorney, appointed by the Commonwealth's Attorney to serve a term equal to hers, will likely prosecute *Miss. Johnson*. n67

The trial judge for *Sergeant Johnson's* general court-martial will be a judge advocate (military attorney) with substantial military justice experience, whom The Judge Advocate General of the Air Force has assigned to perform full-time duties as a military judge. n68 Air Force trial judges are supervised through a USAF Judiciary chain of supervision that is completely independent of the commanders and judge advocates who make decisions and recommendations concerning whether particular cases should go to trial. n69

The prosecutor for *Sergeant Johnson's* case will be a judge advocate assigned to the base legal office at Langley Air Force Base. The senior judge advocate on a commander's staff (staff judge advocate or SJA) has overall responsibility to ensure that the prosecutor (Trial Counsel) effectively represents the government's interests. n70 However, the SJA herself is charged with ensuring that the administration of justice is fair and above board; her job is *not* to advocate the prosecution's position. n71

Because of the seriousness of the charges in *Sergeant Johnson's* case, a Circuit Trial Counsel (CTC) will likely assist the trial counsel and act as lead prosecutor. CTCs are judge advocates with significant military justice [*225] experience who travel to various bases to represent the government in more serious cases. n72 As discussed above, Circuit Defense Counsel (CDCs) likewise have significant experience, and assist Area Defense Counsel (ADCs) in more serious cases. If *Sergeant Johnson* requests it, both an ADC and a CDC will represent her. Thus there could be two prosecutors and two defense counsel.

I. Selection of Jury Members and Challenges

Both *Miss. Johnson* and *Sergeant Johnson* have a right to choose trial by jury or trial by a judge sitting alone. In *Miss. Johnson's* case, if she elects trial by jury, the jury will consist of twelve individuals. n73 They will be selected from a panel of twenty citizens who have been randomly selected from the community n74 and then questioned to ensure they can be fair and impartial. n75 When selecting potential jurors, the judge has wide discretion to exempt people whose service on a jury would cause them "a particular occupational inconvenience." n76 This system has been criticized because it can result in a jury with under-representation by the better-educated and more affluent citizens.

To reduce the panel of twenty to the twelve jurors who will serve on *Miss. Johnson's* case, the court will use a statutory system of peremptory challenges. n77 The prosecution and the defense will take turns striking members of the panel until each side has eliminated four, and twelve jurors remain. n78

The jurors in a court-martial case are called "court members" rather than "jurors" or "the jury." n79 If *Sergeant Johnson* elects to be tried by court members rather than by a military judge sitting alone, the panel that decides her case will consist of at least five court members. n80 Prior to trial, the convening authority will choose members from throughout the command who are, in her opinion, best qualified to serve based on their age, education, training, experience, length of service, and judicial temperament. n81 Court members are usually commissioned officers, but an enlisted accused, such as *Sergeant Johnson*, may request that enlisted members also serve on her court, in which case at least one-third of the panel will be enlisted members. n82

Like *Miss. Johnson*, *Sergeant Johnson* and her counsel will have the opportunity to question the court members and ask the judge to remove any [*226] member whose fairness or impartiality is in question. n83 In addition, the prosecution and defense may each strike one member from the panel preemptorily (without cause). n84

J. Command Influence

Commanders are responsible for administering the military justice system and maintaining good order and discipline within their commands. Because of the significant role of commanders in the court-martial process, a question arises as to whether improper command influence may deprive an accused of a fair trial. However, a number of checks built into the system minimize the likelihood of unlawful command influence and provide a remedy when it does occur.

As discussed above, the military judge and defense counsel for a court-martial fall within Air Force Judiciary chains of supervision, which are completely separate and independent from the convening authority and other commanders who decide which cases will go to trial. Thus the defense counsel is able to zealously represent the interests of Sergeant Johnson without fear of retribution. Similarly, the military judge can focus on ensuring a fair trial and need not be concerned about adverse reactions to rulings.

Although commanders are given wide discretion to decide whether a case should go to trial, the UCMJ specifically prohibits them, and anyone else subject to the UCMJ, from attempting to coerce or otherwise unlawfully influence the action of a court-martial in reaching findings or a sentence. n85 A similar prohibition forbids attempts to influence convening, approving, or reviewing authorities with respect to their judicial acts. n86 In addition, the performance evaluations of military members who have served as court members may not consider or evaluate how they performed their duties as a court member. n87 Thus the system is designed to ensure court members exercise their independent judgment in evaluating the evidence in the case. Commanders recognize that integrity in the military justice system requires fairness in fact and perception.

When questioning potential court members to determine whether they are able to evaluate the evidence fairly and impartially, the military judge inquires into the issue of indirect command influence. n88 Counsel for both sides [*227] also have an opportunity to question the members further about possible command influence. n89 If there is substantial doubt as to whether a particular member will be fair and impartial, based on command influence or any other factor, that member may be removed from the panel for cause. n90 If the defense challenges a member for cause and the judge denies the challenge, the judge's ruling may be appealed in due course.

K. Production of Witnesses and Evidence

Both Miss. Johnson and Sergeant Johnson enjoy the Sixth Amendment right to compulsory process for obtaining witnesses and evidence in their favor. n91 However, if she is convicted and not indigent, *Miss. Johnson* will have to pay for witness costs such as travel and expert witness fees, for her witnesses as well as prosecution witnesses, in addition to almost all other costs incurred by the government in prosecuting her. n92 *Sergeant Johnson*, in contrast, will not be responsible for any of these expenses, regardless of her ability to pay or the verdict at trial. n93

L. Trial Procedure and Rules of Evidence

If there is a litigated trial rather than a guilty plea, both Miss. Johnson and Sergeant Johnson's trials will be governed by similar rules of procedure and evidence. n94 After the jury or court members have been selected and the judge has ruled on any preliminary legal issues, counsel for each side will make an opening statement, in which they outline what they expect the evidence to show. The prosecution will then present its evidence and witnesses, who are subject to cross-examination by the defense. After presenting its case, the prosecution will rest and the defense will have an opportunity to present evidence and witnesses. Once any rebuttal evidence has [*228] been presented, the judge will discuss her jury instructions with counsel and rule on any objections. Counsel will then make their closing arguments, after which the judge will instruct the jury and direct them to begin their deliberations.

The twelve jurors in *Miss. Johnson's* case must vote unanimously in order to convict or acquit her. n95 The need for unanimity can give rise to undue pressure by some jurors against others to disregard their own convictions and join the group consensus. In the event the jury cannot reach unanimity, they become a "hung jury" and a mistrial will be declared. The prosecution is then free to start the process over and retry Miss. Johnson on the same charges, n96 using the same or any other evidence. So, even if 11 of the 12 jurors voted "not guilty," Miss. Johnson could be prosecuted anew.

In *Sergeant Johnson's* trial, the court members *will* reach a verdict and there is less potential for undue pressure by some court members against others. After fully and freely reviewing and discussing all of the evidence, the court members will vote only once on each offense. n97 At least two-thirds of the court members must vote for a finding of guilty in order to convict. n98 If fewer than two-thirds of the members vote for a finding of guilty, Sergeant Johnson is found not guilty of that offense. There is no hung jury or retrial in the military justice system.

M. Sentencing and Post-Trial Processing

Assuming *Miss. Johnson* is found guilty of the charged offenses, the trial will move to a sentencing phase. Virginia is one of only a few remaining states that provide for jury sentencing. n99 A separate sentencing hearing takes place before the same jury that convicted the defendant. n100 The prosecution may offer evidence of any prior convictions and the defense may offer any relevant, admissible evidence related to punishment. n101 The jury will then deliberate on the sentence and impose a punishment within the limits prescribed by statute. It will impose a separate sentence for each offense, with sentences to confinement running consecutively unless the court orders otherwise. n102

[*229] Beginning in the 1990s, Virginia instituted a system of discretionary sentencing guidelines. n103 Juries are not given access to the guidelines, but the judge must consider them in deciding whether to suspend the sentence imposed by the jury in whole or in part. Neither judge nor jury has the authority to suspend or disregard minimum terms of confinement that are mandatory under the law for certain offenses.

In *Miss. Johnson's* case, assume she was found guilty of all three offenses. Aggravated involuntary manslaughter is a felony punishable by up to 20 years of confinement, with a mandatory minimum term of one year of confinement. n104 Possession of more than one-half ounce and up to five pounds of marijuana with intent to distribute is a Class 5 felony, for which up to 10 years of confinement may be imposed. n105 Finally, possession of a firearm, while committing the offense of possession of more than one pound of marijuana with intent to distribute, is a Class 6 felony carrying a mandatory term of confinement of five years. n106 Thus the jury will impose an aggregate sentence of at least 6 years confinement and no more than 35 years confinement. n107 The judge will consider the state sentencing guidelines and may suspend any or all confinement in excess of 6 years. However, *Miss. Johnson* will be sentenced to at least 6 years because of the mandatory minimum terms for two of her three offenses.

Like the jury in *Miss. Johnson's* case, the court members who found *Sergeant Johnson* guilty will determine her sentence. However, the court members will have the discretion to impose any sentence they find appropriate, from no punishment up to the maximum authorized for the offenses. They will impose a single sentence covering all offenses, rather than separate sentences for each offense. The military judge has no authority to modify their sentence. The convening authority, however, has broad discretion to modify the guilty findings or sentence--but only in a manner that is favorable to *Sergeant Johnson*.

In the sentencing phase of the trial, the prosecution will present personal data concerning *Sergeant Johnson* and the character of her prior service. This includes evidence of any prior military or civilian convictions, evidence in aggravation relating to the offenses for which she is being sentenced, and evidence of her rehabilitative potential. n108 The defense then has the opportunity to present evidence explaining the circumstances surrounding [*230] the offenses and any other matters offered to lessen the punishment or support a recommendation for leniency. n109 *Sergeant Johnson* may submit matters in a variety of ways: through sworn testimony or via a written or oral unsworn statement, or through her attorney. *Sergeant Johnson* chooses the option that will be most effective for her. Sworn testimony is subject to cross-examination, while material presented by other means is subject to normal rebuttal.

The government is given an opportunity to present rebuttal evidence. If any such evidence is introduced, the defense also has the opportunity to present matters in rebuttal. The judge then instructs the members prior to their sentencing deliberations.

The UCMJ gives court members a much broader range of sentencing options than are available in the civilian justice system. Punishments may include death (for specified offenses), punitive discharges from the service, confinement, hard labor without confinement, restriction to specified locations, reduction in pay grade, fines, forfeiture of pay and allowances, and reprimands. n110 In *Sergeant Johnson's* case, the maximum punishment includes a dishonorable or bad conduct discharge, confinement for life, and other authorized punishments other than death. n111 There is no minimum punishment that the court members are required to adjudge in her case. n112

After her sentence has been adjudged and the record of trial transcribed, *Sergeant Johnson* will have another opportunity to submit written matters. She may seek disapproval of any guilty finding or approval of a less severe sentence than the court members have adjudged. This process is called clemency. n113 The convening authority must consider the matters submitted by *Sergeant Johnson* before acting on her case. She has broad discretion to set aside findings of guilty, reduce them to findings of guilty to lesser offenses, or approve a less severe sentence than the one adjudged by the court members. n114 In no event may the convening authority take action against *Sergeant Johnson* that is more severe than that adjudged by the court members.

[*231] **N. Appellate Process**

After conviction and sentencing, the final step is the appeals process. If *Miss. Johnson* is indigent and represented by court-appointed counsel, the same attorney will handle any appeal. n115 If she is not indigent, *Miss. Johnson* is responsible for providing her own attorney and covering all costs associated with the appeal, including the cost of transcribing the record of trial.

There is no absolute right of appeal in Virginia, except in capital cases. However, *Miss. Johnson* does have the right to petition the Court of Appeals of Virginia for review of her case. n116 The judge receiving her petition will either grant it, allowing the appeal to proceed, or refer it to a three-judge panel and give *Miss. Johnson* the opportunity to make an oral presentation as to why her appeal should be considered. If all judges on the panel agree that the petition for appeal should not be granted, it will be denied and *Miss. Johnson's* remedies will be exhausted. If at least one judge on the panel decides the appeal should be heard, it will be referred to a panel for consideration on the merits. n117 If the decision on the merits is adverse to her, *Miss. Johnson* may petition the Virginia Supreme Court for an appeal. n118 The Virginia Supreme Court has complete discretion in deciding whether to grant her petition and consider her appeal on the merits. Once her last appeal is decided or her request for appeal is denied, *Miss. Johnson's* conviction and sentence are final.

In *Sergeant Johnson's* case, there will be an automatic appellate review if her approved sentence includes a punitive discharge from the service or confinement for one year or longer. n119 Whether indigent or not, *Sergeant Johnson* will be represented by an experienced judge advocate who is assigned to full-time duties as an appellate defense counsel. n120 A three-judge panel of the Air Force Court of Criminal Appeals will review her case. n121 In addition to deciding issues of law, the judges are required by the UCMJ to determine whether the record of trial supports both the findings and sentence as approved by the convening authority. n122 Very few appellate courts, other than the military Courts of Criminal Appeals, have the authority to reverse convictions if, based on the trial record, the appellate judges are not convinced of guilt beyond a reasonable doubt.

[*232] If the Air Force Court of Criminal Appeals rules against *Sergeant Johnson*, she can request further review by the United States Court of Appeals for the Armed Forces (USCAAF). n123 USCAAF consists of five civilian judges, appointed to 15-year terms. n124 If USCAAF decides to review her case, and rules against *Sergeant Johnson*, she may request review by the United States Supreme Court through a writ of certiorari. n125 Once her last appeal is decided or her request for further appeal is denied, *Sergeant Johnson's* conviction and sentence are final.

IV. CONCLUSION

The military justice system gives service members virtually all rights and privileges that are afforded to citizens who face prosecution in civilian courts. In many areas--such as the right to counsel, the pretrial investigatory process, discovery, sentencing, post-trial processing, and appeals--the military system offers benefits to an accused that are more favorable than those available in civilian systems.

Americans, now firmly settled in the era of an all-volunteer military force, would not support a military justice system that did not provide fundamental due process and fair trial guarantees. The Uniform Code of Military Justice establishes a system that is separate and different, but one that fully meets expectations for fairness and protection of individual rights. The American citizens who volunteer to serve their country deserve nothing less.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Criminal Law & Procedure Bail Conditions of Release Criminal Law & Procedure Counsel Right to Counsel General
 Overview Public Health & Welfare Law Social Services Legal Aid

FOOTNOTES:

n1 F. LEE BAILEY, *TO BE A TRIAL LAWYER* 225 (2d ed. 1994).

n2 Although there are differences among the criminal processes of each state, those differences have become less pronounced over time as the Supreme Court has now determined that almost all of the specific guarantees of the Bill of Rights are binding on the states. *See* RICHARD A. WILLIAMSON, *DEFENDING CRIM-*

INAL CASES IN VIRGINIA § 1.201 (6th ed. Supp. 2000). Some significant differences between Virginia criminal procedure and that of other states are noted within this article.

n3 The most common types of legislative jurisdiction on Air Force bases in the United States are proprietary and exclusive. Proprietary jurisdiction results when the federal government has acquired some right or title to an area in a state but has not obtained any of the state's authority to legislate over the area. Exclusive jurisdiction exists when the federal government has acquired, by state statute, all of the state's authority in an area, and the state concerned has not reserved the right to exercise any of that authority except the right to serve state civil or criminal process. *See* Air Force Instruction 32-9001, Acquisition of Real Property, Attachment 2 (July 27, 1994). Langley Air Force Base consists of areas with both types of jurisdiction.

n4 MANUAL FOR COURTS-MARTIAL [hereinafter MCM], app. 2 (2000).

n5 The circuit courts of Virginia, except where otherwise provided, have exclusive original jurisdiction for the trial of offenses committed within their respective circuits. *Va. Code § 19.2-239* (2001). Langley Air Force Base falls within the jurisdiction of the Circuit Court for the City of Hampton.

n6 Courts-martial may try any person when authorized to do so under the code. MCM, *supra* note 4, pt. II, Rule for Courts-Martial [hereinafter RCM] 202(a). Article 2 of the UCMJ, *supra* note 4, lists classes of persons subject to the code, which include active duty personnel, cadets, aviation cadets, midshipmen, certain retired personnel, members of reserve components not on active duty under some circumstances, persons in the custody of the armed forces serving a sentence imposed by court-martial, and, under some circumstances, specified categories of civilians. In *Solario v. United States*, 483 U.S. 435 (1987), the Supreme Court held that court-martial jurisdiction depends solely on the status of the accused as a person subject to the UCMJ.

n7 Article 5 of the UCMJ, *supra* note 4, provides that it applies in all places.

n8 For example, desertion, absence without leave, disrespect toward a superior commissioned officer, and failure to obey a lawful order are military offenses with no civilian equivalent. UCMJ, *supra* note 4, Articles 85, 86, 89, 92. Such offenses are necessary because of the life and death consequences that can result if military members don't properly perform duties.

n9 Virginia law enforcement officers may make an arrest, without a warrant, when they have reasonable grounds to suspect an individual has committed a felony. *Va. Code § 19.2-81* (2001).

n10 In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court found that custodial interrogation is inherently coercive and judicially established the requirement that suspects be warned of the right to remain silent and of the right to have counsel present at a custodial interrogation.

n11 *See supra* note 4. Upon the enactment of the UCMJ in 1951, Article 31 established protections similar to those of *Miranda* for all military personnel, 15 years before the *Miranda* decision.

n12 Pursuant to RCM 304, *supra* note 6, any commissioned officer may order pretrial restraint of any enlisted person. Pretrial restraint may be ordered only when there is a reasonable belief that the individual committed an offense triable by court-martial and the restraint is necessary to ensure the presence of the person restrained or to prevent foreseeable serious criminal misconduct.

n13 *Va. Code § 19.2-159* (2001).

n14 66 *Fed. Reg.* 10695 (Feb. 16, 2001).

n15 Selected jurisdictions throughout Virginia have public defender programs, under which full time, state-employed public defenders represent indigent persons charged with criminal offenses. Va. Code § 19.2-163.2 (2001). In jurisdictions without a public defender program, such as the City of Hampton, court-appointed counsel are selected by a system of rotation among members of the local bar whose practice includes criminal representation and who have indicated their willingness to accept such appointments. Va. Code § 19.2-159 (2001).

n16 *See Va. Code § 19.2-163* (2001).

n17 *Id.*

n18 *Webb v. Commonwealth*, 32 Va. App. 337, 528 S.E.2d 138 (2000).

n19 *See RCM 501(b)*, *supra* note 6.

n20 The Judge Advocate General of the Air Force is a major general who is the senior uniformed attorney in the service.

n21 *See RCM 502(d)(1)*, *supra* note 6, and Article 27(b) of the UCMJ, *supra* note 4.

n22 *See Air Force Manual 51-204*, United States Air Force Judiciary P2.7 (July 1, 1995) [hereinafter AFM 51-204].

n23 *Id.* at P2.10. The Defense Paralegal's primary duty is to support the ADC in the management and operation of the ADC office.

n24 *See id.*, at P1.5.

n25 *See id.*, at P2.5.

n26 *See Annual Report of the Code Committee on Military Justice for the period October 1, 1999 to September 30, 2000*, Section 5: Report of the Judge Advocate General of the Air Force, and Appendix--U.S. Air Force Military Justice Statistics. Excluding summary courts-martial, which may try minor offenses with the consent of the accused and impose up to one month of confinement (*see* Article 20 of the UCMJ, *supra* note 4), there were 758 courts-martial tried in fiscal year 2000. They were defended by 81 ADCs at 71 bases worldwide.

n27 *See AFM 51-204 P2.6*, *supra* note 22.

n28 Va. Code § 19.2-82 (2001).

n29 Va. Code § 18.2-36.1 (2001).

n30 Va. Code § 18.2-248.1 (2001).

n31 *Va. Code § 18.2-308.4* (2001).

n32 Article 92 of the UCMJ, *supra* note 4, prohibits violations of written regulations of which the accused has knowledge. Air Force Instruction 31-209/Langley Air Force Base Supplement 1, The Air Force Resource Protection Program P5.1.1 (Nov. 15, 1995) prohibits carrying privately-owned firearms in vehicles on base except when traveling to or from an authorized activity, such as a storage facility. It also requires that firearms be unloaded and placed in the trunk of the vehicle during authorized transportation.

n33 *See* RCM 307, *supra* note 6.

n34 *See* Air Force Instruction 51-201, Administration of Military Justice P3.5 (Nov. 2, 1999) [hereinafter AFI 51-201].

n35 The commanders of most Air Force installations, usually comprising Air Force wings, act as special court-martial convening authorities. *See* Article 23 of the UCMJ, *supra* note 4, RCM 504(b)(2), *supra* note 6, and Special Order GA-001, Department of the Air Force, October 10, 2000 (designating court-martial convening authorities). A special court-martial may not adjudge confinement greater than one year or the most severe forms of punitive discharges (dismissal for officers and dishonorable discharge for enlisted members). *See* Article 19 of the UCMJ, *supra* note 4.

n36 *Va. Code § 19.2-120* (2001).

n37 *Id.*

n38 *See* http://www.vabailbonds.com/Root/Why_A_Bondsman.htm (last visited Apr 24, 2002).

n39 *See* RCM 305, *supra* note 6.

n40 *Id.*

n41 *Id.* The reviewing officer must be a neutral and detached officer.

n42 *Id.*

n43 *Id.*

n44 *See Va. Code §§ 19.2-183, 19.2-218* (2001).

n45 *See Williams v. Commonwealth*, 208 Va. 724, 160 S.E.2d 781 (1968).

n46 *Va. Code § 19.2-186* (2001).

n47 *Va. Code § 19.2-191* (2001).

n48 *Va. Code § 19.2-195* (2001).

n49 *Va. Code § 19.2-192* (2001).

n50 *See RCM 601(d)(2)*, *supra* note 6.

n51 *See RCM 405*, *supra* note 6.

n52 *RCM 405(g)*, *supra* note 6.

n53 The investigating officer must be a commissioned officer who is not the accuser, preferably in the grade of major or higher or one with legal training. *RCM 405(d)(1)*, *supra* note 6. In Air Force practice, the investigating officer is always a judge advocate (uniformed attorney).

n54 *Id.*

n55 *See RCM 405(j)*, *supra* note 6.

n56 The commanders of most numbered air forces, and other headquarters organizations at echelons above Air Force wings, act as general court-martial convening authorities. *See Article 22 of the UCMJ*, *supra* note 4, *RCM 504(b)(1)*, *supra* note 6, and Special Order GA-001, Department of the Air Force, October 10, 2000 (designating court-martial convening authorities). A general court-martial may adjudge any punishment authorized for the offenses of which the accused is convicted. *See Article 18 of the UCMJ*, *supra* note 4.

n57 Referral is the order of a convening authority that charges against an accused will be tried by a specified court-martial. *RCM 601(a)*, *supra* note 6.

n58 *See WILLIAMSON*, *supra* note 2, at § 9.2.

n59 *See Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667 (1985).

n60 *Currie v. Commonwealth*, 30 Va. App. 58, 515 S.E.2d 335 (1999); *Williams v. Commonwealth*, 30 Va. App. 378, 517 S.E.2d 246 (1999).

n61 *See AFI 51-201*, *supra* note 34, at P3.7. Staff judge advocates (legal advisors to commanders) are encouraged to provide basic discovery to defense counsel as soon as practicable, even before preferral of charges.

n62 *See RCM 701*, *supra* note 6, and Rule 3.2, Uniform Rules of Practice Before Air Force Courts-Martial, May 1, 2000.

n63 *Id.*

n64 *Va. Const. Art. VI, § 7* (2001).

n65 *Id.*

n66 *Va. Const. Art. VII, § 4* (2001).

n67 See *Va. Code § 15.2-1626* (2001), authorizing the appointment of Assistant Commonwealth's Attorneys. The Commonwealth's Attorney for the City of Hampton has one chief deputy, three deputies, two senior assistants, and nine assistants. Telephone call to Office of the Commonwealth's Attorney for the City of Hampton (757-727-6442) (Nov. 1, 2001).

n68 Military judges must be members of the bar of a Federal court or the highest court of a State, and must be certified as qualified for duty as a military judge by the Judge Advocate General of the Air Force. See RCM 502(c), *supra* note 6, Article 26 of the UCMJ, *supra* note 4, and AFM 51-204 P1, *supra* note 22.

n69 *Id.*

n70 See AFM 51-204 P2.4.7, *supra* note 22.

n71 "The SJA's job is to insure a level playing field. The [Area Defense Counsel] is equal at the bar of justice with the prosecution function of the legal office. Advocacy of the prosecution's position in a military justice action is the responsibility of the trial counsel, not the SJA. The SJA's responsibility is to insure that the government is well represented and prepared." TJAG Policy Number 28, The Area Defense Counsel Function, AF/JA (Feb. 4, 1998).

n72 See AFM 51-204 P2.4, *supra* note 22.

n73 See *Va. Const. Art. I, § 8* (2001) and *Va. Code § 19.2-262(B)* (2001).

n74 See *Va. Code §§ 8.01-337, 8.01-357, 19.2-262(B)* (2001).

n75 *Va. Code § 8.01-358* (2001).

n76 *Va. Code § 8.01-341.2* (2001).

n77 *Va. Code § 19.2-262(C)* (2001).

n78 *Id.*

n79 See Article 25 of the UCMJ, *supra* note 4.

n80 Article 16(1)(A) of the UCMJ, *supra* note 4.

n81 Article 25(d)(2) of the UCMJ, *supra* note 4.

n82 Article 25(c) of the UCMJ, *supra* note 4.

n83 See Article 41 of the UCMJ, *supra* note 4, and RCM 912, *supra* note 6.

n84 *Id.*

n85 See Article 37 of the UCMJ, *supra* note 4, and RCM 104, *supra* note 6. Violations of the prohibition against unlawful command influence may be prosecuted under Article 98, and carry a maximum punishment including confinement for five years. MCM, *supra* note 4, pt. IV, Punitive Article 98.

n86 *Id.*

n87 *Id.*

n88 The judge instructs and questions the members as follows: "You are all basically familiar with the military justice system, and you know that the accused has been charged, her charges have been forwarded to the convening authority and referred to trial. None of this warrants any inference of guilt. Can each of you follow this instruction and not infer that the accused is guilty of anything merely because the charges have been referred to trial?" Department of the Army Pamphlet 27-9, Military Judges' Benchbook P2-5-1 (Apr. 1, 2001) [hereinafter DA Pam 27-9].

n89 See Article 41 of the UCMJ, *supra* note 4, and RCM 912, *supra* note 6.

n90 *Id.*

n91 See Va. Code § 19.2-267 (2001), Article 46 of the UCMJ, *supra* note 4, and RCM 703, *supra* note 6.

n92 Va. Code § 19.2-336 (2001).

n93 See AFI 51-201, *supra* note 34, at § 6A.

n94 See generally WILLIAMSON, *supra* note 2, at Chapter 11, and RONALD J. BACIGAL, VIRGINIA CRIMINAL PROCEDURE § 17-1 *et seq.* (3rd ed. Supp. 1998), for Virginia procedure and rules of evidence. See RCM 901 *et seq.*, *supra* note 6, for court-martial procedure. Courts-martial are governed by the Military Rules of Evidence, which are similar to and derived from the Federal Rules of Evidence. MCM, *supra* note 4, pt. III, Military Rules of Evidence [hereinafter MRE] 1101, 1102.

n95 Va. Const. Art. I, § 8 (2001).

n96 See *Holloman v. Commonwealth*, 23 Va. App. 183, 475 S.E.2d 815 (1996).

n97 RCM 921, *supra* note 6.

n98 *Id.*

n99 Va. Code § 19.2-295 (2001). If the accused pleads guilty or elects trial by judge alone, the judge determines the sentence. See generally BACIGAL, *supra* note 94, at Chapter 19.

n100 Va. Code § 19.2-295.1 (2001).

n101 See *Pierce v. Commonwealth*, 21 Va. App. 581, 466 S.E.2d 130 (1996).

n102 *Va. Code § 19.2-308* (2001).

n103 See WILLIAMSON, *supra* note 2, at § 12.3, and VIRGINIA CRIMINAL SENTENCING COMMISSION, VIRGINIA SENTENCING GUIDELINES (July 1, 2000).

n104 *Va. Code § 18.2-36.1* (2001).

n105 *Va. Code §§ 18.2-248.1, 18.2-10* (2001).

n106 *Va. Code §§ 18.2-308.4, 18.2-10* (2001).

n107 This assumes the judge does not order the sentences to confinement to run concurrently. If the judge does order them to run concurrently, the actual term of confinement will be between 5 and 20 years.

n108 See RCM 1001, *supra* note 6.

n109 *Id.*

n110 See RCM 1003, *supra* note 6.

n111 Murder by engaging in an act inherently dangerous to another carries a maximum term of confinement of life, wrongful possession of marijuana with intent to distribute carries a maximum term of confinement of 15 years, and possession of a firearm in violation of a lawful regulation carries a maximum term of confinement of six months. MCM, *supra* note 4, pt. IV, Punitive Articles 112a, 118, 92.

n112 See RCM 1002, *supra* note 6. Except for a very small number of offenses where the UCMJ prescribes a mandatory minimum sentence, a court-martial may adjudge any sentence from no punishment to the maximum authorized.

n113 See RCM 1105, *supra* note 6.

n114 See Article 60 of the UCMJ, *supra* note 4, and RCM 1107, *supra* note 6.

n115 See *Va. Code § 19.2-159* (2001).

n116 See *Va. Code § 17.1-407* (2001).

n117 *Id.*

n118 *Va. Code § 17.1-411* (2001).

n119 See Article 66 of the UCMJ, *supra* note 4, and RCM 1203, *supra* note 6.

N120 See Article 70 of the UCMJ, *supra* note 4, and RCM 1202, *supra* note 6.

n121 *See* Article 66 of the UCMJ, *supra* note 4, and RCM 1203, *supra* note 6.

n122 In considering the record of trial, the judges may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses. Article 66(c) of the UCMJ, *supra* note 4.

n123 *See* Article 67 of the UCMJ, *supra* note 4, and RCM 1204, *supra* note 6.

n124 Article 142 of the UCMJ, *supra* note 4.

n125 Article 67a of the UCMJ, *supra* note 4, and RCM 1205, *supra* note 6.

