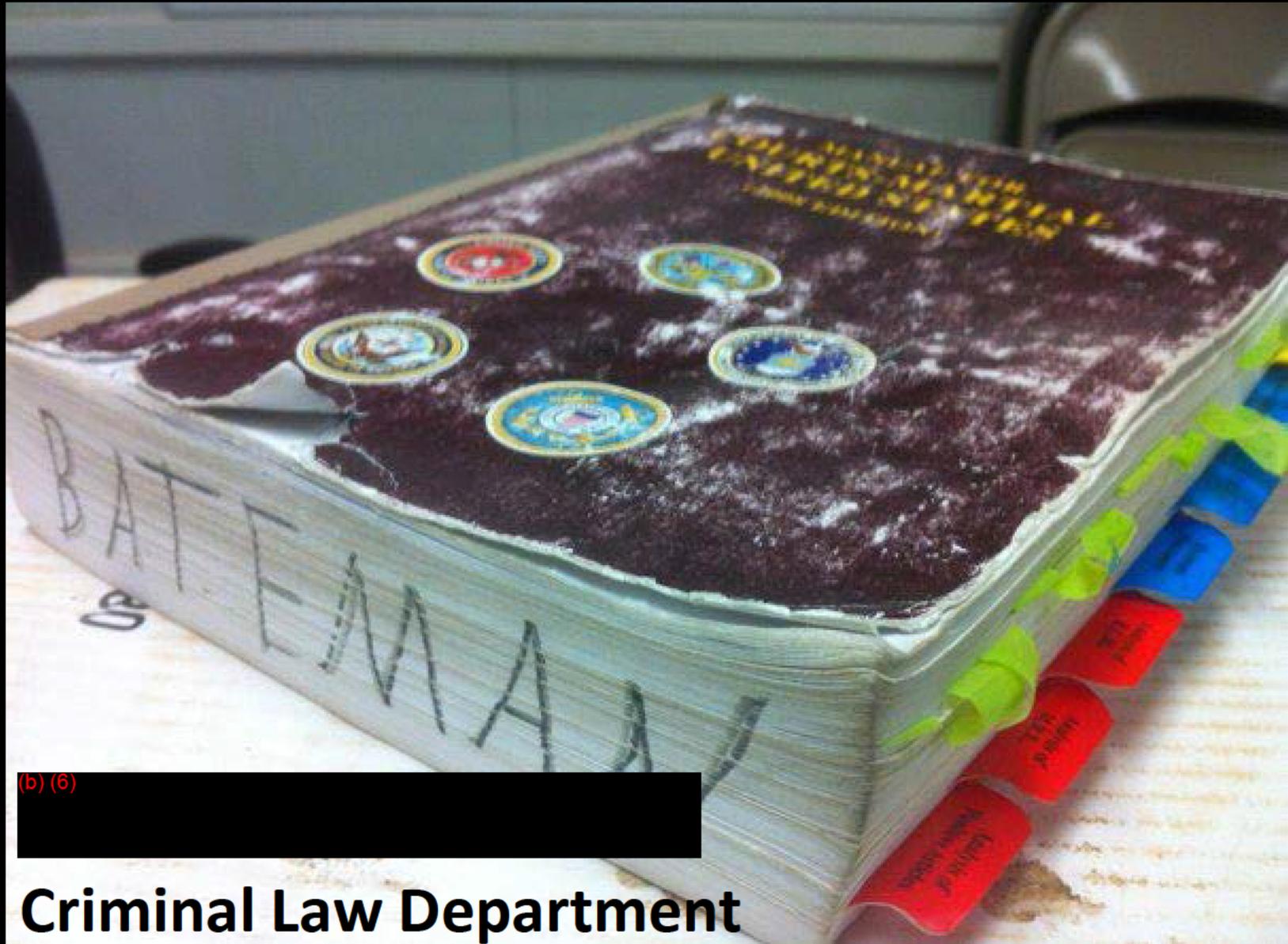


Article 120 Overview



(b) (6)

Criminal Law Department

Article 120

- Pre-2007: Appendix 27 (Red Tab)
- 2007-2012: Appendix 28 (Red Tab)
- Post-June 28, 2012 – page IV-68 of the “Punitive Articles”

****NEW** Statute of Limitations**

- As of 26 December 2013:

§ 843. Art. 43. Statute of limitations

(a) A person charged with absence without leave or missing movement in time of war, with murder, ~~rape, or rape of a child~~, or with any other offense punishable by death, may be tried and punished at any time without limitation.

SEC. 1703. ELIMINATION OF FIVE-YEAR STATUTE OF LIMITATIONS ON TRIAL BY COURT-MARTIAL FOR ADDITIONAL OFFENSES INVOLVING SEX-RELATED CRIMES.

(a) INCLUSION OF ADDITIONAL OFFENSES.—Section 843(a) of title 10, United States Code (article 43(a) of the Uniform Code of Military Justice), is amended by striking “rape, or rape of a child” and inserting “rape or sexual assault, or rape or sexual assault of a child”.

The Stuff That's Missing

[Note: The subparagraphs that would normally address elements, explanation, lesser included offenses, maximum punishments, and sample specifications are generated under the President's authority to prescribe rules pursuant to Article 36. At the time of publishing this MCM, the President had not prescribed such rules for this version of Article 120. Practitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.]

Maximum Punishment

- Executive Order 13543 of May 15, 2013:

Sec. 2. Part IV of the Manual for Courts-Martial, United States, is amended as follows:

- For Article 120 (Paragraph 45, Part IV, MCM):

“e. *Maximum punishment.*

(1) *Rape.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

(2) *Sexual assault.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

(3) *Aggravated sexual contact.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(4) *Abusive sexual contact.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.”

- Also, see Military Judges’ Benchbook
– (E.g., page 560 – para 3-45-13.a).

Minimum Punishment

SEC. 1705. DISCHARGE OR DISMISSAL FOR CERTAIN SEX-RELATED OFFENSES AND TRIAL OF SUCH OFFENSES BY GENERAL COURTS-MARTIAL.

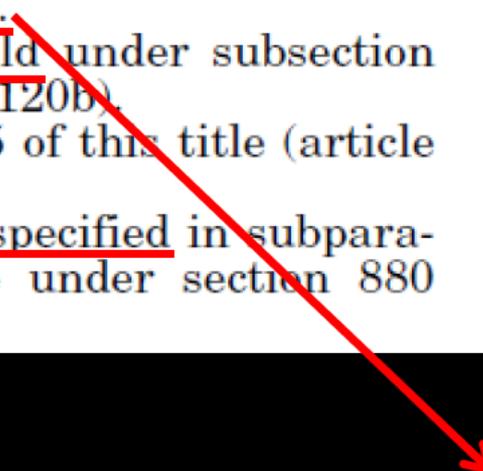
“(2) Paragraph (1) applies to the following offenses:

“(A) An offense in violation of subsection (a) or (b) of section 920 of this title (article 120(a) or (b)).

“(B) Rape and sexual assault of a child under subsection (a) or (b) of section 920b of this title (article 120b).

“(C) Forcible sodomy under section 925 of this title (article 125).

“(D) An attempt to commit an offense specified in subparagraph (A), (B), or (C) that is punishable under section 880 of this title (article 80).”.



Rape and Sexual Assault

The Stuff That's Missing (still...)

Everything Else

- The remaining subparagraph of Paragraph 45, Part IV (b., c., d., f.)
- In the interim:

**Military
Judges'
Benchbook**

UNOFFICIAL
This version contains all
approved changes as of
13 November 2013
(through Change 13-12
excluding 13-09).

FEDERAL RE



~~Tuesday,
October 23, 2012~~

Art 120 (and 120a, 120b, 120c) (2012)

ADULT CRIMES (Art 120)

- RAPE
- SEXUAL ASSAULT
- AGGRAVATED SEXUAL CONTACT
- ABUSIVE SEXUAL CONTACT

STALKING (Art 120a)

CHILD CRIMES (Art 120b)

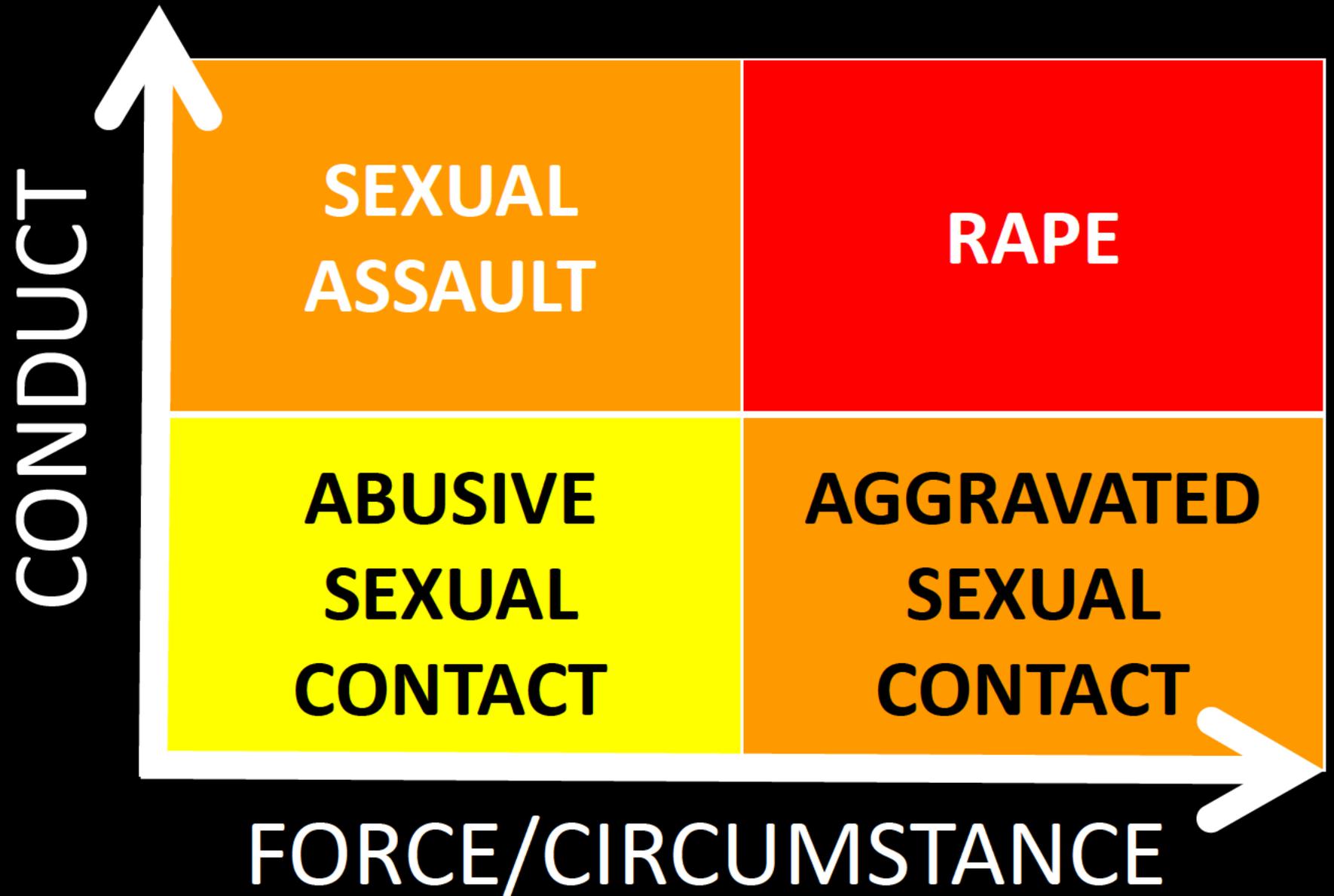
- RAPE OF A CHILD
- SEXUAL ASSAULT OF A CHILD
- SEXUAL ABUSE OF A CHILD

OTHER SEXUAL MISCONDUCT (Art 120c)

- INDECENT VIEWING, VISUAL RECORDING, OR BROADCASTING
- FORCIBLE PANDERING
- INDECENT EXPOSURE

Effective 28 June 2012

ADULT CRIMES



ADULT CRIMES

Sexual Act

SEXUAL
ASSAULT
30

RAPE
LWOP

Sexual Contact

ABUSIVE
SEXUAL
CONTACT
7

AGGRAVATED
SEXUAL
CONTACT
20

Lower degree of force



Higher degree of force

SEXUAL ACT

ARTICLE 120 (2007)

1. Contact* between penis and vulva (*penetration however slight)

OR

1. Penetration* of the genital opening of another

2. By a hand, finger, or any object

3. With the intent to:

- a. Abuse, humiliate, harass, or degrade any person or
- b. Arouse or gratify the sexual desire of any person.

ARTICLE 120 (2012)

1. Contact* between penis and vulva **or anus or mouth** (*penetration however slight)

OR

1. Penetration* of **vulva, anus, or mouth**

2. By **any body part or object**

3. With the intent to:

- a. Abuse, humiliate, harass, or degrade any person or
- b. Arouse or gratify the sexual desire of any person.

SEXUAL CONTACT

ARTICLE 120 (2007)

1. Touching (or cause another to touch)
2. Directly or through clothing
3. Genitalia, anus, groin, breast, inner thigh, or buttocks
4. With intent to:
 - a. Abuse, humiliate, harass, or degrade any person , OR
 - b. Gratify the sexual desire of any person.

ARTICLE 120 (2012)

1. Touching (or causing another to touch)
2. Directly or through clothing
3. Of genitalia, anus, groin, breast, inner thigh, or buttocks
4. With intent to abuse, humiliate, harass, or degrade any person

OR

1. Touching (or causing another to touch)
2. Directly or through clothing
3. **Any body part by any body part**
4. With intent to gratify the sexual desire of any person.

FORCE/CIRCUMSTANCE

Rape or Aggravated Sexual Contact

1. using **unlawful force** against that other person;
2. using **force** causing or **likely to cause death or grievous bodily harm** to any person;
3. **threatening . . . death, grievous bodily harm, or kidnapping;**
4. first **rendering** that other person **unconscious**; or
5. **administering . . . by force or threat of force, or without the knowledge or consent . . . intoxicant, . . . substantially impairing** the ability of that other person to appraise or control conduct;

Sexual Assault or Abusive Sexual Contact

- **threatening** or placing that other person in **fear**;
- causing **bodily harm** to that other person;
- making a **fraudulent representation** that the sexual act serves a professional purpose;
- inducing a **belief . . .** that the person is **another person**;
- **knows or reasonably should know** that the other person is **asleep, unconscious, or otherwise unaware . . . or is incapable of consenting . . .**

Sexual Act

**SEXUAL
ASSAULT**
30

RAPE
LWOP

Sexual Contact

**ABUSIVE
SEXUAL
CONTACT**
7

**AGGRAVATED
SEXUAL
CONTACT**
20

Lower degree of force



Higher degree of force

common law type crimes

118 - Murder

119 - Manslaughter

119a - Death or injury of an unborn child

120 - Rape and sexual assault

120a - Stalking

120b - Rape and sexual assault of a child

120c - Other sexual misconduct

121 - Larceny and wrongful appropriation

122 - Robbery

123 - Forgery

123a - Making, drawing, or uttering check,
draft, or order without sufficient funds

124 - Maiming

125 - ~~Sodomy~~ **Forcible Sodomy and Bestiality**

126 - Arson

127 - Extortion

128 - Assault

129 - Burglary

130 - Housebreaking

131 - Perjury

132 - Frauds against the United States



Article 120

- Pre-2007: Appendix 27 (Red Tab)
- 2007-2012: Appendix 28 (Red Tab)
- Post-June 28, 2012 – page IV-68 of the “Punitive Articles”
 - What is missing?

Art 120 (and 120a, 120b, 120c) (2012)

ADULT CRIMES (Art 120)

- RAPE
- SEXUAL ASSAULT
- AGGRAVATED SEXUAL CONTACT
- ABUSIVE SEXUAL CONTACT

STALKING (Art 120a)

CHILD CRIMES (Art 120b)

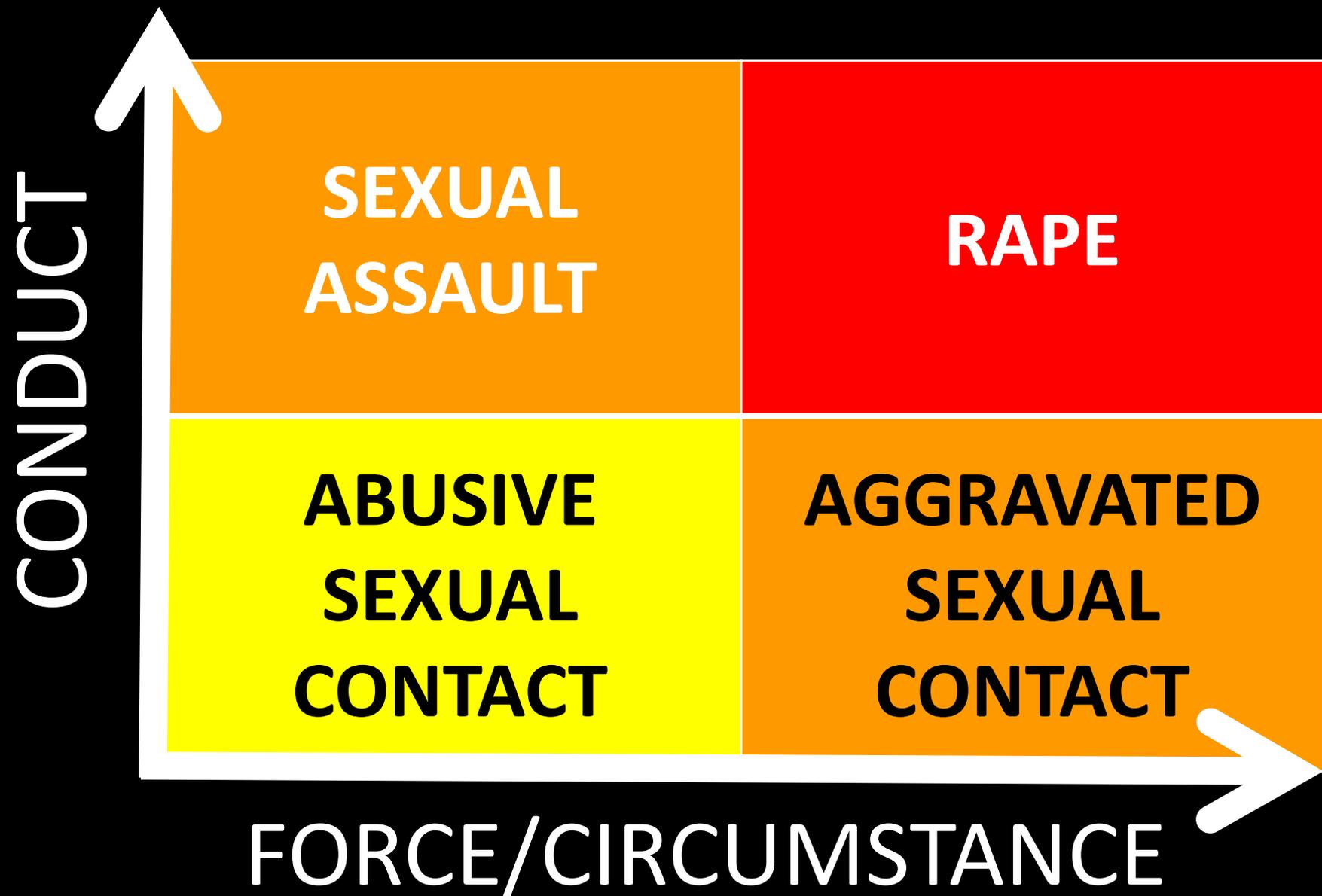
- RAPE OF A CHILD
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- INDECENT VIEWING, VISUAL RECORDING, OR BROADCASTING
- FORCIBLE PANDERING
- INDECENT EXPOSURE

Effective 28 June 2012

ADULT CRIMES



ADULT CRIMES

Sexual Act

**SEXUAL
ASSAULT**
30

RAPE
LWOP

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CONTACT**
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SEXUAL
CONTACT**
20

Lower degree of force



Higher degree of force

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ARTICLE 120 (2007)

1. Contact* between penis and vulva (*penetration however slight)

OR

1. Penetration* of the genital opening of another

2. By a hand, finger, or any object

3. With the intent to:

- a. Abuse, humiliate, harass, or degrade any person or
- b. Arouse or gratify the sexual desire of any person.

ARTICLE 120 (2012)

1. Contact* between penis and vulva **or anus or mouth** (*penetration however slight)

OR

1. Penetration* of **vulva, anus, or mouth**

2. By **any body part or object**

3. With the intent to:

- a. Abuse, humiliate, harass, or degrade any person or
- b. Arouse or gratify the sexual desire of any person.

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ARTICLE 120 (2007)

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 - b. Gratify the sexual desire of any person.

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2. Directly or through clothing
3. Of genitalia, anus, groin, breast, inner thigh, or buttocks
4. With intent to abuse, humiliate, harass, or degrade any person

OR

1. Touching (or causing another to touch)
2. Directly or through clothing
3. **Any body part by any body part**
4. With intent to gratify the sexual desire of any person.

FORCE/CIRCUMSTANCE

Rape or Aggravated Sexual Contact

1. using **unlawful force** against that other person;
2. using **force** causing or **likely to cause death or grievous bodily harm** to any person;
3. **threatening . . . death, grievous bodily harm, or kidnapping**;
4. first **rendering** that other person **unconscious**; or
5. **administering . . . by force or threat of force, or without the knowledge or consent . . . intoxicant, . . . substantially impairing** the ability of that other person to appraise or control conduct;

Sexual Assault or Abusive Sexual Contact

- **threatening** or placing that other person in **fear**;
- causing **bodily harm** to that other person;
- making a **fraudulent representation** that the sexual act serves a professional purpose;
- inducing a **belief . . .** that the person is **another person**;
- **knows or reasonably should know** that the other person is **asleep, unconscious, or otherwise unaware . . .** or is **incapable of consenting . . .**

Sexual Act

**SEXUAL
ASSAULT**
30

RAPE
LWOP

Sexual Contact

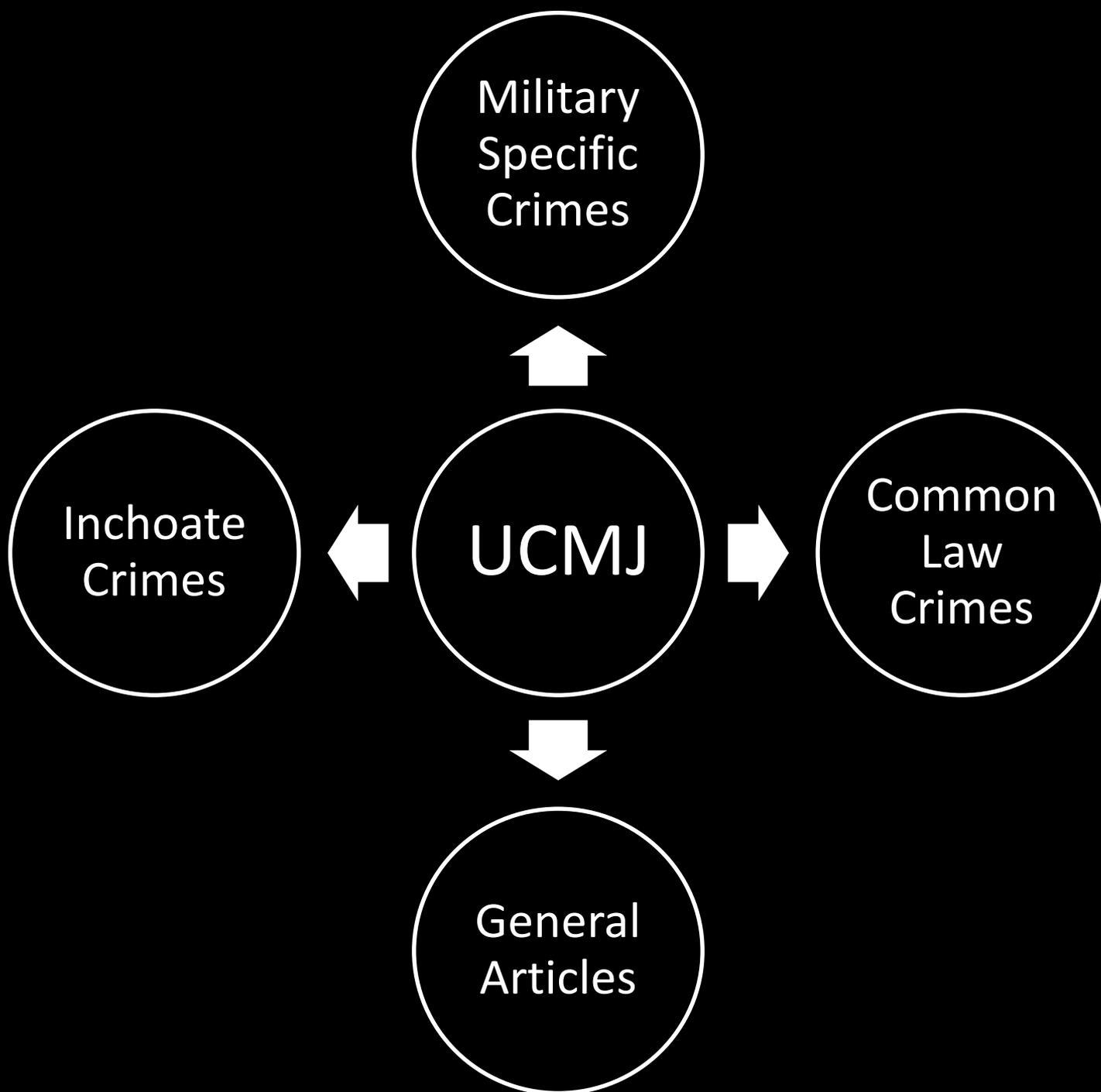
**ABUSIVE
SEXUAL
CONTACT**
7

**AGGRAVATED
SEXUAL
CONTACT**
20

Lower degree of force



Higher degree of force



Defenses

For Article 120, UCMJ
Effective 28 June 2012

Article 120, UCMJ
p. IV-69, text of the statute



(f) *Defenses.* An accused may raise any applicable defenses available under this chapter or the Rules for Court-Martial. Marriage is not a defense for any conduct in issue in any prosecution under this section.

Rules for Court-Martial 916(b),
“Defenses – Burden of
Proof”
p. II-110



(b) *Burden of proof.*

~~(4) *Mistake of fact as to consent.* In the defense of mistake of fact as to consent in Article 120(a), rape, Article 120(c), aggravated sexual assault, Article 120(e), aggravated sexual contact, and Article 120(h), abusive sexual contact, the accused has the burden of proving mistake of fact as to consent by a preponderance of the evidence. After the defense meets its burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist.~~

U.S. v. Prather, CAAF, 2011
69 M.J. 338
U.S. v. Medina, CAAF, 2011
69 M.J. 462

Defenses

For Article 120, UCMJ
Effective 28 June 2012

Rules for Court-Martial 916(j),
“Defenses – Ignorance or
Mistake of Fact”
p. II-113



(j) *Ignorance or mistake of fact.*

(1) *Generally.* Except as otherwise provided in this subsection, it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused’s knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

Defenses

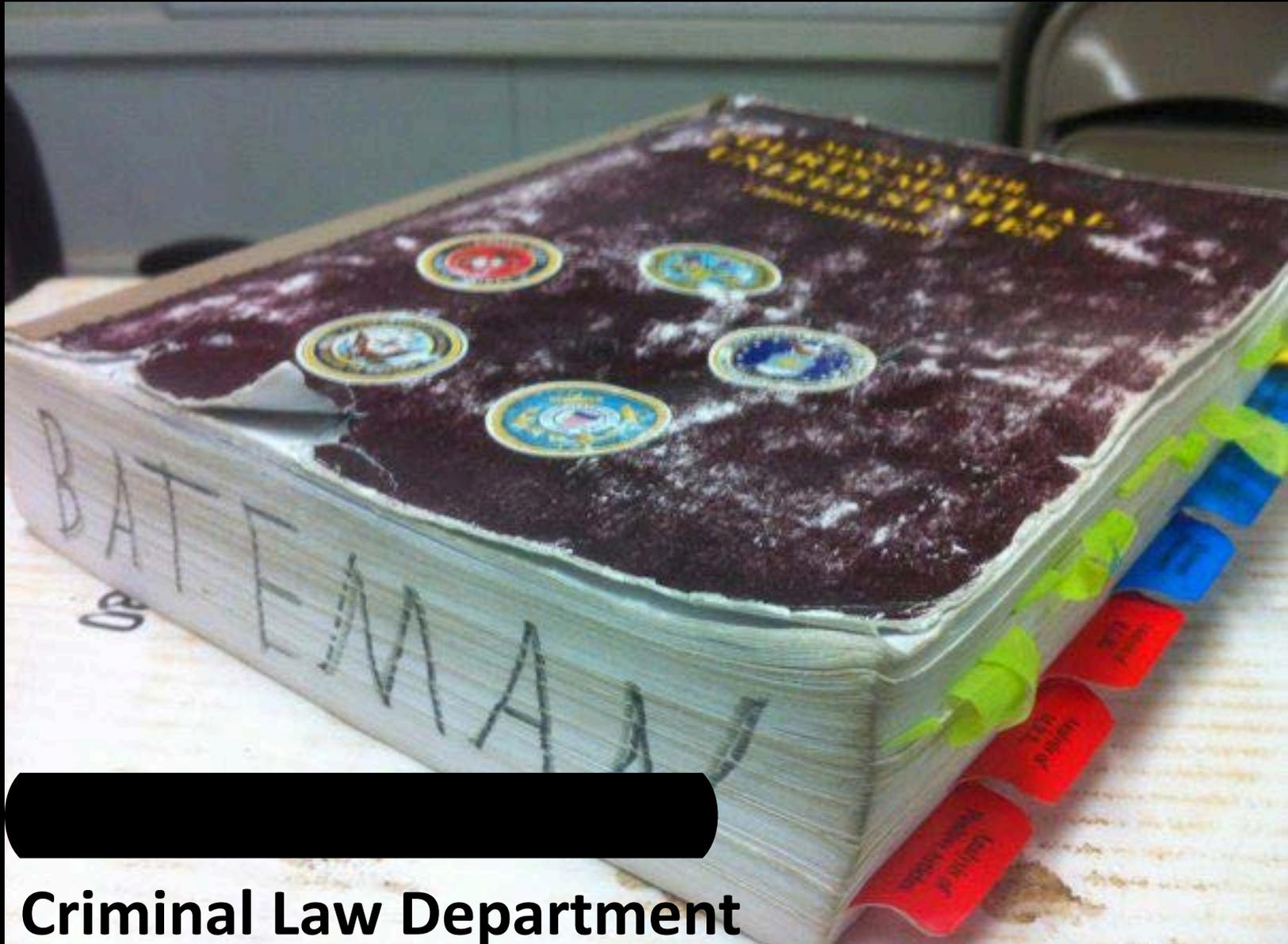
For Article 120, UCMJ
Effective 28 June 2012

Rules for Court-Martial 916(j),
“Defenses – Ignorance or
Mistake of Fact”
p. II-113



(3) *Sexual offenses.* It is an affirmative defense to a prosecution for Article 120(a), rape, Article 120(c), aggravated sexual assault, Article 120(e), aggravated sexual contact, and Article 120(h), abusive sexual contact that the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances. The accused's state of intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense.

Sexual Offenses under the UCMJ



Criminal Law Department

Article 120

...and 120b, 120c, 134...

- Pre-2007: Appendix 27 (Red Tab)
 - Rape, Carnal Knowledge, “Indecent” crimes
- 2007-2012: Appendix 28 (Red Tab)
 - All sex crimes moved to Article 120
- Post-June 28, 2012 – page IV-68 of the “Punitive Articles”
 - What is missing?

The Stuff That's Missing

[Note: The subparagraphs that would normally address elements, explanation, lesser included offenses, maximum punishments, and sample specifications are generated under the President's authority to prescribe rules pursuant to Article 36. At the time of publishing this MCM, the President had not prescribed such rules for this version of Article 120. Practitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.]

The Stuff That's Missing (no longer)

Maximum Punishment

- Executive Order 13543 of May 15, 2013

Sec. 2. Part IV of the Manual for Courts-Martial, United States, is amended as follows:

- For Article 120 (Paragraph 45, Part IV, MCM)

“e. *Maximum punishment.*

(1) *Rape.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

(2) *Sexual assault.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

(3) *Aggravated sexual contact.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(4) *Abusive sexual contact.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.”

- Also, see Military Judges' Benchbook

The Stuff That's Missing (still...)

Everything Else

- The remaining subparagraph of Paragraph 45, Part IV (b., c., d., f.)
- In the interim:

Military Judges' Benchbook

UNOFFICIAL

**This version contains all
approved changes as of
12 June 2014
(through Change 14-12).**

Art 120 (and 120a, 120b, 120c) (2012)

ADULT CRIMES (Art 120)

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- SEXUAL ASSAULT
- AGGRAVATED SEXUAL CONTACT
- ABUSIVE SEXUAL CONTACT

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CHILD CRIMES (Art 120b)

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- SEXUAL ASSAULT OF A CHILD
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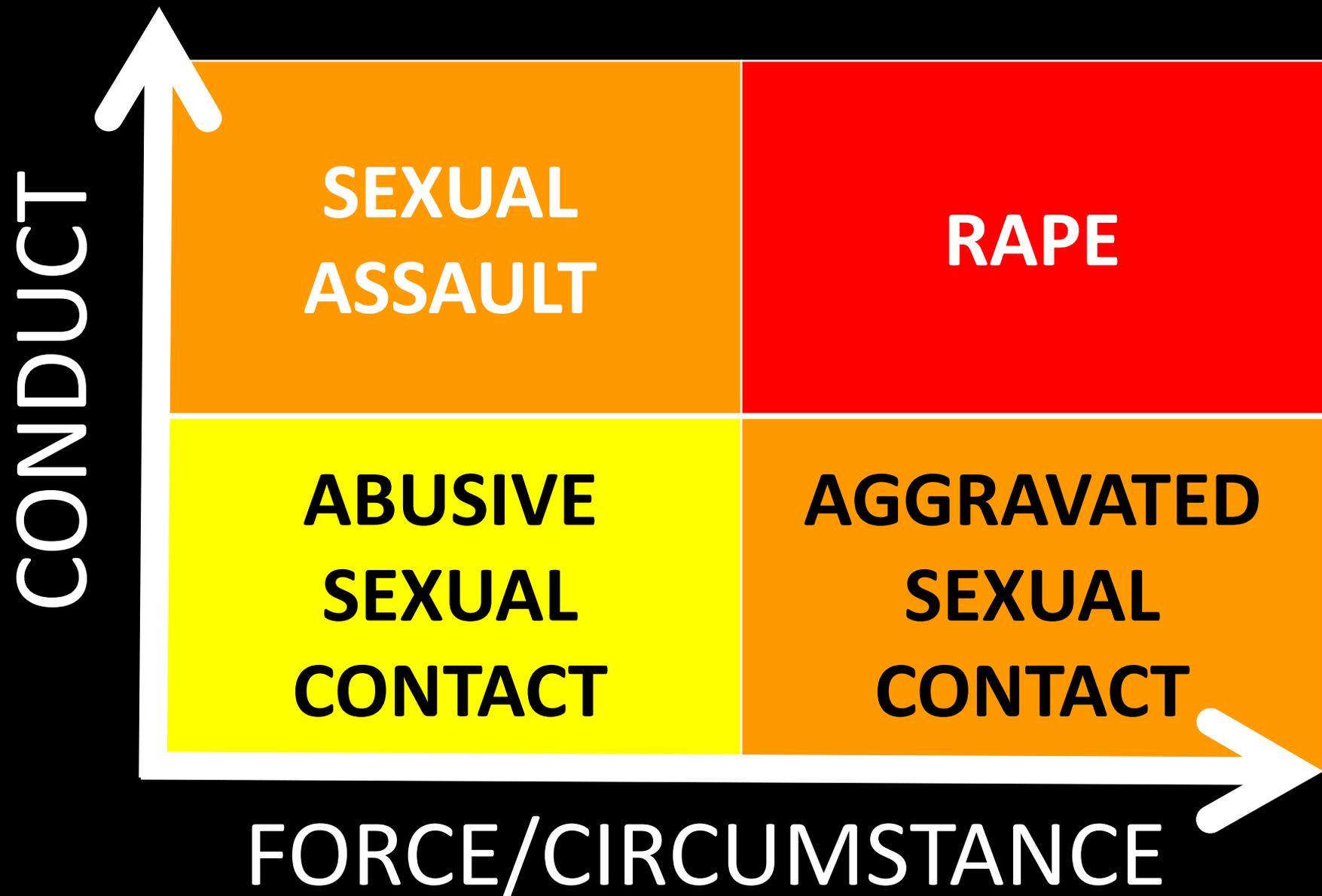
*Forcible Sodomy (Art 125)

- INDECENT VIEWING, VISUAL RECORDING, OR BROADCASTING
- FORCIBLE PANDERING
- INDECENT EXPOSURE

Effective 28 June 2012

***Effective 26 December 2014**

ADULT CRIMES



ADULT CRIMES

Sexual Act

**SEXUAL
ASSAULT**
30

RAPE
LWOP

Sexual Contact

**ABUSIVE
SEXUAL
CONTACT**
7

**AGGRAVATED
SEXUAL
CONTACT**
20

Lower degree of force



Higher degree of force

SEXUAL ACT

ARTICLE 120 (2007)

1. Contact* between penis and vulva (*penetration however slight)

OR

1. Penetration* of the genital opening of another

2. By a hand, finger, or any object

3. With the intent to:

- a. Abuse, humiliate, harass, or degrade any person or
- b. Arouse or gratify the sexual desire of any person.

ARTICLE 120 (2012)

1. Contact* between penis and vulva **or anus or mouth** (*penetration however slight)

OR

1. Penetration* of **vulva, anus, or mouth**

2. By **any body part or object**

3. With the intent to:

- a. Abuse, humiliate, harass, or degrade any person or
- b. Arouse or gratify the sexual desire of any person.

SEXUAL CONTACT

ARTICLE 120 (2007)

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2. Directly or through clothing
3. Genitalia, anus, groin, breast, inner thigh, or buttocks
4. With intent to:
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ARTICLE 120 (2012)

1. Touching (or causing another to touch)
2. Directly or through clothing
3. Of genitalia, anus, groin, breast, inner thigh, or buttocks
4. With intent to abuse, humiliate, harass, or degrade any person

OR

1. Touching (or causing another to touch)
2. Directly or through clothing
3. **Any body part by any body part**
4. With intent to gratify the sexual desire of any person.

FORCE/CIRCUMSTANCE

Rape or Aggravated Sexual Contact

1. using **unlawful force** against that other person;
2. using **force** causing or **likely to cause death or grievous bodily harm** to any person;
3. **threatening . . . death, grievous bodily harm, or kidnapping**;
4. first **rendering** that other person **unconscious**; or
5. **administering . . . by force or threat of force, or without the knowledge or consent . . . intoxicant, . . . substantially impairing** the ability of that other person to appraise or control conduct;

Sexual Assault or Abusive Sexual Contact

- **threatening** or placing that other person in **fear**;
- causing **bodily harm** to that other person;
- making a **fraudulent representation** that the sexual act serves a professional purpose;
- inducing a **belief . . .** that the person is **another person**;
- **knows or reasonably should know** that the other person is **asleep, unconscious, or otherwise unaware . . .** or is **incapable of consenting . . .**

Sexual Act

**SEXUAL
ASSAULT**
30 (& DD/D)

RAPE
LWOP (& DD/D)

Sexual Contact

**ABUSIVE
SEXUAL
CONTACT**
7

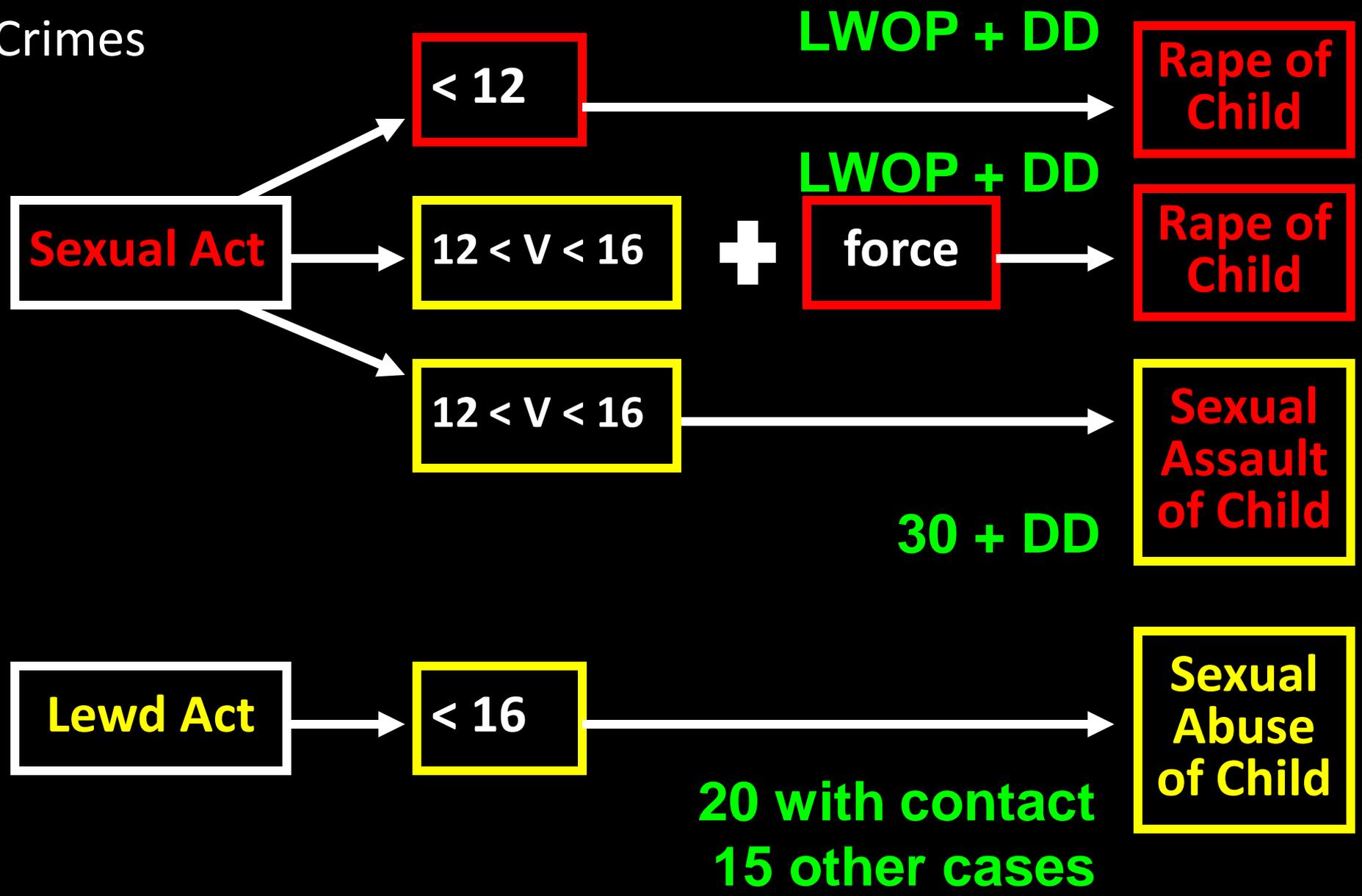
**AGGRAVATED
SEXUAL
CONTACT**
20

Lower degree of force



Higher degree of force

Child Crimes



SEXUAL ACT

1. Contact between penis and vulva **or anus or mouth**

OR

1. Penetration of **vulva, anus, or mouth**

2. By **any body part or object**

3. With the intent to:

a. Abuse, humiliate, harass, or degrade any person or

b. Arouse or gratify the sexual desire of any person.

SEXUAL CONTACT

- 1. Touching (or causing another to touch)**
- 2. Directly or through clothing**
- 3. Of genitalia, anus, groin, breast, inner thigh, or buttocks**
- 4. With intent to abuse, humiliate, harass, or degrade any person**

OR

- 1. Touching (or causing another to touch)**
- 2. Directly or through clothing**
- 3. Any body part by any body part**
- 4. With intent to gratify the sexual desire of any person.**

LEWD ACT

4 TYPES OF LEWD ACTS:

1. Any **sexual contact**
2. Intentionally exposing (with one of two intents)
3. Intentionally communicating indecent language (with one of two intents)
4. Any indecent conduct
 - a. Intentionally done with or in the presence of a child
 - b. Traditional “form of immorality” definition

Physical presence requirement eliminated

FORCE

ARTICLE 120 (2012) – adult crimes

1. The use of a weapon; or
2. The use of such physical strength or violence as is sufficient to overcome, restrain or injure a person; or
3. Inflicting physical harm sufficient to coerce or compel submission by the victim.

ARTICLE 120 (2012) – child crimes

1. The use of a weapon;
2. The use of such physical strength or violence as is sufficient to overcome, restrain or injure a child; or
3. Inflicting physical harm.

In the case of a parent-child or similar relationship, the use or abuse of parental or similar authority is sufficient to constitute the use of force.

Art 120c - Indecent Viewing, Visual Recording, or Broadcasting

Two observation crimes

1. Views (**1 year**)
2. Photographs, videotapes, films, or records (**5 years**)

- Knowingly
- Private area of another
- Without consent
- Other person had a REOP

One broadcasting crime (7 years)

- Knowingly broadcasts or distributes one of above
- Knew or should have known made under circumstances above



***Advanced Topics for
Consideration***

Language use

Rape by administration:

Administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby **substantially** **impairing** the ability of that other person to appraise or control conduct.

Sexual Assault when incapable of consent:

Commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to— **impairment** by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the Accused.

“Known or reasonably should be known”

(2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or

(3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—

(A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or

(B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person;

Know = actual

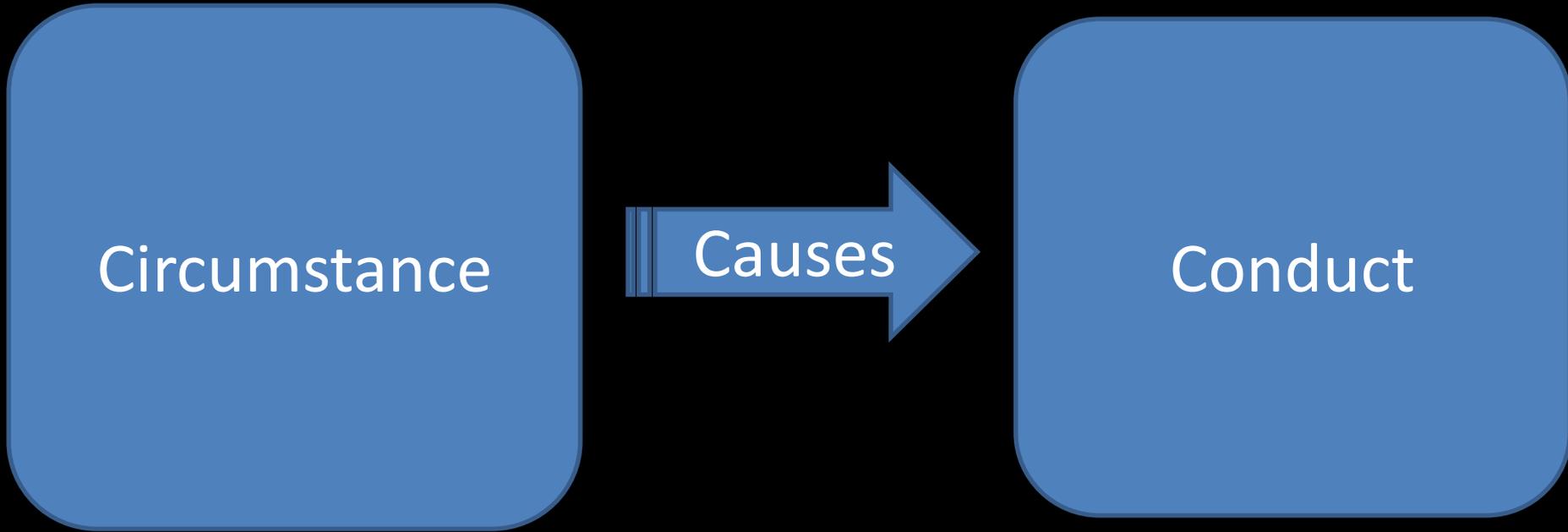
Reasonably should know = objective

Negligence standard

Circumstance

Causes

Conduct



Unlawful force

Force = Death or GBH

Fear of Death, GBH,
or kidnapping

Rendering
unconscious

Administering
substance that
substantially impairs

Causes

Sexual Act

Threat or Fear

Bodily harm

Fraud

Causes

Sexual Act



Sexual Act

When

Condition/
Capacity

Sexual Act

When

Accused
knows/reasonably
should know victim
is:

Asleep/unconscious/
otherwise unaware

Incapable of consent
due to condition

This is what
consent
looks
like



CONSENT

- Lack of consent is not an element (two exceptions).
- “freely given agreement ...by a competent person.”
- Cannot Consent:
 - ✓ Sleeping, unconscious, incompetent
 - ✓ Death/GBH
 - ✓ Render unconscious
 - ✓ Under threat or fear
 - ✓ Fraud

How is consent evidence used?

Sexual Assault by Causing Bodily Harm

1. Sex Act

2. Bodily Harm

Offensive touching

Consent = not offensive

Not a defense

Bodily Harm

“to wit” or not “to wit”

(3) *Bodily harm.* The term ‘bodily harm’ means any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.

It’s in the pleading:

1. In that A did sexually assault V by committing a sexual act with V, to wit: penetration of V’s vulva with his penis by causing bodily harm, to wit: pushing V to the bed and holding her down with his hands.

Consent ≠ element

2. In that A did sexually assault V by committing a sexual act with V, to wit: penetration of V’s vulva with his penis by causing bodily harm.

Consent = element: the penetration serves as both the sexual act AND the bodily harm IF the Government proves the sexual act was nonconsensual.

Threat or Fear
Bodily harm
Fraud

Causes

Consent

Sexual Act

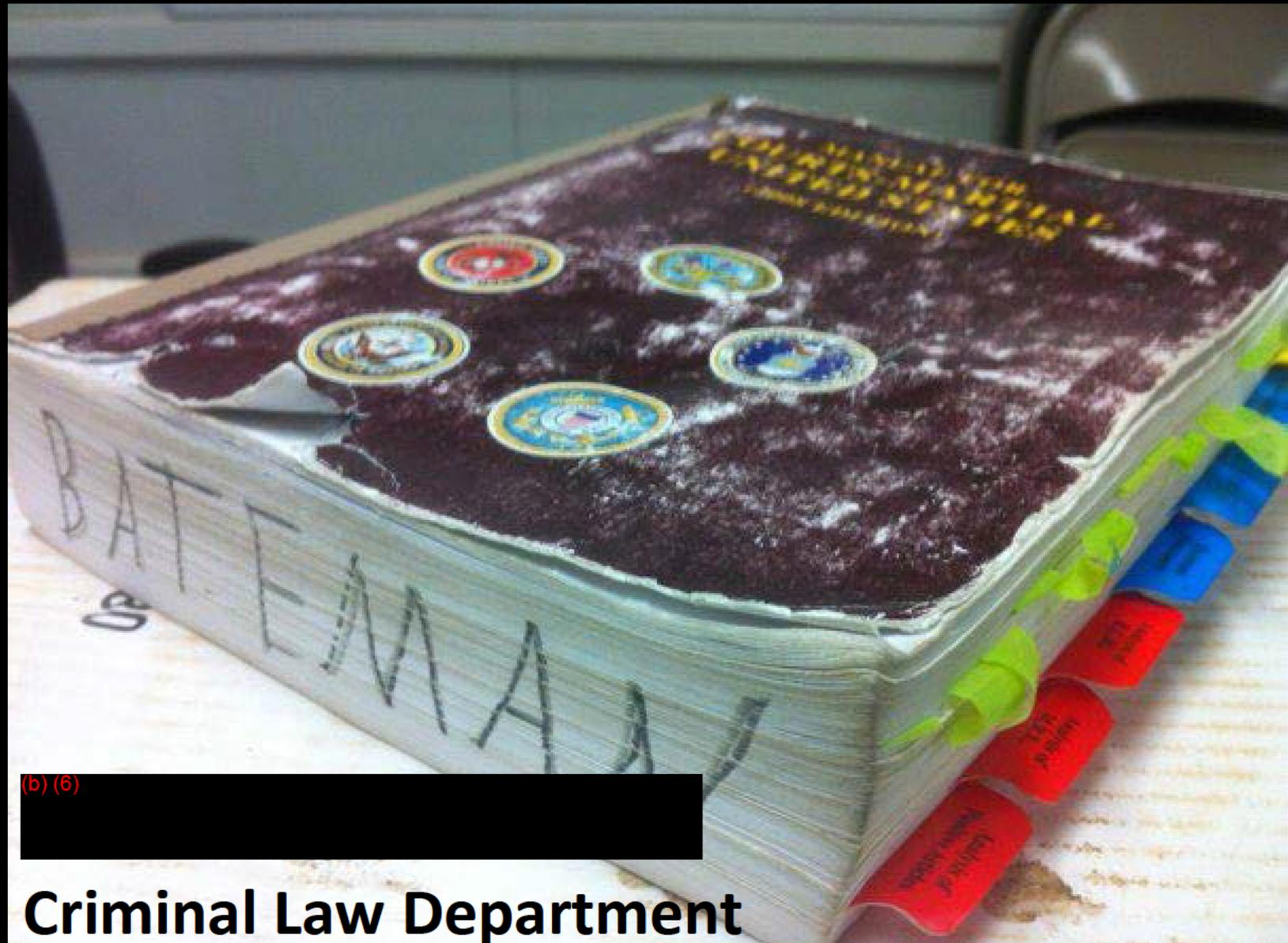
Sexual Assault (asleep, unconscious, or otherwise)

1. Sex Act
2. Victim asleep, unconscious, or otherwise unaware the sex act is occurring
3. Accused knew or reasonably should have known victim was asleep, unconscious, or otherwise unaware.

Sexual Assault (incapable of consent)

1. Sex Act
2. Victim incapable of consent due to
 - a. Impairment by drug, intoxicant, similar substance
 - b. Mental disease or defect or physical disability
3. Accused knew or reasonably should have known of the impairment or disease/defect/disability

Article 120 (and 120b & 120c)



(b) (6)

Criminal Law Department

Article 120 (& 134?)

- Pre-2007: Appendix 27 (Red Tab)
- 2007-2012: Appendix 28 (Red Tab)
- Post-June 28, 2012 – page IV-68 of the “Punitive Articles”
 - What is missing?

The Stuff That's Missing

[Note: The subparagraphs that would normally address elements, explanation, lesser included offenses, maximum punishments, and sample specifications are generated under the President's authority to prescribe rules pursuant to Article 36. At the time of publishing this MCM, the President had not prescribed such rules for this version of Article 120. Practitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.]

The Stuff That's Missing (no longer)

Maximum Punishment

- Executive Order 13543 of May 15, 2013

Sec. 2. Part IV of the Manual for Courts-Martial, United States, is amended as follows:

- For Article 120 (Paragraph 45, Part IV, MCM)

“e. *Maximum punishment.*

(1) *Rape.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

(2) *Sexual assault.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

(3) *Aggravated sexual contact.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(4) *Abusive sexual contact.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.”

- Also, see Approved Interim Update 13-07, Military Judges' Benchbook

Mandatory Discharge/Dismissal

SEC. 1705. DISCHARGE OR DISMISSAL FOR CERTAIN SEX-RELATED OFFENSES AND TRIAL OF SUCH OFFENSES BY GENERAL COURTS-MARTIAL.

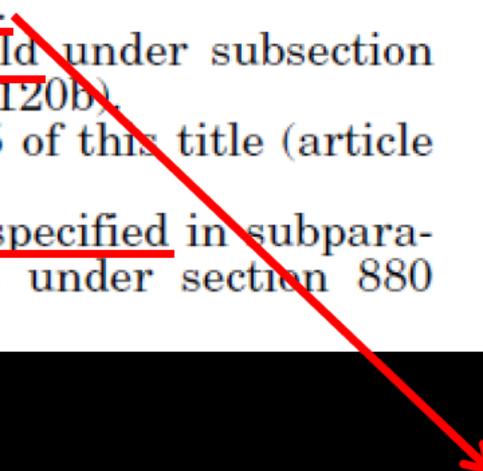
“(2) Paragraph (1) applies to the following offenses:

“(A) An offense in violation of subsection (a) or (b) of section 920 of this title (article 120(a) or (b)).

“(B) Rape and sexual assault of a child under subsection (a) or (b) of section 920b of this title (article 120b).

“(C) Forcible sodomy under section 925 of this title (article 125).

“(D) An attempt to commit an offense specified in subparagraph (A), (B), or (C) that is punishable under section 880 of this title (article 80).”.



Rape and Sexual Assault

The Stuff That's Missing (still...)

Everything Else

- The remaining subparagraph of Paragraph 45, Part IV (b., c., d., f.)
- In the interim:

**Military
Judges'
Benchmark**

UNOFFICIAL
This version contains all
approved changes as of
17 March 2014
(through Change 14-01).

FEDERAL RE



~~Tuesday,
October 23, 2012~~

****NEW** Statute of Limitations**

- As of 26 December 2013:

§ 843. Art. 43. Statute of limitations

(a) A person charged with absence without leave or missing movement in time of war, with murder, ~~rape, or rape of a child~~ or with any other offense punishable by death, may be tried and punished at any time without limitation.

SEC. 1703. ELIMINATION OF FIVE-YEAR STATUTE OF LIMITATIONS ON TRIAL BY COURT-MARTIAL FOR ADDITIONAL OFFENSES INVOLVING SEX-RELATED CRIMES.

(a) **INCLUSION OF ADDITIONAL OFFENSES.**—Section 843(a) of title 10, United States Code (article 43(a) of the Uniform Code of Military Justice), is amended by striking “rape, or rape of a child” and inserting “rape or sexual assault, or rape or sexual assault of a child”.

Art 120 (and 120a, 120b, 120c) (2012)

ADULT CRIMES (Art 120)

- RAPE
- SEXUAL ASSAULT
- AGGRAVATED SEXUAL CONTACT
- ABUSIVE SEXUAL CONTACT

STALKING (Art 120a)

CHILD CRIMES (Art 120b)

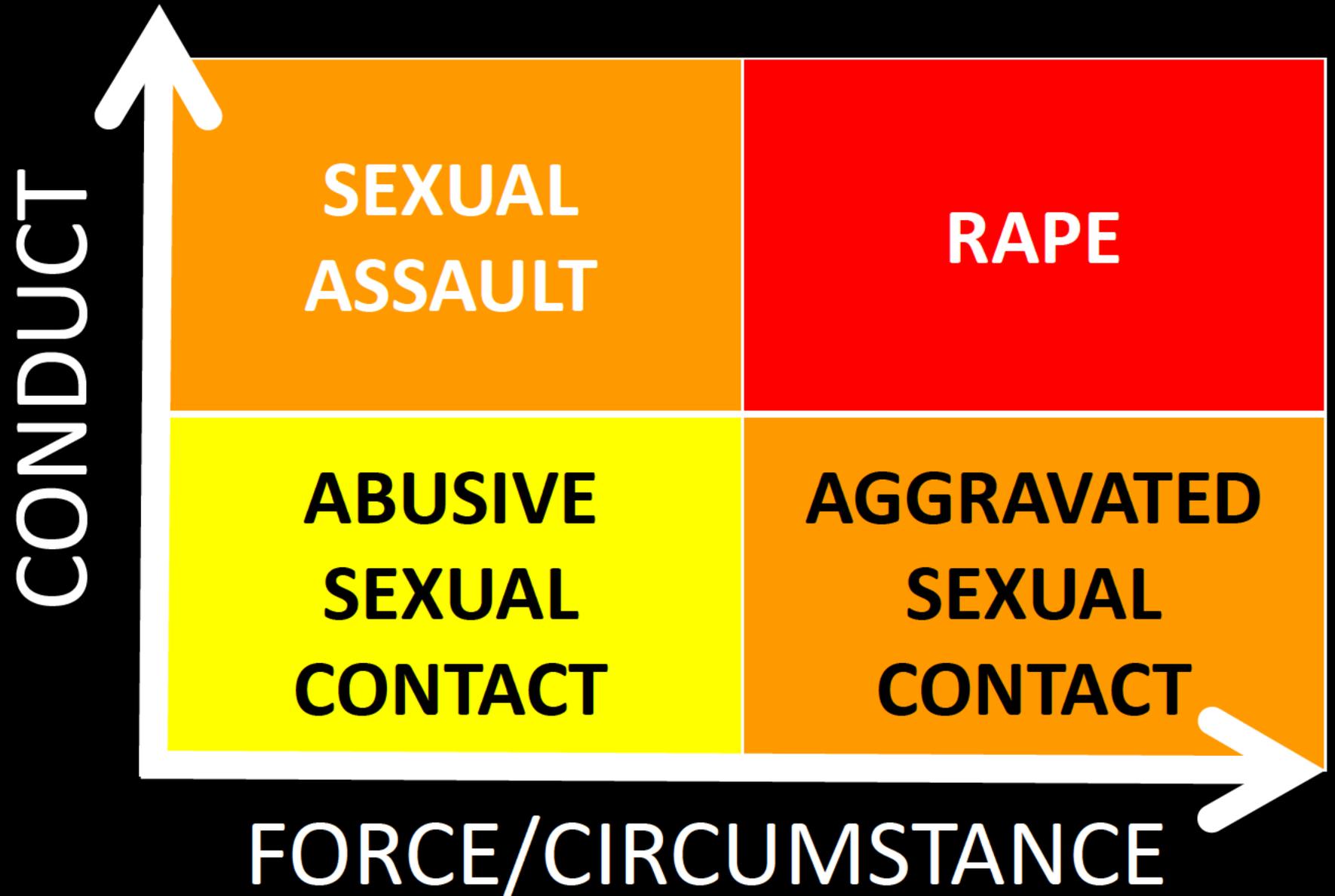
- RAPE OF A CHILD
- SEXUAL ASSAULT OF A CHILD
- SEXUAL ABUSE OF A CHILD

OTHER SEXUAL MISCONDUCT (Art 120c)

- INDECENT VIEWING, VISUAL RECORDING, OR BROADCASTING
- FORCIBLE PANDERING
- INDECENT EXPOSURE

Effective 28 June 2012

ADULT CRIMES



ADULT CRIMES

Sexual Act

**SEXUAL
ASSAULT**
30

RAPE
LWOP

Sexual Contact

**ABUSIVE
SEXUAL
CONTACT**
7

**AGGRAVATED
SEXUAL
CONTACT**
20

Lower degree of force



Higher degree of force

SEXUAL ACT

ARTICLE 120 (2007)

1. Contact* between penis and vulva (*penetration however slight)

OR

1. Penetration* of the genital opening of another

2. By a hand, finger, or any object

3. With the intent to:

- a. Abuse, humiliate, harass, or degrade any person or
- b. Arouse or gratify the sexual desire of any person.

ARTICLE 120 (2012)

1. Contact* between penis and vulva **or anus or mouth** (*penetration however slight)

OR

1. Penetration* of **vulva, anus, or mouth**

2. By **any body part or object**

3. With the intent to:

- a. Abuse, humiliate, harass, or degrade any person or
- b. Arouse or gratify the sexual desire of any person.

SEXUAL CONTACT

ARTICLE 120 (2007)

1. Touching (or cause another to touch)
2. Directly or through clothing
3. Genitalia, anus, groin, breast, inner thigh, or buttocks
4. With intent to:
 - a. Abuse, humiliate, harass, or degrade any person , OR
 - b. Gratify the sexual desire of any person.

ARTICLE 120 (2012)

1. Touching (or causing another to touch)
2. Directly or through clothing
3. Of genitalia, anus, groin, breast, inner thigh, or buttocks
4. With intent to abuse, humiliate, harass, or degrade any person

OR

1. Touching (or causing another to touch)
2. Directly or through clothing
3. **Any body part by any body part**
4. With intent to gratify the sexual desire of any person.

FORCE/CIRCUMSTANCE

Rape or Aggravated Sexual Contact

1. using **unlawful force** against that other person;
2. using **force** causing or **likely to cause death or grievous bodily harm** to any person;
3. **threatening . . . death, grievous bodily harm, or kidnapping;**
4. first **rendering** that other person **unconscious;** or
5. **administering . . . by force or threat of force, or without the knowledge or consent . . . intoxicant, . . . substantially impairing** the ability of that other person to appraise or control conduct;

Sexual Assault or Abusive Sexual Contact

- **threatening** or placing that other person in **fear;**
- causing **bodily harm** to that other person;
- making a **fraudulent representation** that the sexual act serves a professional purpose;
- inducing a **belief . . .** that the person is **another person;**
- **knows or reasonably should know** that the other person is **asleep, unconscious, or otherwise unaware . . .** or is **incapable of consenting . . .**

Sexual Act

**SEXUAL
ASSAULT**
30 (& DD/D)

RAPE
LWOP (& DD/D)

Sexual Contact

**ABUSIVE
SEXUAL
CONTACT**
7

**AGGRAVATED
SEXUAL
CONTACT**
20

Lower degree of force



Higher degree of force

U.S. v. SGT Archie

Sexual Assault

Conduct

1. commits a **sexual act**
upon another person

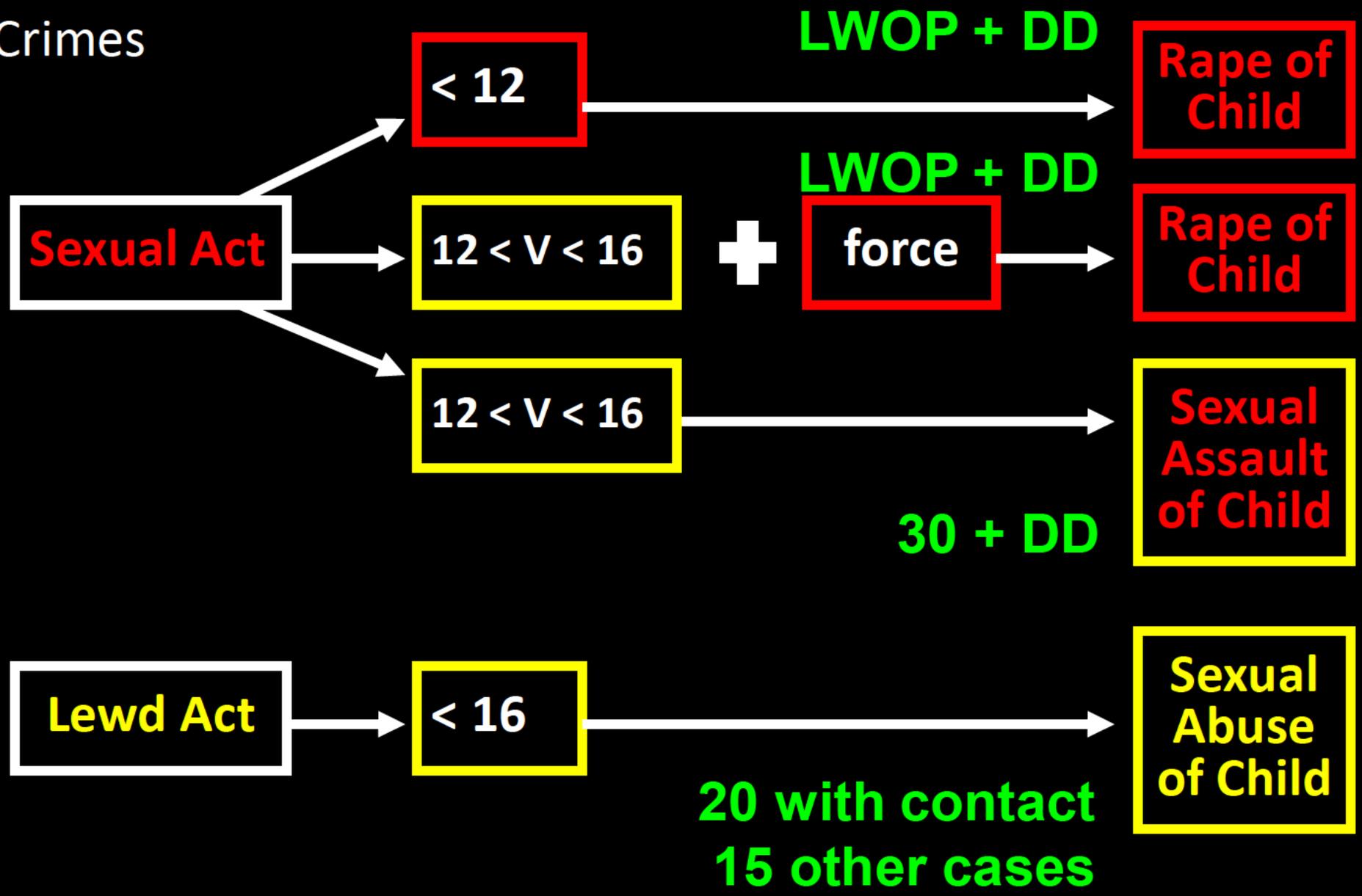
Force/Circumstances

2. By causing **bodily harm**
to that other person;

Evidence?

Defenses?

Child Crimes



Art 120c - Indecent Viewing, Visual Recording, or Broadcasting

Two observation crimes

1. Views (**1 year**)
2. Photographs, videotapes, films, or records (**5 years**)

- Knowingly
- Private area of another
- Without consent
- Other person had a REOP

One broadcasting crime (7 years)

- Knowingly broadcasts or distributes one of above
- Knew or should have known made under circumstances above



SEXUAL ACT

1. Contact between penis and vulva or anus or mouth

OR

1. Penetration of vulva, anus, or mouth

2. By any body part or object

3. With the intent to:

a. Abuse, humiliate, harass, or degrade any person or

b. Arouse or gratify the sexual desire of any person.

SEXUAL CONTACT

1. Touching (or causing another to touch)
2. Directly or through clothing
3. Of genitalia, anus, groin, breast, inner thigh, or buttocks
4. With intent to abuse, humiliate, harass, or degrade any person

OR

1. Touching (or causing another to touch)
2. Directly or through clothing
3. Any body part by any body part
4. With intent to gratify the sexual desire of any person.

LEWD ACT

4 TYPES OF LEWD ACTS:

1. Any **sexual contact**
2. Intentionally exposing (with one of two intents)
3. Intentionally communicating indecent language (with one of two intents)
4. Any indecent conduct
 - a. Intentionally done with or in the presence of a child
 - b. Traditional “form of immorality” definition

Physical presence requirement eliminated

FORCE

ARTICLE 120 (2012) – **adult crimes**

1. The use of **a weapon**; or
2. The use of such physical strength or violence as is **sufficient to overcome, restrain or injure a person**; or
3. Inflicting physical harm **sufficient to coerce or compel submission** by the victim.

ARTICLE 120 (2012) – **child crimes**

1. The use of **a weapon**;
2. The use of such physical strength or violence as is **sufficient to overcome, restrain or injure a child**; or
3. Inflicting **physical harm**.

In the case of a parent-child or similar relationship, the use or abuse of **parental or similar authority is sufficient to constitute the use of force**.

Language use

Rape by administration:

Administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby **substantially** **impairing** the ability of that other person to appraise or control conduct.

Sexual Assault when incapable of consent:

Commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to— **impairment** by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the Accused.

“Known or reasonably should be known”

(2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or

(3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—

(A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or

(B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person;

Know = actual

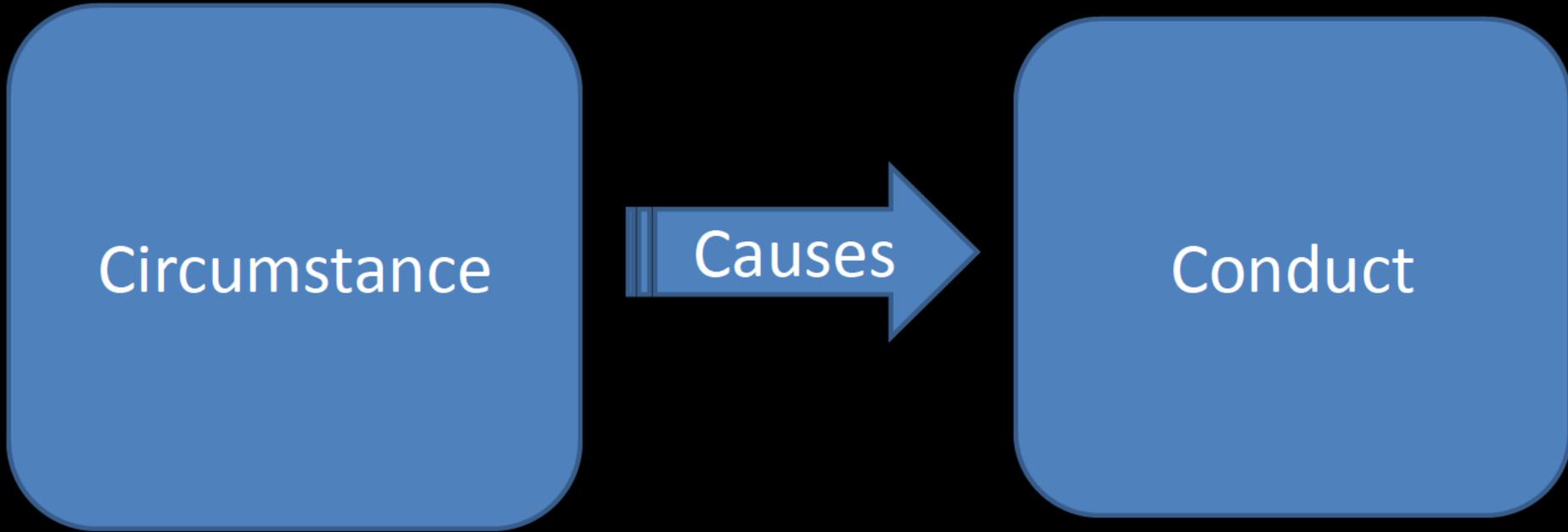
Reasonably should know = objective

Negligence standard

Circumstance

Causes

Conduct



Unlawful force

Force = Death or GBH

Fear of Death, GBH,
or kidnapping

Rendering
unconscious

Administering
substance that
substantially impairs

Causes

Sexual Act

Threat or Fear

Bodily harm

Fraud

Causes

Sexual Act



Sexual Act

When

Condition/
Capacity

Sexual Act

When

Accused
knows/reasonably
should know victim
is:

Asleep/unconscious/
otherwise unaware

Incapable of consent
due to condition



This is what
consent
looks
like

CONSENT

- Lack of consent is not an element (two exceptions).
- “freely given agreement ...by a competent person.”
- Cannot Consent:
 - ✓ Sleeping, unconscious, incompetent
 - ✓ Death/GBH
 - ✓ Render unconscious
 - ✓ Under threat or fear
 - ✓ Fraud

How is consent evidence used?

Sexual Assault by Causing Bodily Harm

1. Sex Act

2. Bodily Harm

Offensive touching

Consent = not offensive

Not a defense

Bodily Harm

“to wit” or not “to wit”

(3) *Bodily harm.* The term ‘bodily harm’ means any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.

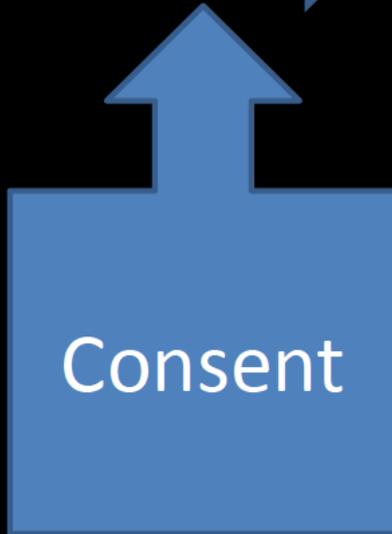
It’s in the pleading:

1. In that A did sexually assault V by committing a sexual act with V, to wit: penetration of V’s vulva with his penis by causing bodily harm, to wit: pushing V to the bed and holding her down with his hands.

Consent ≠ element

2. In that A did sexually assault V by committing a sexual act with V, to wit: penetration of V’s vulva with his penis by causing bodily harm.

Consent = element: the penetration serves as both the sexual act AND the bodily harm IF the Government proves the sexual act was nonconsensual.



Sexual Assault (asleep, unconscious, or otherwise)

1. Sex Act
2. Victim asleep, unconscious, or otherwise unaware the sex act is occurring
3. Accused knew or reasonably should have known victim was asleep, unconscious, or otherwise unaware.

Sexual Assault (incapable of consent)

1. Sex Act
2. Victim incapable of consent due to
 - a. Impairment by drug, intoxicant, similar substance
 - b. Mental disease or defect or physical disability
3. Accused knew or reasonably should have known of the impairment or disease/defect/disability

Defenses and Instructions

For Article 120, UCMJ
Effective 28 June 2012

Article 120, UCMJ
p. IV-69, text of the statute



(f) *Defenses.* An accused may raise any applicable defenses available under this chapter or the Rules for Court-Martial. Marriage is not a defense for any conduct in issue in any prosecution under this section.

Rules for Court-Martial 916(b),
“Defenses – Burden of
Proof”
p. II-110



(b) *Burden of proof.*

~~(4) *Mistake of fact as to consent.* In the defense of mistake of fact as to consent in Article 120(a), rape, Article 120(c), aggravated sexual assault, Article 120(e), aggravated sexual contact, and Article 120(h), abusive sexual contact, the accused has the burden of proving mistake of fact as to consent by a preponderance of the evidence. After the defense meets its burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist.~~

U.S. v. Prather, CAAF, 2011
69 M.J. 338
U.S. v. Medina, CAAF, 2011
69 M.J. 462

Defenses and Instructions

For Article 120, UCMJ
Effective 28 June 2012

Rules for Court-Martial 916(j),
“Defenses – Ignorance or
Mistake of Fact”
p. II-113



(j) *Ignorance or mistake of fact.*

(1) *Generally.* Except as otherwise provided in this subsection, it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused’s knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

Defenses and Instructions

For Article 120, UCMJ
Effective 28 June 2012

Rules for Court-Martial 916(j),
“Defenses – Ignorance or
Mistake of Fact”
p. II-113



~~(3) *Sexual offenses.* It is an affirmative defense to a prosecution for Article 120(a), rape, Article 120(c), aggravated sexual assault, Article 120(e), aggravated sexual contact, and Article 120(h), abusive sexual contact that the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances. The accused's state of intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense.~~

Defenses and Instructions

For Article 120, UCMJ
Effective 28 June 2012

Art. 120(g): Definitions:



(3) *Bodily harm.* The term ‘bodily harm’ means any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.

Approved Change 13-08 (Article 120 Bodily Harm and Consent)

NOTE 2 Lack of consent as an element. When the same physical act is alleged as both the actus reus and the bodily harm for the charged sexual assault, include this as a final element:

[(3)] That the accused did so without the consent of (state the name of the alleged victim).

Defenses and Instructions

For Article 120, UCMJ

Effective 28 June 2012

Department of the Army
Pamphlet 27-9

Legal Services

Military Judges' Benchbook

UNOFFICIAL
This version contains all
approved changes as of
6 May 13
(through Change 13-04).

Headquarters
Department of the Army
Washington, DC
1 January 2010

UNCLASSIFIED

3-45. PREFACE TO ARTICLE 120 INSTRUCTIONS

Changes effective 28 June 2012

p. 462, MJBB, Unofficial, as of 6 May 2013

3-45-13. RAPE (ARTICLE 120)

**NOTE 1: Applicability of this instruction.
after 28 June 2012.**

p. 551, MJBB, Unofficial, as of 6 May 2013

Not in current update:



Approved Change 13-08 (Article 120 Bodily Harm and Consent)

General/Specific Intent

Why do we care?

➤ Lesser Included Offenses

➤ Mistake of Fact Defense

(j) *Ignorance or mistake of fact.*

(1) *Generally.* Except as otherwise provided in this subsection, it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

RCM 916(j)

[I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense.

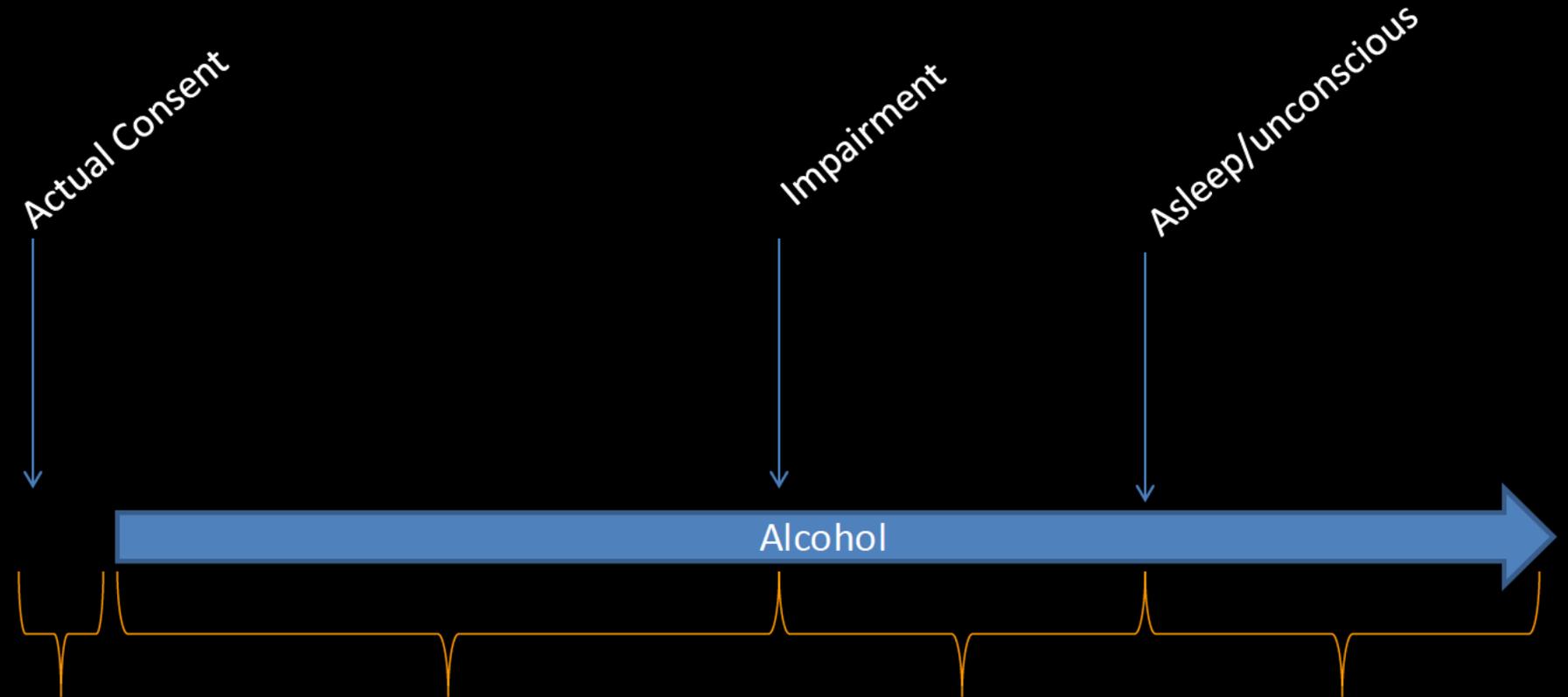
If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused.

If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances.

However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not an excuse.



Prior consent?



Sexual Event



Sexual Assault (incapable of consent)

1. Sex Act
2. Victim incapable of consent due to
 - a. Impairment by drug, intoxicant, similar substance
 - b. Mental disease or defect or physical disability
3. Accused knew or reasonably should have known of the impairment or disease/defect/disability

Issues:

- Multiple versions of Art 120
- Flying solo (no E.O.)
- Benchbook instructions changing
- Definitions allow factual and legal anomalies
- Subjective v. Objective standards
- LIOs
- Victim's counsel

Oh Lord, please make it stop!



**NDAA Changes to the UCMJ
and
Substantive Law Update**



Victim Rights

THE LAW

Reporting

Article 32

Post-Trial Actions

Post-trial

Effective dates

§1711 – Prevention of entry into service of convicted sex offenders	§1722 – Shortened RSP deadline	§1725 – Min. requirements for SAPR personnel
§1746 – Service Academy initial SAPR training	§1731 – Additional RSP duties	§1725 – SANE availability at MTFs
§1741 – Report to Congress on need for specific UCMJ article regarding prohibited relationships with recruits and trainees		§1733 – Review of SAPR training
§1741 – Regs on inappropriate conduct with recruits and trainees (mandatory separation processing)		§1726 – Added DOD SAPRO responsibilities
§1734 – SecDef review of retention of, and access to, evidence and records relating to sexual assault	§1721 – Verification of command climate surveys	§1735 – SecDef review of how sexual harassment is handled (EO vs. SAPRO?)
§1701 – Add Crime Victims' Rights Act to UCMJ	§1704 – DC must go through TC to interview victim	§1716 – Special Victims Counsel requirement
§1701 – Crime Victims' Rights Act implementing regulations	§1703 – Eliminate SOL for sexual assault and sexual assault of a child	§1707 – Repeal of consensual sodomy
§1724 – NG & Reserve access to SARCs	§1751 – Sense of Congress on command climate free of retaliation for allegations of sexual assault	
§1712 – Expedited transfer for USCG	§1715 – IG investigation of retaliation claims in sexual assault and sexual harassment cases	
§1743 – SecDef policy on use of 8-day incident report for alleged sexual assaults	§1714 – Expanded whistleblower protection (e.g., broadens unfavorable personnel actions and covered communications)	
§1713 – Guidance on transfer of an accused following an allegation of sexual assault	§1709 – Service regulations to prohibit retaliation against members who report a criminal offense	
§1723 – 50 year retention of restricted reports	§1709 – Report due on establishing a new punitive article for retaliation offenses	
§1732 – SecDef review of MCIO investigative practices	§1742 – Immediate referral of sexual assault allegations to MCIO	
§1752 – Sense of Congress on disposition of sex offenses via court-martial	§1753 – Sense of Congress on discharge in lieu of court-martial	
§1708 – Elimination of "character and military service of accused" as a factor in disposition decision	§1702 – Complete revision of Article 32 (now a probable cause "preliminary hearing")	§1744 – Review of decisions not to refer sexual assaults
§1705 – Mandatory GCM jurisdiction for penetration offenses	§1705 – Mandatory dismissal or DD for penetration offense convictions	
§1702 – Complete revision to commander's authority to take post-trial action	§1706 – Victim participation in clemency phase	§1745 – Inclusion and command review of records of sex-related offenses

Immediate

25 Apr 14 (120 days)

24 Jun 14 (180 days)

June 2014

26 Dec 14 (1 year)

Changes to the UCMJ

- *Article 6b: “Rights of the victim of an offense under this chapter”*
 - *Title 10 amended to add new Article*
- **Article 18: “Jurisdiction of general courts-martial”**
- *Article 32: “Preliminary hearing”*
- **Article 43(a): “Statute of limitations”**
- **Article 46(b): “Defense Counsel Interview...”**
- **Article 56: “Maximum and minimum limits”**
- *Article 60: “Action by the convening authority”*
- **Article 125: “Forcible sodomy; bestiality”**

Changes to the UCMJ

- **Article 125: Amended by §1707**
 - Immediate
- **Article 43(a): Amended by §1703**
 - Immediate
- **Article 46(b): Amended by §1704**
 - Immediate
- **Articles 18 and 56: Amended by §1705**
 - ****For offenses occurring on or after** 24 June 2014**
- **Article 60: Amended by §1702 and §1706**
 - ****For offenses occurring on or after** 24 June 2014**

SEC. 1707. REPEAL OF THE OFFENSE OF CONSENSUAL SODOMY UNDER THE UNIFORM CODE OF MILITARY JUSTICE.

§ 925. Art. 125. Sodomy

(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex ~~or with an animal~~ is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

**“Old”
Article 125
One crime:
Sodomy**

“New”

Article 125

Two Crimes:

Forcible Sodomy

Bestiality

“§ 925. Art 125. Forcible sodomy; bestiality”

“(a) FORCIBLE SODOMY.—Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex by force or without the consent of the other person is guilty of forcible sodomy and shall be punished as a court-martial may direct.

“(b) BESTIALITY.—Any person subject to this chapter who engages in unnatural carnal copulation with an animal is guilty of bestiality and shall be punished as a court-martial may direct.

“(c) SCOPE OF OFFENSES.—Penetration, however slight, is sufficient to complete an offense under subsection (a) or (b).”

Article 125

“§ 925. Art 125. Forcible sodomy; bestiality

“(a) **FORCIBLE SODOMY.**—Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex by force or without the consent of the other person is guilty of forcible sodomy and shall be punished as a court-martial may direct.

← 2014?

“(b) **BESTIALITY.**—Any person subject to this chapter who engages in unnatural carnal copulation with an animal is guilty of bestiality and shall be punished as a court-martial may direct.

“(c) **SCOPE OF OFFENSES.**—Penetration, however slight, is sufficient to complete an offense under subsection (a) or (b).”

§ 920. Art. 120. Rape and sexual assault generally

(1) Sexual act. The term ‘sexual act’ means—

(A) contact between the penis and the vulva or anus or mouth, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or

(B) the penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

As of
Pre-June 28,
June 28,
2012
2012

****NEW** Statute of Limitations**

- As of 26 December 2013:

§ 843. Art. 43. Statute of limitations

(a) A person charged with absence without leave or missing movement in time of war, with murder, ~~rape, or rape of a child~~, or with any other offense punishable by death, may be tried and punished at any time without limitation.

SEC. 1703. ELIMINATION OF FIVE-YEAR STATUTE OF LIMITATIONS ON TRIAL BY COURT-MARTIAL FOR ADDITIONAL OFFENSES INVOLVING SEX-RELATED CRIMES.

(a) INCLUSION OF ADDITIONAL OFFENSES.—Section 843(a) of title 10, United States Code (article 43(a) of the Uniform Code of Military Justice), is amended by striking “rape, or rape of a child” and inserting “rape or sexual assault, or rape or sexual assault of a child”.

Defense Counsel Interviews

- As of 26 December 2013: Article 46(b)

§ 846. Art. 46. Opportunity to obtain witnesses and other evidence

The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.

(a)

“(b) DEFENSE COUNSEL INTERVIEW OF VICTIM OF ALLEGED SEX-RELATED OFFENSE.—(1) Upon notice by trial counsel to defense counsel of the name of an alleged victim of an alleged sex-related offense who trial counsel intends to call to testify at a preliminary hearing under section 832 of this title (article 32) or a court-martial under this chapter, defense counsel shall make any request to interview the victim through trial counsel.

(c)

“(2) If requested by an alleged victim of an alleged sex-related offense who is subject to a request for interview under paragraph (1), any interview of the victim by defense counsel shall take place only in the presence of trial counsel, a counsel for the victim, or a Sexual Assault Victim Advocate.

“(3) In this subsection, the term ‘alleged sex-related offense’ means any allegation of—

“(A) a violation of section 920, 920a, 920b, 920c, or 925 of this title (article 120, 120a, 120b, 120c, or 125); or

“(B) an attempt to commit an offense specified in a paragraph (1) as punishable under section 880 of this title (article 80).”.

“Victim”

any person who has suffered direct, physical, emotional, or pecuniary harm as a result of the commission of an offense under UCMJ (1701)

alleged victim of sex-related offense who TC intends to call to testify at preliminary hearing or CM (1704)

individual eligible for LA under section 1044 who is the victim of sex-related offense (1716)

any person who has suffered direct, physical, emotional, or pecuniary LOSS and on which the convening authority is taking action under this section (1706)

any person who has suffered direct, physical, emotional, or pecuniary harm as a result of matters set forth in a charge or specification being considered and is named in one of the specifications (1702)

SEC. 1705. DISCHARGE OR DISMISSAL FOR CERTAIN SEX-RELATED OFFENSES AND TRIAL OF SUCH OFFENSES BY GENERAL COURTS-MARTIAL.

**24 June
2014**

§ 818. Art. 18. Jurisdiction of general courts-martial

(a) → Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war. However, a general court-martial of the kind specified in section 816(1)(B) of this title (article 16(1)(B)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.

“(b) A general court-martial” →

“(c) Consistent with sections 819, 820, and 856(b) of this title (articles 19, 20, and 56(b)), only general courts-martial have jurisdiction over an offense specified in section 856(b)(2) of this title (article 56(b)(2)).”

SEC. 1705. DISCHARGE OR DISMISSAL FOR CERTAIN SEX-RELATED OFFENSES AND TRIAL OF SUCH OFFENSES BY GENERAL COURTS-MARTIAL.

§ 856. Art. 56. Maximum limits

(a) → The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.

**24 June
2014**

“§ 856. Art. 56. Maximum and minimum limits”.

“(b)(1) While a person subject to this chapter who is found guilty of an offense specified in paragraph (2) shall be punished as a general court-martial may direct, such punishment must include, at a minimum, dismissal or dishonorable discharge, except as provided for in section 860 of this title (article 60).

“(2) Paragraph (1) applies to the following offenses:

“(A) An offense in violation of subsection (a) or (b) of section 920 of this title (article 120(a) or (b)), **(Rape and Sexual Assault)**

“(B) Rape and sexual assault of a child under subsection (a) or (b) of section 920b of this title (article 120b).

“(C) Forcible sodomy under section 925 of this title (article 125).

“(D) An attempt to commit an offense specified in subparagraph (A), (B), or (C) that is punishable under section 880 of this title (article 80).”.

Post-24 June 14 Crimes: At Trial

“§ 856. Art. 56. Maximum and minimum limits”.

- DA Pam 27-9 (Military Judges' Benchbook), 10 Sep 14

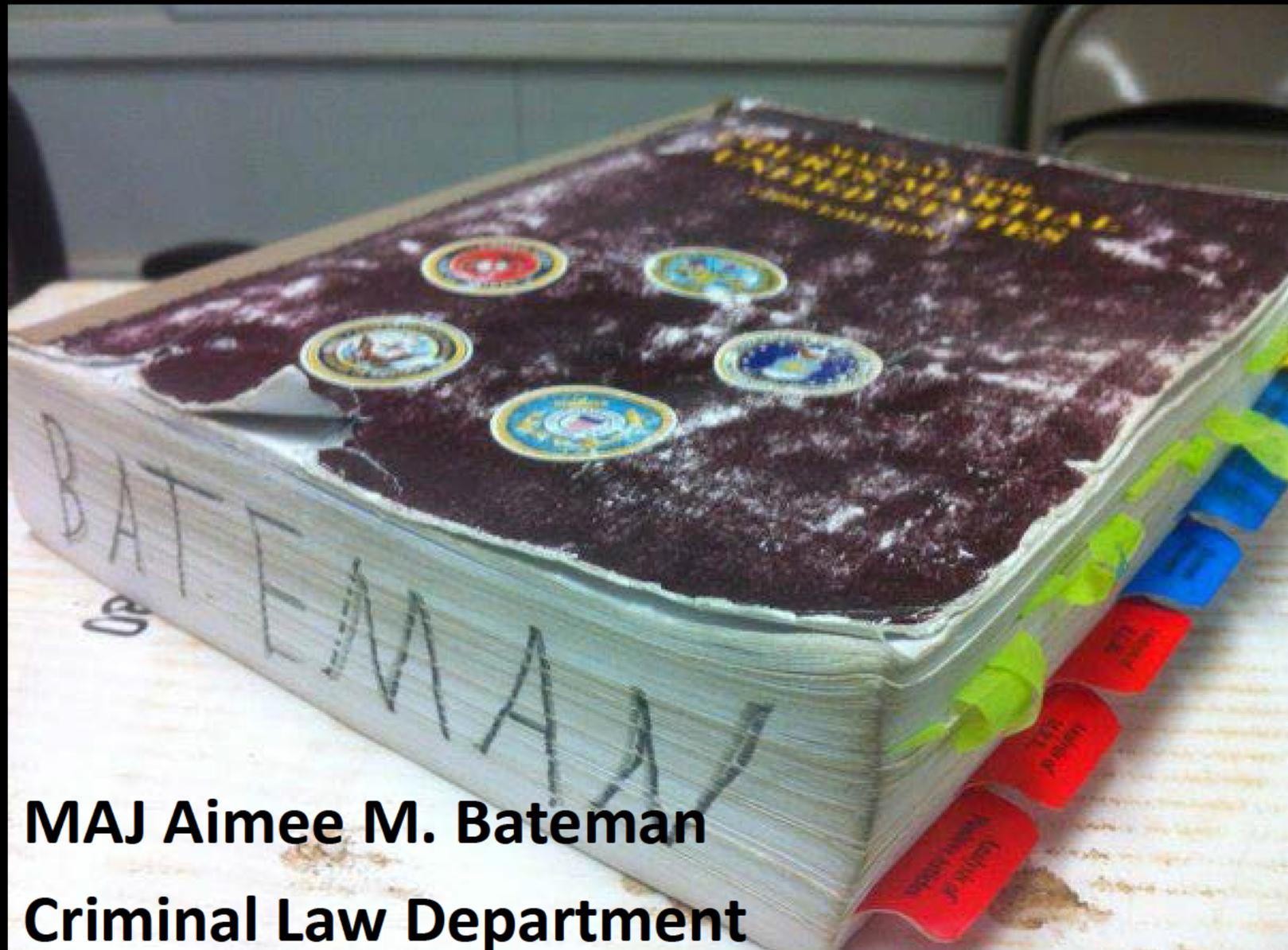
NOTE: Listing of punishments. Only those punishments on which an instruction will be given should ordinarily be listed on the Sentence Worksheet. If all have agreed that a fine is not appropriate, then it ordinarily should not be listed on the worksheet. If a dishonorable discharge or dismissal is a mandatory minimum sentence, then this punishment should be listed on the worksheet in order to aid the president in announcing the sentence of the court.

Post-24 June 14 Crimes: At Trial

- DA Pam 27-9 (Military Judges' Benchbook), 10 Sep 14

(DISHONORABLE DISCHARGE ALLOWED:) MJ: (This court may adjudge either a dishonorable discharge or a bad-conduct discharge.) The law imposes a mandatory minimum sentence of a dishonorable discharge for the offense(s) of _____. Such a discharge deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Army establishment. (However, vested benefits from a prior period of honorable service are not forfeited by receipt of a dishonorable discharge or a bad-conduct discharge that would terminate the accused's current term of service.) A dishonorable discharge should be reserved for those who in the opinion of the court should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment. A bad-conduct discharge is a severe punishment, although less severe than a dishonorable discharge, and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct (even though such bad conduct may not include the commission of serious offenses of a military or civil nature).

Article 120 (and 120b & 120c)



MAJ Aimee M. Bateman
Criminal Law Department

Article 120

...and 120b, 120c, 134...

- Pre-2007: Appendix 27 (Red Tab)
 - Rape, Carnal Knowledge, “Indecent” crimes
- 2007-2012: Appendix 28 (Red Tab)
 - All sex crimes moved to Article 120
- Post-June 28, 2012 – page IV-68 through IV-73 of the “Punitive Articles”

The Stuff That's Missing

[Note: The subparagraphs that would normally address elements, explanation, lesser included offenses, maximum punishments, and sample specifications are generated under the President's authority to prescribe rules pursuant to Article 36. At the time of publishing this MCM, the President had not prescribed such rules for this version of Article 120. Practitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.]

The Stuff That's Missing (no longer)

Maximum Punishment

- Executive Order 13543 of May 15, 2013

Sec. 2. Part IV of the Manual for Courts-Martial, United States, is amended as follows:

“e. *Maximum punishment.*

- (1) *Rape.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

(2) *Sexual assault.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

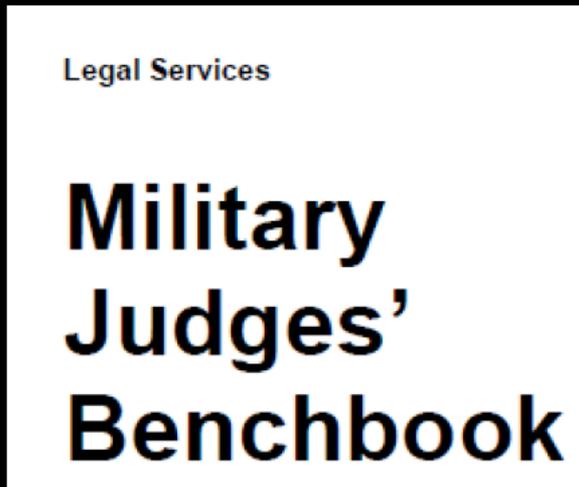
(3) *Aggravated sexual contact.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(4) *Abusive sexual contact.* Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.”

The Stuff That's Missing (still...)

Everything Else

- The remaining subparagraph of Paragraph 45, Part IV (b., c., d., f.)
- In the interim: A new ****published**** MJBB



Department of the Army
Pamphlet 27-9

Headquarters
Department of the Army
Washington, DC
10 September 2014

- Includes all updates through update 14-12

Mandatory Discharge/Dismissal

SEC. 1705. DISCHARGE OR DISMISSAL FOR CERTAIN SEX-RELATED OFFENSES AND TRIAL OF SUCH OFFENSES BY GENERAL COURTS-MARTIAL.

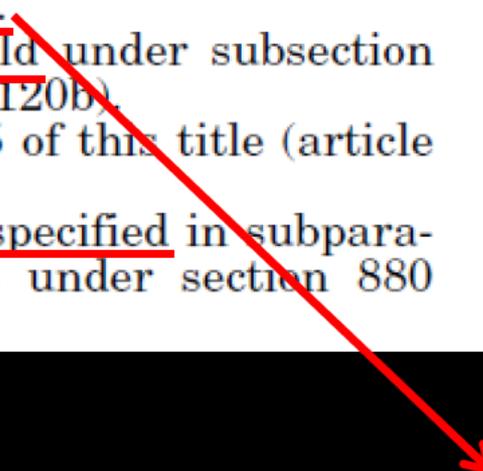
“(2) Paragraph (1) applies to the following offenses:

“(A) An offense in violation of subsection (a) or (b) of section 920 of this title (article 120(a) or (b)).

“(B) Rape and sexual assault of a child under subsection (a) or (b) of section 920b of this title (article 120b).

“(C) Forcible sodomy under section 925 of this title (article 125).

“(D) An attempt to commit an offense specified in subparagraph (A), (B), or (C) that is punishable under section 880 of this title (article 80).”.



Rape and Sexual Assault

****NEW** Statute of Limitations**

- As of 26 December 2013:

§ 843. Art. 43. Statute of limitations

(a) A person charged with absence without leave or missing movement in time of war, with murder, ~~rape, or rape of a child~~, or with any other offense punishable by death, may be tried and punished at any time without limitation.

SEC. 1703. ELIMINATION OF FIVE-YEAR STATUTE OF LIMITATIONS ON TRIAL BY COURT-MARTIAL FOR ADDITIONAL OFFENSES INVOLVING SEX-RELATED CRIMES.

(a) **INCLUSION OF ADDITIONAL OFFENSES.**—Section 843(a) of title 10, United States Code (article 43(a) of the Uniform Code of Military Justice), is amended by striking “rape, or rape of a child” and inserting “rape or sexual assault, or rape or sexual assault of a child”.

Art 120 (and 120a, 120b, 120c) (2012)

ADULT CRIMES (Art 120)

- RAPE
- SEXUAL ASSAULT
- AGGRAVATED SEXUAL CONTACT
- ABUSIVE SEXUAL CONTACT

STALKING (Art 120a)

CHILD CRIMES (Art 120b)

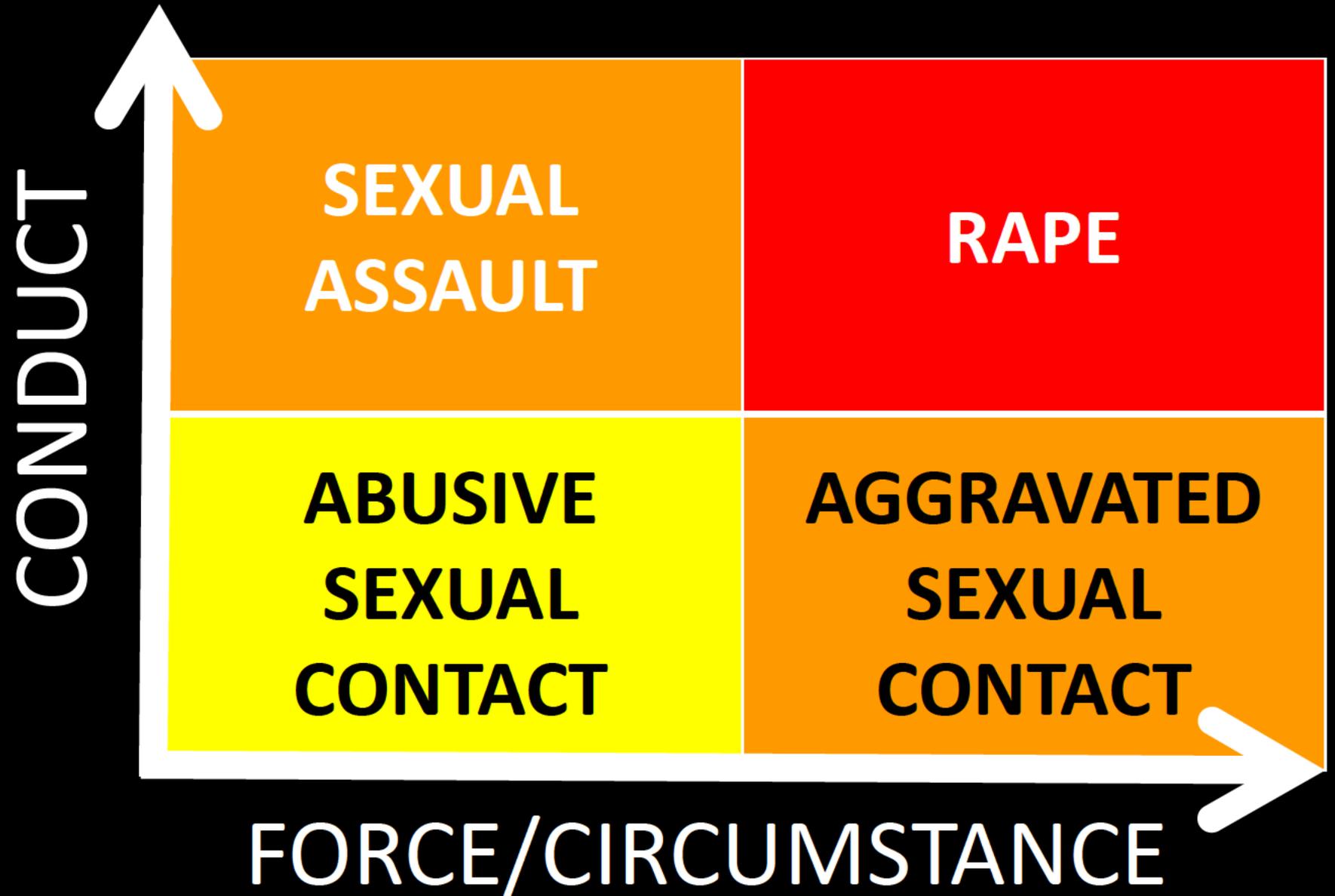
- RAPE OF A CHILD
- SEXUAL ASSAULT OF A CHILD
- SEXUAL ABUSE OF A CHILD

OTHER SEXUAL MISCONDUCT (Art 120c)

- INDECENT VIEWING, VISUAL RECORDING, OR BROADCASTING
- FORCIBLE PANDERING
- INDECENT EXPOSURE

Effective 28 June 2012

ADULT CRIMES



ADULT CRIMES

Sexual Act

**SEXUAL
ASSAULT**
30

RAPE
LWOP

Sexual Contact

**ABUSIVE
SEXUAL
CONTACT**
7

**AGGRAVATED
SEXUAL
CONTACT**
20

Lower degree of force



Higher degree of force

SEXUAL ACT

ARTICLE 120 (2007)

1. Contact* between penis and vulva (*penetration however slight)

OR

1. Penetration* of the genital opening of another

2. By a hand, finger, or any object

3. With the intent to:

- a. Abuse, humiliate, harass, or degrade any person or
- b. Arouse or gratify the sexual desire of any person.

ARTICLE 120 (2012)

1. Contact* between penis and vulva **or anus or mouth** (*penetration however slight)

OR

1. Penetration* of **vulva, anus, or mouth**

2. By **any body part or object**

3. With the intent to:

- a. Abuse, humiliate, harass, or degrade any person or
- b. Arouse or gratify the sexual desire of any person.

SEXUAL CONTACT

ARTICLE 120 (2007)

1. Touching (or cause another to touch)
2. Directly or through clothing
3. Genitalia, anus, groin, breast, inner thigh, or buttocks
4. With intent to:
 - a. Abuse, humiliate, harass, or degrade any person , OR
 - b. Gratify the sexual desire of any person.

ARTICLE 120 (2012)

1. Touching (or causing another to touch)
2. Directly or through clothing
3. Of genitalia, anus, groin, breast, inner thigh, or buttocks
4. With intent to abuse, humiliate, harass, or degrade any person

OR

1. Touching (or causing another to touch)
2. Directly or through clothing
3. **Any body part by any body part**
4. With intent to gratify the sexual desire of any person.

FORCE/CIRCUMSTANCE

Rape or Aggravated Sexual Contact

1. using **unlawful force** against that other person;
2. using **force** causing or **likely to cause death or grievous bodily harm** to any person;
3. **threatening . . . death, grievous bodily harm, or kidnapping;**
4. first **rendering** that other person **unconscious**; or
5. **administering . . . by force or threat of force, or without the knowledge or consent . . . intoxicant, . . . substantially impairing** the ability of that other person to appraise or control conduct;

Sexual Assault or Abusive Sexual Contact

- **threatening** or placing that other person in **fear**;
- causing **bodily harm** to that other person;
- making a **fraudulent representation** that the sexual act serves a professional purpose;
- inducing a **belief . . .** that the person is **another person**;
- **knows or reasonably should know** that the other person is **asleep, unconscious, or otherwise unaware . . .** or is **incapable of consenting . . .**

Sexual Act

**SEXUAL
ASSAULT**
30 (& DD/D)

RAPE
LWOP (& DD/D)

Sexual Contact

**ABUSIVE
SEXUAL
CONTACT**
7

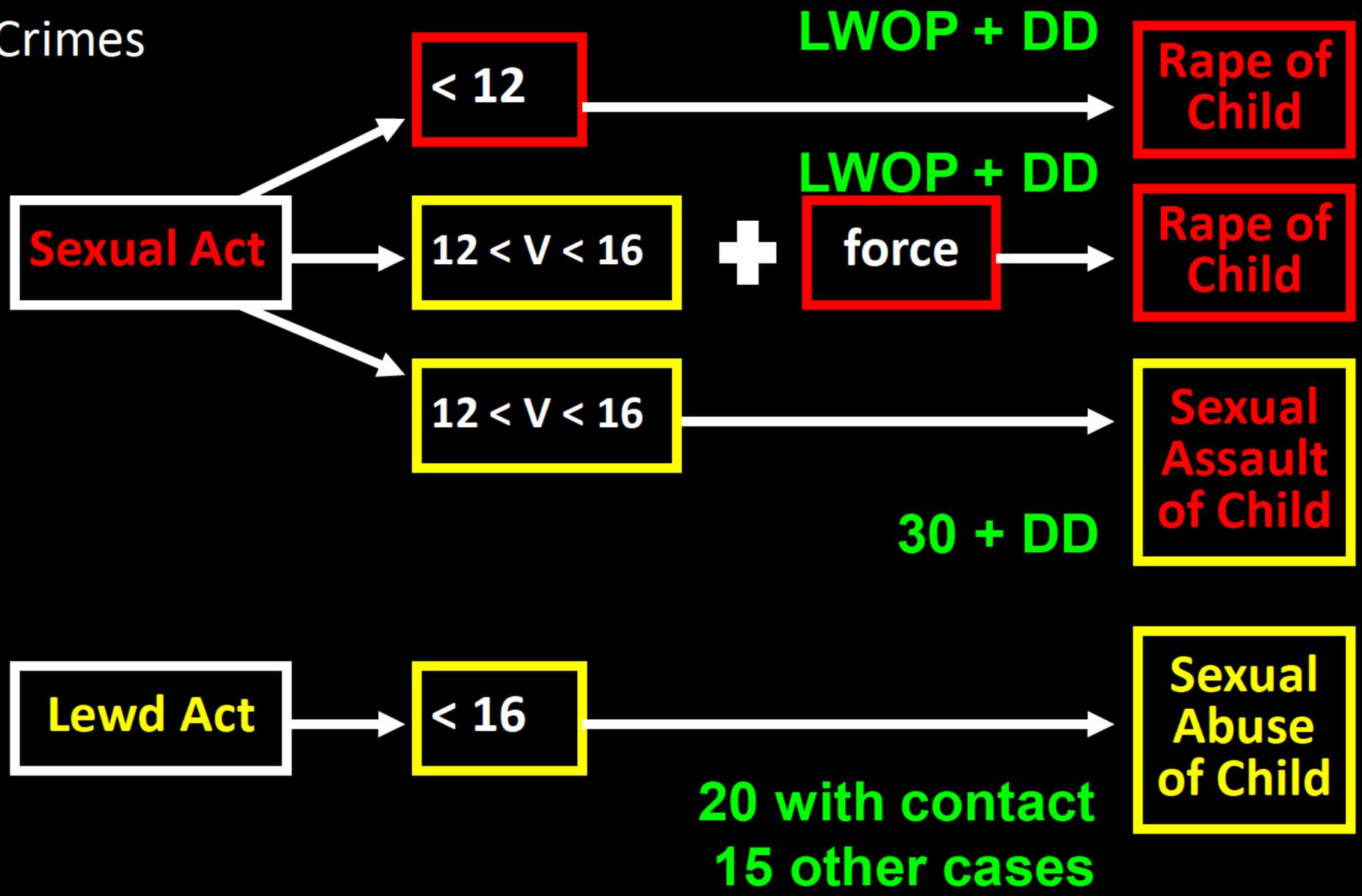
**AGGRAVATED
SEXUAL
CONTACT**
20

Lower degree of force



Higher degree of force

Child Crimes



Art 120c - Indecent Viewing, Visual Recording, or Broadcasting

Two observation crimes

1. Views (**1 year**)
2. Photographs, videotapes, films, or records (**5 years**)

- Knowingly
- Private area of another
- Without consent
- Other person had a REOP

One broadcasting crime (7 years)

- Knowingly broadcasts or distributes one of above
- Knew or should have known made under circumstances above



SEXUAL ACT

1. Contact between penis and vulva **or anus or mouth**

OR

1. Penetration of **vulva, anus, or mouth**

2. By **any body part or object**

3. With the intent to:

a. Abuse, humiliate, harass, or degrade any person or

b. Arouse or gratify the sexual desire of any person.

SEXUAL CONTACT

- 1. Touching (or causing another to touch)**
- 2. Directly or through clothing**
- 3. Of genitalia, anus, groin, breast, inner thigh, or buttocks**
- 4. With intent to abuse, humiliate, harass, or degrade any person**

OR

- 1. Touching (or causing another to touch)**
- 2. Directly or through clothing**
- 3. Any body part by any body part**
- 4. With intent to gratify the sexual desire of any person.**

LEWD ACT

4 TYPES OF LEWD ACTS:

1. Any **sexual contact**
2. Intentionally exposing (with one of two intents)
3. Intentionally communicating indecent language (with one of two intents)
4. Any indecent conduct
 - a. Intentionally done with or in the presence of a child
 - b. Traditional “form of immorality” definition

Physical presence requirement eliminated

FORCE

ARTICLE 120 (2012) – adult crimes

1. The use of a weapon; or
2. The use of such physical strength or violence as is sufficient to overcome, restrain or injure a person; or
3. Inflicting physical harm sufficient to coerce or compel submission by the victim.

ARTICLE 120 (2012) – child crimes

1. The use of a weapon;
2. The use of such physical strength or violence as is sufficient to overcome, restrain or injure a child; or
3. Inflicting physical harm.

In the case of a parent-child or similar relationship, the use or abuse of parental or similar authority is sufficient to constitute the use of force.

Language use

Rape by administration:

Administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby **substantially** **impairing** the ability of that other person to appraise or control conduct.

Sexual Assault when incapable of consent:

Commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to— **impairment** by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the Accused.

“Known or reasonably should be known”

(2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or

(3) commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—

(A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or

(B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person;

Know = actual

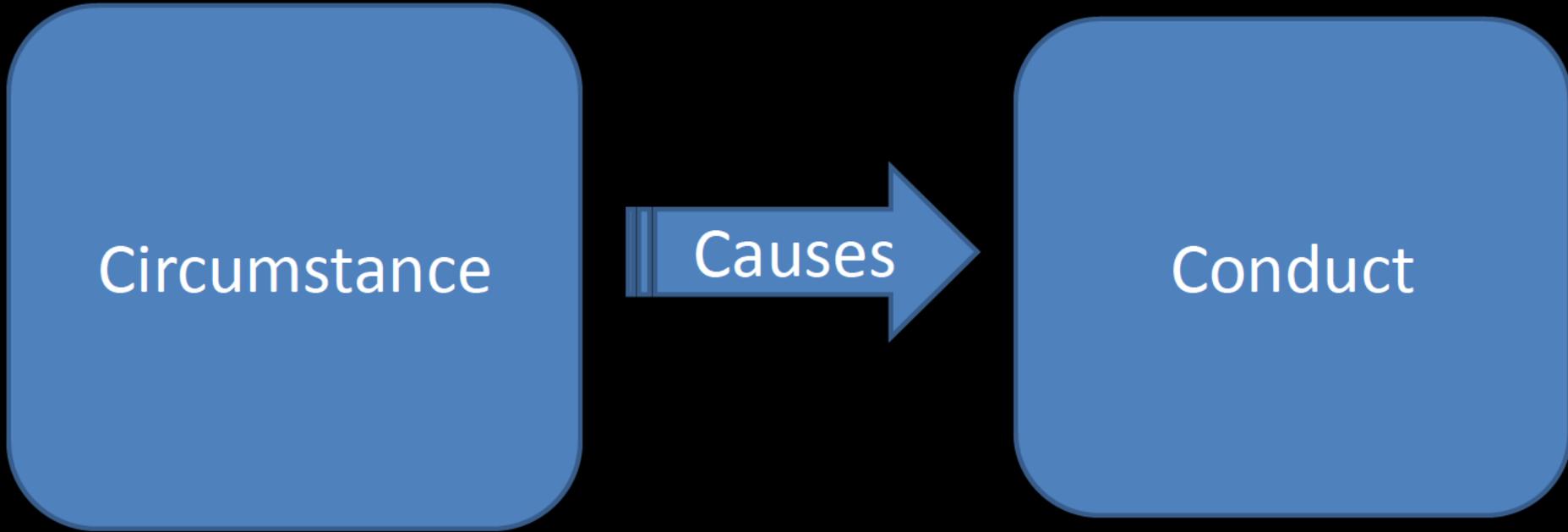
Reasonably should know = objective

Negligence standard

Circumstance

Causes

Conduct



Unlawful force

Force = Death or GBH

Fear of Death, GBH,
or kidnapping

Rendering
unconscious

Administering
substance that
substantially impairs

Causes

Sexual Act

Threat or Fear

Bodily harm

Fraud

Causes

Sexual Act



Sexual Act

When

Condition/
Capacity

Sexual Act

When

Accused
knows/reasonably
should know victim
is:

Asleep/unconscious/
otherwise unaware

Incapable of consent
due to condition

CONSENT

- Lack of consent is not an element (two exceptions).
- “freely given agreement ...by a competent person.”
- Cannot Consent:
 - ✓ Sleeping, unconscious, incompetent
 - ✓ Death/GBH
 - ✓ Render unconscious
 - ✓ Under threat or fear
 - ✓ Fraud

How is consent evidence used?

Sexual Assault by Causing Bodily Harm

1. Sex Act

2. Bodily Harm

Offensive touching

Consent = not offensive

Not a defense

Bodily Harm

“to wit” or not “to wit”

(3) *Bodily harm.* The term ‘bodily harm’ means any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.

It’s in the pleading:

1. In that A did sexually assault V by committing a sexual act with V, to wit: penetration of V’s vulva with his penis by causing bodily harm, to wit: pushing V to the bed and holding her down with his hands.

Consent ≠ element

2. In that A did sexually assault V by committing a sexual act with V, to wit: penetration of V’s vulva with his penis by causing bodily harm.

Consent = element: the penetration serves as both the sexual act AND the bodily harm IF the Government proves the sexual act was nonconsensual.

Threat or Fear
Bodily harm
Fraud

Causes

Consent

Sexual Act

Sexual Assault (asleep, unconscious, or otherwise)

1. Sex Act
2. Victim asleep, unconscious, or otherwise unaware the sex act is occurring
3. Accused knew or reasonably should have known victim was asleep, unconscious, or otherwise unaware.

Sexual Assault (incapable of consent)

1. Sex Act
2. Victim incapable of consent due to
 - a. Impairment by drug, intoxicant, similar substance
 - b. Mental disease or defect or physical disability
3. Accused knew or reasonably should have known of the impairment or disease/defect/disability

Defenses and Instructions

For Article 120, UCMJ
Effective 28 June 2012

Article 120, UCMJ
p. IV-69, text of the statute



(f) *Defenses.* An accused may raise any applicable defenses available under this chapter or the Rules for Court-Martial. Marriage is not a defense for any conduct in issue in any prosecution under this section.

Rules for Court-Martial 916(b),
“Defenses – Burden of
Proof”
p. II-110



(b) *Burden of proof.*

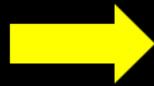
U.S. v. Prather, CAAF, 2011
69 M.J. 338
U.S. v. Medina, CAAF, 2011
69 M.J. 462

~~(4) *Mistake of fact as to consent.* In the defense of mistake of fact as to consent in Article 120(a), rape, Article 120(c), aggravated sexual assault, Article 120(e), aggravated sexual contact, and Article 120(h), abusive sexual contact, the accused has the burden of proving mistake of fact as to consent by a preponderance of the evidence. After the defense meets its burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the defense did not exist.~~

Defenses and Instructions

For Article 120, UCMJ
Effective 28 June 2012

Rules for Court-Martial 916(j),
“Defenses – Ignorance or
Mistake of Fact”
p. II-113



(j) *Ignorance or mistake of fact.*

(1) *Generally.* Except as otherwise provided in this subsection, it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused’s knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

Defenses and Instructions

For Article 120, UCMJ
Effective 28 June 2012

Rules for Court-Martial 916(j),
“Defenses – Ignorance or
Mistake of Fact”
p. II-113



~~(3) *Sexual offenses.* It is an affirmative defense to a prosecution for Article 120(a), rape, Article 120(c), aggravated sexual assault, Article 120(e), aggravated sexual contact, and Article 120(h), abusive sexual contact that the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable the ignorance or mistake must have been based on information, or lack of it, which would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances. The accused's state of intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense.~~

General/Specific Intent

Why do we care?

➤ Lesser Included Offenses

➤ Mistake of Fact Defense

RCM 916(j)

[I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense.

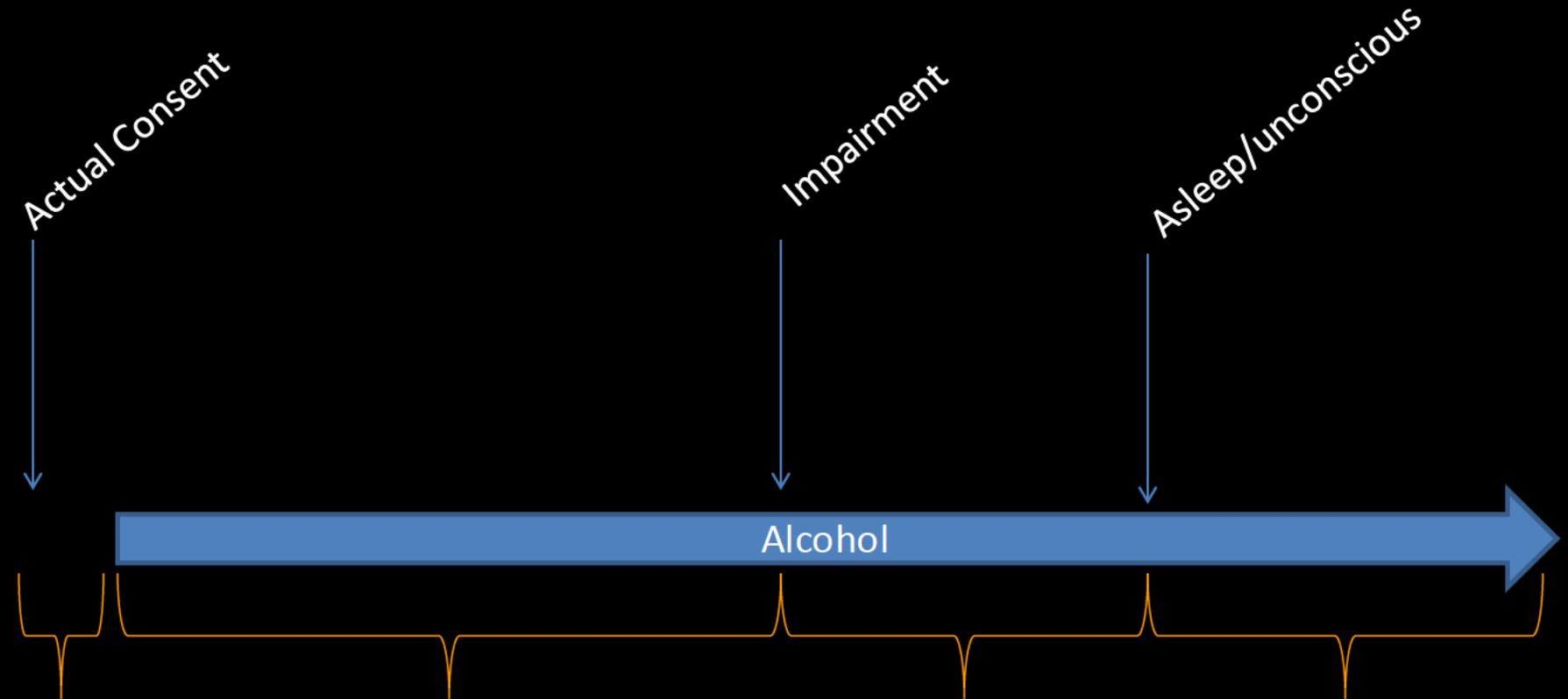
If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused.

If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances.

However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not an excuse.



Prior consent?



Sexual Event



Sexual Assault (incapable of consent)

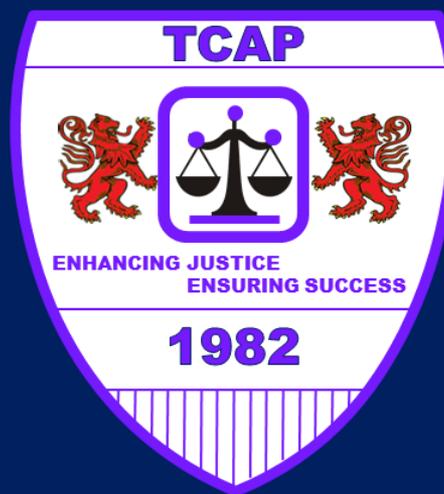
1. Sex Act
2. Victim incapable of consent due to
 - a. Impairment by drug, intoxicant, similar substance
 - b. Mental disease or defect or physical disability
3. Accused knew or reasonably should have known of the impairment or disease/defect/disability



Article 120

Continuing Legal
Education

Direct
Assistance



Special Victim
Prosecutors

U.S. Army

Trial Counsel Assistance Program

Agenda

- New Article 120 (Adult)
- New, New Article 120 (Adult)
- Hypotheticals
- Defenses
- Other Sexual Misconduct
- Resources



TCAP Slide Deck

NEW ARTICLE 120 (2008)

- Act vs. Contact
- Modalities
- Chart
- Specifications



Act vs. Contact (2008)

- Sexual Act
 - Penis: Contact between the penis and the vulva (occurs upon penetration, however slight)
 - Hand/Finger/Object: penetration with an intent to abuse, humiliate, harass, or degrade, or to arouse or gratify the sexual desire of any person

Act vs. Contact (2008)

- Sexual Contact
 - Intentional touching, either directly or through the clothing of the genitalia, anus, groin, breast, inner thigh, or buttocks with intent to abuse, humiliate, harass, or degrade, or to arouse or gratify the sexual desire of any person

TCAP Slide Deck

NEW ARTICLE 120 (2008)

- Act vs. Contact
- Modalities
- Chart
- Specifications



Modalities (2008)

- Greater Modalities
 - Force
 - Causing grievous bodily harm
 - Threatening or placing in fear of death, grievous bodily harm, or kidnapping
 - Rendering another unconscious
 - Administering by force, threat of force, or without victim's knowledge a drug/intoxicant, thereby substantially impairing victim's ability to appraise or control the conduct

Modalities (2008)

- Lesser Modalities
 - Threatening or placing in fear (other than GBH)
 - Cause bodily harm
 - Victim is substantially incapable of appraising the nature of the conduct, declining participation, or communicating unwillingness

TCAP Slide Deck

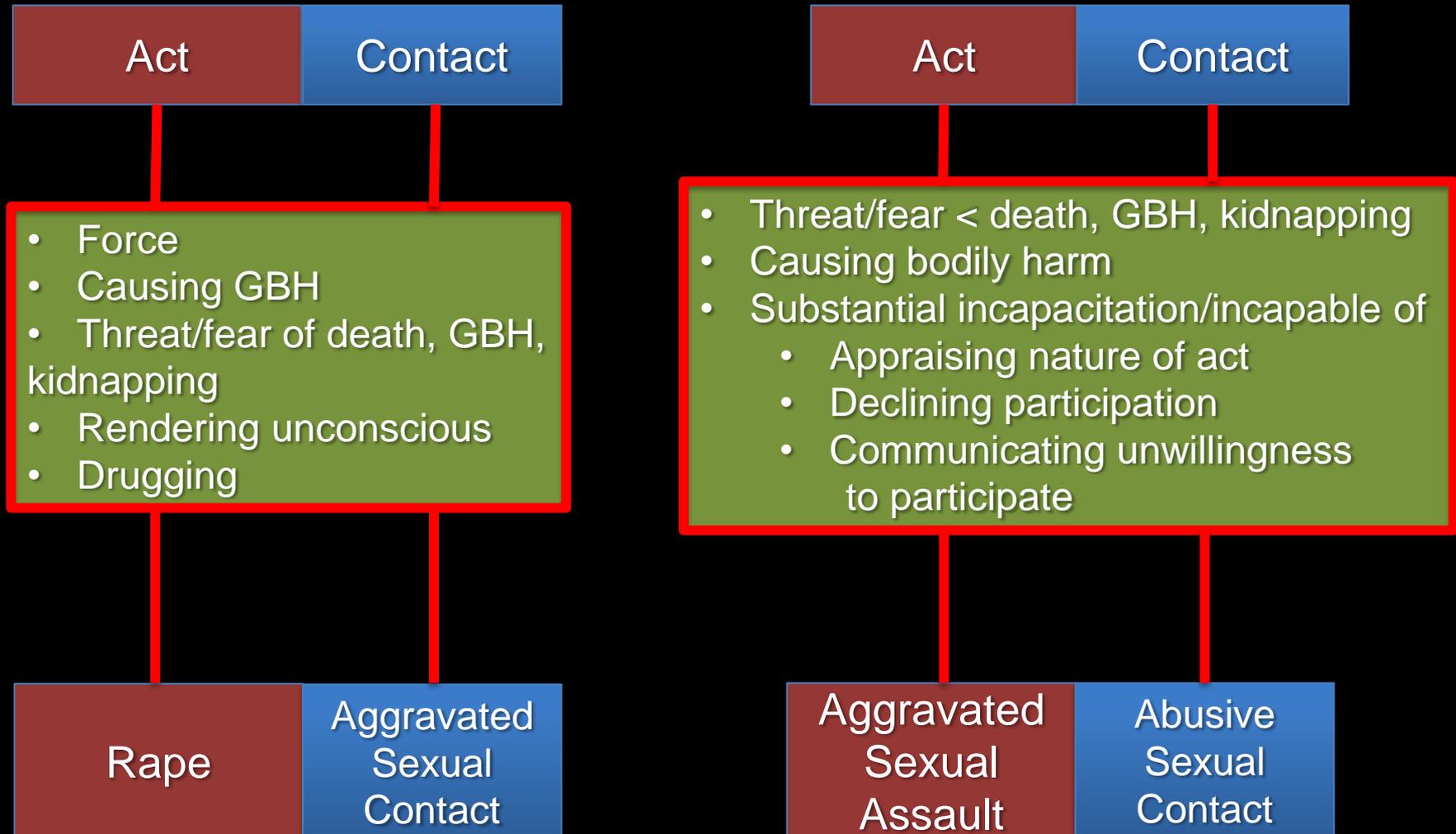
NEW ARTICLE 120 (2008)

- Act vs. Contact
- Modalities
- **Chart**
- Specifications



ARTICLE 120- ADULT VICTIM

Valid between 1 Oct 07 and 27 Jun 12



TCAP Slide Deck

NEW ARTICLE 120 (2008)

- Act vs. Contact
- Modalities
- Chart
- Specifications



SPECIFICATIONS

- In that SGT Scott Snuffy, U.S. Army, did at or near Fort Belvoir, Virginia, on or about 4 February 2010, cause PFC Vicki Vickers to engage in a sexual act, to wit: penetrated the vulva of PFC Vickers with his penis, by using physical violence, strength, power, and restraint applied to PFC Vickers, sufficient that she could not avoid or escape the sexual conduct.

SPECIFICATIONS

- In that SGT Scott Snuffy, U.S. Army, did at or near Fort Belvoir, Virginia, on or about 4 February 2010, cause PFC Vicki Vickers to engage in a sexual act, to wit: penetrated the vulva of PFC Vickers with his penis, by causing grievous bodily harm upon her, to wit: a fractured skull.

SPECIFICATIONS

- In that SGT Scott Snuffy, U.S. Army, did at or near Fort Belvoir, Virginia, on or about 4 February 2010, engage in sexual contact, to wit: touched the buttocks of PFC Vickie Vickers, by causing grievous bodily harm upon her, to wit: a fractured skull.

SPECIFICATIONS

- In that SGT Scott Snuffy, U.S. Army, did at or near Fort Belvoir, Virginia, on or about 4 February 2010, engage in sexual contact, to wit: touched the clothed breast of PFC Vickers with his hand, by threatening to burn down the said PFC Vickers's house.

SPECIFICATIONS

- In that SGT Scott Snuffy, U.S. Army, did at or near Fort Belvoir, Virginia, on or about 4 February 2010, engage in sexual contact, to wit: touched the clothed breast of PFC Vickers with his hand, by placing the said PFC Vickers in fear that she would be subjected to death.

SPECIFICATIONS

- In that SGT Scott Snuffy, U.S. Army, did at or near Fort Belvoir, Virginia, on or about 4 February 2010, cause PFC Vickie Vickers to engage in a sexual act, to wit: penetrated her vulva with a broom stick, by causing bodily harm upon her, to wit: an offensive touching.

Agenda

- New Article 120 (Adult)
- **New, New Article 120 (Adult)**
- Hypotheticals
- Defenses
- Other Sexual Misconduct
- Resources

TCAP Slide Deck

NEW, NEW ARTICLE 120 (2012)

- Act vs. Contact
- Modalities
- Chart



Act v. Contact (2012)

- Sexual Act
 - Not just penetration of the vulva anymore
 - Now includes penetration of the mouth and anus
 - Specific intent elements of non-penis offenses still applies

Act v. Contact (2012)

- Sexual Contact
 - Now includes any body part, if done with an intent to arouse or gratify the sexual desire of any person

TCAP Slide Deck

NEW, NEW ARTICLE 120 (2012)

- Act vs. Contact
- Modalities
- Chart



Modalities (2012)

- New Lesser Modalities
 - Making a fraudulent representation that the sexual act or contact serves a professional purpose (Dirty Doctor Cases)
 - Inducing a belief by any artifice, pretense, or concealment that the person is another person (Tag Team Twin Cases)
 - Accused knew or should have known that victim was asleep, unconscious, or otherwise unaware

Modalities (2012)

- Definition of Bodily Harm Changed
 - Can now be the nonconsensual sexual act or contact, itself.
 - 2008 version required an additional bodily harm, other than the sexual act or contact.

Modalities (2012)

- Substantial Incapacitation Changed
 - 2008 version
 - Had to prove victim was substantially incapable of consenting
 - 2012 version
 - victim was incapable of consenting
 - AND...
 - Knew or should have known victim was incapable of consenting due to impairment by a drug, intoxicant, or other similar substance

Modalities (2012)

- Greater Modality – Force Definition Changed
 - 2008 version was a subjective standard
 - “physical violence, strength, power, or restraint . . . sufficient that the other person could not avoid or escape the sexual conduct”
 - 2012 version is an objective standard
 - “use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person”

Modalities (2012)

- Greater Modality – Grievous Bodily Harm
 - 2008 version required actual GBH
 - “causing grievous bodily harm to any person”
 - 2012 version only requires a likelihood of GBH
 - “using force likely to cause death or grievous bodily harm to any person”

TCAP Slide Deck

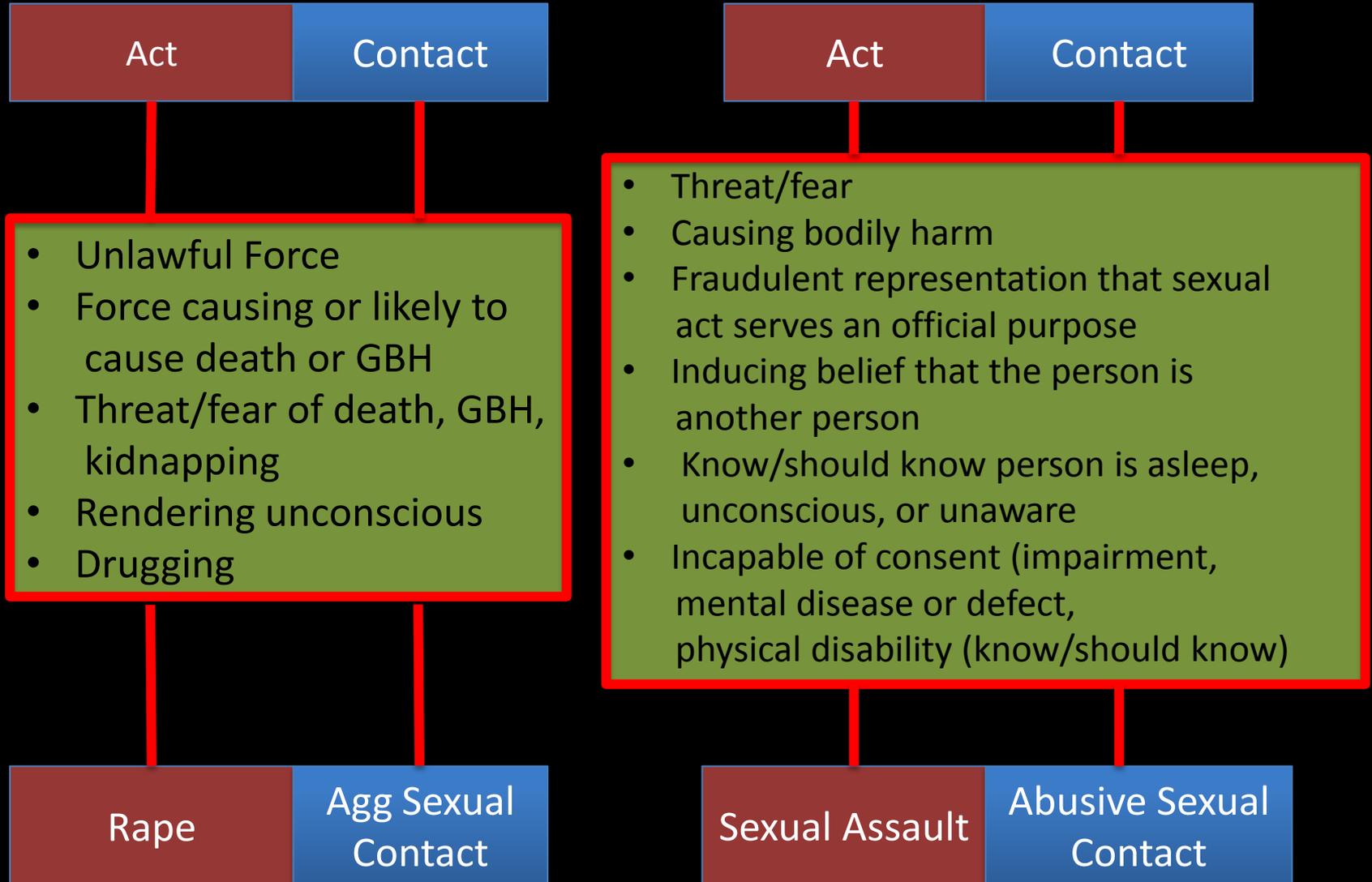
NEW, NEW ARTICLE 120 (2012)

- Act vs. Contact
- Modalities
- Chart



ARTICLE 120 - ADULT VICTIM

After 28 June 2012



Agenda

- New Article 120 (Adult)
- New, New Article 120 (Adult)
- **Hypotheticals**
- Defenses
- Other Sexual Misconduct
- Resources

TCAP Slide Deck

HYPOTHETICALS



Hypotheticals

- Accused and Victim have been drinking. Accused is 6'2", 220 lbs. Victim is 5'5", 130 lbs. Accused removes victim's pants and underwear. Victim is now sitting on the edge of the bed. Accused puts his hand on victim's chest and guides her backwards. He keeps his hand on her chest while he vaginally penetrates her with his penis. Victim is in such shock that she freezes and can't move.

Hypotheticals

- Accused brings victim home from the club. She's falling down, her speech is heavily slurred, and she vomited once at the club and once in the Accused's kitchen sink. Accused carries victim to his bedroom, takes off her clothes, and digitally penetrates her. She wakes up the next day, naked in the Accused's bed. She feels soreness in her vaginal area, but she can't remember what happened.

Hypotheticals

- Accused pushes victim against a wall and chokes her with his hand while groping her breast. Victim ultimately suffers no severe injuries from the choking, other than bruising.

Hypotheticals

- While driving to the barracks, Accused grabs victim by her hair and forces his penis into her mouth.

Hypotheticals

- Accused is in AIT. He, along with two other AIT Soldiers barge into victim's barracks room, jump on top of him, hold him down, and Accused digitally penetrates the victim's anus.

Hypotheticals

- Accused sneaks up behind victim, reaches around from behind her, and gropes her clothed breast.

Hypotheticals

- Accused sneaks up behind victim, slowly smells her neck, licks her ear, and whispers “God you turn me on.”

Hypotheticals

- Accused sneaks up behind victim and flicks her ear very hard, and it's painful for the victim.

Agenda

- New Article 120 (Adult)
- New, New Article 120 (Adult)
- Hypotheticals
- **Defenses**
- Other Sexual Misconduct
- Resources

TCAP Slide Deck

DEFENSES

- Marriage
- Consent
- Mistake of Fact



Defenses - Marriage

- Affirmative defense under the 2008 version, but only for certain crimes:
 - Aggravated Sexual Assault by substantial incapacitation
 - Child crimes
 - Wrongful Sexual Contact
 - Indecent Exposure
- But, if Accused's intent was to abuse, humiliate, or degrade, then the defense does not exist.

Defenses - Marriage

- Not a defense under the 2012 version. Period.

TCAP Slide Deck

DEFENSES

- Marriage
- **Consent**
- Mistake of Fact



Defenses - Consent

- 2008 Version
 - Consent is an affirmative defense to the big four and wrongful sexual contact (Art. 120(r)).
- 2012 Version
 - Art. 120(f): “An accused may raise any applicable defenses available under this chapter or the Rules for Court-Martial. Marriage is not a defense for any conduct in issue in any prosecution under this section.”



Defenses - Consent

- Consent problem:
 - Accused commits some sort of 120 offense by bodily harm, and we charge the bodily harm as the act/contact, itself.

TCAP Slide Deck

DEFENSES

- Marriage
- Consent
- Mistake of Fact



Defenses – Mistake of Fact

- Mistake of fact as to consent
 - Mistake of fact as to consent is an explicit defense to the big four sex offenses under the 2008 version
 - 2012 version just says all defenses available under “this chapter or the Rules for Court-Martial” apply
 - RCM 916(j)(3) → Mistake of fact as to consent
 - Applies to the 2008 version (the citations don’t match up to the 2012 statute) New Benchbook Instruction is clear that this defense can be raised to attack an element of the offense.

Agenda

- New Article 120 (Adult)
- New, New Article 120 (Adult)
- Hypotheticals
- Defenses
- **Other Sexual Misconduct**
- Resources



TCAP Slide Deck

OTHER SEXUAL MISCONDUCT

- Wrongful Sexual Contact
- Indecent Act



Wrongful Sexual Contact

- Only exists in the 2008 version
 - Sexual contact, without permission and without legal justification (no real modality here)
- Swallowed up by Abusive Sexual Contact by Bodily Harm, when the bodily harm is the act or contact, itself.

TCAP Slide Deck

OTHER SEXUAL MISCONDUCT

- Wrongful Sexual Contact
- Indecent Act



Indecent Act

- Only exists in the 2008 version
- You could probably still charge it as an Article 134 Clause 1 or 2 offense, but the 2012 version of 120 is so broad, that it's not really necessary.

Agenda

- New Article 120 (Adult)
- New, New Article 120 (Adult)
- Hypotheticals
- Defenses
- Other Sexual Misconduct / Article 120c
- Resources

Resources

- Section 920, Chapter 47, Title 10, U.S. Code (10 U.S.C. § 920) – Use Westlaw
- DA Pam 27-9, Military Judges' Benchbook, Paragraph 3-45 (See approved interim updates on JAGCNET)
- MCM Discussion and Analysis sections
- *Practicing Military Justice*, published by the TJAGLCS Criminal Law Department
- Give your SVP a call



Approved Interim Updates

- www.jagcnet.army.mil
 - Legal Disciplines
 - Military Justice
 - Trial Judiciary Site
 - » Resources
 - DA PAM 27-9 & Approved Interim Updates
 - Approved Interim Updates
- Also, download the electronic benchbook from the same Trial Judiciary site.



MRE 412/413/414



Continuing Legal
Education

Direct
Assistance



Special Victim
Prosecutors

U.S. Army
Trial Counsel Assistance Program

Agenda

- MRE 412
- MRE 413
- MRE 414



MRE 412

- Applies to Who
 - Charged victim
 - Unrelated victims?
- Requirements
 - Written notice
- When
 - Article 32?
- Offensive/Defensive/Passive



MRE 412 – Evidence Covered?

- Offered to prove Victim engaged in other sexual behavior? No, but...
 - Any sexual behavior not encompassed by the alleged offense
 - Conversations? → Hard to splice
- Offered to prove victim's sexual predisposition? No, but...
 - What is a sexual connotation?
 - Whose Definition?
 - Dress? “She was wearing this Tight black top and a Thong”
- Not for Reputation/Opinion...specific acts known by the Accused



MRE 412 - Procedure

- Notice in writing to Court, Opposing Counsel, alleged victim/Representative
- 5 days prior to entry of plea...Check your PTO
- Closed Hearing
- Alleged victim reasonable opportunity to be present and heard
- Sealed

MRE 412 - Exceptions

- Offered to show alternate source of injury or physical evidence?
- Prior behavior with the Accused?
 - Consent/MoF – Course of Conduct
- By the Prosecution?
 - Distinguish/Attack Reasonableness of MoF argument
- Constitutionally Required?
 - Bias/Motive to Fabricate (protection of a relationship)



US v Ellerbrock, 70 MJ 134

- MRE 412(b)(1)(C) includes the accused's Sixth Amendment right to confrontation
 - Accused has a constitutional right to be confronted by the witnesses against him...including a right to cross-examine those witnesses
 - The right to cross-examination has traditionally included the right to impeach, i.e., discredit the witness.
- Rape/Sodomy
 - Alleged victim's Extra-marital affair
 - Significant other's reaction
 - = direct and substantial link to the victim's credibility.
- Remove the Sex and ID whether there is a relationship to be protected



MRE 412 – Proponent

- Must show
 - Relevant
 - Consent/Constitutional must show Material and Favorable
 - Material
 - Importance of the issue which offered for
 - Extent issue is in dispute
 - Nature of the other Evidence as to that issue
 - Favorable = Vital to the Defense Theory
- MRE 403...victim privacy only a factor



HYPO #1

- Victim dependent spouse had no Hx with the Accused prior to the assault
- Accused sexually assaults victim while victim's husband is deployed
- Victim engages in sexual relationship with the Accused after the assault
- Husband is informed by victim of the consensual relationship
- Husband returns early
- Victim reports sexual assault 2 weeks after husband return



HYPO #2

- Victim had no Hx with the the Accused prior to the assault
- Victim goes to a bar with the Accused and becomes incapacitated
- Accused engages in a sexual act with the victim and props her legs up with his and finishes
- Victim awakens with no memory and calls boyfriend
- Boyfriend pressures victim to find out what happened
- Victim goes out with the Accused again and has consensual sex with the Accused in retaliation



HYPO #3

- Victim has a consensual relationship with the Accused
- Accused sexually assaults victim during an argument
- Victim continues the consensual sexual relationship
- Accused again sexually assaults victim during an argument
- Victim continues the consensual relationship
- Accused cheats on the victim with another woman
- Victim reports the sexual assaults



MRE 413/414

- Who
- What
- How
- When
- Why



MRE 413/414

WHO

- Accused must be charged with an offense of sexual assault/child molestation;

WHAT

- Evidence must be evidence of the accused's commission of another offense of sexual assault/child molestation¹; and
- ¹Definitions are specific and defined



MRE 413/414

HOW

- The MJ must conclude that the members could find by a preponderance of the evidence that the offenses occurred;
- Evidence must be relevant (MRE 401/402)
- And...MRE 403 Balancing → Presumption = Admissibility

MRE 413 – MRE 403 Balancing

- Presumption of Admissibility
 - balancing test should be applied in light of the strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible
- Factors (Non-Exhaustive)
 - Strength of proof of the prior act (i.e., conviction versus gossip);
 - Probative weight of the evidence;
 - Potential for less prejudicial evidence;
 - Distraction of the factfinder;
 - Time needed for proof of the prior conduct;
 - Temporal proximity;
 - Frequency of the acts;
 - Presence or lack of intervening circumstances; and
 - The relationship between the parties
- Appellate Standard – Clear Abuse of Discretion



MRE 413/414

WHEN

- Charged offenses with multiple victims
 - Allows the Propensity argument
- Uncharged Sexual Assaults
 - MRE 404b
- MJ will provide an instruction on the use of the prior sexual assault evidence as propensity
- Powerful...so use it...but don't over argue it.



HYPO #1

- In 2012 Accused sexually assaults victim after a house party behind his garage
- In 2006 Accused was arrested and charged for sexually assaulting a woman in a back room at a night club
- The 2006 case is dismissed without prejudice by the ADA

HYPO #2

- In 2013 accused sexually assaults what he believed was his biological 9 yr old daughter by digital and penile penetration of her vagina and anus
- Accused is 33 at the time of the offenses
- In 1997 the accused was convicted of statutory rape for having anal and vaginal intercourse with his then 13 year old girlfriend

US v Washington, 63 MJ 418

- With respect to other acts evidence involving child molestation and sexual assault, MRE 413 and MRE 414 are intended to provide for more liberal admissibility of character evidence in criminal cases; specifically, MRE 414(a) provides that in a court-martial in which the accused is charged with an offense of child molestation, evidence of the accused's commission of one or more offenses of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.



413/414 – INSTRUCTION

- You heard evidence that the accused may have committed (another) (other) (sexual) (child molestation) offense(s).
- The accused is not charged with (this) (these) other offense(s).
- This evidence may have no bearing on your deliberations unless you first determine by a preponderance of the evidence, that is more likely than not, (this) (these) uncharged offense(s) occurred.
- If you determine by a preponderance of the evidence (this) (these) other uncharged offense(s) occurred, you may then consider the evidence of (that) (those) offense(s) for its bearing on any matter to which it is relevant only in relation to (list the specification(s) for which the members may consider the evidence).
- **You may consider the evidence of such other (sexual) (child molestation) offense(s) for its tendency, if any, to show the accused's propensity or predisposition to engage in (sexual) (child molestation) offenses(, as well as its tendency, if any, to:**



TCAP

413/414 – INSTRUCTION

- Identify the accused as the person who committed the offense(s) alleged in → Rapist/Molester
- Prove a plan or design of the accused to → Rapist/Molester
- Prove knowledge on the part of the accused that → Rapist/Molester
- Prove that the accused intended to → Rape and Molest...because he is a rapist/molester
- Show the accused's awareness of (his) (her) guilt of the offense(s) charged → Rapist/Molester
- Determine whether the accused had a motive to commit the offense(s) → Rapist/Molester
- Show that the accused had the opportunity to commit the offense(s) → Rapist/Molester
- Rebut the contention of the accused his/her participation in the offense(s) charged was the result of (accident/mistake/entrapment) → Rapist/Molester
- Rebut the issue of _____ raised by the defense; (and) (_____). → Rapist/Molester

