

MODEL PENAL CODE

ARTICLE 213

(draft, April 1, 2015)

PROPOSED SECTIONS 213.0 TO 213.11

1 **SECTION 213.0. DEFINITIONS**

2 **In this Article, unless a different definition is plainly required:**

3 **(1) The definitions given in Section 210.0 apply;**

4 **(2) “Commercial sex act” means any act of sexual penetration or sexual**
5 **contact in exchange for which any money, property, or services are given to or**
6 **received by any person.**

7 **(3) “Consent” means a person’s positive agreement, communicated by either**
8 **words or actions, to engage in a specific act of sexual penetration or sexual contact;**

9 **(4) “Recklessly” shall carry only the meaning designated in Model Penal Code**
10 **§ 2.02(2)(c); the provisions of Model Penal Code § 2.08(2) shall not apply to this**
11 **Article.**

12 **(5) “Sexual contact” means**

13 **(a) any touching of any body part of another person, whether clothed or**
14 **unclothed, by any body part, body fluid, or object; or**

15 **(b) any undressing that reveals the breast, genitals, or buttocks of**
16 **another person,**

17 **when the touching or undressing is for the purpose of sexual gratification,**
18 **sexual humiliation, sexual degradation, or sexual arousal, and does not constitute**
19 **“sexual penetration” as defined by Section 213.0(6).**

20 **(6) “Sexual penetration” means:**

21 **(a) any act involving penetration, however slight, of the anus or vulva**
22 **by any object or body part, unless done for bona fide medical, hygienic, or law-**
23 **enforcement purposes; or**

24 **(b) direct contact between the mouth or tongue of one person and the**
25 **anus, penis, or vulva of another person.**

26 **(7) Except with respect to the offense of Aggravated Forcible Rape (Section**
27 **213.1(1)), “actor” means a person more than 12 years of age.**

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SECTION 213.1. FORCIBLE RAPE

(1) *Aggravated Forcible Rape.* An actor is guilty of Aggravated Forcible Rape, a felony of the first degree, if he or she violates subsection (2) of this section and in doing so:

(a) uses a deadly weapon to cause the other person to engage in the act of sexual penetration; or

(b) acts with the active participation or assistance of one or more other persons who are present at the time of the act of sexual penetration; or

(c) knowingly or recklessly causes serious bodily injury to the other person or to anyone else for the purpose of causing the other person to engage in the act of sexual penetration.

(2) *Forcible rape.* An actor is guilty of Forcible Rape, a felony of the second degree, if he or she knowingly or recklessly:

(a) uses physical force, physical restraint, or an implied or express threat of physical force, bodily injury, or physical restraint to cause another person to engage in an act of sexual penetration; or

(b) threatens to inflict bodily injury on someone other than such person or threatens to commit any other crime of violence to cause such person to engage in an act of sexual penetration.

SECTION 213.2 SEXUAL PENETRATION AGAINST THE WILL OR WITHOUT CONSENT

(1) *Sexual Penetration Against the Will.* An actor is guilty of Sexual Penetration Against the Will, a felony of the third degree, if he or she knowingly or recklessly engages in an act of sexual penetration with a person who at the time of such act:

(a) has expressed by words or conduct his or her refusal to consent to the act of sexual penetration; a verbally expressed refusal establishes such refusal in the absence of subsequent words or actions indicating positive agreement; or

(b) is wholly or partly undressed, or is in the process of undressing, for the purpose of receiving nonsexual professional services from the actor, and has not given consent to the act of sexual penetration.

(2) *Sexual Penetration Without Consent.* An actor is guilty of Sexual Penetration Without Consent, a misdemeanor, if the actor knowingly or recklessly engages in an act of sexual penetration with a person who at the time of such act has not given consent to such act.

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SECTION 213.3 RAPE OR SEXUAL PENETRATION OF A VULNERABLE PERSON

(1) *Rape of a Vulnerable Person.* An actor is guilty of Rape of a Vulnerable Person, a felony of the second degree, if he or she knowingly or recklessly engages in an act of sexual penetration with a person who at the time of such act:

(a) is sleeping, unconscious, or physically unable to communicate by words or actions a refusal to engage in such act; or

(b) is unable to express refusal, by words or actions, to engage in such act of sexual penetration, because of mental disorder or disability, whether temporary or permanent; or

(c) lacks substantial capacity to appraise or control his or her conduct because of drugs, alcohol, or other intoxicating or consciousness-altering substances that the actor administered or caused to be administered, without the knowledge of such other person, for the purpose of impairing such other person's capacity to communicate, by words or actions, his or her refusal to engage in such act.

(2) *Sexual Penetration of a Vulnerable Person.* An actor is guilty of Sexual Penetration of a Vulnerable Person, a felony of the third degree, if he or she knowingly or recklessly engages in an act of sexual penetration with a person who, at the time of such act:

(a) is mentally disabled, developmentally disabled, or mentally incapacitated, whether temporarily or permanently, to the extent that such person is incapable of understanding the physiological nature of sexual penetration, its potential for causing pregnancy, or its potential for transmitting disease; or

(b) is mentally or developmentally disabled to the extent that such person's social or intellectual capacities are no greater than that of a person who is less than 12 years old; or

(c) has not expressly refused to consent to such act, but is unable to express by words or actions his or her refusal to engage in such act, because of intoxication, whether voluntary or involuntary, and regardless of the identity of the person who administered the intoxicants.

SECTION 213.4 SEXUAL PENETRATION BY COERCION OR EXPLOITATION

(1) *Sexual Penetration by Coercion.* An actor is guilty of Sexual Penetration by Coercion, a felony of the third degree, if he or she engages in an act of sexual penetration with another person and

(a) obtains that person's consent by threatening to:

1 **(i) accuse anyone of a criminal offense or of a failure to comply with**
2 **immigration regulations; or**

3 **(ii) expose any information tending to impair the credit or business**
4 **repute of any person; or**

5 **(iii) take or withhold action in an official capacity, whether public or**
6 **private, or cause another person to take or withhold action in an official**
7 **capacity, whether public or private; or**

8 **(iv) inflict any substantial economic or financial harm that would not**
9 **benefit the actor; or**

10 **(b) knowingly or recklessly disregards the risk that the other person:**

11 **(i) is detained in a hospital, prison, or other custodial institution, in**
12 **which the actor holds a position of authority; or**

13 **(ii) is under arrest or is on probation, parole, pretrial diversion or**
14 **treatment program, or any other status involving state-imposed restrictions**
15 **on liberty, and the actor holds any position of authority or supervision with**
16 **respect to such person's status or compliance with such restrictions.**

17 **(2) *Sexual Penetration by Exploitation.* An actor is guilty of Sexual Penetration by**
18 **Exploitation, a felony of the fourth degree, if he or she knowingly or recklessly**
19 **engages in an act of sexual penetration with another person and the actor:**

20 **(a) is engaged in providing professional treatment, assessment, or counseling**
21 **for a mental or emotional illness, symptom, or condition of such person over a**
22 **period concurrent with or substantially contemporaneous with the time when**
23 **the act of sexual penetration occurs, regardless of the location where such act**
24 **of sexual penetration occurs and regardless of whether the actor is formally**
25 **licensed to provide such treatment; or**

26 **(b) is a lawyer who is representing the other person in a domestic-relations**
27 **matter or is representing the other person as a defense attorney in a criminal**
28 **matter, the sexual penetration occurs during the course of the representation,**
29 **and a consensual sexual relationship between the parties did not predate the**
30 **lawyer-client relationship; or**

31 **(c) represents that the act of sexual penetration is for purposes of medical**
32 **treatment or that such person is in danger of physical injury or illness which**
33 **the act of sexual penetration may serve to mitigate or prevent; or**

34 **(d) knowingly leads such person to believe falsely that he or she is someone**
35 **with whom such person has been sexually intimate.**

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37 **SECTION 213.5 SEXUAL PENETRATION OFFENSES AGAINST CHILDREN**

38 **(1) *Rape of a Child.* An actor is guilty of Rape of a Child, a felony of the second**
39 **degree, if he or she knowingly or recklessly engages in an act of sexual penetration**

1 with a child who at the time of such act is less than 12 years old, and the actor is
2 more than two years older than such child.

3 (2) *Incest*. An actor is guilty of Incest, a felony of the second degree, if he or
4 she knowingly or recklessly engages in an act of sexual penetration with a child who,
5 at the time of such act, is less than 18 years old, and the actor is a parent, foster
6 parent, guardian, grandparent, aunt, or uncle of the child.

7 (3) *Sexual Penetration of a Minor*. An actor is guilty of Sexual Penetration of a
8 Minor, a felony of the third degree, if he or she knowingly or recklessly engages in an
9 act of sexual penetration with a minor who, at the time of such act, is less than 16
10 years old, and the actor is more than four years older than such minor.

11 (4) *Sexual Exploitation of a Minor*. An actor is guilty of Sexual Exploitation of a
12 Minor, a felony of the fourth degree, if he or she knowingly or recklessly engages in
13 an act of sexual penetration, when the minor is less than 18 years old, and the actor
14 is more than five years older and is a teacher, educational or religious counselor,
15 mental-health treatment provider, school administrator, extracurricular instructor,
16 or coach of such minor.

17 SECTION 213.6. CRIMINAL SEXUAL CONTACT

18 (1) *Aggravated Criminal Sexual Contact*. An actor is guilty of Aggravated
19 Criminal Sexual Contact, a felony of the fourth degree, if the actor knowingly or
20 recklessly causes another person to submit to or engage in sexual contact and:

21 (a) the actor uses a deadly weapon to cause the other person to submit
22 to or engage in such sexual contact; or

23 (b) the actor acts with the active participation or assistance of one or
24 more other individuals who also engage in acts of sexual contact with the
25 same person without the consent of that person; or

26 (c) the actor knowingly or recklessly causes serious bodily injury to the
27 other person or to anyone else, or makes an express or implied threat of
28 serious bodily injury, for the purpose of causing such person to submit to or
29 engage in such sexual contact; or

30 (d) the other person is incapable of giving consent because that person
31 is impaired by the actor in the manner described in Section 213.3(1)(c).

32 (2) *Forcible Criminal Sexual Contact*. An actor is guilty of Forcible Criminal
33 Sexual Contact, a misdemeanor, if the actor knowingly or recklessly engages in
34 sexual contact with another person and:

35 (a) uses physical force; physical restraint; an express or implied threat
36 of physical force, bodily injury, or physical restraint; or a threat to commit a
37 crime of violence against that person or any other person, for the purpose of
38 causing such person to submit to or engage in sexual contact; or

39 (b) the other person is incapable of giving consent because such person
40 is impaired in the manner described in Section 213.3(1)(a) or (b); or

1 (c) the other person has by words or conduct expressly refused to
2 consent to such contact;

3 (d) the actor knows or recklessly disregards a risk that the other
4 person falls within any of the categories specified in Section 213.4(1)(b)(i) or
5 (ii).

6 **(3) *Criminal Sexual Contact Without Consent.*** An actor is guilty of Criminal
7 Sexual Contact Without Consent, a petty misdemeanor, if the actor knowingly or
8 recklessly:

9 (a) engages in sexual contact without consent; or

10 (b) engages in sexual contact with consent, but that consent was given
11 in any of the circumstances described in Sections 213.4(1)(a) or 213.4(2)(c).

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13 **SECTION 213.7. CRIMINAL SEXUAL CONTACT WITH A CHILD**

14 **(1) *Aggravated Felonious Sexual Contact with a Child.*** An actor is guilty of
15 Aggravated Felonious Sexual Contact with a Child, a felony of the third degree, if the
16 actor knowingly or recklessly engages in or causes another to engage in sexual
17 contact with a child and such child is under the age of 12, and the actor is more than
18 four years older; or

19 **(2) *Incestuous Sexual Contact with a Child.*** An actor is guilty of Incestuous
20 Sexual Contact with a Child, a felony of the third degree, if the actor knowingly or
21 recklessly engages in sexual contact with a child who is less than 18 years old and
22 the actor is a parent, foster parent, guardian, grandparent, aunt, or uncle of the child.

23 **(3) *Felonious Sexual Contact with a Child.*** An actor is guilty of Felonious Sexual
24 Contact with a Child, a felony in the fourth degree, if the actor knowingly or
25 recklessly engages in sexual contact with a child under the age of 16, without that
26 child's consent, and the actor is more than four years older than such child.

27 **(4) *Sexual Contact with a Child.*** An actor is guilty of Sexual Contact with a
28 Child, a misdemeanor, if the actor knowingly or recklessly engages in or causes
29 another to engage in sexual contact with a child with that child's consent, but:

30 (a) the child is less than 16 years old and the actor is more than four
31 years older than such child; or

32 (b) the child is less than 18 years old, and the actor is more than five
33 years older and is a teacher, educational or religious counselor, mental-health
34 treatment provider, school administrator, extracurricular instructor, or coach
35 of such person.

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37 **SECTION 213.8 COMMERCIAL SEX ACTS**

1 **When the act of sexual penetration or sexual contact in violation of this Article is a**
2 **commercial sex act, the classification of the offense shall be one degree higher than**
3 **that otherwise provided in this Article.**

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5 **SECTION 213.9. SEXUAL OFFENSES INVOLVING INTIMATE PARTNERS**

6 **(1) The fact that the actor is the spouse or other intimate partner of the**
7 **complainant is not in itself a defense to any charge under this Article that involves**
8 **the use or threat of physical force, physical restraint, bodily injury, or any other**
9 **crime of violence within the meaning of Section 213.1, or coercion within the**
10 **meaning of Section 213.4(1)(a).**

11 **(2) The fact that the actor is the spouse or other intimate partner of the**
12 **complainant is not in itself a defense to any other charge under this Article, except as**
13 **specifically provided in this Section.**

14 **(3) The fact that an actor is legally married to the complainant is a defense to**
15 **charges of nonforcible sexual penetration and nonforcible sexual contact, under the**
16 **circumstances described in Sections 213.5(3), 213.5(4), and 213.7(4).**

17 **(4) The fact that the actor is the spouse or other intimate partner of the**
18 **complainant is a defense to a charge of**

19 **(a) nonforcible sexual penetration committed by coercion, exploitation,**
20 **or without consent, under the circumstances described in Sections 213.2(2);**
21 **213.4(1)(b)(i) and (ii); and 213.4(2)(a), (b) and (d); and**

22 **(b) nonforcible sexual contact committed by exploitation or without**
23 **affirmative consent, under the circumstances described in Sections**
24 **213.6(2)(d), 213.6(3)(a) and (b).**

25 **(5) In any prosecution under Sections 213.3(1)(a), 213.3(2)(c), or**
26 **213.6(2)(b), where liability is based not on the use or threat of physical force, but**
27 **only on the absence of consent, it shall be an affirmative defense that the actor was a**
28 **spouse or other intimate partner of the complainant, and that in light of the specific**
29 **facts and circumstances of that relationship and the context surrounding the**
30 **disputed act, the actor honestly and reasonably believed that the act was welcome.**

31 **(6) In any prosecution based on Section 213.3(2)(a) or (b)... [reserved]**

32 **(7) For purposes of this Section,**

33 **(a) "Intimate partner" means a person who, at the time of the alleged**
34 **offense, was in a legal or common-law marriage, domestic partnership, or**
35 **sexually intimate relationship involving cohabitation with the**
36 **complainant.**

37 **(b) An actor does not qualify as the spouse or other intimate partner**
38 **of the complainant within the meaning of this Section if there was either a**
39 **temporary or permanent order of separation or a temporary or permanent**
40 **order of protection issued against the actor as regards the complainant, or**

1 **if the parties were no longer living together because of estrangement in**
2 **the relationship.**

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5 **SECTION 213.10. PROCEDURAL AND EVIDENTIARY PRINCIPLES APPLICABLE TO**
6 **ARTICLE 213**

7
8 **(1) *Sexual Activity of the Complainant.***

9 **(a) *General Rule***

10 **(i) In a prosecution under this Article, notwithstanding any other provision**
11 **of law, reputation or opinion evidence regarding the sexual history of the**
12 **complainant is not admissible, unless constitutionally required.**

13 **(ii) Evidence of specific instances from the sexual history of the**
14 **complainant, other than sexual history with the accused, shall be**
15 **inadmissible, except as provided in subsection (b).**

16 **(iii) Specialized rules of court shall establish procedures for determining,**
17 **prior to trial whenever possible, the admissibility of evidence covered by**
18 **this Section.**

19 **(iv) For purposes of this Section, “sexual history” shall mean any behavior,**
20 **condition, or expression related to human sexuality, or allegations**
21 **thereof, whether voluntary or involuntary, including but not limited to**
22 **evidence and allegations relating to sexual intimacy, contact, and**
23 **orientation; use of pornography; sexual fantasies and dreams; use of**
24 **contraceptives; habits of dress; and marital and partnership history or**
25 **status. “Sexual history” shall not include any allegedly false accusation of**
26 **a sexual offense.**

27 **(b) *Exceptions.* Evidence of specific instances of sexual history, if otherwise**
28 **admissible according to generally applicable rules of evidence, shall not be**
29 **inadmissible under subsection (a):**

30 **(i) when offered to prove that the defendant was not the source of physical**
31 **evidence, pregnancy, infection, or injury in the present case; or**

32 **(ii) when offered to impeach admitted evidence by specific contradiction or**
33 **prior inconsistency; or**

34 **(iii) when offered to prove the complainant’s bias or motive to fabricate a**
35 **material fact; or**

36 **(iv) when other evidence or circumstances at a trial involving an alleged**
37 **victim of tender years suggest that the accusation is more likely to be**
38 **true because the alleged victim has a specific kind of precocious sexual**
39 **knowledge pertinent to the accusation, or when the prosecutor makes**
40 **such a suggestion or argument, regardless of the alleged victim’s age; or**

1 **(v) when offered to rebut or provide an alternative explanation for**
2 **evidence, argument, or other specific circumstances apparent to the**
3 **trier of fact which suggest that the defendant's defense is highly**
4 **implausible; or**

5 **(vi) when the exclusion of such evidence would deprive the defendant of the**
6 **meaningful opportunity to present a complete defense or would**
7 **otherwise violate the Constitution.**

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9 ***(2) Prior Sexual History of the Defendant.***

10 **Evidence of the sexual history of the defendant is not admissible to prove the**
11 **character of the defendant in order to show action in conformity therewith. It may,**
12 **however, be admissible for other purposes, such as for impeachment, bias, or as**
13 **proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or**
14 **absence of mistake or accident.**

15
16 ***(3) Testimony Outside of the Courtroom.***

17 **(a) Testimony of an alleged victim of the defendant may be taken outside the**
18 **courtroom in accordance with the procedures specified in subsection (b) if, at the**
19 **request of any party, the court finds on the record, after a hearing based on evidence**
20 **that includes the testimony of a medical or psychological expert who has examined**
21 **the alleged victim, that**

22 **(i) The alleged victim is less than 12 years of age at the time of trial, or has a**
23 **documented developmental delay to the extent that his or her emotional**
24 **or cognitive capacity is no greater than that of a child aged 12;**

25 **(ii) The alleged victim will suffer serious emotional distress if required to**
26 **testify in the presence of the defendant;**

27 **(iii) Such distress will impair the alleged victim's ability to communicate, or**
28 **will render the victim incapable of testifying; and**

29 **(iv) The procedure is necessary to, and will significantly, mitigate that**
30 **distress.**

31 **(b) After making the findings required by subsection (a), the court may order**
32 **that the testimony of an alleged victim be taken outside the courtroom and outside**
33 **the physical presence of the judge, the defendant, and the jury, provided that all of**
34 **the following conditions are met:**

35 **(i) The testimony is taken during the proceeding;**

36 **(ii) The testimony is taken via a method of communication that allows the**
37 **defendant, judge, and jury to hear and see clearly the witness and**
38 **counsel for prosecution and defense;**

1 **(iii) Counsel for the defense is present in the room in which the alleged**
2 **victim testifies and has the opportunity to cross-examine the alleged**
3 **victim in the usual way; or, in the event that the defendant elects to**
4 **proceed *pro se*, then the court has appointed standby counsel prior to**
5 **the commencement of trial, who shall be present;**

6 **(iv) The room in which the alleged victim testifies contains no person other**
7 **than the witness, counsel for the government, counsel or standby**
8 **counsel for the defense, the operators of the technical equipment, any**
9 **essential court personnel, and no more than one person who the court**
10 **finds contributes to the well-being of the alleged victim;**

11 **(v) During the testimony, the defendant, judge, and jury shall remain in the**
12 **courtroom;**

13 **(vi) The defendant shall be provided with a confidential and nondisruptive**
14 **means of instantaneous communication with defense counsel.**

15
16 **(4) *Official Complaint.***

17 **(a) In a prosecution under this Article, and to the extent consistent with the**
18 **constitutional right of confrontation, the government may introduce in its case-in-**
19 **chief evidence that shows the time and place where the complaint was made to a**
20 **person in authority, along with evidence tending to establish the reasons for any**
21 **delay, provided that such evidence is not substantially more prejudicial than**
22 **probative. The court shall take care to circumscribe the admissible testimony to**
23 **avoid reference to the details alleged in the complaint, including by limiting the**
24 **testimony of a witness and by limiting the number of witnesses produced.**

25 **(b) Evidence of reports, or lack of reports, to persons other than those in**
26 **authority are inadmissible, unless deemed admissible by generally applicable rules**
27 **of evidence, or unless offered to rebut an express or implied argument concerning**
28 **the failure of the complainant to make a report.**
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30 **SECTION 213.11. COLLATERAL CONSEQUENCES OF CONVICTION**

31 ***[Reserved]***
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