

7. MILITARY JUSTICE MISCELLANEOUS

7.A. ARTICLE 138, UCMJ COMPLAINTS

7.A.1. Statutory Provision

“Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.” [Article 138, UCMJ, 10 U.S.C. § 938.]

7.A.2. Definitions

For the purpose of this Chapter, terms are defined, as in Article 1, UCMJ, RCM 103, and as follows:

7.A.2.a. Member of the Coast Guard

Any person in the Coast Guard or Coast Guard Reserve performing duty that subjects him or her to jurisdiction under the Uniform Code of Military Justice.

7.A.2.b. Wrong

A discretionary action by a commanding officer under the color of federal military authority, which was unauthorized, unfair, or discriminatory, resulting in personal detriment, harm, or injury to the complainant, and is capable of redress in command channels without resort to trial by court-martial. The wrong may consist of either affirmative action or passive inaction.

7.A.2.c. Commanding Officer

Any commissioned Coast Guard commanding officer empowered to impose NJP upon the complainant, which includes any superior commanding officer in the chain of command.

7.A.2.d. Officer Exercising General Court-Martial Jurisdiction [OEGCMJ]

The primary officer exercising general court-martial jurisdiction [OEGCMJ] is the OEGCMJ for the unit of the commanding officer about whom the complaint is filed. [See, subparagraph 3.A.3.b above.]

7.A.2.e. Respondent

The commanding officer against whom the complaint is made.

7.A.2.f. Redress

Any lawful action taken that restores to the complainant whatever rights, privileges, property, or status he or she would have been entitled to had the wrong not occurred.

7.A.2.g. Examination into a Complaint

An investigation consisting of either a formal or an informal inquiry into all facts material to the complaint. The specific inquiry conducted depends on the nature of the alleged wrong, but will normally be of a type recognized by Coast Guard directive.

7.A.2.h. Complainant

Member submitting complaint.

7.A.3. Policy

It is the policy of the Secretary, Department of Transportation [DoT] to resolve complaints of wrong at the lowest possible level and to provide administrative procedures to effect such resolution. There is a presumption of administrative regularity. Therefore, a complainant in order to support the belief that he or she has been wronged should state in the complaint all pertinent facts and document them with independent evidence when possible. A commanding officer may not restrict the submission of complaints under Article 138, UCMJ and all such complaints shall be forwarded directly to the responsible Officer Exercising General Court-Martial jurisdiction over the complainant [OEGCMJ].

7.A.4. Scope

Upon due application, a complaint alleging a wrong for which redress has been sought in writing, but refused by the commanding officer, is cognizable under Article 138, UCMJ.

7.A.4.a. Time Limit

A complaint pursuant to this chapter must be submitted to a superior commissioned officer within 90 days of the date of discovery of the alleged wrong, and the complainant must have requested in writing redress from his or her commanding officer and have been refused. A complaint that on its face, or after investigation or informal inquiry, is not directed at a commanding officer as defined in subparagraph 7.A.2.c above, or in which there has been no written request for redress and denial thereof, may be returned by the OEGCMJ upon advice of his or her SJA without action and with a statement as to the reason for the return. The OEGCMJ may waive the 90-day time limit and the requirement for written request for redress and denial thereof for good cause and action on the complaint by the OEGCMJ constitutes such waiver. The period during which the commanding officer considers the request for redress will not be included in computing the 90-day period.

7.A.4.b. Commanding Officer's Reply

The commanding officer shall reply to the request for redress without undue delay and, if redress is denied, shall inform the member that a complaint may be forwarded to the OEGCMJ.

7.A.4.c. Subsequent Action by Complainant

Article 138, UCMJ does not give complainants the right to participate in subsequent action on their complaints; the government is charged with acting for them. Complainants may be questioned in the course of the inquiry or investigation conducted as a result of their complaint and may be requested to submit clarifying or explanatory statements for consideration.

7.A.4.d. Complaints Not Cognizable Under Article 138, UCMJ

Article 138, UCMJ places principal responsibility for the resolution of complaints with the OEGCMJ and requires that he or she take proper measures for their redress. In many cases, there already exist by law or regulation specific channels to accomplish this objective. Such areas include, but are not limited to:

- (1) Actions taken pursuant to the Uniform Code of Military Justice, MCM, or military criminal law regulations subject to resolution by:
 - (a) Application to the appropriate commander, such as in cases of clemency;
 - (b) Pretrial motion to the convening authority or military judge; or
 - (c) Other administrative or judicial action

- (d) **Note:** Some issues generally relating to the way a member is treated, such as conditions of confinement, are amenable to a complaint under Article 138, UCMJ.
- (2) Nonjudicial punishment imposed pursuant to Article 15, UCMJ;
- (3) Actions regarding officer fitness reports;
- (4) Actions regarding enlisted performance evaluation marks;
- (5) Actions in accordance with the Coast Guard Personnel Manual, COMDTINST M1000.6 (series), regarding withdrawal of designator or administrative reductions in enlisted grade;
- (6) Appeal from findings of pecuniary liability;
- (7) Withdrawal of flying status;
- (8) Military Civil Rights complaints; and
- (9) Officer elimination, cadet separation, and administrative discharge actions.

7.A.4.e. Action by OEGCMJ

When complaints are received by the OEGCMJ that apparently are subject to resolution in other established channels he or she shall cause an informal inquiry to be made to determine whether the complaint is, in fact, subject to resolution in other established channels. In those cases in which it is determined that such other channels exist the OEGCMJ may advise the complainant in writing of those channels. In other cases, the subject of the complaint may already be under consideration within those channels. In either case, a decision by the OEGCMJ to refer the complainant to those channels will constitute “proper measures for redressing the wrong complained of” within the meaning of Article 138, UCMJ.

7.A.5. Jurisdiction

Jurisdiction to examine into complaints lies with the primary OEGCMJ [*see*, subparagraph 7.A.2.d above]. In the event of the respondent’s transfer to another general court-martial jurisdiction, the action on the complaint may also be transferred if the investigation or redress will be facilitated thereby. Intermediate commanders receiving complaints will transmit the complaint and accompanying papers without delay to the appropriate OEGCMJ. They may add pertinent material to the file or grant the redress requested and so note in the transmittal to the appropriate OEGCMJ. All complaints, including those that by definition [*See* subparagraph 7.A.2.d above] are excluded from the scope of Article 138, UCMJ shall be forwarded to the OEGCMJ over the respondent.

7.A.6. Procedures for Filing Complaints Under Article 138, UCMJ

7.A.6.a. Application to Commanding Officers

The basis of a complaint properly brought under Article 138, UCMJ is a wrong coupled with the commanding officer's refusal or failure to redress the wrong. Therefore, the commanding officer must be provided the opportunity to redress the wrong as a condition precedent to the filing of a complaint. A request for redress must be submitted in writing to the commanding officer complained against, via the chain of command. The respondent commanding officer shall act on the application in a timely manner and will notify the complainant of his or her action.

7.A.6.b. Form of Complaint

The complaint shall:

- (1) Be in writing, signed by the complainant, and addressed to the appropriate OEGCMJ;
- (2) Include a statement that the complaint is made pursuant to Article 138, UCMJ;
- (3) Set forth all relevant facts applicable to the complaint;
- (4) Clearly identify the respondent;
- (5) State that the complainant previously requested in writing redress from his or her commanding officer and that he or she was refused such redress. A copy of the request and reply shall be included;
- (6) Describe the specific redress desired;
- (7) Attach all available evidence including affidavits and statements of witnesses that support the complaint or provide other information pertinent to the complaint; and
- (8) Be submitted to the commanding officer or any other superior commissioned officer of the Coast Guard for forwarding to the appropriate OEGCMJ.

7.A.6.c. Legal Advice

Law specialists or legal counsel will provide advice upon request to members desiring to submit an Article 138, UCMJ complaint. Requests shall be made according to the established procedures of the cognizant MLC [*see*, subparagraph 3.H.2 above]. Telephonic requests are sufficient. The advice should include an opinion whether an Article 138, UCMJ complaint is an appropriate procedure under the circumstances. If not, advice will be given concerning other authorized Coast Guard channels by which the member may seek relief. This section is not to be construed as requiring the assignment of a law specialist to represent a complainant in any proceedings held pursuant to Article 138, UCMJ or to create a right to individual military counsel. Complainants may retain civilian coun-

sel at no expense to the government to assist them in connection with the submission of their complaint.

7.A.7. Action by the OEGCMJ

Except in those cases wherein the original complaint is appropriately addressed to the Secretary, Department of Transportation because Commandant, Coast Guard is the respondent the OEGCMJ has primary responsibility for granting the necessary redress or procuring the desired relief, if warranted. Such responsibility is not delegable. Upon receipt of a complaint, the OEGCMJ over the respondent shall take one or more of the below actions.

a. Prior to acting on a complaint, ensure that the complainant has been informed of the substance of any forwarding endorsements that have added substantive comments or new factual matter and afford the complainant the opportunity to rebut any adverse matter contained therein.

b. Examine the complaint and take any of the following actions as appropriate:

(1) Require the complainant to comply with the procedures outlined in subparagraph 7.A.6.b above;

(2) For untimely complaints, determine whether the complaint should be refused on that basis [*see*, subparagraph 7.A.4.a above];

(3) If there is another mechanism available more suitable for resolution of the complaint, advise the complainant of such procedure and the method by which to proceed. Advice will include the appropriate law or regulation(s) under which the member may proceed;

(4) If the complaint is already under consideration, or has been considered in another venue, the complainant shall be so advised;

(5) Deny or grant redress; or,

(6) If the OEGCMJ lacks authority to redress the complaint he or she shall forward the results of the examination along with specific recommendations concerning the appropriate redress to the officer who has authority to grant such redress. [*See*, paragraph 7.A.8 below.]

7.A.8. Forwarding Complaint to the Commandant

After taking any of the actions under subparagraphs 7.A.7.b.(2) through (5), the OEGCMJ shall forward the complaint, including the original request for redress and refusal thereof, the results of the investigation or informal inquiry, his or her action on the

complaint together with a statement of the reasons for the action, and a copy of his or her notification to the complainant to the Chief Counsel (Commandant (G-L)). The file will reflect that the action on the complaint was personally taken by the OEGCMJ, and that officer shall sign the forwarding correspondence. In cases in which the complaint is forwarded to an intermediate jurisdiction under subparagraph 7.A.7.b.(6), the commander of that jurisdiction shall grant or deny redress, and take action required under this paragraph. Action taken pursuant to subparagraph 7.A.7.b.(1), need not be forwarded to the Chief Counsel (Commandant (G-L)).

7.A.9. Review and Final Disposition

In cases where Commandant, U.S. Coast Guard is the respondent, review and final disposition shall be by the Secretary, Department of Transportation. In all other cases the Chief Counsel Commandant (G-L) shall review complaints and actions thereon, and if he or she disagrees with the action taken, recommend a different action to the Secretary. When there is no disagreement as to the final action taken by the OEGCMJ the complaint file shall be filed for the Secretary in the Office of the Chief Counsel (Commandant (G-LMJ)). If the Secretary in his or her discretion takes action on a complaint the complainant, respondent, and OEGCMJ over the respondent shall be informed.

7.B. DELIVERY OF PERSONNEL TO CIVIL AUTHORITIES

7.B.1. Purpose

This section sets forth the authority, policy, and procedures for delivery of Coast Guard military personnel to civil authorities for trial. [See, Article 14, UCMJ.]

7.B.2. Definitions and Applicability

7.B.2.a. Definitions

As used in this section:

(1) “State” includes each of the states of the United States; District of Columbia; Commonwealth of Puerto Rico; Guam; American Samoa; United States Virgin Islands; Commonwealth of the Northern Mariana Islands; and any other commonwealth, territory, or possession of the United States.

(2) “Civil authorities” are state agents or representatives acting under the authority of their respective state or jurisdiction.

(3) “Foreign” authorities are all authorities not defined as a state or federal authority.

(4) “Personnel” or “Coast Guard personnel” as used in this section refer to Coast Guard military personnel. This section does not apply to civilian personnel or civilian contractors.

7.B.2.b. Applicability

This section applies to all military personnel in the Coast Guard.

7.B.2.c. Non-Applicability to “Foreign” Authorities

This section does not apply to delivery of personnel to foreign authorities. Neither is it applicable where a state, having concurrent jurisdiction for the purpose of executing criminal process, proceeds by service of process to take custody of a Coast Guard member without making formal request to the Coast Guard for his or her delivery.

7.B.3. Policy

a. It is Coast Guard policy to cooperate with civil authorities to the maximum extent possible consistent with needs of the service and the individual rights of the service members concerned.

b. It is contrary to Coast Guard policy to transfer a Coast Guard member from a command within one state to a command within another state solely, or primarily, for the purpose of making the individual amenable to prosecution by civil authorities.

7.B.4. Delivery when Personnel are Within the Territorial Limits of the Requesting State

When the delivery of any person in the Coast Guard is requested by local civil authorities of a state for the alleged commission of an offense punishable under the laws of that jurisdiction and such person is within the requesting authority’s territorial limits (including territorial waters), commanding officers are authorized to deliver such person when a proper warrant is presented and the approval of the Chief Counsel, (Commandant (G-L)), if necessary, has been obtained. [See, paragraph 7.A.8 above.]

7.B.5. Delivery when Personnel are Beyond the Territorial Limits of the Requesting State

7.B.5.a. General

When delivery of any member of the Coast Guard is requested by civil authorities of a state for the alleged commission of an offense punishable under the laws of that jurisdiction and the person is not within the requesting state’s territorial limits (including territorial waters) the OEGCMJ or staff officer designated by him or her, over the command of the person may authorize the individual’s delivery when all of the following conditions are met:

- (1) A proper warrant is presented or there has been a valid waiver of formal extradition [*see*, subparagraph 7.B.5.b below];
- (2) The agreement required by paragraph 7.B.6 below has been signed; and,
- (3) the approval of the Chief Counsel (Commandant (G-L)), if necessary, has been obtained. [*See*, paragraph 7.B.5.b below.]

7.B.5.b. Waiver of Extradition

(1) All persons in the Coast Guard requested to be delivered under this section shall be afforded the opportunity to consult with a law specialist or civilian attorney at no cost to the government concerning the formal extradition process of the jurisdiction in which the person is located. Once having received advice from an attorney the person may waive extradition. A waiver must be in writing and witnessed. It shall include a statement that the person signing the extradition waiver has received the advice of an attorney and include the name and address of that attorney. The waiver shall be substantially in the form suggested in enclosure (22b).

(2) An executed copy of each waiver of extradition shall be mailed to the Commandant (G-LMJ) with the report required by paragraph 7.B.9 below.

7.B.5.c. Refusal to Waive Extradition

When a member declines to waive extradition, or refuses to consult with an attorney, the requesting civil authority will be notified and advised delivery may only be made to local civil authorities on the presentation of a proper warrant. In this situation a fugitive warrant issued by the requesting state and delivered by local civil authorities shall be considered a proper warrant. The member requested to be delivered would have the opportunity to contest extradition in the courts of the jurisdiction in which he or she is located. At this point, the process becomes the same as that described in paragraph 7.B.4 above, with the member's commanding officer having the authority to deliver the individual once the command has complied with paragraphs 7.B.6 and 7.B.8 below.

7.B.6. Agreement Required Prior to Delivery to State Authorities

7.B.6.a. Terms of Agreement

When delivery is authorized directly or ultimately to a state other than the one where the member is located the member's commanding officer shall, before making such delivery, obtain a written agreement providing:

- (1) The commanding officer will be informed of the outcome of the trial;

(2) The member so delivered will be transported to the requesting state without expense to the member or the United States; and,

(3) The member so delivered will be returned to the place of delivery, or such place as is mutually agreeable to the Chief Counsel (Commandant (G-L)) and the requesting state upon disposition of the case, provided the Coast Guard shall then desire the member's return.

7.B.6.b. Form of Agreement

The language of the agreement shall be substantially the same as that in enclosure (22a). Substantial deviations from the suggested language requires the advance approval of Commandant (G-LMJ).

7.B.6.c. Parties to the Agreement

When delivery is made directly to the requesting state, the Governor or authorized agent of the requesting state is required to complete the agreement. When delivery is made to local civil authorities to provide for formal extradition, process attempts shall be made to have the agreement executed by the officials of both the requesting state and the local state.

7.B.7. Delivery of Personnel to Federal Authorities

7.B.7.a. General

Commanding officers are authorized to deliver personnel to Federal authorities on presentation of a proper warrant in all cases if the approval of the Commandant (G-L) if applicable, has been obtained. [See, paragraph 7.A.8 above.]

7.B.7.b. Agreement Not Required of Federal Authorities

An agreement as to expenses will not be exacted as a condition to the delivery of Coast Guard members to federal authorities either in response to writs of *habeas corpus*, as witnesses, or for trial. Expenses in such cases will be defrayed as follows:

(1) The person who produces an individual in a federal court in response to a writ of *habeas corpus* or as a witness will keep an accurate account of expenses and present the expenses for reimbursement to the United States marshal for the district in which the court is sitting, who is the proper officer to settle such account, including the expenses of the return trip.

(2) Members required by the federal authorities for trial will be called for and taken into custody by a United States marshal or deputy marshal. In such case the marshal will defray the expense of transporting the individual to the place of trial.

(3) If the member is not convicted or the case is dismissed, the individual will be returned to the Coast Guard and the necessary expenses are paid from an appropriation under the control of the Department of Justice.

7.B.8. Deliveries Requiring Advance Approval of Commandant (G-L)

a. Approval of the Chief Counsel (Commandant (G-L)) is required prior to delivery of Coast Guard personnel to federal or state authorities when:

(1) Disciplinary or judicial proceedings involving offenses in violation of the UCMJ are pending (*i.e.*, charges have been preferred or potential charges are under investigation) against the member;

(2) The member is undergoing a sentence of a court-martial;

(3) In the opinion of the commanding officer, it is in the best interest of the Coast Guard to refuse delivery; or

(4) In the opinion of the commanding officer, certain requirements established by this section should be waived in a particular case.

b. It is expected that through informal contact with local authorities commanding officers will, in most cases, have sufficient advance notification that a request for delivery will be forthcoming to permit a letter request for advance approval from the Chief Counsel. When circumstances dictate a more expeditious handling of the matter a message request is authorized. In those rare cases when immediate action is an absolute must, approval may be requested and a decision communicated by telephone.

c. All requests shall include sufficiently detailed information to permit an informed decision without additional inquiry. Requests shall be submitted to the Chief Counsel via Commandant (G-LMJ).

7.B.9. Reporting Requirements

The commanding officer concerned shall either upon delivery or refusal to deliver personnel under this section forward a letter report with pertinent documents to Commandant (G-LMJ), via the chain of command, setting forth a full statement of the facts in the following cases:

a. When delivery is ultimately refused;

b. When the procedures of paragraph 7.B.5 above are used; or

c. When the advance approval of the Chief Counsel is necessary.

7.C. SEARCH AUTHORIZATIONS

7.C.1. Authority to Issue Search Authorizations

7.C.1.a. General

(1) Purpose

This section establishes the procedure for the issuance of search authorizations. This section provides guidance and is not to be viewed as inflexible. Although the procedures and standards set out herein should be followed as appropriate under the circumstances, deviations will not invalidate an otherwise lawful search. This section does not derogate in any manner the authority of the commanding officer to authorize a search based on probable cause. [See, subparagraph 7.C.1.c below.] This section is intended to offer an alternative to reduce the risk a search may later be found to be unlawful.

(2) Scope

Due to the vast amount of case law on the subject of searches and the 4th Amendment to the U.S. Constitution, it is impossible to set out a comprehensive treatment of all aspects or possible situations that could arise. Although general guidelines and some specific suggestions have been set out it remains the responsibility of commanding officers and military judges to keep themselves informed of the current state of the law. Commanding officers should consult frequently with their SJA concerning issues surrounding search authorizations.

7.C.1.b. Military judge

(1) General

Pursuant to the authority of MRE 315(d)(2), Coast Guard military judges are empowered to authorize searches. This includes the authority to issue search warrants by telephone. When seeking search authorization from a military judge every effort should be made to avoid using the Chief Trial Judge, except as a last resort.

(2) Limitations

(a) Military judges may order searches pursuant to the foregoing authority only through the issuance of a search authorization.

(b) Only the following persons may obtain search authorizations from a military judge:

- i. Individual commanding officers or officers-in-charge;
- ii. Responsible persons of a command who the commanding officer or officer-in-charge authorizes to obtain such search authorizations (this authorization need not be in writing); or,

iii. CGIS agents assigned to investigative duties. This includes CGIS agents bearing current credentials and assigned to an investigations billet.

(c) Ordinarily, persons authorized to seek search authorizations [see, subparagraph 7.C.1.b(2) above] will coordinate their request for a search authorization with the command's servicing legal office.

7.C.1.c. Commanding Officers and Officers-in-charge

(1) General

Pursuant to the authority of MRE 315(d)(1), Coast Guard commanding officers and officers-in-charge are empowered to authorize searches.

(2) Probable Cause

Upon a finding of probable cause a commanding officer or officer-in-charge may authorize a search of any person or place over which he or she has control. MRE 315(f) sets out the basis for a finding of probable cause.

(3) Procedure

Commanding officers and officers-in-charge may issue search authorizations only on the basis of a personal application. Commanding officers or officers-in-charge issuing a search authorization shall ensure that the procedures set forth in subparagraph 7.C.3.a.(2), 7.C.2.b. through 7.C.2.d., and paragraph 7.C.3., and 7.C.4., of this section are followed, substituting themselves for the military judge. Commanding officers and officers-in-charge should consult with their servicing legal office prior to authorizing a search, if practicable.

(4) Warning

Any decision to grant a search authorization based on probable cause will be subject to legal scrutiny. A determination by a court of law that a search authorization was not based on sufficient probable cause may prevent the use of any evidence seized under the search authorization at criminal or disciplinary proceeding(s). Commanding officers and officers-in-charge are encouraged when circumstances allow, to refer applicants seeking a search authorization to a military judge rather than acting on the application themselves. They should act themselves however, if resorting to a military judge would likely result in harm or loss of evidence.

7.C.2. Issuance of Search Authorizations

7.C.2.a. Application

(1) General

A search authorization shall be issued by a military judge pursuant to the requirements of MRE 315. [See, enclosures (23a, 23b, 23e).]

(2) Personal Application

If time and the circumstances permit written affidavits may be submitted in person to the military judge. Before ruling on a request for a search authorization, the military judge may require the affiant to appear personally and may examine the affiant and any witnesses he or she may produce, under oath if desired, to obtain additional information. It is normal however, that search authorizations are obtained telephonically from a military judge due to geographic separation. [See subparagraph 7.C.2.a(3) below.] Search authorizations from a commanding officer are normally obtained in person but may be obtained by telephone.

(3) Telephonic Application

Application for a search authorization may be made by telephonic communication between the applicant and a military judge. A staff attorney of the servicing legal office should ordinarily be on the telephone conference call with the applicant and military judge. The military judge will normally need either an affidavit from the applicant or a verbatim transcript of the telephone application. If necessary, the staff attorney should make arrangements for recording the telephone application and preparing the verbatim transcript. The application procedure should generally follow the script set out in enclosure (23a) as is appropriate under the circumstances. The military judge shall determine if a verbatim transcript shall be prepared for any recorded application and direct that any verbatim transcription of the telephone application be prepared in a timely manner so it may be attached to the search authorization upon its return pursuant to subparagraph 7.C.3.b below.

(a) Authentication

The military judge shall authenticate the transcript, if prepared, as follows:

I certify the foregoing application done by [Name], consisting of ____ pages, is a true verbatim transcript of a telephonic application taken by me at [Place], at [Time, Date].

/s/

Military Judge

(b) Written Affidavit

A written affidavit is a suitable alternative to a verbatim transcript of the telephonic application and may be prepared and sent by facsimile to the military judge.

(c) Procedure

Telephonic application should be made to the following military judges depending on the location of the prospective convening authority should the case ultimately lead to trial by court-martial:

- i. Convening authority located in Pacific Area:**
 - (i) **Primary** - A military judge located in Atlantic Area.
 - (ii) **Secondary** - A military judge located in Pacific Area, but from other than the district in which the convening authority is located.
 - (iii) **Tertiary** - A military judge in the same district as the convening authority.
- ii. Convening authority located in Atlantic Area:**
 - (i) **Primary** - A military judge located in Pacific Area.
 - (ii) **Secondary** - A military judge located in Atlantic Area, but from other than the district in which the convening authority is located.
 - (iii) **Tertiary** - A military judge in the same district as the convening authority.

(d) Search Authorization Authority Preference

It must be kept in mind that if a search authorization is obtained from the command's legal advisor his or her ability to function fully as the legal advisor of the convening authority and superior commander may be compromised in the event a court-martial ensues. All other sources should be exhausted if time and circumstances permit. For the same reason telephonic applications to a military judge are generally preferred over personal applications if applicable under the circumstances.

7.C.2.b. Issuance

(1) General

Upon the presentation, by way of personal or telephonic application, of information establishing probable cause a military judge shall issue a search authorization identifying the property to be seized and naming or describing the person or property to be searched.

(2) Scope

A military judge may issue a search authorization directing a search of any of the persons or property permitted under MRE 315. It is imperative that persons seeking and executing search authorizations be completely familiar with MRE 315.

(3) Signature

If personal application is made, the military judge shall sign the original search authorization before delivering it to the applicant. If telephonic application is made, the search authorization should be faxed to the military judge and then faxed back to the applicant with the military judge's signature. A facsimile copy of the search authorization will take the place of the original for purposes of executing a search. In the event that a facsimile machine is unavailable, the military judge may orally authorize the applicant to sign the military judge's name above the applicant's signature on a duplicate original search authorization. This duplicate original search authorization shall be deemed to be a search authorization and it shall be returned along with the unsigned original search authorization to the military judge as provided in subparagraph 7.C.3.b below. In such cases, the military judge shall enter on the face of the original search authorization the exact time of the issuance of the search authorization and sign and forward the original search authorization and the duplicate original search authorization as provided in subparagraph 7.C.3.b below. The military judge should attach to the search authorization any affidavit or verbatim transcript of the telephonic application.

7.C.2.c. Authorization

(1) General

The search authorization issued by a military judge shall be directed to a named individual who will usually be the applicant. If good cause is shown the military judge may direct the search authorization to a person other than the applicant.

(2) Contents

The search authorization should be drafted in the format contained in enclosure (23b). It shall state the names of the person or persons whose information has been taken in support thereof. It shall command the named person to conduct the search and to search forthwith the person or place named and for the property specified.

(3) Attachments

Any written statements or affidavits presented to the military judge shall be attached to the search authorization. When the search authorization is issued on the basis of a telephonic application, the verbatim transcript of the entire communication should be attached after transcription. Any statements are incorporated into the search authorization by reference.

(4) Night Service

If the search authorization by the military judge is to be executed between 2200 and 0600, the search authorization must specifically authorize this on its face. A discussion of the factors to consider before authorizing such service is included in subparagraph 7.C.4.h(2) below.

7.C.2.d. Disclosure Required for Reapplication

Any person requesting a search authorization must disclose during the application procedure any knowledge he or she has of a denial of any previous request for a search authorization or permission to search involving the same individual and the same property.

7.C.3. Execution and Return of Search Authorizations

7.C.3.a. Execution

(1) Time Limit

(a) A search authorization or search warrant may be issued on a showing that there exists probable cause (more likely than not) that certain evidence (a thing) of criminal conduct is located in a specific place (a location), presently or at a particular time in the future (time). A properly issued search authorization or warrant lapses if it is no longer probable (more likely than not) that the object of the search is located in the place to be searched. As a result, it is always prudent to execute a search authorization as soon as possible after being issued.

(b) The search authorization issued by a military judge must be executed within five days after its date of issue if execution is not required earlier. If the search authorization is not executed within that time, or for any other reason, the unexecuted search authorization shall be returned to the issuing military judge with an explanation as to why the search authorization was not executed.

(2) Notice to Command

The individual conducting the search shall notify the commanding officer of the person to be searched, or the commanding officer who is responsible for the premises to be searched, prior to initiating the search unless the military judge, in his or her discretion, concludes that such notice would impede the orderly execution of the search authorization. The military judge may in such a case waive the requirement for prior notice to the commanding officer; however, such a waiver shall be clearly indicated. The appropriate commanding officer shall be notified subsequent to the search when prior notice is not given.

(3) Notice to the Individual

The individual conducting the search shall give to the person searched or whose premises are searched a copy of the search authorization and a receipt for items seized at the place searched. It is not required that a copy of the application proceedings establishing the grounds for issuing the search authorization be attached to this copy of the search authorization.

(4) Receipt for Property Seized

A receipt shall be given for any property seized. The receipt shall contain an inventory of the property. This inventory shall be made in the presence of the person searched or whose premises are searched. If such person is not present the inventory shall be made in the presence of some other person, preferably designated by the commanding officer given notice in subparagraph 7.C.3.a(2) above.

(5) Property That May Be Seized

To be lawful, even when conducted under the authority of a valid search authorization, searches upon probable cause of a person's house, dwelling, automobile, effects, papers, or person without his or her freely given consent must be for instrumentalities or fruits of crime; things that might be used to resist apprehension or used to escape; property, the possession of which is itself a crime (contraband); or evidence that there is reason to believe will otherwise aid in a particular apprehension or conviction. [See, subparagraph 7.C.4.e(5) below.] Care must be taken that only property fully described in the search authorization is seized, unless other properly seizable types of evidence come into plain view or are encountered within the lawful execution of the search authorization. [See, subparagraph 7.C.4.e below.]

(6) Administrative Inspections

The restriction discussed above does not apply to administrative inspections or inventories conducted in accordance with law, regulation, or custom. This section is not applicable to valid administrative inspections, as contrasted with searches upon probable cause. [See, MRE 313.]

7.C.3.b. Return Disposition

After the search authorization has been executed, or at the end of the five-day period if unexecuted, the search authorization together with a copy of the inventory of property seized, if any, shall be returned to the issuing military judge. Thereafter, all documents and papers relative to a search authorized under the provisions of this section shall be transmitted to the unit or organization responsible for the application. These documents shall be retained to be available in any future litigation or proceeding considering the results of such a search.

7.C.4. Specificity

7.C.4.a. General

(1) Background

Probable cause and specificity are two distinct but interrelated requirements that operate together to validate a legal invasion of individual privacy. The items discussed below are intended to provide better applications for search authorizations.

(2) Legal Test

Each person, item, or premises to be searched, and any property to be seized, must be particularly described in the search authorization so that each can be unmistakably identified. If there is a specific range of time during which the person or item to be seized is more likely than not to be at the place to be searched, the time limitation must also be described.

7.C.4.b. Describing the Premises to be Searched

(1) General

The areas most frequently subject to search in the Coast Guard are barracks, berthing spaces, and workspaces. The description of the area to be searched must be as specific as possible and as limited in scope as is consistent with the goals of the search.

(2) “Open Bay” Barracks or Berthing Areas

Some older units have “open bay” barracks or berthing areas. These areas consist of numerous berths that are not separated by partitions and include common living areas. In authorizing a search authorization for such areas, including the common living area, the military judge should be mindful of the legitimate privacy interests of occupants besides the suspect.

7.C.4.c. Describing the Person to be Searched

(1) General

The description of the person to be searched should include as much specific information about the person as possible. This should include, when known, the name, rank or rate, social security number, and physical description of the individual.

(2) Name of Individual Unknown

When the name of the suspect is not known the affidavit should contain all possible relevant information including physical description, places that he or she frequents, known associates, type of car and clothing, pattern of operation, etc.

7.C.4.d. Describing Personal Property

(1) Vehicles

The description should contain the make and model, color, license number, and any peculiarities of the vehicle. Include the vehicle identification number when possible.

(2) Lockers

Include a complete description of where the particular locker is located.

(3) Suitcases, Bags, etc.

Include a description of the color, approximate size, location, type of fastener, stencil or shipping labels, and any available information.

7.C.4.e. Describing the Property To Be Seized

(1) Types of Property That May Be Seized

The following general types of property may be seized pursuant to a lawful search authorization: instrumentalities of a crime, fruits of a crime, things that might be used to resist apprehension or to effect escape, property the possession of which is itself a crime (contraband), and evidence that there is a reason to believe will otherwise aid in a particular apprehension or conviction. The latter category may include identification evidence.

(2) Instrumentalities of a Crime

This category encompasses property used in a crime. Often these will be items used in the consumption and transfer of drugs, but may also include such items as weapons that do not fit into the contraband category and tools used in the commission of the offense.

(3) Fruits of a Crime

This category usually consists of stolen property.

(4) Contraband

This category includes all items that it is inherently illegal to possess. Usually these items will be narcotics or controlled substances, but they might include automatic weapons, undersized lobster, sawed-off shotguns, etc.

(5) Reason to Believe Evidence Will Aid in a Apprehension or Conviction

The law dealing with this general category of evidence is extremely complex and is beyond the scope of this section as it frequently changes. The applicant for a search authorization must rely on the advice of his or her servicing legal office when faced with a question as to the extent of this provision.

(6) Identification Evidence

Whenever evidence is seized, identification evidence should also be seized if necessary to connect the suspect with the other evidence seized. This category includes items that can tie the suspect to the crime, or establish that the suspect is in control of the area or article searched. It includes such items as cancelled mail envelopes, stenciled or monogrammed clothing, vehicle registration, etc.

(7) Plain View Doctrine

Under this doctrine, incriminating evidence such as contraband or recognized fruits or tools of a crime may be seized in the course of a lawful search even if the seized item does not relate to the original purpose of the search as long as the seized item is readily apparent in “plain view.” The individual making the search or seizure must be lawfully present at the scene within the proper scope of authority. The “plain view doctrine” is limited by the “elephant in a matchbox” common sense limitation. That is, a search of a locker for a submachine gun, pursuant to a search authorization could not lawfully extend to the seizure of a cigarette package containing narcotics if the package must be opened in order for the narcotics to come into view because the submachine gun could never be hidden in a cigarette package.

7.C.4.f. Sample Descriptions

(1) General

The basic rule in describing the property is to go from the general to the specific. For example, if the purpose of the search is to discover and seize a Thompson Machine gun the search authorization should state: “Automatic firearms, including, but not limited to, one “Thompson Machine gun.” It is important to fully describe property to be seized because only that property described in the search authorization, or otherwise lawfully seized, can be used in court.

(2) Contraband

Example: “Narcotics, including, but not limited to, heroin and paraphernalia for the use, packaging, and sale of said contraband, including, but not limited, to burnt spoons, hypodermic syringes and needles, balloons, cotton, lactose and rubber tubing.”

(3) Fruits of a Crime

Example of stolen property: “Household appliances, including but not limited to, one General Electric clock radio, light blue in color, having an AM-FM selector, and one Sony 15” portable color TV, tan in color, with black knobs.”

(4) Tools of a Crime

Example, marijuana paraphernalia: “Items used in the sale and consumption of marijuana including, but not limited to, plastic baggies, smoking pipes, scales used in the weighing of marijuana, cigarette rolling machines, and cigarette papers.”

(5) Identification Evidence

Example: “Papers, documents, and effects that show possession, dominion, and control of said area or objects including, but not limited to, keys, cancelled mail envelopes, monogrammed or stenciled clothing, wallets, and receipts.”

7.C.4.g. Corroboration

The application should include any information showing the suspect committed the crime or that the described property is at the described location. Corroboration is particularly important where the application is based on information supplied by an informant rather than on the personal knowledge or observation of the applicant.

7.C.4.h. Night Service

(1) General

If the search authorization is to be executed between 2200 and 0600 this authorization must be specifically noted on the face of the search authorization by the notation “Night Service Authorized,” or words to that effectively specify the time outside of 0600 to 2200 in which the search may be conducted.

(2) Reasons for Authorizing Night Service

The general reason for requesting night service is that there is danger that the suspect may be alerted to the upcoming search or that the evidence may be transferred, sold, or destroyed. Some basis beyond the mere speculation of the applicant should be given that this is a possibility.

7.C.5. Telephonic Application Procedure and Check List

7.C.5.a. Advance Preparation

Before contacting the military judge an applicant for a search authorization should:

(1) Be thoroughly familiar with the contents of this section and the procedures set out herein. (Because it is often necessary for applications for a search authorization to be made quickly, it is advisable that potential applicants familiarize themselves with this section when first assigned to a position described in subparagraph 7.C.1.b(2)(ii).

(2) Have the facts organized.

(3) Contact the servicing legal advisor and relate the facts giving probable cause for the search authorization.

(4) With the assistance of the legal advisor fill out the search authorization application, found in enclosure (23e), to include the description of the person or location to be searched, and the property to be seized.

(5) Refer to the script for application for search authorizations contained in enclosure (23a) and write out the answers to the questions that will be asked by the military judge.

(6) Ensure the same verbatim description of the place or person to be searched and the articles to be seized is used in both the application and the search authorization.

(7) Applicants for search authorization must complete enclosure (23e) and be prepared to hand deliver or fax a copy to the military judge to whom the application will be directed. In the event that a facsimile machine is not available, *see*, subparagraph 7.C.2.b(3) above.

7.C.5.b. Application Procedure

After completing the preliminary steps, the applicant's staff judge advocate [SJA, or servicing legal officer] will assist the applicant in contacting the appropriate military judge by telephone and, if a recording and transcript of the search authorization is desired or required the SJA will make arrangements to record the three way conversation between the applicant, military judge, and applicant's SJA. The applicant should then:

(1) Tell the military judge that he or she wishes to apply for a telephonic search authorization. (The judge will tell the applicant when to begin the script. Thereafter, the conversation may be tape recorded and later transcribed as determined by the applicant's SJA.)

(2) Speak only in response to a question.

(3) Speak calmly and clearly.

(4) Each speaker should identify him or herself prior to making any statement.

(5) Follow the judge's instructions.

(6) Finally, if directed, sign the judge's name and the applicant's name, rank and position in the lower right hand corner of the search authorization.

7.C.5.c. Procedure for Executing the Search Authorization

After obtaining the search authorization, the applicant should take the following action:

(1) If the person whose property is to be searched is present, give him or her a copy of the search authorization and allow the person to read the original if he or she so desires.

(2) Enter the time of execution on the authorization.

(3) Detail all property seized on a receipted inventory form and give a copy to the individual if present.

(4) Forward all documents in accordance with subparagraph 7.C.3.b above.

(5) Maintain secure custody of items seized, and initiate a proper chain of custody if the items seized change hands.