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# How to Achieve Success in Federal Magistrate Court

BY CAPTAIN DAVID K. ROLEK & CAPTAIN GABRIEL W. BUSH

Beyond the relevant Air Force Instruction (AFI), there is little Air Force guidance available to JAGs on the administration and prosecution of magistrate court cases.

Many legal offices across the Air Force administer a federal magistrate court program, with judge advocates (JAGs) appointed as Special Assistant U.S. Attorneys (SAUSAs) to prosecute misdemeanor offenses committed by civilians on areas of federal jurisdiction.<sup>[1]</sup> Beyond the relevant Air Force Instruction (AFI), there is little Air Force guidance available to JAGs on the administration and prosecution of magistrate court cases. Based on lessons learned from the Air Force's largest magistrate court program, this article identifies four practical ways JAGs can achieve success as SAUSAs in federal magistrate court<sup>[2]</sup> and offers a brief concluding case study.

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## (1) GET TO KNOW THE KEY PLAYERS

Relationships are the key to administering an effective magistrate court program. A JAG who has only prosecuted courts-martial may be unfamiliar with the critically impor-

tant allies he or she must team with to be successful in this forum. This section will explain the roles and capabilities of the players and agencies with whom a magistrate court JAG should establish a good working relationship.

### The United States Attorney's Office (USAO)

In the world of military justice, trial counsel will typically consult with the Deputy Staff Judge Advocate (DSJA), Staff Judge Advocate (SJA), and/or Senior Trial Counsel (STC) in preparation for trial. While the DSJA and SJA are still available to provide guidance, a SAUSA's primary advisor is the Assistant U.S. Attorney (AUSA) appointed as the liaison to the military installation.<sup>[3]</sup>

The AUSAs are typically eager to provide guidance to JAGs prosecuting these on-base misdemeanor offenses that may not otherwise be a priority for them.

The JAGs serving as SAUSAs should work closely with their assigned AUSA and utilize her or his expertise and familiarity with the magistrate court forum. An AUSA can provide invaluable input on charging determinations, charging language, how to interact with the court and other agencies, appropriate plea offers for defendants, sentencing recommendations, and any other questions that arise along the way.

The AUSAs are typically eager to provide guidance to JAGs prosecuting these on-base misdemeanor offenses that may not otherwise be a priority for them. To put this in perspective, and according to the United States Attorney for the Western District of Texas, Richard L. Durbin Jr.:

“[T]he U.S. Attorney’s Office would not have the personnel to address the large volume of cases that arise on military properties in San Antonio. It is so important to the work of our service members that order and discipline be observed throughout these properties. It is only through the fine work of the magistrate court SAUSAs who regularly appear in federal court that there is an effective prosecution program that supports the mission of Joint Base San Antonio. Their participation on this program is invaluable.”<sup>[4]</sup>

### The United States Pretrial Services Office (PSO)

Once a defendant is charged with a misdemeanor in magistrate court, he or she is typically released on bond while awaiting trial. While on bond, the court expects the defendant to be on her or his best behavior. The court monitors the defendant by assigning a pretrial services officer (PSO), who ensures the defendant complies with any limitations set by the court.<sup>[5]</sup> Should the defendant violate a bond condition, the PSO can file a petition with the court to place the defendant in pretrial confinement or the pretrial violation can be used as an aggravating factor at sentencing. For these reasons, it is vitally important that SAUSAs maintain open lines of communication with the PSO.

### The United States Probation Office (USPO)

A term of probation is a common sentence for magistrate court defendants, especially first-time offenders. While serving probation, the defendant will be assigned to a United States Probation Officer (USPO) to ensure she or he complies with the conditions set by the judge.<sup>[6]</sup> If the defendant violates one of these conditions, the USPO can petition the court to revoke probation, subjecting the defendant to the maximum penalty that could have been imposed at the original trial.<sup>[7]</sup> The USPO is typically the government’s key witness to prove the defendant’s violations at a probation revocation hearing.

The USPO is an important ally even before the trial is held. In every case, the USPO makes a recommendation to the magistrate judge as to the appropriate sentence for the defendant, taking into consideration the **U.S. Sentencing Guidelines**,<sup>[8]</sup> the defendant’s criminal history, and the defendant’s performance while on bond. The prosecuting SAUSA should contact the USPO before trial to discuss the USPO’s recommended sentence. By doing so, the SAUSA can be confident that a proposed plea offer is appropriate, and will avoid recommending an unreasonable sentence at trial.

### The Clerk of the Court

Because JAGs are often unfamiliar with the procedural differences between magistrate court and courts-martial, having a good working relationship with the clerk of the court is invaluable. Successful SAUSAs will establish a relationship with the magistrate judge’s clerk or deputy. The clerk is responsible for many of the administrative functions that are the government’s responsibility at a court-martial.<sup>[9]</sup> More importantly, a magistrate judge’s clerk knows her or his judge’s preferences on countless courtroom issues and can provide guidance on what to expect during different types of hearings.

## **(2) GET TO KNOW YOUR BASE**

No two magistrate court programs are the same, so understanding the local geography and community are vital to success in federal court. Knowing your base includes

understanding trends of the types of crimes being committed, their frequency and location, and the perpetrators who commit them. With this understanding, the SAUSA will know where to focus her or his efforts, improve training, and develop best practices.

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## Knowing your base includes understanding trends of the types of crimes being committed...

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For example, from June 2016 through June 2017, the Joint Base San Antonio (JBSA) magistrate court program brought charges against over 100 criminal defendants. Of those, 42 were for driving while intoxicated (DWI) and 30 involved drug related offenses. Of these DWI and drug charges, 74% occurred at Fort Sam Houston. Why is Fort Sam Houston such a hot spot for DWI and drug charges? A closer look at the city of San Antonio and its history provides some insight.

San Antonio is part of Bexar County, which has historically had one of the highest drunk-driver rates in the nation.[10] The result is an average of one to two DWI offenses being committed somewhere on JBSA each week. Fort Sam Houston sits in the heart of San Antonio, just blocks away from the downtown metropolitan area, concert venues, scores of bars, and individuals coming and going from the city. Until 2003, Fort Sam Houston was open to the public as a thoroughfare and some GPS devices continue to direct drivers to gas stations and services located on base.[11] Entry control points often do not appear on GPS devices and civilians are caught off guard when they round a corner to find themselves facing a military checkpoint guarded by armed security forces.

Fort Sam Houston also draws an unusually high number of visitors to the **San Antonio Military Medical Center (SAMMC)**—the Department of Defense’s (DoD) largest inpatient hospital—located inside the installation.[12] Non-DoD affiliated civilians are also eligible for emergency services at SAMMC and are frequently rushed onto base in ambulances. During treatment, personal items are

inventoried and security forces are notified if contraband is discovered. JBSA SAUSAs routinely prosecute these non-DoD affiliated civilians who arrive at SAMMC with illegal substances.

Getting to know the unique aspects of JBSA has helped identify DWI and drug possession as serious problems for the installation. As a result, steps were taken to bolster successful prosecution of these offenses. The magistrate court program enhanced training with security forces to detect signs of intoxication, conduct standard field sobriety test (SFSTs), execute probable cause searches, properly preserve evidence, and obtain breath samples. Entry control points next to freeways and public roads at which DWIs most frequently occur have been identified, and security forces has been provided with handheld cameras to ensure all DWI stops are recorded. The base has also developed an on-call system where the Federal Bureau of Investigation (FBI) is notified and can respond to felony-level DWIs or off base pursuits. By understanding the installation and the community, a SAUSA will be better prepared to address misconduct when it occurs.

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### (3) IDENTIFY THE APPROPRIATE DISPOSITION FOR CIVILIAN MISCONDUCT

The Air Force’s interests in holding civilian offenders accountable for on-base misdemeanors is often different than its interest in prosecuting courts-martial. Furthermore, the Air Force’s interest in a civilian offender can vary greatly depending of the status of the civilian.[13]

What then should a SAUSA consider when deciding how best to address on-base civilian criminal misconduct? The first step is to decide the appropriate forum for the misconduct. A JAG should first assess whether any of the administrative

tools available will achieve the Air Force's objectives. For example, if a government contractor threatens an active duty member, will debarment from the installation be sufficient? If a dependent child is caught stealing \$20 worth of costume jewelry from the Base Exchange (BX), will a revocation of BX and Commissary (Defense Commissary Activities—DeCA, hereafter) privileges be sufficient to address the problem? In other words, the SAUSA should first consider whether administrative remedies such as debarment, revocation of driving privileges, loss of BX/DeCA privileges, or adverse employment actions for government employees can satisfy the Air Force's interest in addressing civilian misconduct.

Another option available in most federal jurisdictions is **pretrial diversion**. Pretrial diversion is a program run by the U.S. Pretrial Services Office that can be a useful rehabilitative tool for first-time civilian offenders. An offender who participates in the program agrees to be monitored by a PSO for a period of 3 to 18 months, and will serve what amounts to a period of probation. If the offender stays out of trouble and satisfies all conditions set by the PSO (such as completion of a set number of hours of community service, or payment of restitution), the government agrees to not prosecute the offense. The program is valuable, if satisfactorily completed, because it rehabilitates the offender without the investment of resources in a full-on prosecution of the case.[14]

Some on-base civilian misconduct is serious enough that a federal conviction is warranted.[15] Once charges are filed, the SAUSA must then ask, "What is the goal of this prosecution?" The goal may be pursuing a federal conviction for the offense in order to deter future similar misconduct. This may be the case when the defendant has no DoD affiliation. Alternatively, the offense may be serious enough that confinement or a monetary fine is necessary to achieve justice. In these cases, a SAUSA should consult with their AUSA to ensure the defendant is being charged in the appropriate forum. In cases of egregious misconduct, having the AUSA prosecute the case at the felony level may be most appropriate. In the authors' experience, magistrate judges rarely sentence defendants to confinement for these misdemeanor offenses, absent a pre-existing criminal history. If punishment beyond probation is imposed, the most

common additional punishment is a nominal fine between \$100 and \$500.

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These are important points to keep in mind when engaging in plea negotiations with defense counsel. By identifying the government's interest early, SAUSAs will know which points he or she is willing to cede and which are non-negotiable. Plea agreements allow SAUSAs to achieve justice without expending unnecessary resources, often for little, if any, additional benefit. A typical plea agreement might offer to dismiss a lesser charge in exchange for a guilty plea to a more serious charge or the government may agree to make a non-binding sentencing recommendation to the magistrate judge.[16] If SAUSAs identify the Air Force's interest in a civilian offense/offender early, they can save themselves considerable headache by avoiding unnecessary battles.

#### **(4) MAKE SMART CHARGING DECISIONS**

Over the course of a magistrate court prosecution, a SAUSA will make several strategic decisions that will affect the outcome of a case. The SAUSA's first strategic decision is determining which offense(s) to charge. The charges filed impact the forum, the law that will apply, and the sentence that can be imposed—all of which are vital to achieving a successful, just prosecution of a criminal offender.

SAUSAs have at their disposal the full spectrum of federal misdemeanor offenses, as well as the misdemeanor offenses of the state in which the crime is committed. Under 18 U.S.C. § 13 (2017), SAUSAs are able to assimilate state offenses into the magistrate court charging document.

SAUSAs should consider whether the case can be charged as either a Class A or a Class B misdemeanor. Defendants charged with Class A misdemeanors are entitled to a jury trial, whereas defendants charged with a Class B misde-

meanor are not.[17] If a case involves issues that would likely confuse the jury or might result in jury nullification, SAUSAs can make the strategic decision to charge a lesser offense (Class B) in order to ensure a (magistrate) judge will be the finder of fact and apply the law appropriately.[18] Additionally, SAUSAs should closely examine a case and consider charging every offense that has been committed. By charging all offenses for which the prosecution has a good-faith basis, SAUSAs garner additional flexibility in reaching a plea agreement.[19] SAUSAs will also have a wider range of misconduct to address in sentencing, and will avoid evidentiary problems that could result from introducing uncharged misconduct during trial.

SAUSAs should also be aware of their ability to petition the court to place a defendant in pretrial confinement under certain circumstances. If a defendant is facing other federal or state court charges, poses a risk to the community, or is a flight risk, under federal law the magistrate judge is authorized to detain the defendant until trial.[20] If the defendant is sitting in pretrial confinement, defense counsel will likely be motivated to resolve the case quickly—which may help facilitate a plea agreement to achieve swift justice.

### These Principles in Action: A Brief Case Study

By way of example, a case prosecuted at JBSA in 2016 shows how these principles can be applied in practice.

The defendant had been transported to SAMMC after having his jaw broken into three pieces during a fight at a halfway house. Upon conducting an inventory of his belongings, hospital personnel found methamphetamine, for which he was charged. Security and hospital personnel followed the magistrate court program's training and flawlessly preserved the chain of custody. The defendant had an extensive criminal record, including three prior drug possession convictions, and the judge ordered him to be detained as he awaited his trial because he was a flight risk.

The government's evidence was strong and the defense's end goal was clear: move the case as quickly as possible to get the defendant out of jail. The defense was initially open to a plea agreement, but only on terms that did not involve confinement. As prosecutors, it was tempting to push for a trial and up to 12 months confinement. However, upon further examination and coordination with the FBI and the AUSA liaison, the SAUSAs learned the defendant was involved in running a prostitution ring for prisoners.

With this knowledge, the government's end game changed. The defendant's involvement in the prostitution ring would result in felony charges; confinement would be more likely and more extensive for that charge than in a magistrate court case. The government also knew a conviction in a magistrate court case would bolster the sentence in the felony case to come. The SAUSA decided that, given these circumstances, justice could be best achieved in magistrate court with a plea offer that involved no confinement. The defense jumped at the offer and the defendant pled guilty in magistrate court two days later. Defense counsel and their client were smug at the hearing, thinking they had strong-armed their will to victory. The next day, however, the defendant appeared on statewide news after being indicted for his involvement in the prostitution ring. Defense counsel was notified that his client was transferred back to federal confinement to await trial on felony charges.

### **CONCLUSION**

In federal magistrate court SAUSAs should work to develop strong relationships with their USAO and courthouse staff. Further, SAUSAs should study criminal trends, respond effectively, manage caseloads efficiently, remain open to creative plea deals, and craft charges with the end goal of justice in mind. If these techniques are employed, success will inevitably follow, thereby fostering better magistrate programs and SAUSA-litigators across the Air Force.

## ABOUT THE AUTHORS

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## EXPAND YOUR KNOWLEDGE:

### EXTERNAL LINKS TO ADDITIONAL RESOURCES

- **USCourts.Gov:** Probation and Pretrial Officers and Officer Assistants, <https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-officers-and-officer>
- **YouTube:** Magistrate Judges: Serving the Judiciary and the Public (4:11), <https://www.youtube.com/watch?v=v81yi5GbECc&feature=youtu.be>

## ENDNOTES

- [1] U.S. DEP'T OF AIR FORCE, INSTR. 51-905, USE OF MAGISTRATE JUDGES FOR TRIAL OF MISDEMEANORS COMMITTED BY CIVILIANS, para. 2.3.1 (Sept. 30, 2014) [hereinafter AFI 51-905].
- [2] In 2016, the JBSA legal offices consolidated the magistrate court functions from Fort Sam Houston, Lackland, and Randolph into a single magistrate court office, which operates out of JBSA-Fort Sam Houston. From July 2016 to June 2017, the JBSA magistrate court office reviewed more than 300 civilian (non-traffic) misdemeanor investigations and adjudicated more than 150 civilian offenses.
- [3] AFI 51-905, *supra* note 1, at para. 2.3.1 (“Attorneys [appointed as SAUSAs] come under the supervision of the appropriate U.S. attorney in the performance of those duties, and may perform only those duties, under such supervision...”).
- [4] Statement of Richard L. Durbin, Jr., United States Attorney for the Western District of Texas, in San Antonio, Texas (June 6, 2017) (on file with author).
- [5] Typical bond conditions include refraining from additional criminal misconduct, drug and alcohol testing, and maintaining employment.
- [6] Typical probation conditions include abstinence from drugs and alcohol, payment of a fine or restitution, regular meetings with the USPO, and rehabilitation programs related to the offense for which the defendant was convicted.
- [7] 18 U.S.C. § 3565(a)(2) (2017).
- [8] Federal Sentencing Guidelines Manual (U.S. Sentencing Comm’n 2016), <https://www.uscc.gov/guidelines> (last visited Aug. 7, 2018).
- [9] For example, functions handled by the judge’s clerk include scheduling hearings with the parties, jury member contact, and post-trial administration.
- [10] Stephanie Sera, *Recent Drunk-Driving Fatalities a Concern for MADD*, KSAT12 (Mar. 15, 2017), <http://www.ksat.com/news/recent-drunk-driving-fatalities-a-concern-for-madd> (last visited Aug. 7, 2018).
- [11] In 2003, Fort Sam Houston was closed to the public in response to the September 11, 2001 terrorist attacks.
- [12] Scott Huddleton, *SAMMC Now the Largest Military Medical Center*, mySA (Oct. 8, 2011), <http://www.mysanantonio.com/news/military/article/New-Co-To-makes-SAMMC-largest-DoD-hospital-2207990.php> (last visited Aug. 7, 2018).
- [13] For example, the Air Force would typically have a greater interest in a civilian spouse who commits domestic violence against an active duty member than a non-DoD affiliated individual found with drug paraphernalia at an entry control point.
- [14] Offenses appropriate for pretrial diversion may include first time possession of marijuana, theft under \$250, or low-level assaults with minimal injuries. Pretrial diversion should only be offered when the government has sufficient evidence to prove the case at trial beyond a reasonable doubt. If the offender declines to participate in pretrial diversion, or subsequently fails pretrial diversion, the expectation is that the government will file charges against the offender. Check with the local USAO for guidance on offering pretrial diversion in your district.
- [15] At JBSA, the most commonly prosecuted offenses are Driving While Intoxicated (18 U.S.C. § 13 (2017) (Involving Tex. Penal Code § 49.04) (2017)), Possession of a Controlled Substance (21 U.S.C. § 844(a) (2017)), Theft of Government Property (18 U.S.C. § 641 (2017)), Assault (18 U.S.C. § 113(a) (2017)), and Trespassing on Military Property (18 U.S.C. 1382 (2017)).
- [16] Fed. R. Crim. P. 16(c)(1)(B). A binding plea agreement is permitted under Fed. R. Crim. P. 16(c)(1)(C), but judges frown upon such agreements in the Western District of Texas, viewing sentencing as within the purview of the court.
- [17] *Baldwin v. New York*, 399 U.S. 66, 69 (1970).
- [18] In a JBSA case, a defendant charged with a Class A misdemeanor DWI was a sympathetic senior citizen with prior military service. In a legally solid case, the government was ready to prove the defendant had an alcohol concentration over .30. As trial approached, the government ascertained that the defense would try to confuse the jury with burdensome technical information regarding the maintenance of the Intoxilyzer. The day before what was set to be a week-long trial, the government filed a motion to charge the defendant with a Class B misdemeanor DWI instead of the charged Class A misdemeanor. This move eliminated the defendant’s right to a jury trial. The judge-alone trial was finished in one day and the government secured the conviction. The defendant received 18 months of probation and a \$500 fine.
- [19] It is advisable to reach out to the U.S. Probation Office ahead of time when considering modifying or dropping charges. The government’s charging decisions impact their analysis of the case and sentence recommendation to the judge. Probation officers will become frustrated if they arrive to court and learn about changes to the charges for the first time just minutes before the proceedings are set to begin.
- [20] 18 U.S.C. § 3142(d)-(f) (2017).