

United States Army Trial Judiciary

**STANDARD OPERATING PROCEDURES
FOR
MILITARY MAGISTRATES**



16 July 2019

**UNITED STATES ARMY TRIAL JUDICIARY
STANDARD OPERATING PROCEDURES (SOP)
FOR MILITARY MAGISTRATES**

OVERVIEW

These Standard Operating Procedures (SOP) are designed to assist military judges and military magistrates in performing duties pursuant to Article 26a, UCMJ (2019) and applicable Rules for Courts-Martial and Military Rules of Evidence. Although this SOP is meant to be a comprehensive and accurate procedural guide, it is not a replacement for any law or regulation. Unless otherwise stated, all references herein cite to the most current version of that source – e.g., the 2019 Manual for Courts-Martial, and Interim AR 27-10 (1 JAN 2019). In the event of a question or conflict between this SOP and any applicable authority, military magistrates should consult their supervising military judge for guidance.

This SOP supersedes and replaces the U.S. Army Trial Judiciary Military Magistrate SOP dated 1 September 2013. With approval of the Chief Trial Judge (CTJ), this SOP may be supplemented by Chief Circuit Judges (CCJs) to meet unique local conditions and to address military magistrate responsibilities concerning custody reviews exercised pursuant to Status of Forces agreements.



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U.S. Army Trial Judiciary Military Magistrate Standard Operating Procedures

Summary of Changes

This revision, as of 16 July 2019:

- Conforms with updates to the Rules for Courts-Martial, Military Rules of Evidence, UCMJ pursuant to the MJA Act of 2106, and Interim AR 27-10 (2019).
- Updates terminology (e.g., from “part-time military magistrate” to “military magistrate;” from “appointment” to “designation”) to conform with updates to the UCMJ and Interim AR 27-10.
- Reorganizes Section I to clarify the magistrate nomination and designation process, the term and scope of designation, and disqualifying events or duties.
- Adds a requirement to terminate military magistrate duties no later than 4 weeks prior to a Permanent Change of Station (PCS) move.
- Requires military magistrates to maintain records of magisterial functions for at least three years in case of trial or appellate review.
- Reduces military magistrate reporting requirements from quarterly to semi-annually, consistent with semi-annual reports sent to the USATJ.
- Reorganizes the step-by-step process in Section II for conducting search, seizure, or apprehension authorizations.
- Adds discussion and references to the end of Section II on common search and seizure issues, including search and seizure of electronic media.
- Streamlines the Section III discussion of steps for pretrial confinement reviews.
- Adds references to an alleged victim’s right to be notified of and to be reasonably heard in a pretrial confinement review.
- Makes accompanying stylistic and substantive updates to the Enclosures and Appendices, including Enclosure 15 (sample termination memo), and a sample search and seizure authorization and discussion at Appendix 1.

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- ENCL 1 Delegation of Authority to Appoint Military Magistrates**
- ENCL 2 SJANomination Memorandum**
- ENCL 3 Military Magistrate Nomination Data Sheet**
- ENCL 4 Memorandum Designating Military Magistrate**
- ENCL 5 Circuit Magistrate Roster**
- ENCL 6 Military Magistrate Report with Instructions**
- ENCL 7 Chief Circuit Judge Semi-Annual Report**
- ENCL 8 Guide to Articulating Probable Cause to Search**
- ENCL 9 Notes on Request for Search Authorization**
- ENCL 10 Pretrial Confinees Log (Optional Form)**
- ENCL 11 Checklist for Review of Pretrial Confinement**
- ENCL 12 Pretrial Confinement Review Script**
- ENCL 13 Memorandum of Military Magistrate's Conclusions**
- ENCL 14 Military Magistrate Deployment / Redeployment Memorandum**
- ENCL 15 Military Magistrate Termination Memo**

APPENDICES (FORMS)

- APPENDIX 1 DA Form 3745 Search and Seizure Authorization (SAMPLE) and Notes**
- APPENDIX 2 DA Form 3745-1 Apprehension Authorization**
- APPENDIX 3 DA Form 3744 Affidavit Supporting Request for Authorization to Search and Seize or Apprehend**

Section I

General Provisions

1. Military Judges

a. Each trial judge assigned to the U.S. Army Trial Judiciary is authorized to perform military magistrate duties. U.S. Army Reserve (USAR) military judges assigned to the 150th Legal Operations Detachment or the U.S. Army Trial Judiciary may also perform military magistrate duties.

b. A military judge who previously reviewed the propriety of continued pretrial confinement or issued a search and seizure authorization is not automatically disqualified from presiding over a court-martial involving those issues. Recusal of the military judge from a later court-martial is only appropriate where the military judge's impartiality might reasonably be questioned.

2. Military Magistrate Qualifications and Designation

a. Persons Eligible for Designation: Military magistrates are active duty judge advocates certified by TJAG, nominated by a Staff Judge Advocate, and designated by a Chief Circuit Judge pursuant to Article 26a(a), UCMJ, and Interim AR 27-10, para. 8-3. While TJAG has designated the USALSA Commander, the CTJ and CCJs as appointing/designating authorities (Encl 1), the CCJ will normally act on a nomination.

b. Qualifications: Consistent with the training, knowledge, judgment and maturity required to serve as a military magistrate, nominees will ideally have prior trial or defense counsel experience and should ordinarily not be on their initial judge advocate tour.

c. Nomination: The Staff Judge Advocate (SJA) will forward a nomination memorandum (Encl 2), a signed Military Magistrate Nomination Data Sheet (Encl 3), and the nominee's Officer Record Brief through the military judge assigned to the installation, if any, to the CCJ. The CCJ's notification of designation (Encl 4) will be sent to the nominee, with a courtesy copy provided to the appropriate supervising military judge. The newly designated military magistrate must contact the supervising military judge and arrange an initial training session before performing any magisterial duties.

d. Disqualifying Duties: Certain positions and functions conflict with the military magistrate's independent judicial role. As such, military magistrate nominees cannot be involved in criminal investigations, perform duties or hold positions in the defense or

prosecution function (such as trial counsel or SAUSA), or be appointed or serve as a victim advocate or Special Victim Counsel (SVC). Likewise, military magistrates cannot be related to persons, such as a spouse, child, parent, or sibling, involved in such functions in the same General Court-Martial (GCM) jurisdiction.

e. Non-Disqualifying Duties: Judge advocates who serve as legal advisors to Article 32 preliminary hearing officers (PHOs) or on-call duty officers are not disqualified from appointment as a military magistrate, but providing substantive advice to command or law enforcement personnel in criminal matters as a part of such duty will disqualify the individual from acting as a military magistrate on that case. A judge advocate cannot act as both a military magistrate and an Article 32 PHO in the same or related case, such as that of a co-accused.

f. Limited Scope of Designation: Military magistrates are authorized to issue search, seizure, and apprehension authorizations based on probable cause; to review the propriety of continued pretrial confinement of persons subject to the UCMJ; and to review the confinement of Soldiers in U.S. facilities pending disposition, including appeals, of foreign criminal charges. See AR 27-10, para. 8-4a through c. Unless explicitly certified and designated by TJAG, military magistrates are **not** authorized to perform additional duties pursuant to Article 26a(b) or Article 30a (i.e., presiding over special courts-martial or pre-referral proceedings that require a military judge).

g. Term of Designation: Unless otherwise notified, military magistrates continue in their designated role until they are relieved by the designating authority, or until they are assigned to a disqualifying duty (see above).

(1) Terminating Events: Assignment to a disqualifying duty (see above) will result in immediate and automatic termination as a military magistrate. Further, a military magistrate designation will be terminated NLT four weeks prior to a Permanent Change of Station (PCS) move, including transfer or reassignment to a position under the purview of a different command or SJA, regardless of any change in installation. Termination of magistrate duties is final, and magistrate designations do not transfer from one command, installation, or judicial circuit to another. A terminated magistrate may not continue magistrate duties at a gaining command or installation unless re-nominated and re-designated by the appropriate SJA and military judge.

(2) Non-Terminating Events: Temporary absences or non-disqualifying changes of duty, including leave, pass, temporary duty (TDY), deployment, or re-deployment do not automatically terminate a military magistrate designation. A deployed military magistrate will fall under the supervising judge responsible for the deployed jurisdiction for the length of the deployment, for administrative

accountability and reporting purposes. See enclosure 14.

3. Impartiality and Standards of Conduct

a. Quasi-Judicial Role: The execution of magistrate duties is a judicial function. Although normally performed part-time or for limited hours, designation as a military magistrate is a 24/7 obligation. As such, military magistrates must serve as neutral, detached, and impartial authorities for matters within their purview and must at all times maintain impartiality, and the appearance of impartiality, in their magisterial duties. Military magistrates are **not** advisors to counsel, the SJA, or law enforcement and must serve as an independent decision-maker in every case. A military magistrate may not advocate for either side or assist the government to meet its burden.

b. Standards of Conduct: Military magistrates shall comply with applicable provisions of the Code of Judicial Conduct for Army Trial and Appellate Judges, including:

- Canon 1, Independence, Integrity, Impartiality
- Rule 2.2, Impartiality and Fairness
- Rule 2.3, Bias, Prejudice, and Harassment
- Rule 2.4, External Influences on Judicial Conduct
- Rule 2.5(A), Competence, Diligence, Cooperation
- Rule 2.6, Ensuring the Right to be Heard
- Rule 2.7, Responsibility to Decide
- Rule 2.8, Decorum, Demeanor, Communication
- Rule 2.9, *Ex Parte* Communications
- Rule 2.10, Pending and Impending Cases
- Rule 3.5, Use of Nonpublic Information
- Rule 3.6(A), Affiliation with Discriminatory Organization

c. Judicial Privilege and Independent Decision-Making: Military magistrates may, within the scope of judicial privilege, consult with other military magistrates as well as with military judges on their duties and magisterial determinations. Military magistrates may not consult with any other persons about their deliberations or magisterial determinations. Notwithstanding any authorized consultation, military magistrates have a duty to independently and individually decide issues within their purview.

4. Supervision and Reporting

a. A military judge assigned to the U.S. Army Trial Judiciary and designated as the supervising judge by a CCJ will supervise each military magistrate. Supervising judges, with appropriate CCJ oversight, will train military magistrates and assist military magistrates thereafter by providing advice, counsel, and support as needed. Supervising judges should consider quarterly training or in-person meetings with military magistrates in their jurisdiction in order to share legal updates and best practices. Supervising judges will also regularly review pretrial confinement memoranda and search authorizations issued by military magistrates for use in training.

b. Notifications and Accountability: Military magistrates will immediately notify their supervising judge if appointed to a disqualifying duty; upon receipt of PCS orders; or as soon as they are aware of any expected absence from their installation for more than three calendar days, including medical absences, leave, pass, temporary duty (TDY), or deployment. The supervising judge has no role in reviewing or approving any temporary absence, but will use this information to ensure necessary magistrate coverage and support.

c. Duty Rosters: A supervising judge, or a magistrate under the judge's supervision, may create a magistrate on-call duty roster to manage magistrate availability and to provide local authorities with reliable points of contact. Although all military magistrates should have a reasonable opportunity to perform magistrate functions, any military magistrate may perform magistrate functions at any time as needed, regardless of the status of any duty roster.

d. Reporting of Actions Taken: Whenever a military magistrate issues a pretrial confinement (PTC) review or a search/seizure/apprehension authorization, the magistrate will immediately forward a copy of the PTC review memorandum, search and seizure authorization (DA Form 3745), or apprehension authorization (DA Form 3745-1) to the supervising military judge. Supporting materials such as affidavits may, but need not be, forwarded unless requested by the supervising judge.

e. Records Retention: Military magistrates are subject to interview and being called to testify about their authorizations and pretrial confinement reviews during pretrial, trial, and post-trial sessions including appellate review. For this reason, magistrates will individually retain all notes, work product, authorizations, and pretrial confinement reviews for a minimum of three years, regardless of PCS or change of duties. Magistrates should consider retaining this information electronically for portability and ease of access. Magistrates need not retain supporting materials provided by a requester (e.g., affidavits, command memos, or evidentiary documents) for this period.

f. Magistrate Reports: All military magistrates will file a semi-annual report through their supervising military judge to the CCJ NLT 15 January and 15 July of each year (Encl 6). Chief Circuit Judges may require more frequent reports as conditions dictate.

g. Reporting by Military Judge: Each CCJ will provide a semi-annual military magistrate roster reflecting the names of current military magistrates in the circuit, date of appointment, date of training and contact information, to the Office of the CTJ (OCTJ) NLT 1 February and 1 August (Encl 5). Each CCJ will also submit a semi-annual report to the OCTJ, NLT 1 February and 1 August of each year, reflecting the consolidated number of confinement reviews and search authorizations conducted within the circuit during the January-June and July-December time frames, respectively (Encl 7).

5. References:

Because the need for magistrate services is often unscheduled and may arise outside of typical business hours, military magistrates should keep needed resources and references available to them both in and away from the office, including:

(1) Appointment Memorandum

(2) Current Manual for Courts-Martial, specifically

- R.C.M. 302, Apprehension
- R.C.M. 304, Pretrial Restraint
- R.C.M. 305, Pretrial Confinement
- M.R.E. 312, Body Views and Intrusions
- M.R.E. 313, Inspections and Inventories
- M.R.E. 314, Searches Not Requiring Probable Cause
- M.R.E. 315, Probable Cause Searches
- M.R.E. 316, Seizures

(3) This SOP

(4) Chapter 8 (Military Magistrates), Interim AR 27-10 (1 JAN 2019)

(5) Code of Judicial Conduct for Army Trial and Appellate Judges (16 May 2008)

(6) Applicable Forms

- DA Form 3744, Supporting Affidavit
- DA Form 3745, Search and Seizure Authorization
- DA Form 3745-1, Apprehension Authorization

Section II

Search, Seizure and Apprehension Authorizations

1. Role and Jurisdiction. Military magistrates are authorized to issue search and seizure or apprehension authorizations upon a showing of probable cause. See Interim AR 27-10, Chapter 8, Section III. This authority is not specific to any particular military installation. A military magistrate stationed at one installation may issue authorizations, upon request, for another installation. Notwithstanding this lack of geographic limitations, military magistrates should be cautious when it appears that law enforcement or command personnel may be engaged in "forum shopping" (the attempt to seek authority from one military magistrate after being denied authority by another military magistrate).

2. Scope of Authority

a. Upon application and a determination of probable cause, a military magistrate may authorize:

- A physical search of any member of the armed forces, and any person subject to military law or the law of war, wherever located. M.R.E. 315(c)(1).
- The search and seizure of any military aircraft, military vehicle, military vessel, and/or other military property, wherever located. M.R.E. 315(c)(2).
- The search of any person, and the search and seizure of any property, located on a military installation, or other location under military control or in a military encampment, aircraft, vehicle, or vessel, wherever located. M.R.E. 315(c)(3).
- Nonmilitary property within a foreign country. M.R.E. 315(c)(4).
- The apprehension of any person subject to the Uniform Code of Military Justice wherever located, subject to specific limitations that apply to private dwellings. R.C.M. 302(e)(1)-(2).

A military magistrate will not issue a search, seizure, or apprehension authorization except as noted above, without first discussing the matter with a military judge.

b. Specific Limitations to Search and Seizure Authority: A military magistrate may **not** perform the following functions: authorize the interception of wire and oral communications (M.R.E. 317); authorize counterintelligence searches (Executive Order 12333 (8 Dec 1981)); authorize the search or seizure of financial records from financial institutions in any State or territory of the United States; issue subpoenas or warrants pursuant to the Stored Communications Act (18 U.S.C. 2703; R.C.M. 703A); or authorize the search of private property or living quarters not on a military installation, even if occupied by service members. If in doubt about whether a requested action falls within a military magistrate's authority, the military magistrate must consult with their supervising military judge before proceeding.

c. Military magistrates may grant authorization to search all structures, barracks, living quarters, and privatized housing located on an Army installation, whether occupied by military or civilian personnel. M.R.E. 315(c)(3); Interim AR 27-10, para. 8-12.

d. Specific Limitations to Apprehension Authority: Neither a warrant nor other authorization is required to apprehend a person subject to the UCMJ in a public place.¹ Authorization is required to apprehend military members in private dwellings. Thus, a military magistrate's authority to issue an apprehension authorization is generally limited to military residents or military overnight guests in private dwellings located on military property or under military control.² Military magistrates generally do not have authority to order the apprehension of civilians.³

e. OCONUS Searches and Seizures: In certain OCONUS locations, a military magistrate may grant authorizations to search off-post, private property occupied by military personnel, consistent with any applicable Status of Forces Agreement (SOFA) with that country. See M.R.E. 315(c)(4) and Discussion, and *United States v. Chapple*, 36 M.J. 410 (C.M.A. 1993). Under certain circumstances, military magistrates may also grant search authorizations for financial records retained by institutions located on DoD installations outside the United States when the financial institution does not have a home office in the United States. See DoD Instruction 5400.15, Encl. 16 (2 Dec 2004, incorporating Change 1, 3 July 2007) and *United States v. Moreno*, 23 M.J. 622 (A.F.C.M.R.

¹ R.C.M. 302(e)(1); see also *United States v. Watson*, 423 U.S. 411 (1976). However, if a requester seeks a magistrate's authorization based on probable cause, the magistrate will not deny the request on the sole basis that an apprehension authorization or warrant is not required.

² See R.C.M. 302(e)(2) for a complete discussion of this issue.

³ Note that "apprehension" is the equivalent term for what is normally called "arrest" in civilian terminology. See Discussion to R.C.M. 302(a)(1). "Arrest" has a unique meaning under military law as a type of pretrial restraint and should not be confused with "apprehension" as determined by a military magistrate. Although authorizing the apprehension of civilians is normally beyond the scope of a military magistrate's duties, federal law enforcement officers may possess other, independent authorities to arrest civilians on or off post, apart from any military magistrate involvement. See R.C.M. 302(a)(2) and Discussion.

1986). A military magistrate should consult with a military judge familiar with the applicable OCONUS situation prior to issuing any authorizations under the exceptions in this subparagraph.

3. Steps for Conducting a Search or Seizure Authorization

a. **Review applicable authorities:** Fourth Amendment; M.R.E. 315; M.R.E. 316; Interim AR 27-10, Chapter 8, Section III; and *United States v. Morales*, 77 M.J. 567 (A.C.C.A. 2017) (discussing the importance of thorough supporting affidavits and precise magistrate authorizations that are not overbroad).

b. **Frame the Request:**

(1) Identify **who** is requesting the authorization.

☞ A military magistrate only decides actual requests for search authorizations. Avoid advisory opinions or "what if" conversations.

(2) Identify **who** else, if anyone, the requester has previously asked to issue the authorization.

☞ Always remain vigilant about "forum shopping." Determine up front whether the requester has asked another military magistrate, a military judge, or a commander to grant the request and, if so, whether new information has been added to the previous request. See Interim AR 27-10, para. 8-11.

(3) Determine whether the magistrate has the authority to perform the task requested.

c. **Gather Appropriate Information:**

(1) Administer the following **oath** to the requester and any others who provide information in support of the authorization:

Do you (name) (swear/affirm) that the information you are providing is, to the best of your knowledge, information, and belief, the truth (so help you God)?

☞ Although authorizations may be made on the basis of written, oral, sworn, or unsworn information, in almost every case written information should be offered. Magistrates should have a strong preference for written, sworn statements, usually in the form of an affidavit (DA Form 3745). See AR 27-10, para. 8-7.

(2) Ascertain **what** offense is being investigated and **what** the requester wants to search for.

☞ Specificity matters: Does the evidence sought have a causal nexus to the suspected offense? Is the evidence sufficiently described for the magistrate to narrowly tailor the authorization?

(3) Ascertain **where** or **who** the requester wants to search.

☞ Specificity matters. If searching a residence, inquire about out buildings, storage sheds, vehicles on the property, etc. If searching a person, inquire about purses, bags, clothing, or luggage in the vicinity of that person. If searching a car, does it include the trunk, trailer, or closed containers in the car? If searching a computer, cell phone, or other electronic device, which software, programs, applications, of other components within the device?

(4) Ascertain **why** the requester believes she will find what she is looking for in the places to be searched.

☞ Each assertion should be tied to facts or reasonable inferences that support the assertion.

(5) **Take notes** during the entire process of receiving information, including a list of documents or information reviewed.

☞ Keep good notes of any verbal information the requester provided that is not otherwise reflected in the written file. Otherwise, there will be an incomplete record of the information that the magistrate used to reach a decision. See *Morales*, 77 M.J. 567.

d. Determine whether probable cause exists: Probable cause means "a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched." M.R.E. 315(f)(2).⁴ Probable cause requires a sufficient nexus between an alleged crime and the thing to be

⁴ As C.A.A.F. and the Supreme Court have explained, a substantial basis to find probable cause exists "when, based on the totality of the circumstances, a common-sense judgment would lead to the conclusion that there is a fair probability that evidence of a crime will be found at the identified location." *United States v. Rogers*, 67 M.J. 162, 165 (CAAF 2009), citing *Illinois v. Gates*, 462 U.S. 213, 238 (1983) and *United States v. Leedy*, 65 M.J. 208, 213 (CAAF 2007). "[P]robable cause determinations are inherently contextual, dependent upon the specific circumstances presented as well as on the evidence itself," and are "founded.. upon the overall effect or weight of *all* factors presented to the magistrate." *Leedy*, 65 M.J. at 213 (emphasis in original). Although probable cause is a "common sense" standard and not a "technical" standard, *Leedy*, 65 M.J. at 213, a magistrate must nonetheless avoid inferential leaps that are unsupported by the evidence, or extend beyond reasonable conclusions derived from the evidence.

searched or seized. *United State v. Morales*, 77 M.J. 567, 573 (A.C.C.A. 2017), citing to *United States v. Nieto*, 76 M.J. 101, 106 (C.A.A.F. 2017). Sufficient information must be presented to allow a magistrate to individually determine probable cause; a magistrate's "action cannot be a mere ratification of the bare conclusions of others." *United States v Hoffman*, 75 M.J. 120, 125-26 (CAAF 2016); *Morales*, 77 M.J. at 573.

(1) Before issuing any authorization, **review** all matters provided to you.

☞ This may include affidavits, other written information, or verbal information. You may consider hearsay in reaching your decision, but consider the reliability of the information. Ask specific questions about the source of any information described by the person appearing before you to determine who told the person the information, how current the information is, how the person knows that information, whether the information was provided under oath, and how the person is related to the matter under investigation or persons being investigated (e.g., accomplice, related suspect, paid informant, good citizen, family or friend, anonymous tip, eyewitness, or victim). In regard to informants, ask whether the person has provided information before, how reliable or believable that information was, and why you should believe the informant.

(2) Take time to **reflect** on the information provided.

☞ Although military magistrates should make determinations efficiently and expeditiously, there are few if any "emergency" authorizations that demand immediate action. For example, a phone call by a requester who provides little if any written documentation and demands on-the-spot authorization is cause for concern. A magistrate should not unnecessarily delay an appropriate determination, but also should not hesitate to deny a request that is not supported by sufficient information.

(3) **Don't fix** the request if you deny it based on lack of probable cause.

☞ A magistrate may explain in general terms why a request is denied, but will not tell the requester how to fix the request or how to establish probable cause. Magistrates have no stake in the outcome, only in applying a fair process. Any information relayed back to the requester should be in a neutral and impartial tone. For example:

PERMISSIBLE: "Your search authorization request is disapproved for lack of probable cause. The information is too old to make it sufficiently reliable."

IMPERMISSIBLE: "Why don't you ask Jones if he saw the drugs since last month?"

PERMISSIBLE: "Your search authorization request is disapproved for lack of probable cause. There is insufficient information that the witnesses have a basis in fact to know what you claim they know."

IMPERMISSIBLE: "You seem to think that these witnesses actually saw what went down, but I don't think we know that. Find out who if anyone saw what happened and get back with me."

PERMISSIBLE: "Your search authorization request is disapproved for lack of probable cause. There is insufficient information that the person you suspect and wish to search committed the offense or would have the fruits of the suspected offense where you wish to look for them."

IMPERMISSIBLE: "There is nothing to connect this accused to the scene. All you've got is motive, desire, and a hunch. You need some physical evidence which connects him to this crime."

e. Record an authorization on the appropriate form (DA Form 3745/3745-1):

(1) Write the authorization.

☞ Verbal authorizations are permitted but discouraged. Avoid the temptation to issue a verbal authorization and then "follow up" later with a written authorization; such a practice risks a misunderstanding or divergence between what was actually authorized and what is understood by the receiver. Taking the time to draft a properly framed authorization reduces errors and ensures effective implementation of the search or seizure.

(2) Scope the authorization appropriately.

☞ Specificity matters. Authorization to search "the contents of a computer," for example, may be overbroad and lead to challenges. Such an authorization should list specific areas, files, or components to be searched, consistent with the showing of probable cause contained in the affidavit and/or supporting materials.

(3) Avoid dictating "when" or "how"

☞ Authorizations identify **who** or **what** is to be searched and seized and **where**, but generally should avoid dictating **when** or **how** the search is to be executed.

☞ Authorizations generally should not impose any specific time limit on the execution of a search, seizure, or apprehension. Note, however, that Interim AR 27-10, para. 8-9 requires execution of a search or seizure

authorization within 10 days of the date of issue.

f. Complete and maintain the file: Once an authorization is issued, remind the executing authority that upon completion of the search or seizure, the authorization and a copy of the inventory of any property seized should be returned to the military magistrate. See AR 27-10, para. 8-9(c). The military magistrate should maintain these documents together with notes and any other information considered in the authorization.

g. Administrative Deficiencies: Although the above-described procedures should be followed for every requested authorization, failure to comply with administrative guidelines will not render a search or seizure unlawful within the meaning of M.R.E. 311.

4. Common Search and Seizure Issues

The discussions below should not be viewed as final or authoritative; rather they are meant to identify frequently encountered issues. Always verify the law as to any particular matter, and consult with a supervising military judge when needed.

a. Search of the person and effects of a deceased individual: A probable cause authorization is not required to search the person or seize the personal effects of a deceased person, because Fourth Amendment rights do not attach to the deceased. This issue often arises when CID, for example, is investigating an on-post suicide. In such a situation, a requester should be informed that no authorization is required, though the magistrate should not deny the authorization on this basis alone, and it is not error to issue the authorization. Military magistrates should inform their supervising military judge if they frequently receive requests of this nature.

b. Searches of civilians on military installations: Civilians are subject to search, pursuant to probable cause, while on a military installation. M.R.E. 315(c)(3). When a search involves co-occupied, on-post quarters (e.g., a military member and civilian spouse-dependent), the scope of an authorized search extends to each aspect of the underlying request that is supported by probable cause. Although a military magistrate only makes probable cause determinations, a magistrate should also understand for context the rules relating to consent-based searches of co-occupied or co-possessioned property. See, e.g., M.R.E. 314(e)(2) and *United States v. Rader*, 65 M.J. 30 (CAAF 2007).

c. Search and Seizure of Electronic Media: Requests to search and/or seize electronic media require careful analysis because digital evidence can be stored,

transmitted, and retrieved across a wide variety of platforms. Things to consider:

(1) Electronic media can contain evidence relevant to a criminal offense in several ways, meaning that proper scoping of the authorization is essential.

For example:

(a) Is the electronic media **itself** being sought? (e.g., a cell phone as stolen property)

(b) Is the electronic media a **repository** for contraband, such as child pornography?

(c) Is the electronic media a repository for other data that is **evidence** of a crime? (e.g., pictures of items involved in the suspected offense; text exchanges containing criminal admissions; log files showing relevant Internet Protocol (IP) addresses, websites, email addresses accessed or phone calls made)

(d) Is the electronic media the **instrumentality** of a crime? (such as when used to download and distribute child pornography, or to hack into websites)

Military magistrates must understand what they intend to authorize for search and seizure: the hardware; the information contained within the hardware; information contained elsewhere; and/or all of the above.

(2) Searches of electronic media can be time-consuming. The requester may request authorization to either "image" (forensic copy) the media or to seize the media and search it offsite in a controlled environment. The military magistrate should ensure that the affidavit provides reasonable justification for requesting an off-site search but normally should not put any time limits on the search (although the necessary seizure should occur within the 10-day timeframe specified in Interim AR 27-10).

(3) Avoid inferential leaps. For example, evidence supported by probable cause that a cell phone contains child pornography does not necessarily support a conclusion that other electronic or storage devices owned by the individual contain contraband. And although a law enforcement officer's "professional experience" may help establish a nexus between an alleged crime and a specific item to be searched or seized, a generalized profile about how people "normally" act in certain circumstances does not alone establish probable cause. See *United States v. Nieto*, 76 M.J. 101 (CAAF 2007).

(4) Stay informed of evolving case law in this area. Some helpful references:

- *United States v. Nieto*, 76 M.J. 101 (CAAF 2007) (magistrate's probable cause determination to search laptop was improper when magistrate relied, in substantial part, on generalized profile by a law enforcement officer to suggest that possession of images on a cell phone meant that images were also on the laptop).
- *United States v. Leedy*, 65 M.J. 208 (C.A.A.F 2007) (probable cause search upheld where roommate reported suspected child pornography based on computer file names that he observed).
- *United States v. Macomber*, 67 M.J. 214 (C.A.A.F. 2009) (sufficient probable cause nexus established to search dorm room and computer in the dorm room, where child pornography that was discovered in the suspect's possession at the post office listed his dorm room as return address).
- *United States v. Clayton*, 68 M.J. 419 (C.A.A.F. 2010) (upholding magistrate's probable cause determination to seize computer when magistrate relied on information that suspect was part of and involved in a child pornography web/e-mail group, possessed a computer, and that email bearing the suspect's account name had been accessed on a computer in the suspect's vicinity).
- *United States v. Gurczynski*, 76 M.J. 381, 386 (CAAF 2017) (search for child pornography was beyond the scope of authorized search of thumb drive and hard drive).
- *United States v. Morales*, 77 M.J. 567 (ACCA 2017) (probable cause and scoping of a search authorization with regards to seizure and search of cell phone).
- *United States v. Perkins*, 78 M.J. 381 (CAAF 2019) (upholding the search and seizure of military equipment that was inadvertently discovered while searching for evidence the accused had recorded a sex act on his phone. The Court's decision was not based on a finding of probable cause, but magistrates should find the dissent's discussion helpful as to why PC was lacking, and for spelling out useful factors for determining probable cause).

(5) An effective approach when authorizing a search for information contained within electronic media is to begin with an "all records" description, and then adding limiting language stating the crime, the suspects, and relevant time period, if applicable. Include explicit examples of the records to be seized, and then indicate that the records may be seized in any form electronic or non-electronic.

(6) *Remember:* Although requests for electronic information are often particularly nuanced, a military magistrate's role is not to guide the requester toward a solution, but rather to determine whether the government has met its burden to establish probable cause.

Section III

Pretrial Confinement

1. Overview. All military magistrates are authorized to review the propriety of continued pretrial confinement. This authority is not geographically limited. A military magistrate at one installation may lawfully review the pretrial confinement of military personnel assigned to a different installation. The following procedures apply to Soldiers⁵ placed into pretrial confinement and the military magistrate's review thereof:

a. Preliminary Documents: When a Soldier is ordered into pretrial confinement, the trial counsel must provide the military magistrate with the confinement order and any documentation supporting pretrial confinement by 1200 hours of the day following confinement, unless local policy requires otherwise.

b. The trial counsel will also provide the military magistrate a copy of:

- (1) The commander's 72-hour review IAW R.C.M. 305(h)(2)(C);
- (2) The 48-hour review IAW R.C.M. 305(i)(1),⁶ if already completed; and
- (3) The preferred charges.

If these documents are not immediately available, the trial counsel will forward them to the military magistrate the same day as completed. Although a charge sheet should be provided, a charge sheet is not required to conduct a pretrial confinement review.

c. Scheduling the Review: Upon receipt of the information in subparagraph 1a, the military magistrate will expeditiously set the time, date, and location of the pretrial confinement review; ensure that the parties are informed; and ensure trial counsel has provided the appropriate supporting information to defense counsel. The pretrial confinement review will take place as scheduled, absent a showing of good cause.

d. Soldier's Personal Appearance: Unless personal appearance is waived or determined by the military magistrate to be impracticable, the Government shall produce a Soldier in pretrial confinement for appearance before the military magistrate for the review. While a confined Soldier may waive *appearance* at the

⁵ Within this section, the terms "Soldier," "confinee" and "prisoner," as used in R.C.M. 305, are used interchangeably.

⁶ The military magistrate must note in the decision memorandum, along with supporting reasons, if the 48-hour review required by R.C.M. 305(i)(1) was either not conducted or was conducted by a person the military magistrate believes may not be neutral and detached.

review, the military magistrate must still conduct the review using the procedures outlined herein. If the Soldier is not produced, the military magistrate will note the reasons why in the memorandum.

e. Personal Appearance not Required: although an in-person review of pretrial confinement is the regular and preferred practice, a confinee has no absolute right to an in-person review. See analysis to R.C.M. 305 (MCM 2016, Appendix 21-19). Mere inconvenience in transporting a confinee for a pretrial confinement review does not make an in-person review impracticable. In the event that exceptional circumstances do make an in-person review impracticable, a magistrate should first seek to conduct the review with the parties by teleconference or VTC. As an alternative, an in-person review may be conducted by a magistrate from another Armed Service. See paragraph 7, below. Finally, a review may be conducted entirely with written documents when necessary. See R.C.M. 305(i)(2)(A)(i). It is the government's, not the magistrate's, responsibility, to make any needed logistical arrangements for the review. Logistical hurdles are not a basis to delay timely review of pretrial confinement. In the event that an alternative to in-person review is required, a magistrate will consult with the magistrate's supervising judge prior to proceeding. The magistrate will also note the reason that an in-person review was not conducted in the review memorandum.

f. Victim's Right to be Reasonably Heard: A victim of an alleged offense committed by the confinee has as a right to notice of the 7-day review, to confer with the government counsel and command representative, and to be reasonably heard during the review. The hearing may not be unduly delayed for this purpose. R.C.M. 305(i)(2)(A)(iv). The magistrate is not responsible for notifying the victim; however, the magistrate should coordinate directly with the Special Victim Counsel or, if none, the victim to effect the victim's rights. Interim AR 27-10, para. 8-5b(1). The magistrate should note whether the government properly notified the victim in the written memorandum.

g. Tracking Pretrial Confinement: At installations where the confinement population so warrants, the supervising military judge may appoint a senior military magistrate. It is the senior military magistrate's responsibility to track the status of all Soldiers in pretrial confinement and to report that information to the supervising military judge on a periodic basis, as set by the supervising military judge. A sample format is included at enclosure 10.

2. Levels and Standards of Review

a. Within 7 days of the imposition of confinement, a military magistrate shall review the necessity for continued pretrial confinement. The military magistrate may, for good cause, extend the time for completion of this review to 10 days. If the 7-day review is held within 48 hours of the confinee being ordered into pretrial confinement, the neutral and detached officer's review is not required.

b. To authorize continued pretrial confinement, the military magistrate must be convinced by a **preponderance of the evidence** that:

- (1) An offense triable by court-martial has been committed; and
- (2) the confinee committed it; and
- (3) Continued confinement is necessary because it is foreseeable that:
 - (a) the confinee will not appear at trial, pretrial hearing, or preliminary hearing; and/or
 - (b) the confinee will engage in serious criminal misconduct; and
- (4) Less severe forms of restraint are inadequate. R.C.M. 305(h)(2)(B); 305(i)(2)(A)(iii).

c. A fact is established by a preponderance of the evidence when it is more likely than not to be true. The government bears the burden of establishing the requirements for continued pretrial confinement.

d. The military magistrate should not normally volunteer that he or she has the power to order the confinee released from confinement, though the magistrate should tell the confinee if asked. The magistrate's tone should be receptive and concerned though not overly friendly. The magistrate should not appear judgmental of the confinee's conduct and should not counsel the confinee concerning behavioral or personal problems that may surface during the meeting.

3. The Review Process

a. Logistical Arrangements: The military magistrate will designate the place of meeting. At a minimum, this should be a private office with a desk and a sufficient number of chairs. The military magistrate will not use a courtroom or wear a judicial robe. Unless warranted by unusual conditions, confinement facility personnel or guards should not normally be present. The magistrate may seek advice from the supervising judge about who may attend the review.

b. Scope of Review: A military magistrate does not decide to confine a Soldier,

but rather reviews another's decision to do so. The review must include a review of the memorandum submitted by the Soldier's commander under R.C.M. 305(h)(2)(C). The military magistrate may also consider any other information helpful to making an informed decision (see below). The pretrial confinement review is not adversarial in nature; the military magistrate must control the proceedings and the participants. The Soldier, the Soldier's defense counsel, and the alleged victim must be allowed to appear, if practicable, and make a statement. A command representative, usually the trial counsel, may be allowed to attend, but the hearing should not be delayed solely to allow attendance of a command representative. The military magistrate has discretion to tailor the scope of the review to the individual case and local conditions.

c. Matters to be Considered: The military magistrate will advise the confinee of his Article 31(b) rights at the beginning of the review. The magistrate may use a DA Form 3881 for reference but need not complete one. A rights warning is also included in the review script at enclosure 12. The meeting between the Soldier and the military magistrate should be informal. As an aid to conducting the proceeding, the military magistrate should follow the suggested script at enclosure 12. The magistrate should use the Checklist for Review of Pretrial Confinement at enclosure 11 as appropriate.

(1) In addition to the commander's memorandum required by R.C.M. 305(h)(2)(C), the magistrate should review at a minimum, if available:

- (a) Sworn charge sheets (DD Form 458);
- (b) Confinement order (DD Form 2707);
- (c) Documentary evidence concerning the charges, e.g., signed witness statements, DA Forms 4187, CID reports; and
- (d) Checklist for confinement.

(2) Some factors to be considered in determining the need for continued pretrial confinement are set forth in the discussion to R.C.M. 305(h)(2)(B).

(3) Additionally, the magistrate should consider the following factors concerning the likelihood of obstruction of justice:

- (a) Whether the case depends mainly on the testimony of witnesses rather than documentary evidence;
- (b) Whether the witnesses are members of the Soldier's unit, live in the Soldier's barracks, or have a common place of duty with the Soldier;
- (c) The Soldier's reputation, if any, for violence, bribery, or false statements;
- (d) Reliable information demonstrating threats or acts of violence against witnesses by or at the behest of the Soldier; and

(e) The Soldier's violations of conditions previously established for the protection of witnesses or others.

d. Live Witnesses Not Required: In most cases, the written documentation submitted by the parties is sufficient to satisfy the evidentiary needs of the review. As a general rule, live testimony (in person or telephonic) should not be heard unless a substantial factual issue arises that materially affects the magistrate's ability to perform a legally sufficient review. The military magistrate, not the parties, decides whether to call any witnesses. If a witness is called, the magistrate should ask only those questions necessary to resolve the substantial factual issue. The attending parties may not ask questions, but may suggest lines of inquiry for the military magistrate. Notwithstanding these rules, a confinee retains the right to make a statement, and an alleged victim has the right to be reasonably heard.

e. Accused and Defense Role: Absent extraordinary circumstances, the military magistrate should not question the confinee or seek clarification of any statement made by the confinee, unless it is absolutely necessary for making a pretrial confinement determination. The magistrate will not permit a government representative to question the confinee. The military magistrate's function is not to investigate, but to make a determination based on evidence presented.

f. A defense counsel who is present during the meeting may advise the confinee concerning answers to the military magistrate's questions and assist the confinee in formulating replies. Defense counsel may submit written statements pertaining to any aspect of the magisterial function, including the substance of the offenses charged. The defense counsel may also make a statement for the confinee.

g. Government Role: At the military magistrate's discretion, the government representative may be allowed to make a statement on behalf of the command.

h. Additional Inquiry by Magistrate: In those cases where the military magistrate, based on an initial inquiry or subsequent information, determines that there is a basis for further inquiry, additional information may be gathered from commanders, supervisors in the confinement facility, the SJA office, or others having relevant information. The matters considered should be noted as enclosures to the military magistrate's decision memorandum (see enclosure 13).

i. Magistrate's Conclusions: Each of the magistrate's conclusions should be supported by articulable evidence. Frequently encountered issues:

(1) Foreseeability Determination: The magistrate should not lump together the separate determinations that the confinee will not appear at trial, pretrial hearing, or investigation, or will engage in serious criminal misconduct. The magistrate may find that one, none, or both apply.

(2) **Less Severe Forms of Restraint:** The magistrate is not required to find that less severe forms of restraint were actually tried and found inadequate, but rather that less severe forms of restraint are, by a preponderance of the evidence, inadequate under the circumstances. The magistrate should consider whether the evidence shows the confinee is susceptible to moral restraint. The magistrate may consider that less severe forms of restraint have not actually been attempted as one fact in deciding whether this requirement is met.

j. It is not the military magistrate's duty to determine whether the conditions of confinement or actions by the chain of command entitle the Soldier to administrative credit towards any subsequent court-martial sentence.

k. **Improper Bases for Pretrial Confinement:** Pretrial confinement should not be used as a matter of convenience. A Soldier will not ordinarily be placed in pretrial confinement when charged with an offense normally tried by summary court-martial (SCM). See Article 10, UCMJ. As part of the review, the military magistrate will ask the trial counsel or commander ordering confinement the anticipated level of disposition. If the charges are already referred to a SCM or the government representative indicates that the anticipated level of disposition is SCM, the magistrate should order the Soldier released, absent extraordinary circumstances in evidence establishing the R.C.M. 305(h)(2)(B) factors by a preponderance of the evidence.

4. Release Procedures

a. **Immediate Notification:** If the government does not meet its burden, the magistrate will order pretrial confinement terminated and the government representative will immediately inform the confining commander or command representative. If the Soldier is present when a decision is made, the military magistrate should ordinarily inform the Soldier. However, the military magistrate may properly defer announcing such a decision until after the commander is notified. The military magistrate should include in the decision memorandum any reluctance or hesitation by the command or confinement personnel to release the Soldier at the military magistrate's direction.

b. **Notification to the Victim:** A victim of an alleged offense committed by the confinee has the right to reasonable, accurate, and timely notice of the release, unless such notice may endanger the safety of any person. R.C.M. 305(i)(2)(C). The government is responsible to ensure that such notification is made.

c. **Conditional Release not Authorized:** Once having determined that a pretrial confinee should be released, a military magistrate may not impose or recommend conditions of release, or make release contingent upon satisfaction of any condition or promise. What conditions or restrictions, if any, to place upon a Soldier after release are matters within the command's purview.

d. Commander's Decision to Release: Even when a magistrate determines that continued pretrial confinement is warranted, a commander retains authority to direct release of that confinee for any reason. When a commander directs the release of a confinee from pretrial confinement, a military magistrate has no role or review responsibilities regarding the release.

5. Completing and Forwarding the Magistrate's Memorandum

a. The magistrate's findings and conclusions, whether directing release or finding that continued pretrial confinement is warranted, will be recorded in a memorandum using the format in enclosure 13. This memorandum will include, at a minimum:

- (1) The Soldier's name and identifying data.
- (2) The parties notified and the parties present for the review.
- (3) Whether the victim was notified of the review, was given the opportunity to confer with the representative of the command or counsel for the government, and was given a reasonable opportunity to be heard.
- (4) The military magistrate's conclusions.
- (5) The factual findings upon which the conclusions are based. Findings should be based on the particular circumstances of the case; avoid rote or prefilled language.
- (6) A list of all documents considered and any witnesses called.
- (7) The date, time, and manner in which the Soldier was notified of the magistrate's decision.
- (8) If release was ordered, the date, time, and name of the detention facility individual who was notified of the order.

b. The memorandum should be a precise statement of the important and relevant factors that led to the military magistrate's conclusion. Legal analysis is rarely, if ever, required. Lengthy discussion of the facts is normally not required. A military magistrate should ask, "Does my memo contain enough information for a reviewing authority to understand my conclusions, and the factual bases used to reach those conclusions?" Once the magistrate reaches this threshold, writing should stop.

c. Copies of the magistrate's memorandum should be made available to the

defense counsel and trial counsel. Upon request, a copy of the memorandum should be provided the same day to the Soldier. See R.C.M. 305(i)(2)(D); *United States v. McCants*, 39 M.J. 91 (C.M.A. 1994); *United States v. Burgett*, Army 9501941 (Army Ct. Crim. App. 19 June 1997) (order)(unpub.) (the Soldier is entitled to day-for-day credit under R.C.M. 305(k) for each day of noncompliance after the defense requests a copy of the reviewing officer's memorandum; there are no deductions for preparation time). One copy will be provided to the commander of the military confinement facility for inclusion in the Soldier's Correctional Treatment File or to the installation confinement liaison official if the Soldier is being held in a civilian confinement facility. One copy will be forwarded to the trial counsel for inclusion in the allied papers of any subsequent record of trial (Interim AR 27-10, paragraph 5-53c). The magistrate may direct the trial counsel or command representative to distribute the various copies of the memorandum.

6. Reconsideration of Continued Confinement and Reconfinement After Release

a. Up until the time of referral of charges, the military magistrate shall upon request, and after notice to the parties, reconsider a decision to continue pretrial confinement. R.C.M. 305(i)(2)(E). Reconsideration may be based on any significant information not previously considered. Absent extraordinary circumstances, a military magistrate should review a properly-constituted request for reconsideration within 24 duty hours.

b. Scope of Reconsideration: Normally, reconsideration will consist of the military magistrate reviewing the parties' written submissions. Once a request for reconsideration is received, the military magistrate should ascertain whether the confinee intends to make a statement as part of the reconsideration, keeping in mind that any statement should only be as to any significant information not previously considered. Only if the confinee wishes to make a statement, and upon request by the parties, should the military magistrate conduct an in-person reconsideration review. If a magistrate does conduct an in-person reconsideration review with the parties, the review will generally follow the procedures of the initial pretrial confinement review, but the magistrate will not conduct a de novo review. The reconsideration review will be scoped to receive only significant information not previously considered. However, in arriving at a final determination, the military magistrate should consider all available information, both new and previously considered.

c. Reconfinement After Release: Once a confinee is released from pretrial confinement, the commander may not return the confinee to pretrial confinement except upon discovery, after the order of release, of evidence or of misconduct which, either alone or in conjunction with all other available evidence, justifies confinement. R.C.M. 305(l). The trial counsel will immediately notify the military magistrate who conducted the initial review of any re-confinement and the reasons thereof, if that magistrate is available. AR 27-10, para. 8-5b(3). If the original magistrate is not available, another

magistrate may conduct the review. The determination of whether continued pretrial confinement is warranted will be made by applying the same review and requirements as in any pretrial confinement case.

d. The military magistrate should consult the supervising military judge when a request for a supplemental review is based on a complaint of illegal pretrial confinement. See *United States v. Palmiter*, 20 M.J. 90 (C.M.A. 1985) and *United States v. McCarthy*, 47 M.J. 162 (C.A.A.F. 1997).

e. A military magistrate who has received repeated or questionable requests should inform the supervising military judge.

7. Confinees from Another Service

a. Confinement rules in the Navy, Marine Corps, Air Force, and Coast Guard may differ from rules applicable to Soldiers confined in Army confinement facilities. The place of confinement governs the service-specific rules that will be used in reviewing the propriety of continued pretrial confinement. See AR 27-10, para. 8-5a(3). Note, however, that the requirements of R.C.M. 305 are not service-specific.

b. Before conducting a pretrial confinement review on a military member from another Service, a military magistrate should notify the supervising military judge and the military member's commander. Arrangements for pretrial confinement review by a member of the confinee's Service should be made whenever possible. Pretrial confinement review, however, will not be delayed beyond the time required by R.C.M. 305 solely to obtain review by a member of the confinee's service. Military members of other Armed Forces ordered into pretrial confinement in Army confinement facilities shall be subject to the provisions of Chapter 8, AR 27-10, unless an officer of the other Armed Force requests specific exceptions consistent with R.C.M. 305.

Section IV
Release of Information by Military Magistrates

1. Interviews and Testimony

a. Military magistrates may be interviewed by trial or defense counsel during preparation for litigation or pursuant to some other investigation (for example, an Inspector General Complaint or AR 15-6 investigation). Before and during the interview, the military magistrate should take time to review notes and to be as accurate and precise as possible. A military magistrate should keep a copy of any written statement the magistrate makes. Military magistrates may also properly be called to testify in a court session, such as during a suppression hearing. A military magistrate will notify the supervising judge prior to submitting to an interview or testifying.

b. Appropriate Matters for Disclosure: A military magistrate may properly discuss the basis and the results of the magistrate's decisions during testimony or an interview (i.e., what information the magistrate relied on to reach a decision), but, as a judicial officer, should not reveal the deliberative process behind making that decision (why the magistrate made a particular decision, other than explaining the particular evidence that was relied on). See M.R.E. 509. The magistrate should not embellish or explain the magistrate's reasoning beyond the original findings and conclusions. Magistrates will, upon a request by counsel, a military judge, a law enforcement official, or Article 32 preliminary hearing officer, provide a copy of the affidavit, authorization, notes and any other documents relied on or prepared as part of the military magistrate's duties at issue. A military magistrate should contact the supervising military judge prior to releasing information to any other source. If a requester wishes to inspect documents reviewed by the military magistrate but not kept in the magistrate's possession, the magistrate should refer the person making the request to the custodian of the document in question (such as CID).

2. Media Requests. Military magistrates will not speak to the media about the performance of their duties as magistrates. Answer all inquiries by referring the requester to the local public affairs office. If a military magistrate receives a media inquiry, the magistrate should notify the supervising judge.



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
2200 ARMY PENTAGON
WASHINGTON, DC 20310-2200



DAJA-ZA

26 MAY 2006

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Appointment of Part-Time Military Magistrates

Pursuant to paragraph 9-2b, AR 27-10, you are hereby designated as an appointing authority for part-time military magistrates.

SC Black *MG, USA*

SCOTT C. BLACK
Major General, USA
The Judge Advocate General

DISTRIBUTION:
COMMANDER, USALSA
CHIEF TRIAL JUDGE, US ARMY TRIAL JUDICIARY
CHIEF CIRCUIT JUDGE, FIRST JUDICIAL CIRCUIT
CHIEF CIRCUIT JUDGE, SECOND JUDICIAL CIRCUIT
CHIEF CIRCUIT JUDGE, THIRD JUDICIAL CIRCUIT
CHIEF CIRCUIT JUDGE, FOURTH JUDICIAL CIRCUIT
CHIEF CIRCUIT JUDGE, FIFTH JUDICIAL CIRCUIT
CHIEF CIRCUIT JUDGE, SIXTH JUDICIAL CIRCUIT

XXX-XX

MEMORANDUM FOR Chief Circuit Judge, Second Judicial Circuit, Fort Bragg,
North Carolina 28310

SUBJECT: Nomination of Military Magistrate

1. I nominate **[NAME(s) OF DESIGNEE]** for designation as (a) military magistrate(s) UP Interim Army Regulation 27-10. **[NAME(s) OF DESIGNEE]** will not be involved in criminal investigations, criminal defense or prosecutorial functions, and is not appointed or serving as Special Victim Counsel.
2. **[NAME(s) OF DESIGNEE]** possess(es) the requisite training, experience and maturity to perform the duties of a part-time military magistrate, IAW Interim AR 27-10, paragraph 8-3b(1).
3. Point of contact for this action is the undersigned at [PHONE NUMBER].

JOHN M. DOE
COL, JA
Staff Judge Advocate

Military Magistrate Nomination Data Sheet			
RANK and NAME:		Age:	
Current Duty Position:			
Work Phone: Home/Cell Phone:		FAX:	
E-mail Address:			
Postal Address:			
Total Military Service, Active Duty:			
Total Military Service, USAR/NG:			
AD Experience as a Trial Counsel:		Years	Months <input type="checkbox"/> None
AD Experience as a Defense Counsel:		Years	Months <input type="checkbox"/> None
Has the officer previously served as a Military Magistrate?		<input type="checkbox"/> Yes	<input type="checkbox"/> No
If so, when and where?			
Is the officer currently serving as a Special Victim Counsel?		<input type="checkbox"/> Yes	<input type="checkbox"/> No
Other experience in criminal law (military or civilian):			
Legal experience (military or civilian) other than as indicated above:			
Pertinent military experience (officer or enlisted) other than listed above:			
SJA comments on nominee's maturity, judgment, and temperament:			
Other comments:			
Staff Judge Advocate's Name and Signature:			



DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF CIRCUIT JUDGE
SECOND JUDICIAL CIRCUIT
FORT BRAGG, NORTH CAROLINA 28310

REPLY TO
ATTENTION OF

JALS-TJ2

[DATE]

MEMORANDUM FOR Staff Judge Advocate, 82d Airborne Division, Fort Bragg, North Carolina 28310

SUBJECT: Designation of Military Magistrate

1. I hereby designate MAJ Florence Henderson as a military magistrate pursuant to Interim AR 27-10, paragraph 8-3b(2), and the Standard Operating Procedures for Military Magistrates, Section I, paragraph 2. MAJ Henderson will perform magisterial duties under the supervision of [name of supervising military judge]. MAJ Henderson's authority as a military magistrate is without geographical limitation.

2. Military magistrates cannot be involved in criminal investigations, the criminal defense or prosecution function, or serve or be appointed as Special Victim Counsel. You must notify me if MAJ Henderson begins to perform duties inconsistent with her magisterial role. Unless sooner relieved by me, her tenure as a military magistrate will end four weeks prior to her Permanent Change of Station (PCS) move or assignment to duties inconsistent with her magisterial role, whichever comes first.

3. MAJ Henderson must contact [supervising military judge] to schedule the required training. She will read and become familiar with Rule for Courts-Martial 305, MCM; Section III, Military Rules of Evidence; Interim AR 27-10, Chapter 8; the applicable portions of the Code of Judicial Conduct for Army Trial and Appellate Judges; and the SOP for Military Magistrates. The last document can be downloaded on the Military Justice Database (Army Trial Judiciary Webpage) on JAGCNET at <http://jagcnet.army.mil/USATJ>.

ANN B. DAVIS
COL, JA
Chief Circuit Judge

MILITARY MAGISTRATE ROSTER

2nd JUDICIAL CIRCUIT

Month/Year

Judge	Location	Rank/Name/Email	Office Phone	Home/Cell	Designated	Briefed
JD	Fort Jackson	CPT John Doe, email address	xxx-xxxx (DSN) xxx-xxx-xxxx	xxx-xxx-xxxx xxx-xxx-xxxx	15 July 19	18 July 19
		CPT Mary Smith**				

The block JUDGE indicates the supervising Judge.

JD stands for COL Jane Doe, Chief Circuit Judge, phone xxx-xxx-xxxx; jane.doe@us.army.mil

** currently deployed but duties do not conflict with continued military magistrate service.

MILITARY MAGISTRATE REPORT

NAME AND RANK: _____

DUTY STATION: _____ JUDICIAL CIRCUIT: _____

PERIOD COVERED: _____

1. MAGISTERIAL ACTIVITIES:

a. Names/Locations of Confinement Facilities Used for Pretrial Confinement :
(e.g., Regional Confinement Facility, Ft Knox; Jefferson Co. Jail, Watertown, NY)

b. Number of pretrial confinement (PTC) reviews conducted _____

c. Number of persons released after PTC review: _____

d. Search/seizure/apprehension authorizations:

(1) Requested _____; (2) Issued _____

2. TIME ACCOUNTABILITY:

a. Number of days in which some magisterial duties
were performed: _____

b. Hours performing magisterial duties: _____

c. Hours of travel in connection with magisterial duties: _____

3. REMARKS:

INSTRUCTIONS FOR PREPARATION OF
MILITARY MAGISTRATE REPORT

- 1c. Note any release of a confinee that was directly or indirectly caused by the magistrate.
- 2a. Include as a day any day a portion of which magisterial duties, including acting on search/seizure/apprehension authorizations, were performed.
- 2b & c Round to full hours.
- 2c Total travel hours includes travel to and from airport or terminal and waiting time at terminals. Round out to next full hour. Do not include travel time from quarters to place of duty.
- 3. Note in remarks:
 - a. Magistrate duties performed anywhere other than the magistrate's assigned installation.
 - b. Any special problems or unique situations.
 - c. Comments on support rendered by local command.
 - d. Other pertinent comments regarding improvements in the program, special recognition that should be accorded or systemic problems that should be addressed.

SEMI-ANNUAL MILITARY MAGISTRATES REPORT
2nd Judicial Circuit
Month /Year

Installation	PTC Reviews Conducted	Persons Released	Search & Seizure/Apprehension Req'd/Auth		#Days Mag Duties	#Hrs Mag Duties	#Hrs Travel
Fort Bragg	1	0	1	1	3	10	0
Fort Gordon	2	0	1	1	4	15	0

GUIDE TO ARTICULATING PROBABLE CAUSE TO SEARCH

1. Probable cause to authorize a search exists if there is a *reasonable belief, based on facts*, that the person or evidence sought is at the place to be searched. Reasonable belief is more than mere suspicion. The witness or source should be asked three questions:

A. What is where and when? Get the facts!

1. Be specific: how much, size, color, etc.

2. Is it still there (or is information stale)?

a. If the witness saw a joint in barracks room two weeks ago, it is probably gone; the information is stale.

b. If the witness saw a large quantity of marijuana in barracks room one day ago, probably some is still there; the information is not stale.

B. How do you know? Which of these apply:

1. "I saw it there." Such personal observation is extremely reliable.

2. "He [the suspect] told me." Such an admission is reliable.

3. "His [the suspect's] roommate/wife/ friend told me." This is hearsay. Get details and call in the source if possible.

4. "I heard it in the barracks." Such rumor is unreliable unless there are specific corroborating and verifying details.

C. Why should I believe you? Which of these apply:

1. The witness is a good, honest Soldier; you know him from personal knowledge or by reputation or opinion of chain of command.

2. The witness has given reliable information before; he has a good track record (CID may have records).

3. The witness has no reason to lie.

4. The witness has a truthful demeanor.

5. The witness made a statement under oath. ("Do you swear or affirm that any information you give is true to the best of your knowledge, so help you God?")

6. Other information corroborates or verifies details.

7. The witness made an admission against his or her own interests.

2. The determination that probable cause exists must be based on facts, not only on the conclusion of others.

3. The determination should be a common sense appraisal of the totality of all the facts and circumstances presented.

NOTES ON REQUEST FOR SEARCH AUTHORIZATION

Date/Time Called: _____

Called By: _____ of the _____ office. The requester **did/did not** present an affidavit.

The requester **was/was not** sworn. (The requester was not sworn because _____).

The requester **had/had not** previously requested another magistrate, judge or commander, to grant the same request. (If such a previous request was made, what new information - if any - has been obtained?

The offense being investigated was: _____

The requester requested to search for the following items: _____

The requester wanted to search for the items at/in following place(s) or upon the following person: _____

Why does the requester believe that what he/she wants to search for is located at the place(s) he/she wishes to search? (Indicate here a narrative of the information the requester presents. If an affidavit is attached, indicate only information that is not contained in the affidavit. Use "Fact Notes" sheets to detail information.)

Documents or reports **were/were not** reviewed in making my decision. The names of the items I reviewed **are/are not** listed on reverse. I **did/did not** initial all pages of documents I reviewed.

Probable cause to search exists when there is a reasonable belief that the property, or evidence sought is located in the place or on the person to be searched.

The request was **approved/disapproved/approved with the following modifications:** _____
_____. A written search authorization **was/was not** executed.

Pretrial Confinees Log

Soldier L. Name, F.	Date Confined	Date of Review	Date Charges Preferred	Level of Court

CHECKLIST FOR REVIEW OF PRETRIAL CONFINEMENT

1. Is the Soldier/confinee subject to the UCMJ?
2. Was the Soldier confined by order of a commissioned officer of the Armed Forces?
3. Was the Soldier previously confined for the same offense(s) and released by any person authorized under R.C.M. 305(g)?
4. Did the Soldier's commander decide within 72 hours of ordering the Soldier into pretrial confinement, or receipt of a report that a member of his unit was confined, whether pretrial confinement would continue?
5. Did the commander prepare a memorandum of his reasons for approving continued pretrial confinement?
6. Has a charge sheet been prepared?
7. Is the Soldier charged only with an offense normally tried by summary court-martial?
8. Did the Soldier have or request military counsel prior to this review or meeting with the prisoner?
9. Was the Soldier's counsel informed of the date, time and place of any meeting with the prisoner?
10. Has the Soldier been informed of:
 - a. The nature of the offenses for which held;
 - b. The right to remain silent and that any statement made by the Soldier may be used against the Soldier;
 - c. The right to retain civilian counsel at no expense to the United States, and the right to request assignment of free military counsel; and
 - d. The procedures by which continued pretrial confinement will be reviewed?
11. Is there a preponderance of the evidence to believe that:
 - a. An offense triable by court-martial has been committed;
 - b. The Soldier committed it; and
 - c. Pretrial confinement is required?
12. Has a written memorandum of the decision to approve continued pretrial confinement or order immediate release, including the factual findings upon which they were based, been prepared?
13. Have the Soldier and the commander been informed of the decision?
14. Has a copy of the memorandum of the decision with all documents considered been kept on file?

List of nonexclusive factors to consider in determining whether continued PTC is warranted		
Factor	Discussion	Magistrate's Notes
The nature and circumstances of the offenses charged or suspected, including extenuating circumstances.	The more serious the offense(s), the more likely it may be the Soldier might want to avoid prosecution	
The weight of the evidence against the Soldier	The more likely there will be a conviction, the more likely it may be the Soldier might avoid trial	
The Soldier's ties to the community, including house, family, off-duty employment, financial resources, and length of residence	Where is home? What does the Soldier have to gain or lose by leaving the area?	
The Soldier's character and mental condition.	Law abiding? Follows orders? Violent? Peaceful? Stable?	
The Soldier's service record, including any record of previous misconduct. Consider counseling statements if part of the commander's packet.	If the unit is to use conditions on liberty, those conditions are often enforceable only by moral suasion on the Soldier. Is the Soldier the kind of Soldier that follows orders?	
Has the Soldier been disciplined before? How did (s)he respond to corrective action?	Soldiers who respond favorable to corrective action are less likely to engage in future misconduct.	
The Soldier's record of appearance at or flight from other pretrial investigations, trials and similar proceedings.	Is there evidence the Soldier has missed appointments or hearings?	
The likelihood the Soldier can and will commit further criminal misconduct if allowed to remain at liberty pending trial?	This is a combination of a lot of other factors.	
What other forms of restraint have been tried, if any, and found to be ineffective?	The commander is not required to actually try lesser forms of restraint but the magistrate should not continue confinement unless lesser forms of restraint won't work. If the unit has tried lesser forms of restraint, how did the Soldier respond to them?	
If AWOL before being confined, how did the Soldier come under military control and how long was the absence?	Was the AWOL terminated by apprehension or did the Soldier turn himself in. Is there evidence the AWOL was a desertion or just cold feet.	
Does the Soldier have a history of AWOL, desertion, FTRs?		

List of nonexclusive factors that might indicate whether the Soldier may or may not interfere with trial preparation or obstruct justice

Factor	Discussion	Magistrate's Notes
Does the case depend mainly on witness testimony rather than documentary or physical evidence?	Documents don't change. Witnesses can.	
Are the witnesses members of the Soldier's unit, live in the Soldier's barracks or have a common place of duty with the confine?	Does the Soldier have access to the witnesses?	
What is the Soldier's reputation, if any, for violence, bribery or false statements.		
Is there reliable information demonstrating threats or acts of violence against witnesses by or at the behest of the Soldier?		
Has the confinee violated conditions of any previously established no contact or protective orders.		

Other Notes

PRETRIAL CONFINEMENT REVIEW SCRIPT

NOTE: This suggested script is provided for use by military magistrates conducting pretrial confinement reviews under R.C.M. 305. While the review is not adversarial, the accused has limited rights. See R.C.M. 305(i)(2)(A)(i)). The military magistrate in his/her discretion may permit greater involvement by counsel so that the magistrate has sufficient information upon which to base a decision. Nothing requires that the review be conducted in the presence of both the Government Representative and the defense; however, this suggested script assumes all parties are present at one time and one location. Magistrates should adapt the script to how they desire to conduct the review.

Military Magistrate (MM): My name is _____. I have been designated as a military magistrate by order of the Chief Circuit Judge, [Second] (fill in appropriate circuit) Judicial Circuit, U.S. Army Trial Judiciary.

MM: (To the accused) As a military magistrate, it is my duty to thoroughly and impartially review the matters associated with your case to determine if your pretrial confinement will continue. This review will include an examination of the relevant facts surrounding the offense(s) of which you (are suspected of having committed) (have been charged). My review is not a trial, nor is it an adversarial proceeding or hearing. However, it is my duty to review, evaluate, and weigh the evidence to determine whether there is a preponderance of the evidence to believe that an offense under the Uniform Code of Military Justice has been committed; that you committed such offense(s); that confinement is necessary; and that less severe forms of restraint are inadequate. Based upon my review, I will determine whether you should remain in pretrial confinement as ordered by _____.

Do you understand the purpose of my review and my role?

Accused (ACC): _____.

MM: At this time, it is appropriate that I advise you of your rights during this review. First, you have the following rights granted to you by Article 31 of the Uniform Code of Military Justice:

- (a) You do not have to answer my questions or say anything.
- (b) Anything you say or do can be used as evidence against you in a criminal trial.
- (c) You have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with you during questioning. This lawyer can be a civilian who you arrange for at no expense to the Government or a military

lawyer detailed for you at no expense to you, or both.

- (d) If you are now willing to discuss the offense(s) under investigation, with or without a lawyer present, you have a right to stop answering questions at any time, or you can speak privately with a lawyer before answering further, even if you agree to talk about the offenses.

MM: Do you understand these rights?

ACC: _____

MM: If you do wish to make a statement, it can be a sworn or unsworn statement, it can be done orally or in writing, and it can be about the offenses or why your pretrial confinement should not continue. Do you understand that?

ACC: _____

MM: You may submit written matters from you or others for my consideration. Do you understand these rights?

ACC: _____

MM: You are (suspected of committing) (charged with) the offense(s) of

in violation of Article(s) _____, UCMJ.

(For cases where charges have been preferred): The name of the accuser is

MM: *(Right to counsel)* With regard to counsel during this pretrial confinement review, you have the following rights: First, you have the right to be represented free of charge by military counsel.

Additionally, you have the right to a civilian attorney at no cost to the Government. If you choose to be represented by a civilian lawyer, you can excuse your military counsel and be represented only by your civilian lawyer, or you can keep your military lawyer to assist your civilian lawyer. Do you understand your rights to counsel?

ACC: _____

MM: By whom do you wish to be represented during this pretrial confinement review?

ACC: _____

MM: Also present for this review is _____, the government representative.

MM: I intend to consider or have considered the following documentary evidence:

(list exhibits to be considered)

(I also (intend to interview) (have interviewed) the following witnesses):

Is there anything you wish me to consider?

ACC/DC: _____

MM: (To the accused) Do you wish to remain silent or make a sworn or unsworn statement for my consideration in this review?

ACC/DC: _____

MM: Defense counsel, do you desire to make a statement on behalf of the confinee?

DC: _____

MM: Does the Government Representative desire to make a statement?

GR: _____

MM (If there is a named victim as to any suspected or charged offense): Government, was the alleged victim informed of this review, and does he/she wish to be heard, either directly or through counsel, for the limited purpose of this review?

GR: _____

[NOTE: The military magistrate may make an oral decision before concluding the session or conclude the session and make the decision at a later time. In either event, the military magistrate's conclusions must be set forth in a written memorandum. The memorandum must be provided to the parties upon request. R.C.M. 305(i)(2)(D).]

MM: This review is concluded.

MEMORANDUM OF MILITARY MAGISTRATE'S CONCLUSIONS

DATE: _____
NAME OF SOLDIER: _____ Rank: _____ SSN: _____
UNIT: _____.

TO: SEE DISTRIBUTION

1. On_____, I reviewed the circumstances concerning the continued pretrial confinement of the above named Soldier. Based on this review, I have determined by a preponderance of the evidence that an offense triable by courts-martial **(has) (has not)** been committed and that the Soldier **(did) (did not)** commit it. Further I find that continued pretrial confinement **(is) (is not)** warranted because

(A) It **(is) (is not)** foreseeable that the confine will not appear for trial, pretrial hearing or investigation;

[and/or – military magistrate should pick (A) and/or (B) as applicable]

(B) It **(is) (is not)** foreseeable that the confine will engage in serious criminal misconduct; and

Less severe forms of restraint **(are) (are not)** adequate.

2. My conclusions and the factual findings on which they are based are:

[here the military magistrate should precisely state his/her conclusions and the relevant facts supporting those conclusions].

3. A copy of all documents that I considered are listed below, are attached to the original of this memorandum, and may be inspected in the office of the undersigned.

4. The (Cdr) (TC) has advised that the anticipated level of disposition is: (GCM) (SPCM) (SCM).

5. The Soldier was notified of my decision on_____.

6. [If applicable] The alleged victim was notified of the review, was given the opportunity to confer with the representative of the command or counsel for the government, and was given a reasonable opportunity to be heard.

7. A continuation sheet **(is not attached) (is attached and consists of _____pages.)**

When the Soldier is ordered released, complete the below.

(8. _____ was notified of my order to release the Soldier on_____.)

DISTRIBUTION:

Cdr, Confinement Facility, Fort _____

Trial Counsel, _____

Defense Counsel, _____

Military Judge, _____

_____, JA
Military Magistrate

ENCLOSURES:

1. Pretrial Confinement Checklist

2. Confinement Order

() Charge Sheet

() Statement(s)

() [Other]



DEPARTMENT OF THE ARMY
U.S. ARMY TRIAL JUDICIARY, 7th JUDICIAL CIRCUIT
Area Support Group Kuwait
APO AE 09366

REPLY TO
ATTENTION OF:

JALS-CJ7

30 March 2020

MEMORANDUM FOR Captain John Doe

SUBJECT: (Redeployment) (Deployment) as a Military Magistrate

1. I understand that you are (redeploying back to your home station) (deploying to _____) and will remain in duties consistent with your role as a military magistrate. Accordingly, your designation as a military magistrate remains effective.
2. Upon arrival in the (____) Circuit, you must contact Colonel Janet E. Begood, who will be your supervising military judge while you are in (arriving location). You can reach her at (contact information). You will take all guidance in performing your military magistrate duties from COL Begood while in the (____) Circuit. When magistrate reports are due, you will file one in each circuit in which you performed duties as a military magistrate, each report covering only the duties performed as a military magistrate within that circuit. Please file your (losing circuit number) Circuit report with the Clerk, (____) Judicial Circuit, (name and contact info), and your (gaining circuit number) Circuit report with the Clerk, (____) Judicial Circuit, (name and contact info).
3. Even though there are no geographic limitations to your authority as a military magistrate, after you (redeploy) (deploy), you will not perform military magistrate duties in cases back in the (losing circuit number) Circuit, even if you have previously performed military magistrate duties in the case, without express permission from me.
4. Safe travels. If you have any questions, please do not hesitate to contact your supervising military judge.

CHIEF C. JUDGE
COL, JA
Chief Circuit Judge

CF:
(Gaining/Losing Juris. Supervising Judge)
(Gaining Juris. Clerk of Court)
(Losing Juris. Clerk of Court)



DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF CIRCUIT JUDGE
U.S. ARMY TRIAL JUDICIARY, 2nd JUDICIAL CIRCUIT
FORT BRAGG, NORTH CAROLINA 28310

REPLY TO
ATTENTION OF:

JALS-TJ2

1 AUGUST 2019

MEMORANDUM FOR Staff Judge Advocate, (Installation and Location)

SUBJECT: Termination of Military Magistrate Designation

1. Due to his (PCS) (assignment to a position inconsistent with the performance of magistrate duties) (other), the designation of (name) as a military magistrate is terminated effective (today) (enter effective date).
2. The point of contact for this matter is the Clerk of Court, (name and contact info).

CHIEF C. JUDGE
COL, JA
Chief Circuit Judge

APPENDICES

SEARCH AND SEIZURE AUTHORIZATION

For use of this form, see AR 27-10; the proponent agency is OTJAG

TO: (Name and Organization of the person to whom authorization is given)

Special Agent Sam Spade, 87th MP DET (CID), Fort Bragg, NC, a CID Special Agent employed by the U.S. Army Criminal Investigation Command, and any other authorized agent in support of this investigation, to include USACIL forensic examiners.

(An affidavit) A (sworn) or (unsworn) oral statement having been made before me by Special Agent Sam Spade
(Name of Affiant)

Fort Bragg CID Office, Fort Bragg, NC 28310

(Organization or Address of Affiant)

(which affidavit is attached hereto and made a part of this authorization), and as I am satisfied that there is probable cause to believe that the matters mentioned in the affidavit are true and correct, that the offense set forth therein has been committed, and that the property to be seized is located (on the person) (at the place) to be searched, you are hereby ordered to search the (person) (place) known as

the person of PFC Mike Darkweb, and the barracks room of PFC Darkweb, located at Bldg. C-3526, Room 7, Fort Bragg, NC

for the property described as iPhone 6, SN 123Z56, and any other devices or media capable of sending, receiving, storing, or retrieving digital images or videos; and to subsequently search said devices for images and videos of minors engaging in sexually explicit conduct, including in any app, email program, or web browser capable of sending, receiving, or managing such content.

bringing this order to the attention of the (person searched) (person in possession) if any person be found at the place or on the premises searched. The search will be made in the (daytime) (nighttime), and if the property is found there, you shall seize it, issue a receipt therefor to the person from whom the property is taken or in whose possession the property is found, deliver the property to:

Evidence Custodian, Fort Bragg CID Office, Fort Bragg, NC 28310

(Name and Organization of Authorized Custodian)

and prepare a written inventory of the property. If there is no person at the searched place to whom the receipt may be delivered, the receipt will be left in a conspicuous location at the place or on the premises where the property is found.

Dated this 15 day of July, 2019

TYPED NAME AND GRADE OF AUTHORIZING OFFICIAL
CPT Lettit BeDone

DUTY POSITION OF AUTHORIZING OFFICIAL

Military Magistrate

ORGANIZATION OF AUTHORIZING OFFICIAL
Office of the Staff Judge Advocate
Fort Bragg, NC

SIGNATURE OF AUTHORIZING OFFICIAL

Magistrate Signs Here

Notes for Sample DA 3745 (Search and Seizure Authorization)

*Disclaimer: This form is an example only and is intentionally broad in scope in order to demonstrate language that may be appropriate, depending on the facts presented.
A search and seizure authorization must always be tailored to the facts at hand.*

In the “TO” section: Specify the agent(s) authorized to conduct the search and/or seizure; this may include, for example, follow-on laboratory or forensic examiners.

Under the “TO” section: Circle which written or unwritten information was supplied

“which affidavit is attached hereto...”: Circle this if it applies. It is important that your basis for authorizing the search be clear.

“(on the person) (at the place)”: Circle what applies. It may be one or both depending on the circumstances. Specificity matters.

“for the property described as”: Specificity matters. Carefully tailor and scope the search based on probable cause.

“bringing this order to the attention of...”: generally, only make remarks or notations in this paragraph when necessary. Remember that the magistrate determines “what” may be searched based on probable cause; “how” the search is conducted is normally left to the discretion of the executing agents, unless specific direction is necessary.

“prepare a written inventory of the property”: executing agents sometimes forget to return the required written inventory to the magistrate upon completion of a search. Use this form to remind them.

APPREHENSION AUTHORIZATION

For use of this form, see AR 27-10; the proponent agency is OTJAG

TO: (Name and organization of the person to whom authorization is given)

(An affidavit) (A (sworn) or (unsworn) oral statement) having been made before me by

(Name of Affiant)

(Organization or Address of Affiant)

(which affidavit is attached hereto and made a part of this authorization), and as I am satisfied that there is probable cause to believe that the matters mentioned in the affidavit are true and correct, that the offense set forth therein has been committed, and the person to be apprehended committed the offense and is located at the place to be searched, you are hereby ordered to search the place known as

for the person described as

bringing this order to the attention of the (person apprehended) (person in possession, if any person be found at the place or on the premises searched). The search will be made in the (daytime) (nighttime), and if the person described above is found there, you shall apprehend him/her.

Dated this _____ day of _____, _____.

TYPED NAME AND GRADE OF AUTHORIZING OFFICIAL

DUTY POSITION OF AUTHORIZING OFFICIAL

ORGANIZATION OF AUTHORIZING OFFICIAL

SIGNATURE OF AUTHORIZING OFFICIAL

AFFIDAVIT SUPPORTING REQUEST FOR AUTHORIZATION TO SEARCH AND SEIZE OR APPREHEND

For use of this form, see AR 27-10; the proponent agency is OTJAG.

BEFORE COMPLETING THIS FORM, SEE INSTRUCTIONS ON PAGE 2

1. I, _____, _____
(Name) (Organization or Address)

having been duly sworn, on oath depose and state that:

2. The affiant further states that:

3. In view of the foregoing, the affiant requests that an authorization be issued for a search of _____

(the person) (and)

(the quarters or billets) (and)

(the automobile) _____ and (seizure) (apprehension) of _____

(items/persons searched for)

TYPED NAME AND ORGANIZATION OF AFFIANT

SIGNATURE OF AFFIANT

SWORN TO AND SUBSCRIBED BEFORE ME THIS _____ DAY OF _____ AT _____

TYPED NAME, ORGANIZATION AND OFFICIAL CAPACITY OF AUTHORITY
ADMINISTERING THE OATH

SIGNATURE OF AUTHORITY ADMINISTERING THE OATH

INSTRUCTIONS FOR

AFFIDAVIT SUPPORTING REQUEST FOR AUTHORIZATION TO SEARCH AND SEIZE OR APPREHEND

1. In paragraph 1, set forth a concise, factual statement of the offense that has been committed or the probable cause to believe that it has been committed. Use additional page if necessary.

2. In paragraph 2, set forth facts establishing probable cause for believing that the person, premises, or place to be searched and the property to be seized or the person(s) to be apprehended are connected with the offense mentioned in paragraph 1, plus facts establishing probable cause to believe that the property to be seized or the person(s) to be apprehended are presently located on the person, premises, or place to be searched. Before a person may conclude that probable cause to search exists, he or she must first have a reasonable belief that the person, property or evidence sought is located in the place or on the person to be searched. The facts stated in paragraphs 1 and 2 must be based on either the personal knowledge of the person signing the affidavit or on hearsay information which he/she has plus the underlying circumstances from which he/she has concluded that the hearsay information is trustworthy. If the information is based on personal knowledge, the affidavit should so indicate. If the information is based on hearsay information, paragraph 2 must set forth some of the underlying circumstances from which the person signing the affidavit has concluded that the informant (whose identity need not be disclosed) or his/her information was trustworthy. Use additional pages if necessary.

3. In paragraph 3, the person, premises, or place to be searched and the property to be seized or the person(s) to be apprehended should be described with particularity and in detail. Authorization for a search may issue with respect to a search for fruits or products of an offense, the instrumentality or means of committing the offense, contraband or other property the possession of which is an offense, the person who committed the offense, and under certain circumstances for evidentiary matters.