

**2014 WILLIAM S. FULTON, JR.
APPELLATE MILITARY JUDGES' TRAINING**

Agenda

- 0730** Registration/Breakfast Reception
- 0800** **OPENING REMARKS**
Major General Jeffrey A. Rockwell
The Deputy Judge Advocate General, U.S. Air Force
- 0815** **UPDATE FROM THE COURT OF APPEALS FOR THE ARMED FORCES**
Honorable James E. Baker, Chief Judge, U.S. Court of Appeals for the Armed Forces
- 0900** *Break*
- 0920** **U.S. SUPREME COURT REVIEW AND OUTLOOK**
Professor Gregory Maggs, Interim Dean
The George Washington University School of Law
- 1020** *Break*
- 1030** **INTERNATIONAL HUMAN RIGHTS AND THE UCMJ**
Professor Jeffrey K. Walker, Asst. Dean for Transnational Programs,
St. John's University School of Law
- 1130** *Lunch*
- 1150** **PROFESSIONAL RESPONSIBILITY (optional)**
Lieutenant Colonel Crystal D. Haynes, U.S. Air Force
- 1300** **DNA DEMONSTRATION**
Ms. Rachel Neagle, Virginia Department of Forensic Science
- 1350** *Break*
- 1400** **CONFRONTATION CLAUSE AND DNA**
Professor Stephen A. Saltzburg
The George Washington University School of Law
- 1500** *Break*
- 1520** **SVC PANEL**
Colonel Jay McKee, USA, Program Manager, Special Victim Counsel Program
Colonel Carol K. Joyce, USMC, OIC, Victims' Legal Counsel Organization
Captain Sloan Tyler, USCG, Director, Office of Special Victims' Counsel
Lieutenant Colonel Andrea deCamara, USAF, Chief, Special Victims' Counsel Division
- 1620** **CLOSING REMARKS & AAR**
Colonel Mark L. Allred, Chief Judge, Air Force Court of Criminal Appeals

**THE NATIONAL JUDICIAL COLLEGE
 JURISPRUDENCE, TECHNOLOGY AND THE 4TH AMENDMENT FOR THE NMCCA
 SEPTEMBER 16-17, 2014
 WASHINGTON, DC**

WASHINGTON NAVY YARD

	Tuesday, September 16, 2014	Wednesday, September 17, 2014
 WELCOME TO THE NATIONAL JUDICIAL COLLEGE AND NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS PROGRAM	<p>7:45-8:00 Administrative Remarks</p> <p>8:00-8:50 JURISPRUDENCE [Divider 1] (Crothers)</p> <p>8:50-9:00 Break</p> <p>9:00-9:50 STATUTORY CONSTRUCTION [Divider 2] (Crothers)</p> <p>9:50-10:10 Break</p> <p>10:10-11:00 COLLEGIALITY: BOTH INSIDE AND OUTSIDE OF CONFERENCE [Divider 3] (Crothers)</p> <p>11:00-11:10 Break</p> <p>11:10-12:00 4TH AMENDMENT STRUCTURE AND APPLICABILITY: EXPECTATIONS OF PRIVACY [Divider 4] (Clancy)</p>	<p>8:00-8:50 DISQUALIFICATION AND RECUSAL [Divider 5] (Crothers)</p> <p>8:50-9:00 Break</p> <p>9:00-9:50 REAL ETHICS IN A VIRTUAL WORLD [Divider 6] (Crothers)</p> <p>9:50-10:10 Break</p> <p>10:10-11:00 THE EXCLUSIONARY RULE [Divider 8] (Clancy)</p> <p>11:00-11:10 Break</p> <p>11:10-12:00 EXCLUSIONARY RULE (Clancy) (Concluded)</p>
	12:00-1:00 Lunch	12:00 – 1:00 Lunch
	<p>1:00-1:50 4TH AMENDMENT STRUCTURE AND APPLICABILITY: EXPECTATIONS OF PRIVACY (Clancy) (Concluded)</p> <p>1:50-2:00 Break</p> <p>2:00-2:50 4TH AMENDMENT SATISFACTION: COMPETING VIEWS OF THE NATURE OF DIGITAL EVIDENCE SEARCHES [Divider 4] (Clancy)</p> <p>2:50-3:00 Break</p> <p>3:00-3:50 4TH AMENDMENT SATISFACTION: COMPETING VIEWS OF THE NATURE OF DIGITAL EVIDENCE SEARCHES (Clancy) (Concluded)</p>	<p>1:00-1:50 ARTICLE 120a, 120b, 120c, UCMJ (Bateman)</p> <p>1:50-2:00 Break</p> <p>2:00-2:50 ARTICLE 120a, 120b, 120c, UCMJ (Bateman) (Concluded)</p>





Sex Offenses



Know Your Reference

Pre – October
2007



Appendix 27,
MCM 2012

October 2007 –
June 27, 2012



Appendix 28,
MCM 2012

June 28, 2012 -
onwards



Part IV
2012 MCM



Structure of Sexual Offenses

- Article 120 → Adult Victim
- Article 120a → Stalking
- Article 120b → Child Crimes
- Article 120c → Other Sexual Misconduct



VICTIM = ADULT (over 16 years)

SEXUAL ACT

SEXUAL CONTACT

SEXUAL ACT

SEXUAL CONTACT

Commits SA/SC By:

1. Unlawful force
2. Force causing /likely to GBH to any person
3. Threatening/placing in fear that *any* person subjected to death/GBH/kidnapping
4. Rendering unconscious
5. Administering drug/intoxicant by force/without consent to impair

LWOP

Rape

20

Agg. Sex
Contact

1. Commits SA/SC By:
 - a. Threatening
 - b. Causing bodily harm
 - c. Fraudulent representation for professional purposes
 - d. Inducing a belief that person is another person
2. When person knows that other person is asleep, unconscious, unaware of sex
3. Other person is incapable of consenting due to:
 - a. Impairment by drug/intoxicant
 - b. Mental disease/disability

30

Sex Assault

7

Abusive Sex
Contact



Comparison of Definition of Sexual Act

2007

- Sexual Act = Penis + Vulva ONLY OR penetration of the Vulva only
- Penetration by hand or finger or object of the genital opening
 - With the intent to abuse, humiliate, harass, or degrade/gratify the sexual desire of any person

2012

- Sexual Act = Penis + vulva, anus or mouth; OR penetration of vulva, anus, or mouth
- Penetration of the vulva, anus or mouth by any part of the body or object
 - With the intent to abuse, humiliate, harass, or degrade/gratify the sexual desire of any person



Comparison of Definition of Sexual Contact

2007

- Intentional touching directly or through clothing of:
 - Genitalia, anus, groin, breast inner thigh or buttocks
 - With intent to humiliate, abuse, harass or degrade or to arouse or gratify sexual desire
- Intentionally causing another person to touch...
- With intent to abuse, etc.

2012

- ~~Intentional~~ touching directly or through clothing of:
 - Genitalia, anus, groin, breast inner thigh or buttocks
 - With intent to humiliate, abuse, harass or degrade or to arouse or gratify sexual desire
- ~~Intentionally~~ causing another person to touch...
- Touching (or causing) **any body part** with intent to arouse/gratify sexual desire



Comparison of Modalities -Force-

2007

- Using Force Against other person
 - Use/display of dangerous weapon
 - Suggestion that possess DW or cause another to believe have DW
 - Physical violence/strength/power applied to other person can't escape or avoid

2012

- Unlawful force – no legal justification
- Force –
 - Use/~~display~~ of a ~~dangerous~~ weapon
 - Use of physical strength/violence to overcome, restrain or injure a person (obj. standard)
 - Inflicting physical harm sufficient to coerce/compel submission



Comparison of Modalities -GBH-

2007

➤ Causing GBH

- Serious bodily injury
- Fractured/dislocated bones, deep cuts, torn part of the body, serious damage to internal organs, and other severe bodily injuries
- Does not include minor injuries like black eye or bloody nose
- Same as in Art 128, but not like 18 USC §2246(4)

2012

➤ Using force causing/likely to cause death or GBH

- Serious bodily injury
- Fractured/dislocated bones, deep cuts, torn part of the body, serious damage to internal organs, and other severe bodily injuries
- Does not include minor injuries such as a black eye or bloody nose
- ~~Same as in Art 128, but not like 18 USC §2246(4)~~



Comparison of Modalities

-Threats or Placing person in fear-

2007

- Threatening/placing in fear
 - Communication/action that is of sufficient consequence to cause reasonable fear in V/another person that = anything less than death/kidnapping/GBH
 - Physical injury to others
 - Could be accused of a crime
 - Expose a secret
 - Abuse of military rank to affect someone

2012

- Threatening/placing in fear
 - Communication/action that is sufficient consequence = reasonable fear that noncompliance = V or another person **is subjected to the wrongful action contemplated by the communication/action**
 - Does not need to prove that person actually intended to carry out the threat **or had ability to carry out the threat**



Comparison of Modalities -Bodily Harm-

2007

- Any offensive touching no matter how slight

2012

- Any offensive touching no matter how slight, including any nonconsensual sexual act or nonconsensual sexual contact
- ***** *What is this really saying?*



Comparison of Defenses -Consent-

2007

- Must be overt; freely given
- Lack of consent = no consent
- Lack of resistance or submission to threats/fear does not = consent
- Current/previous relationship; dress does not = consent
- Substantially incapable
 - Mental impairment/disease
 - Physically declining
 - Physically communicating unwillingness

2012

- ~~Overt Act~~; Freely given agreement to conduct
- Express lack of consent = no consent
- Lack of resistance does not = consent
- Current/previous relationship or dress does not = consent
- Sleeping; unconscious; incompetent cannot consent
- Force/GBH does not = consent
- Threat/fear does not = consent
- No consent to fraud rep/inducing/pretense
- Lack of consent based on circumstances



VICTIM = ADULT (over 16 years)

SEXUAL ACT

SEXUAL CONTACT

SEXUAL ACT

SEXUAL CONTACT

Commits SA/SC By:

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 - b. Mental disease/disability

20

Sex Assault

7

Abusive Sex
Contact



Sexual Assault & Abusive Sexual Contact

- Commits an sexual act/contact upon another when the 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 person
 - Mental disease of defect or physical disability and that condition is known or reasonably should be known by the person



Comparison of Defenses -Mistake of Fact -

2007

- Accused believed, as result of mistake/ignorance the incorrect belief that other person consented
- Must have been reasonable under all circumstances
- Reasonable, sober, prudent, ordinary person standard
- Cannot be negligent failure/due care
- Accused's intoxication does not matter

2012

- No defense enumerated; does that matter?
- Look to RCM 916



Defenses -Marriage-

2007

- It is a defense for:
 - Agg. Sexual assault
 - Child sex crimes
 - Wrongful sex contact
 - Indecent exposure

2012

- For Art 120
 - Marriage is NOT a defense

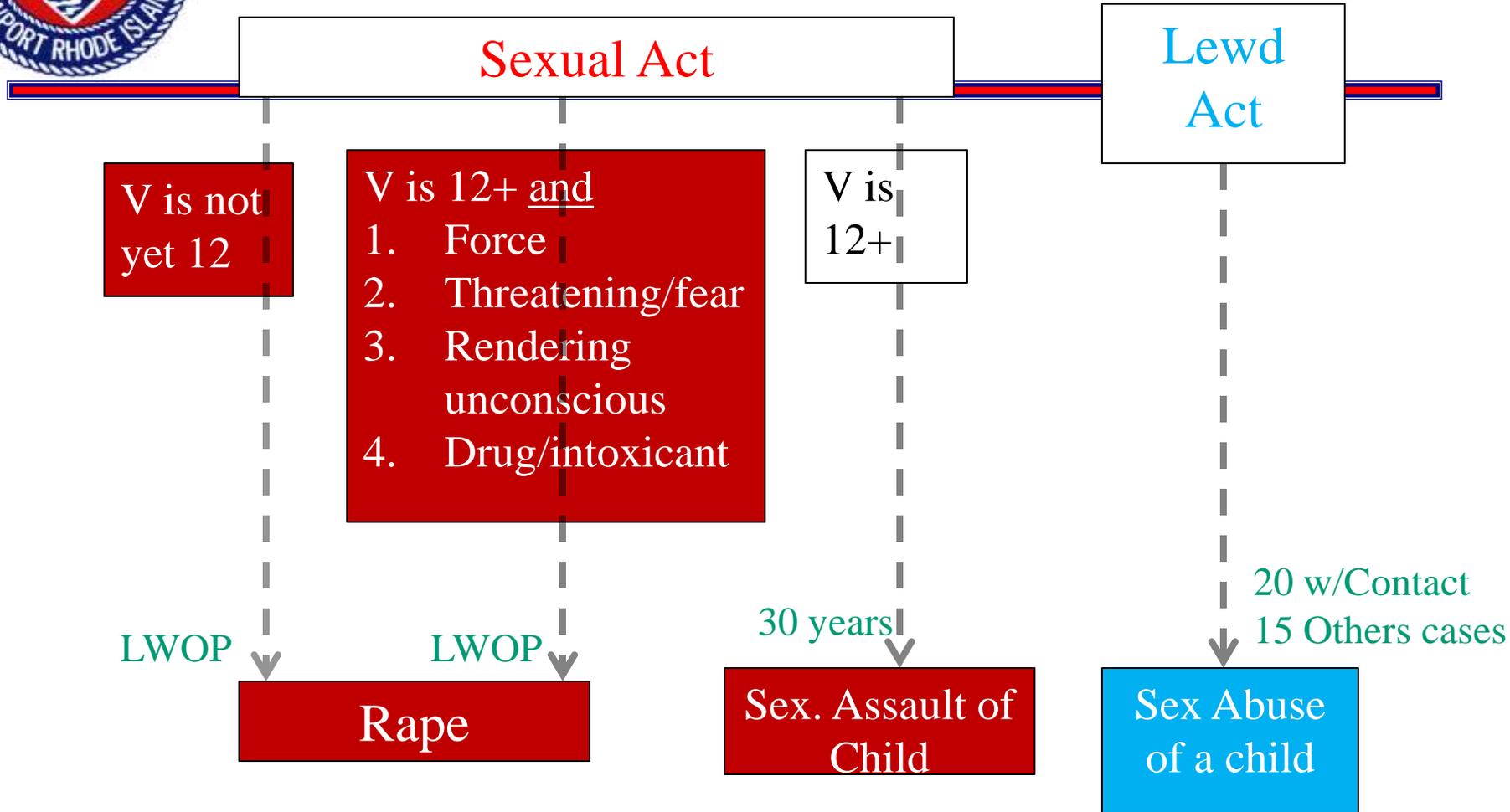


Article 120b

Crimes where Child is the Victim



VICTIM = CHILD (under 16 years)





What is a Lewd Act? (2012)

1. Sexual Contact with Child
2. Intentionally exposing genitalia, anus, buttocks, nipple by any means, incl technology with intent to abuse, humiliate, etc. OR intent to gratify...
3. Intentionally communicating indecent language by any means, incl tech, with intent to abuse, humiliate, etc. OR intent to gratify...
4. Any indecent conduct, intentionally done with/in presence of child, including via tech = immorality which is grossly vulgar, obscene, etc. AND tends to excite sexual desire/depraved morals



Comparison of Child Crimes

2007

- Agg. Sex assault of child
- Agg. Sex abuse of child
- Agg. Sex contact with child
- Abusive Sex contact with child
- Indecent liberty with child
- Indecent acts
- Indecent exposure

2012

- Sexual abuse of child
 - Cover:
 - ✓ All sexual contact crimes
 - ✓ Indecent liberty
 - ✓ Indecent act
 - ✓ Indecent exposure
 - Key – adds via communication technology



Defenses -Marriage-

➤ For Art 120b

- It is NOT a defense to RAPE
- It is a defense for Sexual Assault/Abuse to be proven by POE
 - ✓ EXCEPT if the person is asleep, unconscious or otherwise unaware/incapable of consenting



Defenses

-Consent-

- A child **not legally married** to the person committing the act cannot consent to any sexual act, etc...



Defense

-I thought she was 18-

- Not an affirmative defense that the accused reasonably believed that the child was 12 (strict liability)
- Accused must prove by POE that he/she reasonably believed child was at least 16, *if* the child was in fact at least 12.



Article 120c

Other Sexual Misconduct



Indecent Viewing, Visual Recording, or Broadcasting Art. 120c(a)

➤ Person who w/o legal justification

- Knowingly/wrongfully views the private area of another person w/o consent where Reasonable expectation of privacy (Peeping Tom)
 - ✓ Proposed Punishment – 1 year

- Knowingly photographs, video, films, records the private area w/o consent...
 - ✓ Proposed Punishment – 5 years

- Knowingly broadcasts/distributes any such recording, that the person should have known was made w/o consent where Reasonable Expectation of Privacy
 - ✓ Proposed Punishment – 7 years



Forcible Pandering

Article 120c(b)

- 2007 and 2012 are basically the same, just took out some minor confusing language.
- Any person who compels another to engage in an act of prostitution is guilty of forcible pandering
 - 12 years



Indecent Exposure

Article 120c(c)

-
- Anyone who intentionally exposes in an indecent manner, genitalia, anus, buttocks, female areola/nipple
 - Difference with 2007 – took out “expected to be viewed by people other than family/household”
 - 1 year



Definitions

- **Private area** – naked/underwear clad genitalia, anus, buttocks or female areola/nipple
- **Reas. Exp. Privacy** – circumstances in which a reasonable person believe he/she could disrobe in private or believe that a private area would not be visible to the public.
- **Broadcast** – electronically transmit a visual image with intent that someone else is going to see it
- **Distribute** – delivering actual or constructive possession
- **Indecent manner** – sexual impurity which is grossly vulgar/obscene/repugnant, and tends to excite sexual desire etc.



Comparison

-Definition of Prostitution-

2007

- Sexual act, sexual contact or lewd act for the purposes of receiving money or other compensation

2012

- Sexual act or sexual contact on account of which anything of value is given to or received by any person



Sodomy -Article 125-

- Still in effect; b/c w/o it there is not crime under UCMJ for bestiality
- *Marcum Factors*
 - Is this private, consensual sexual activity between adults?
 - Any factors/behavior outside the *Lawrence* analysis? (i.e. child, competent, public, prostitution, etc.)
 - Is there a military nexus?
- See US v. Stratton (NMCCA 201000637, Unpub. 2012)



NEW PROPOSALS

- Article 134(61) – Animal Abuse
- Article 134 (90) – Indecent Conduct



Questions??

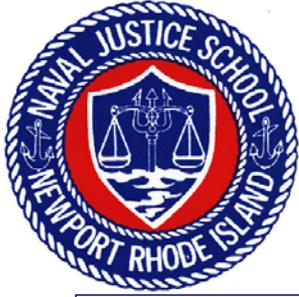


Victim and Witness Assistance Program (VWAP)



References

- JAG/COMNAVLEGSVCCOM 5800.4A
- COMDTINST M5810.1E (MJM, 2011, Ch 3.M.)
- COMDTINST M1754.10D (SAPRP, 2012)
- COMDTINST 1754.16A (2012)
- CG Work Life- VWAP
http://www.uscg.mil/worklife/victim_witness_assistance.asp
- DoD Directive 1030.1 (2004)
- DoD Instruction 1030.2
- SECNAVINST 5800.11B
- OPNAVINST 5800.7A
- LEGADMINMAN Chapter 6



VWAP Purpose

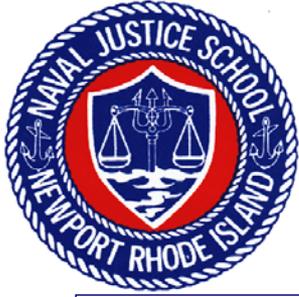
- Ensure that victims & witnesses receive appropriate response and assistance.
- Protect victims from further harm or hardship.
- Ensure victims are aware of their rights and of available services.



When does VWAP Apply?

- Whenever there is an offense in which there is a victim or a witness.

- Dispositions:
 - NJP
 - Administrative separation board
 - Court-martial



Who is a Victim?

Victim:

- A person who suffers *actual* or *threatened* physical, emotional, or financial harm as a direct result of a criminal offense.
- The term “victim” includes the immediate family of a minor who is a victim, or the surviving family of a homicide victim.
- Includes civilians



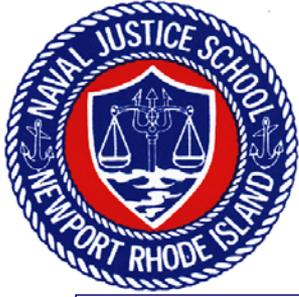
Victim's Rights

- To be treated with fairness and respect for victim's dignity and privacy.
- To be reasonably protected from the accused.
- To be notified of court proceedings.
- To receive restitution as available.
- To attend public court sessions.
 - Unless court determines testimony would be materially affected if victim hears other testimony at trial.
- To confer with the attorney for the Government.
- To be informed about case disposition (conviction, sentencing, imprisonment, and release).



Victim's Rights

- **Advisory role** in decisions involving prosecutorial discretion, such as plea-bargaining.
- Trial Counsel shall ensure the victim's views concerning prosecution and plea negotiations are obtained and forwarded to the CA.



Who is a Witness?

- Person who has information or evidence concerning a crime and provides that knowledge to a DON representative about an offense in the investigative jurisdiction of DON.
- When the witness is a minor, the term includes a parent or legal guardian.
- Does not include defense witnesses or individual involved in the perpetration of the crime as a perpetrator or accomplice.



Witness's Rights

- To be treated with fairness and respect for witness's dignity and privacy.
- To be reasonably protected from the accused.
- To be notified of any scheduling changes that will affect the witness's appearance at court-martial.
- To be notified of the apprehension of an accused, the initial appearance of an accused before a military judge, the release of the accused pending court-martial, and trial proceeding (including guilty pleas).
- To be informed about case disposition (conviction, sentencing, imprisonment, and release).



DD Forms 2701- 2704

- Explains Rights & Contact Information
(Medical, Legal)
 - Investigation (2701)
 - Pre-trial (2702)
 - At trial (2703)
 - Post-trial (2704)



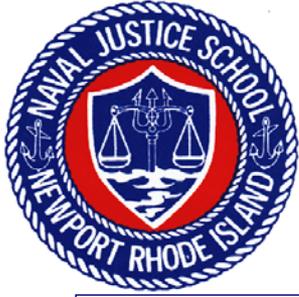
THE PLAYERS

- The Commanding Officer
 - Installation/Regional Commander
 - Unit CO
- The Victim Witness Liaison Officer (VWLO)
- The Victim Witness Assistance Coordinator (VWAC)
- NCIS / Law Enforcement
- Hospital
- Staff Judge Advocate
- Chaplain / FFSC / FAP / SARC / Victim Advocate
- Trial Counsel (RLSO / LSSS)
- NLSO / Legal Assistance Office
- Victims Legal Counsel (VLC)
- Brig



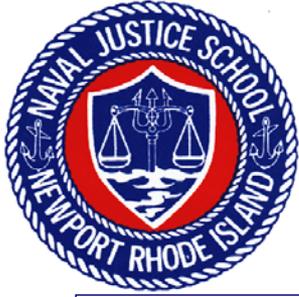
TRIAL COUNSEL REQUIREMENTS

- Notify victim of all procedures leading up to and during the court-martial.
 - **Consultation prior to PTA being signed.**
- Notify of scheduling changes.
- Separate waiting rooms.
- Sentencing
- Miscellaneous items to help make things easier for the victim/witness:
 - Parking
 - Child care
 - Lodging
 - Employers
 - Creditors
 - Victim's property



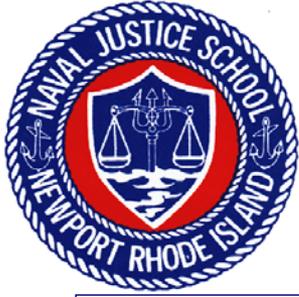
TC - Data

- Maintain data on number of victims/witnesses who received:
 - DD 2702
 - DD 2703
 - Number of victims who elected to be notified of change in confinee status under DD 2704
- Forward data to NLSC using DD 2706



TC - Compensation

- Ensure victims receive information regarding compensation programs:
 - State
 - Other financial sources of relief
 - Transitional Compensation for Abused Dependents



Military Victim Assistance Programs

- SAPR
- FAP/Work-Life
- VLC
- Legal Assistance
- Benefits for dependents who are victims of abuse by Sailors losing right to retired pay
 - Title 10 USC, Section 1408(h)
 - May get retirement benefits from divorce court - can elect transitional compensation meanwhile, but it's subject to recoupment



Compensation for Abused Dependents

- Transitional Compensation for Abused Dependents
 - DoDI 1342.24
 - DD Form 2698 – Application for Transitional Compensation
 - COMDTINST 1754.16A (2012)
 - CG-1754 – Application for Transitional Compensation
- 12-36 months



Other Compensation Programs

- DOJ Office for Victims of Crime (OVC)
 - <http://www.ojp.usdoj.gov/ovc/vwac>
- National Association of Crime Victim Compensation Boards
 - <http://www.nacvcb.org>
- State victim compensation programs



Developments

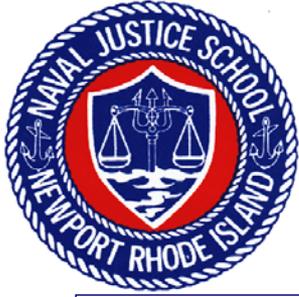
- Victims' Legal Counsel (VLC) (also called Special Victims' Counsel)
 - Section 1716 of NDAA

- DoD Directive-type Memorandum (DTM) 14-003 dtd 12 Feb 14
 - Implementing Special Victim Capability

- Participation by victim
 - At Clemency (Section 1706)
 - At Art. 32 (Section 1702)



Questions?



PRIVILEGES





Objectives

- Understand the various privileges under the MREs
- Understand who may assert the privilege
- Understand privileges that are military-specific and that DO NOT exist in civilian system



References

- MCM (2012 Ed.)
- Military Rules of Evidence, Section V (Privileges)
- Federal Rules of Evidence, Art V (2012)
- Case Law



Why Do Privileges Exist?

- Accurate, trustworthy legal advice
- Seek spiritual guidance
- Create trust in marriage
- Allow for full disclosure of symptoms
- Encourage victims to report



Applicability

➤ Privileges apply at:

- IRO Hearings – RCM 305(i)(2)(A)(ii)
- Art 32 hearings – RCM 405(i)
- Motions hearings – MRE 104(a)



Civilian v. Military

Civilian

- FRE Article V
- Based largely on case law
- Not enumerated in FRE

Military

- MRE Section V
- Privileges are clearly enumerated in MRE
- No Doctor-Patient privilege



General Rule

- MRE 501
- Person claiming privilege may:
 1. Refuse to be a witness
 2. Refuse to disclose any matter
 3. Refuse to produce object or writing
 4. Preventing another from disclosing privileged information



Privileges in MRE Section V

- Lawyer-Client Privilege – MRE 502
- Communications to Clergy – MRE 503
- Husband-Wife Privilege – MRE 504
- Classified Information – MRE 505
- Identity of Informant – MRE 507
- Psychotherapist-Patient – MRE 513
- Victim Advocate-Victim Priv. – MRE 514



Lawyer-Client Privilege

- MRE 502
- What is protected?
 - Communications
 - Work-product
 - Seeking-receiving legal services
 - ✓ NJP counseling?
 - Legal representatives
 - ✓ Make sure all are part of defense team





Lawyer-Client Privilege

- Who may claim the privilege?
- Exceptions to privilege:
 - Crime or fraud
 - Breach of duty by lawyer or client
 - Waiver



Example 1

- Accused makes several incriminating statements to a doctor that is working on the Defense team. Privileged?
- Email correspondence between a Defense counsel and his client on a Gov system. Privileged?
- Defense strategy notes created on a Gov computer? Work product?

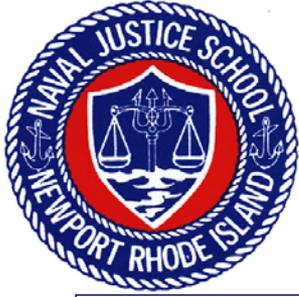


Communications to Clergy

➤ MRE 503

➤ Requirements:

- Made to clergy or assistant
- Intended to be confidential
- MUST be made to clergy or assistant acting in official capacity as spiritual advisor
- Formal act or religion or as a matter of religious conscience



Communications to Clergy

- Who may claim the privilege?
 - Individual, or clergy on behalf
- Exceptions:
 - None
 - Privilege holder may waive privilege





Example 2

- A Cpl makes incriminating statements about drug use to an RP3 (Chaplain's assistant) in the gym while working out. The two are friends and often socialize together. Is this conversation privileged?
- Cpl asks RP3 if they can speak in private about a personal matter. Privileged?



Husband-Wife Privilege

- MRE 504(b) – Confidential Communications During Marriage
- General Rule:
 - Communication must be intended to be confidential
 - Made during a valid marriage
 - Privilege belongs to speaker (accused)
 - Communications v. acts?



Husband-Wife Privilege

➤ Exceptions:

- Sham marriage
- Crime against spouse/marriage
- Joint criminal adventure
- Waiver





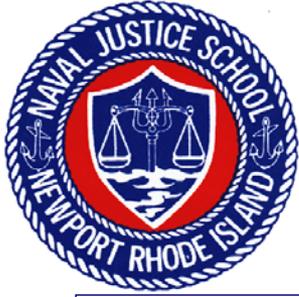
Example 3

- LCpl Troublemaker tells his wife he is going to “destroy” his fire-team leader. LCpl later assaults the Marine and is on trial. Can the wife testify about the conversation with LCpl Troublemaker?
- Can she testify about her husband’s bloody hands that she observed the day of the attack?



Identify of Informant

- MRE 507
- General Rule:
 - Privilege to refuse to disclose identity of informant
 - Informant – one who provides information relating to an investigation
 - Exception: if the informant is called to testify for the prosecution



Psychotherapist-Patient Priv.

➤ MRE 513

➤ General Rule:

- Confidential communications between patient and psychotherapist
- Must be made for the purpose of diagnosis or treatment or mental or emotional condition
- Who is covered? Psychiatrist, clinical psychologist, clinical social worker, or their assistants



Psychotherapist-Patient Priv.

- Who may claim privilege? Patient, psychotherapist or authorized third party
- Exceptions – MRE 513(d)
 - Patient is dead
 - Evidence of spousal abuse
 - Disclosure required by law – child abuse
 - Danger to self or others
 - Future crimes or fraud



Example 4

- Capt Marine seeks emotional treatment from a licensed psychotherapist. He discloses that he is suicidal and might act on his impulses. Privileged? Can the therapist disclose this communication?
- Capt Marine also discloses that he has sexually abused his children. Privileged? Is the therapist required to disclose?



Victim Advocate-Victim Priv.

- MRE 514 – new rule in 2012 MCM
- General Rule:
 - Right to refuse to disclose communications with victim advocate
 - Must be confidential communication
 - Must be made for purpose of providing advice or support to the victim



Victim Advocate-Victim Priv.

- Victim – suffered a direct or emotional harm as the result of a sexual or violent offense
- 2014 EO – adds DoD Safe Helpline staff
- Exceptions –
 - Victim is dead
 - Law creates duty to report
 - Future fraud or crime
 - To ensure safety of victim or others



Example 5

- LCpl Victim was sexually assaulted and seeks counseling as a result. She sits down with her Platoon Sgt. She discloses the attack to SSgt Mentor and discusses at length. Sgt Mentor is not an appointed victim advocate but is very helpful. Is this communication privileged?
- LCpl Victim is referred to the UVA. They discuss at length. Victim is suicidal by now. Privileged?



Doctor – Patient Privilege

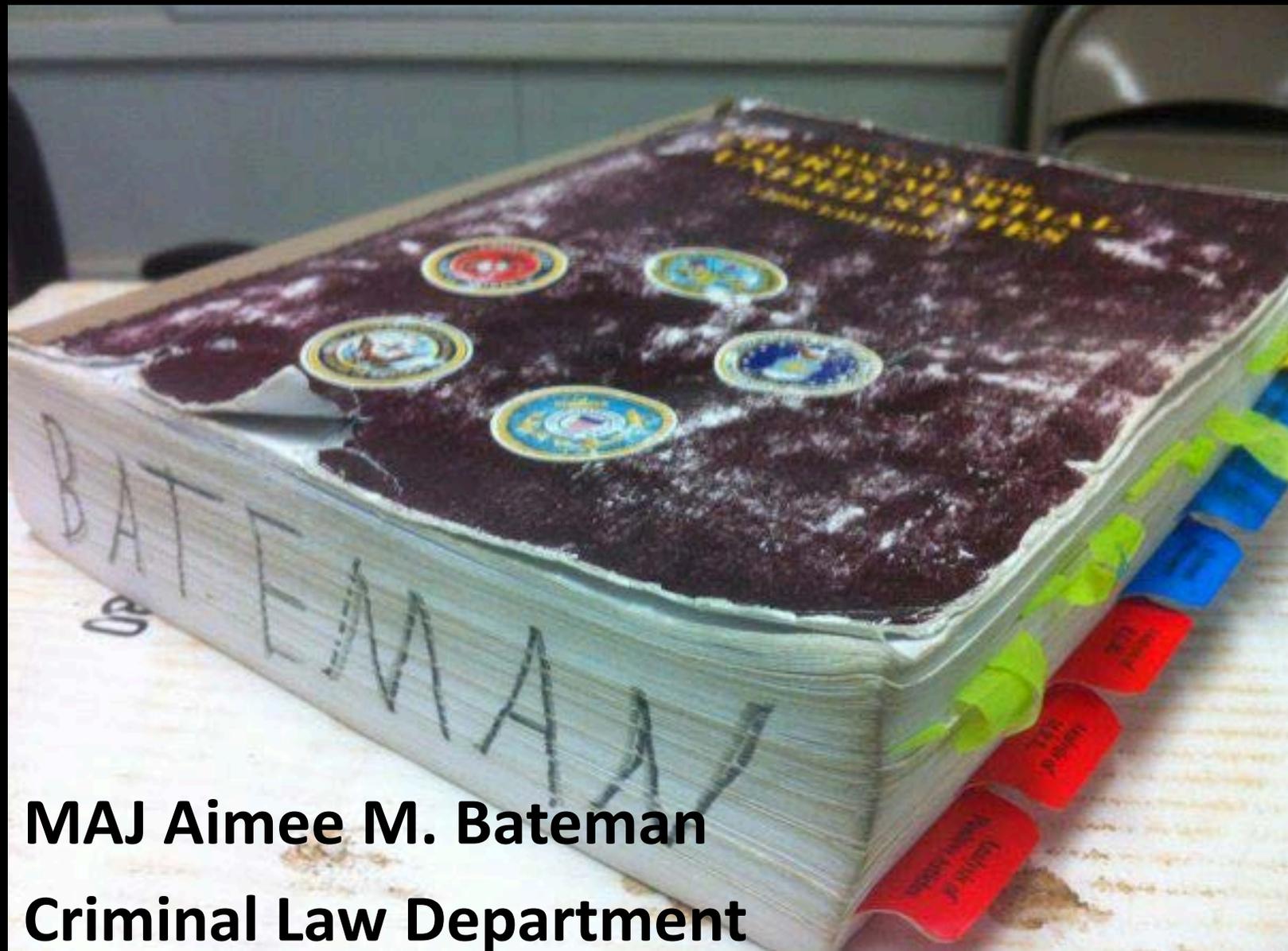
- Generally NOT recognized in the military
- Why not?
- Limited privilege exists:
 - HIV screening
 - RCM 706 board
 - ✓ MRE 302(a)





Questions?

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”
 - Just go to the Benchbook...it is only 163 pages...

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:

Military Judges' Benchbook

UNOFFICIAL

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

Mandatory Discharge/Dismissal

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

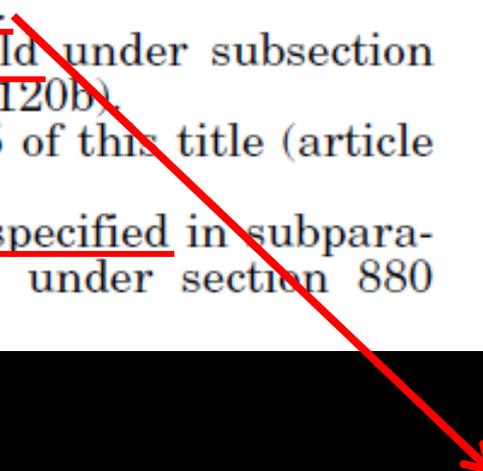
“(2) Paragraph (1) applies to the following offenses:

“(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)

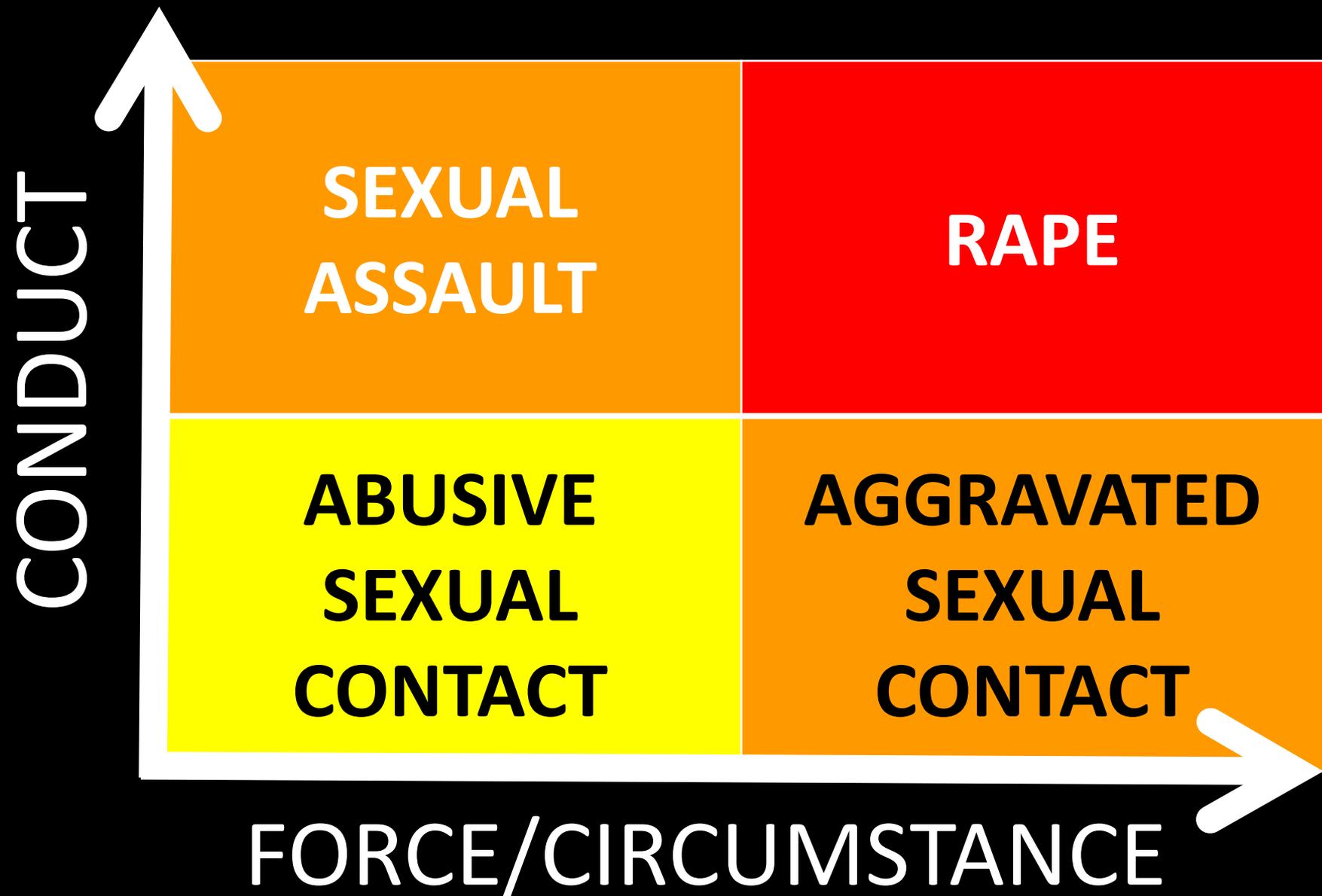
- RAPE OF A CHILD
- SEXUAL ASSAULT OF A CHILD
- SEXUAL ABUSE OF A CHILD

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

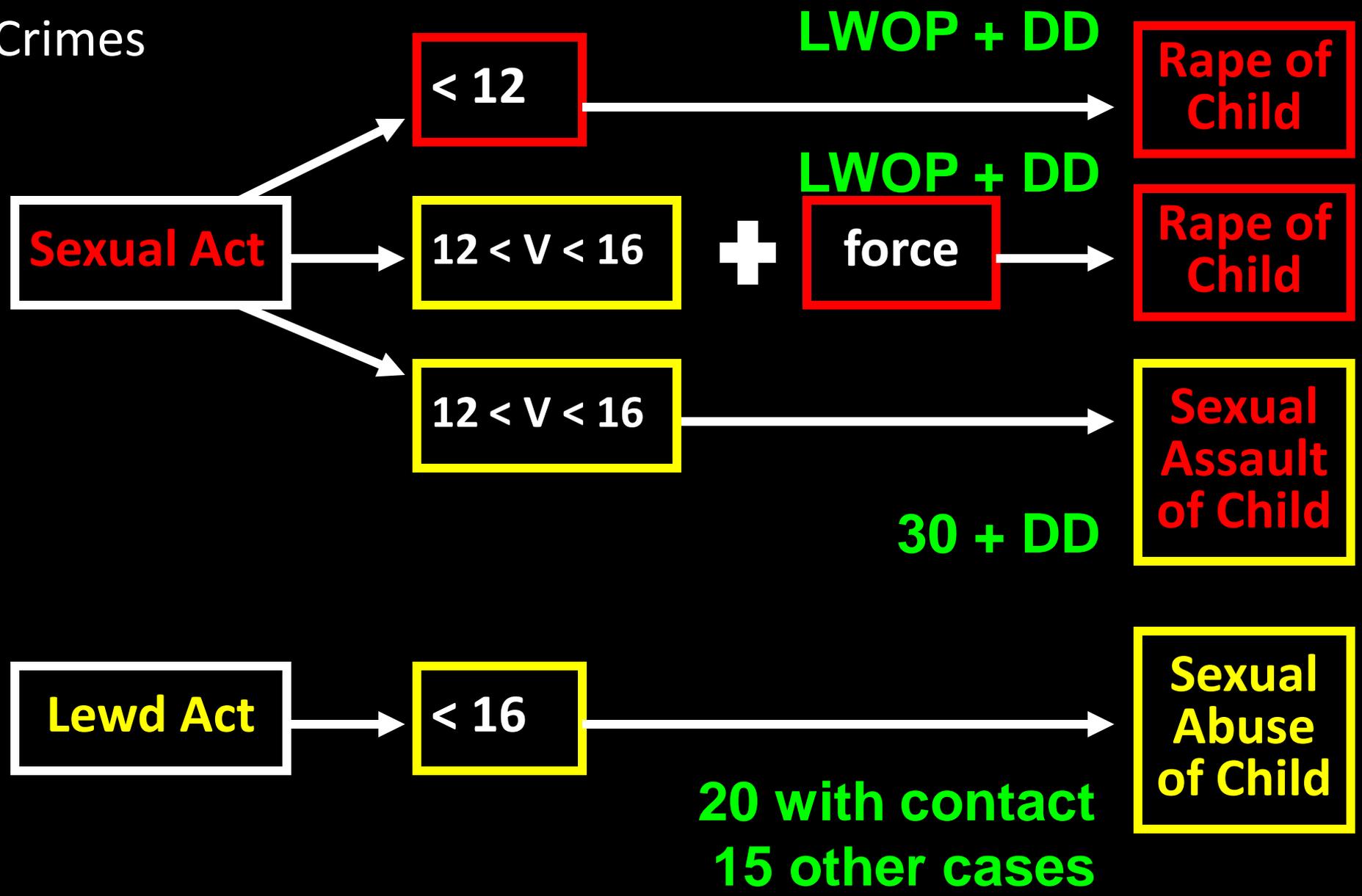
**AGGRAVATED
SEXUAL
CONTACT**
20

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

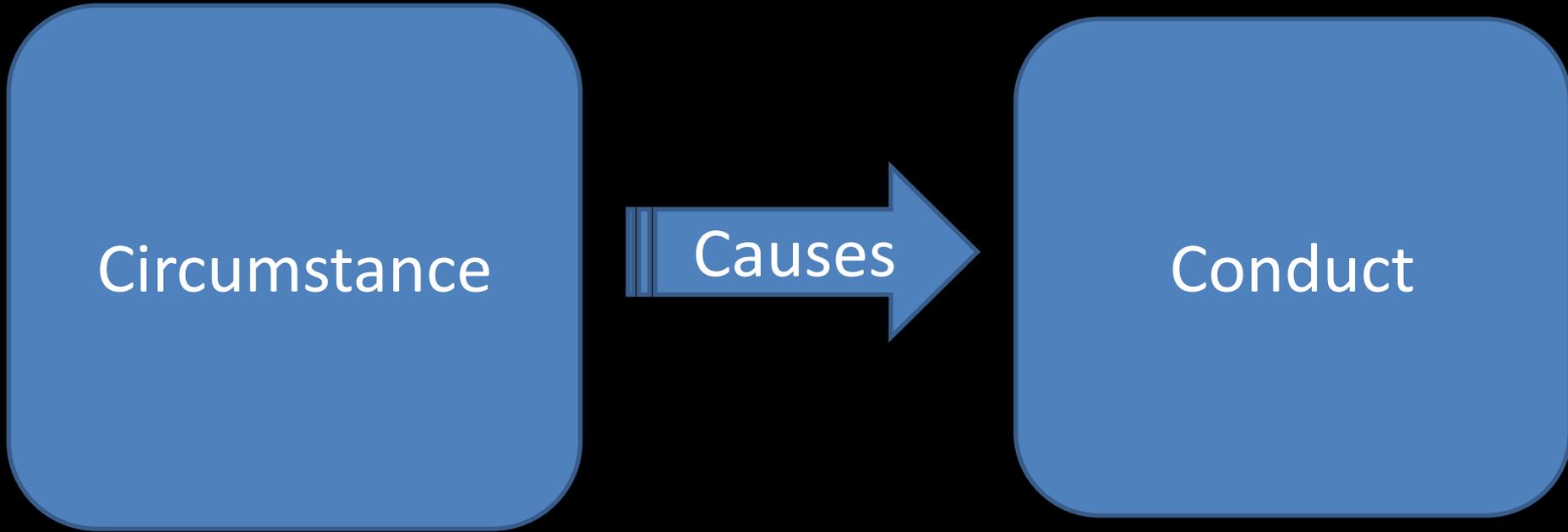
Reasonably should know = objective

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

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.

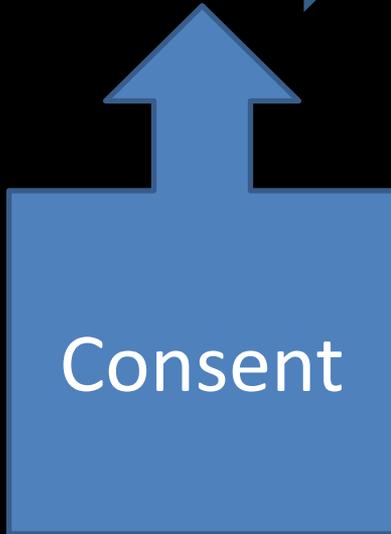
It’s in the pleading:

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



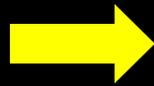
(j) *Ignorance or mistake of fact.*

(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



(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).

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.

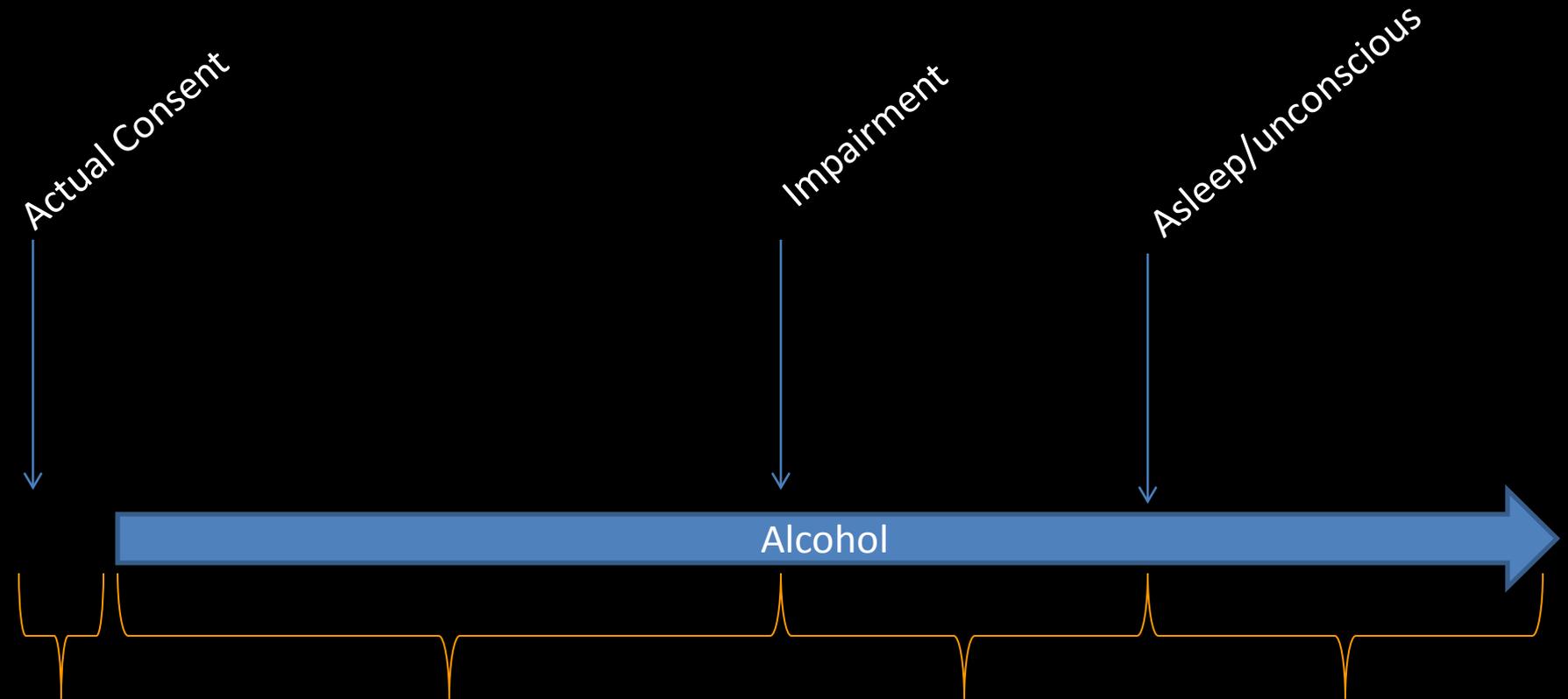
If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused.

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 Assault (incapable of consent)

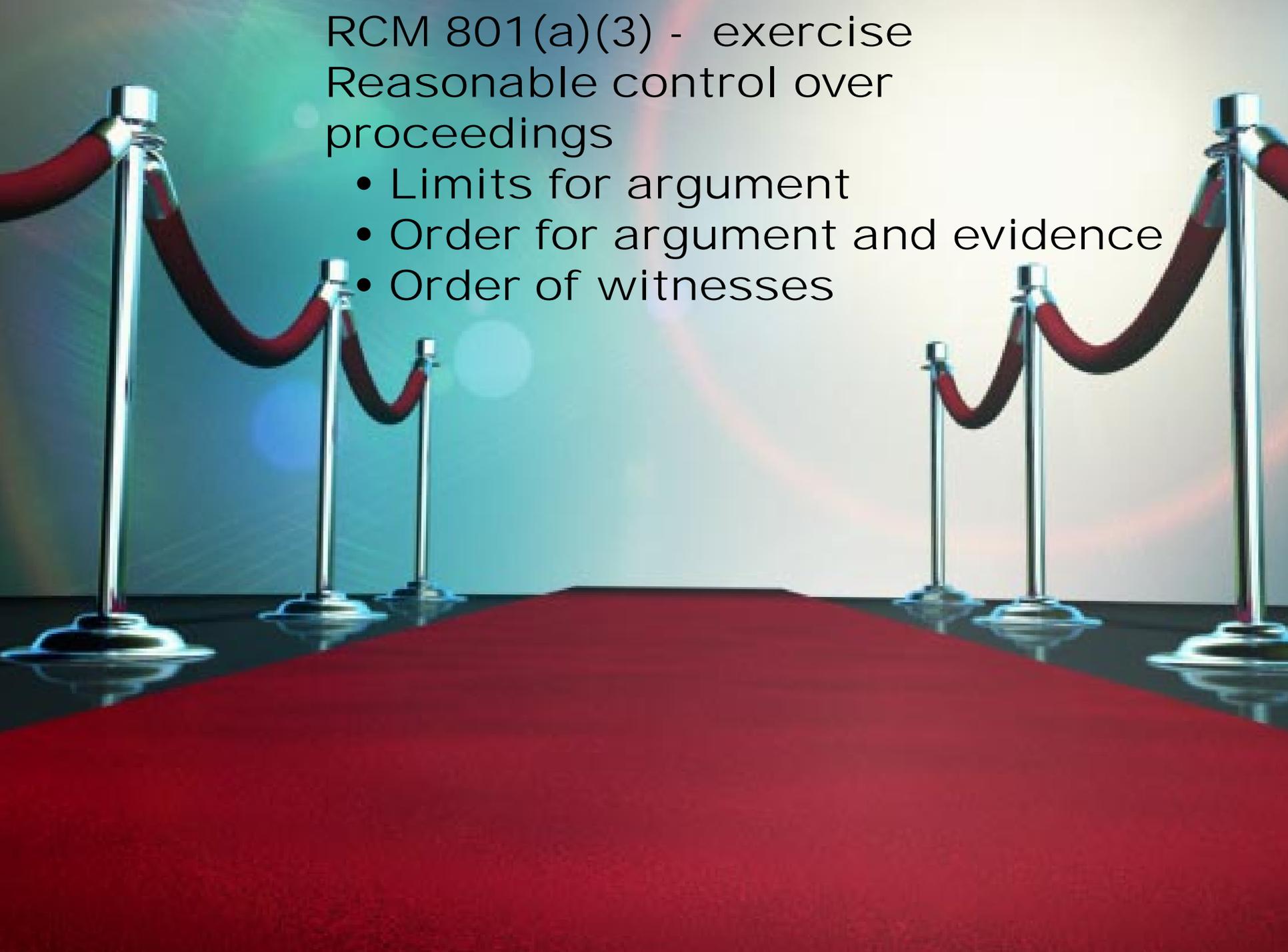
1. Sex Act
2. Victim incapable of consent due to
 - a. Impairment by drug, intoxicant, similar substance
 - b. Mental disease or defect or physical disability
3. Accused knew or reasonably should have known of the impairment or disease/defect/disability

Evidentiary Issues
and
Special Victim Counsel

•LRM v. Kastenber, 72 MJ 364 (CAAF July 18, 2013)

- Special Victim Counsel Requests to be Heard
- Denied by Military Judge – finds no standing to present argument
- CAAF disagrees



A red carpet leads towards a stage area. On either side of the carpet, there are silver stanchions connected by a dark red velvet rope, forming a barrier. The background is a soft, out-of-focus light blue and white gradient.

RCM 801(a)(3) - exercise
Reasonable control over
proceedings

- Limits for argument
- Order for argument and evidence
- Order of witnesses

APPENDIX A

UNITED STATES OF AMERICA

v.

NAME,
RANK, U.S. Army
UNIT

)
)
)
)
)
)
)

ELECTRONIC DOCKET REQUEST

(AR 27-10)

SECTION A

(To be completed by Trial Counsel and delivered to Defense Counsel **before 1500 hours on the first duty day after referral** of charges to trial.)

1. Type of court-martial: GCM: BCD: SPCM:

2. Date charges referred to trial:

3. Date referred charges served upon the accused:

4. Accused (has) (has not) been in pretrial confinement since:

5. Date referred charges provided to defense counsel:

6. The prosecution will be ready for trial on and after:

7. The military judge should consider the following matters when setting a trial date: [ANY restraint other that pretrial confinement should be noted.]

8. Companion case(s):

9. Special Victim Counsel (Name, phone, and email address):

10. Trial Counsel (Name, phone, and e-mail address):

11. Date:

Rules of Practice Before Army Courts-Martial

RULE 2.3: Special Victim Counsel (SVC) Requirements.

RULE 2.3.1: Applicability. As stated in the Preamble, the Rules of Court apply to all counsel practicing before Army courts-martial. Accordingly, notwithstanding references to "both parties", "counsel for both sides", "party" or words to that effect, all Rules of Court apply to SVCs (whether military or civilian counsel representing victims), including but not limited to the rules on motions practice in Rule 3. Upon assuming representation, SVCs will provide contact information to the trial counsel for inclusion on the Electronic Docket Request (Appendix A).



- Other Sexual Behavior
- Sexual Predisposition

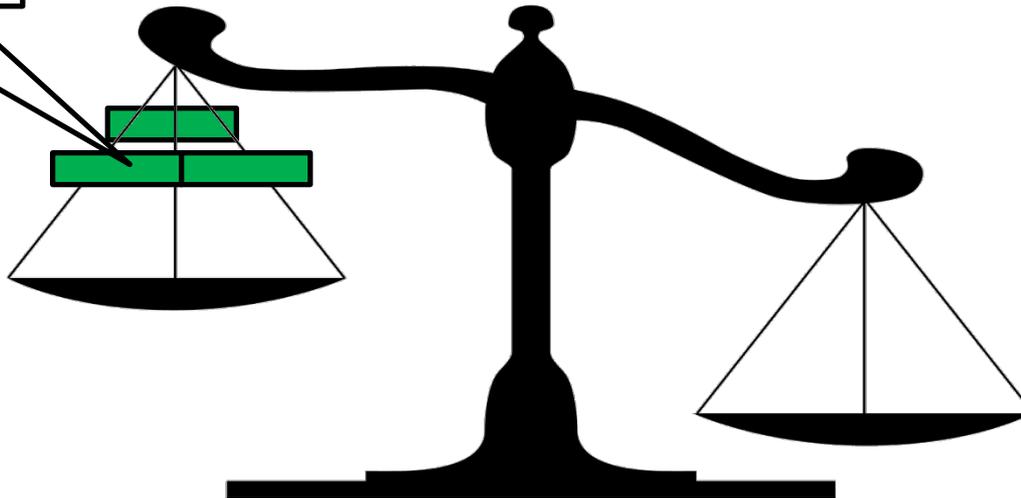
MRE 412

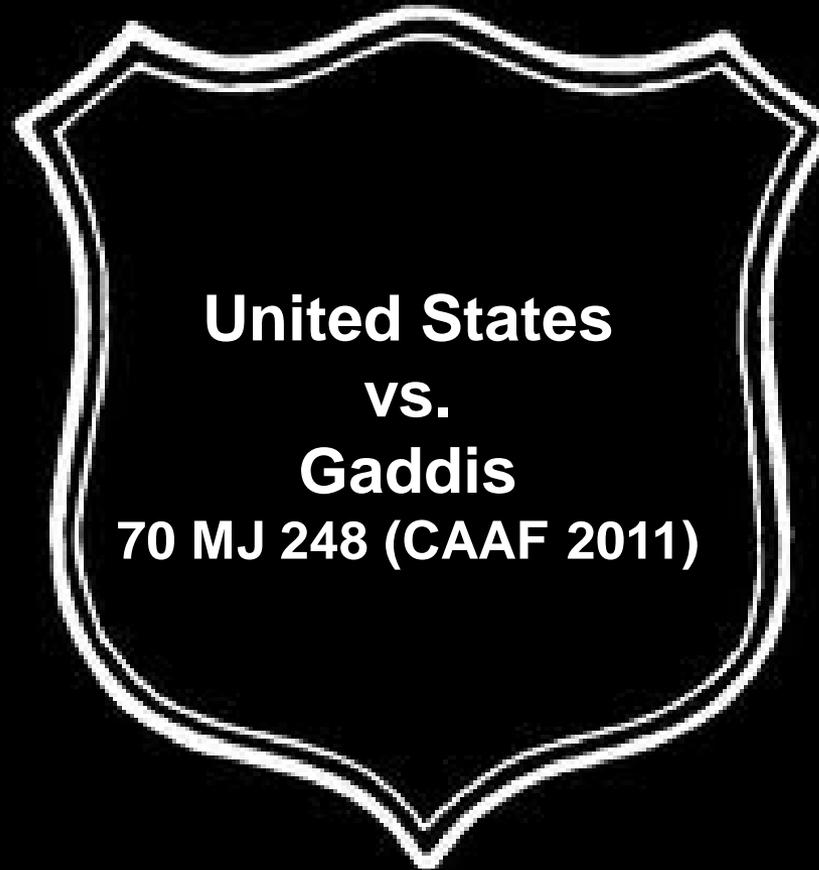
MRE 412

Three exceptions

- Past sexual behavior
- Sexual predisposition

1. Instances of behavior to show someone else was the source of semen, injury, other physical evidence
2. Prior sexual behavior b/n accused and victim *to prove consent or by the prosecution*
3. Constitutionally required





MRE 412

Built-in balancing

**US v.
Gaddis**

(3) If the military judge determines on the basis of the hearing described in paragraph (2) of this subsection that the evidence that the accused seeks to offer is relevant for a purpose under subsection (b) and that the probative value of such evidence outweighs the danger of unfair prejudice ~~to the alleged victim's privacy~~, such evidence shall be admissible under this rule to the extent an order made by the military judge specifies evidence that may be offered and areas with respect to which the alleged victim may be examined or cross-examined. Such evidence is still subject to challenge under Mil. R. Evid. 403.

United States v. Gaddis, 70 M. J. 248 (C.A.A.F. 2011)

M.R.E. 412 cannot limit the introduction of evidence required by the Constitution—although the text of the rule seems to permit such a limitation. And the explanation in Banker—**suggesting** that balancing constitutionally required evidence against the privacy interest of the victim before admitting it is necessary to further the purpose of the rule, see Banker, 60 M.J. at 222–23—**is simply wrong.**

- *Gaddis*, 70 M.J. at 256

Evidence of Sexual Behavior and Sexual Predisposition Not Admissible

Except:

- A) Behavior to prove other source of injury, semen or physical evidence;**
- B) Behavior b/tw victim/acc to prove consent or by prosecution**

Test:

- 1) 401: Relevance**
- 2) Probative value outweighs the danger of unfair prejudice**

MRE 403

Except:

- C) Constitutionally Required**

Test:

- 1) 401: Relevance**
- 2) Probative value outweighs the danger of unfair prejudice**

Add'l Test for Const Req Evid:

- 1) Relevant: 401**
- 2) Material: Importance in relation to other issues; extent in dispute; nature of other evidence on this issue**
- 3) Favorable to Acc: exculpatory; undermine credibility of central witness; central to theory**



**US v.
Gaddis**

Meet 403 balancing?

**...it is admissible no matter
how embarrassing it might
be to the alleged victim**



All in?

*Van Arsdall factors...
can impose “reasonable
limits”*

Constitutional Right of Confrontation . . . except



“Judges retain wide latitude to impose reasonable limits on cross-examination”

-*Delaware v. Van Arsdall*, 475 U.S. 673 (1986)

MRE 611

- **Harassment**
- **Undue embarrassment**
- **Effective truth seeking**
- **Avoid wasting time**



MRE 513

**Psychotherapist
- Patient
Privilege**

Rule 513. Psychotherapist—Patient Privilege

(a) *General Rule.* A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions.* As used in this rule:

(1) "Patient" means a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) "Psychotherapist" means a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any State, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

MRE 513

Exceptions



Types of Evidence

(5) “Evidence of a patient’s records or communications” means testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patient’s mental or emotional condition.

(d) *Exceptions.* There is no privilege under this rule:

(1) when the patient is dead;

(2) when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) when admission or disclosure of a communication is constitutionally required.

(6) when admission or disclosure of a communication is constitutionally required.

Const Req Evid:

- **Relevant: 401**
- **Material: Importance in relation to other issues; extent in dispute; nature of other evidence on this issue**
- **Favorable to Acc: exculpatory; undermine credibility of central witness; central to theory**

MRE 513 Exceptions



**United States v. Bazar, 2012 WL 2505280
(A.F.Ct.Crim.App. 29 June 2012) (unpublished)**

Judge did not allow evidence from mental health records to impeach victim during sentencing; not constitutionally required and excluded by MRE 403.

Procedure

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subdivision (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient must be afforded a reasonable opportunity to attend the hearing and be heard at the patient's

Procedure

(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

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!

