

Sex offenses in the Military – The New Article 120, U.C.M.J.

A. Overview of the new Article 120. Congress amended Article 120, U.C.M.J.¹ effective for offenses occurring on and after October 1, 2007. Article 120 was formerly known as “Rape and carnal knowledge,” but is now entitled “Rape, sexual assault, and other sexual misconduct.” These changes are reflected in the 2007 MCM. These changes are monumental in that:

1. They created 36 offenses. These 36 offenses replace the offenses under the former Article 120 and others that used to be MCM offenses under Article 134.

2. The new Article 120 replaces the following Article 134 offenses. The parenthetical cites indicate the replaced MCM provisions:

- Indecent assault (Paragraph 63, Part IV, MCM).
- Indecent acts or liberties with a child (Paragraph 87, Part IV, MCM).
- Indecent exposure (Paragraph 88, Part IV, MCM).
- Indecent acts with another (Paragraph 90, Part IV, MCM).

3. The UCMJ change also amends some Article 134 offenses.

a. Indecent language communicated to another - other than when communicated in the presence of a child –remains punishable under Article 134 (Paragraph 89, Part IV, MCM). If the language was communicated in the presence of a child, then it is an Article 120 offense.

b. Pandering (having someone commit an act of prostitution) is still an offense under Article 134 (Paragraph 97, Part IV, MCM) but the elements have been somewhat modified. There is a new Article 120 offense when the pandering is “compelled.”

c. With the exception of the new Article 120 offenses as lesser included offenses, Article 125 (sodomy) remains unchanged. (Sodomy is “unnatural carnal copulation” and includes fellatio, cunnilingus, bestiality, and anal sodomy.)

4. The changes also permit charging an accused when the accused himself or herself did not engage in the sexual act, sexual contact, indecent conduct, or lewd act, but instead caused another to do so. Prior to the new Article 120, such conduct was possibly punishable under the U.C.M.J. by alleging that the accused was an aider and abettor.² Under the new Article 120, “causing” another person to commit the offense, or conduct directed at another causing the victim to submit (such as threatening another person), are discreet offenses.

5. The MCM change also amends the definition of “indecent” in the offense of indecent language. Paragraph 89(c), Part IV, MCM, now reads:

¹ 10 U.S.C. § 920.

² See Article 77, U.C.M.J.

“Indecent” language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards.

If the communication was made in the physical presence of the child, the new Article 120 – and not Article 134 - would be used.

B. Elements of the offenses and law enforcement officers. When punitive articles are taught, it is traditional to discuss each offense and then review the elements. This is not a useful approach for this new Article because of the large number of offenses. Such an approach is also not helpful for it is the facts that result from the investigation that will drive what offense occurred, and until the investigation is completed agents and the prosecution do not know what offense, if any, has been committed. In other words, law enforcement officers should not approach an investigation focusing on the elements of 36 offenses (though certainly they should be globally familiar with key elements and definitions), but determine the facts and then – in conjunction with the trial counsel – examine what offenses may have been committed. Once the facts are known and what elements can be satisfied should agents focus on specifically what U.C.M.J. offense, if any, was committed.

C. Selecting the offenses at play. In keeping with the preceding paragraphs discussion of why agents should first collect all the facts and then review the elements of the offenses, it is recommended that investigators follow the suggested investigatory scheme on the following pages. Once the facts are known, use the charts and “elements table” to determine which offenses are at play. (This table is organized by the key elements and highlights those offenses that are limited to child-victims.) Also included is a list of key definitions and finally, a table of maximum punishments for the new Article 120 offenses.

D. How to investigate, and title, an offense under Article 120, UCMJ.

Important: This document is a summary and overview of MCM provisions. Always consult the MCM itself before proceeding.

1. Determine **WHAT** was done to or with the victim (the italics below is the MCM definition).

a. Sexual act. *(C)ontact between the penis and the vulva, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or the penetration, however slight, of the genital opening of another by a hand or finger 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.*

b. Sexual contact. *(T)he intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.*

c. Indecent liberty with a child. *The term 'indecent liberty' means indecent conduct, but physical contact is not required. It includes one who with the requisite intent exposes one's genitalia, anus, buttocks, or female areola or nipple to a child. An indecent liberty may consist of communication of indecent language as long as the communication is made in the physical presence of the child. If words designed to excite sexual desire are spoken to a child, or a child is exposed to or involved in sexual conduct, it is an indecent liberty; the child's consent is not relevant.*

d. Indecent conduct (indecent act). *The term 'indecent conduct' means that form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. Indecent conduct includes observing, or making a videotape, photograph, motion picture, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material, without another person's consent, and contrary to that other person's reasonable expectation of privacy, of--*

(A) that other person's genitalia, anus, or buttocks, or (if that other person is female) that person's areola or nipple; or

(B) that other person while that other person is engaged in a sexual act, sodomy (under section 925 (article 125)), or sexual contact.

e. Indecent exposure. *Intentionally exposing in an indecent manner, in any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor's family or household, the genitalia, anus, buttocks, or female areola or nipple....*

f. Lewd act. *Defined as (A) the intentional touching, not through the clothing, of the genitalia of another person, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or (B) intentionally causing another person to touch, not through the clothing, the genitalia of any person with an intent to abuse, humiliate or degrade any person, or to arouse or gratify the sexual desire of any person.*

g. Pandering (having another to engage in an act of prostitution).
The term 'act of prostitution' means a sexual act, sexual contact, or lewd act for the purpose of receiving money or other compensation.

2. Determine **HOW** it was done to or with the victim.

- By force.
- By inflicting bodily harm.
- By causing grievous bodily harm (GBH).
- By threats or placing in fear.
- By rendering the victim unconscious.
- Using a dangerous weapon or object.
- By administering a drug, intoxicant, or similar substance.
- While the victim was incapacitated or incapable to appraise the nature of the act, decline participation, or communicate unwillingness to participate.
- Lack of permission.

Note: Some offenses – especially involving children – may not require any of the above to be proven.

Note: The victim of a sexual act or conduct need not be the person who was threatened in order to accomplish the act. For example, the suspect may have threatened the victim’s mother, or applied force to the mother, in order to cause the victim to submit.

3. Determine the **SUSPECT’S ROLE** in what was done to or with the victim.

- Perpetrator (engaged in the act or conduct).
- Suspect caused the victim to be subject to the act or conduct.
- Suspect did not himself/herself engage in the act or conduct, but caused another to do so.
- If the act or conduct occurred while the victim was incapacitated or incapable to appraise the nature of the act, decline participation, or communicate unwillingness to participate, to what extent did the suspect render the victim incapacitated, or contribute to the victim’s incapacity or declination.

4. Determine the **AGE** of the victim at the time of the offense.

- Child under 12.
- Child 12 or over, but less than 16.
- Person over 16.

Note 1: Where age is an element, it does not have to be proven the accused knew the age of the child. It will always assist an investigation, however, when the prosecution is able to prove the accused actually knew the victim’s age.

Note 2: In any offense where it is an element that the child had not attained the age of 12, it is NOT a defense the accused reasonably believed the child had attained the age of 12.

Note 3: In some offenses (see paragraph 6 below) where it is an element the child was 12 or over but not yet 16, it may be an affirmative defense if the accused reasonably believed the child had attained the age of 16.

5. Consider whether the actor and the victim were **MARRIED**. (See paragraph 6 below).

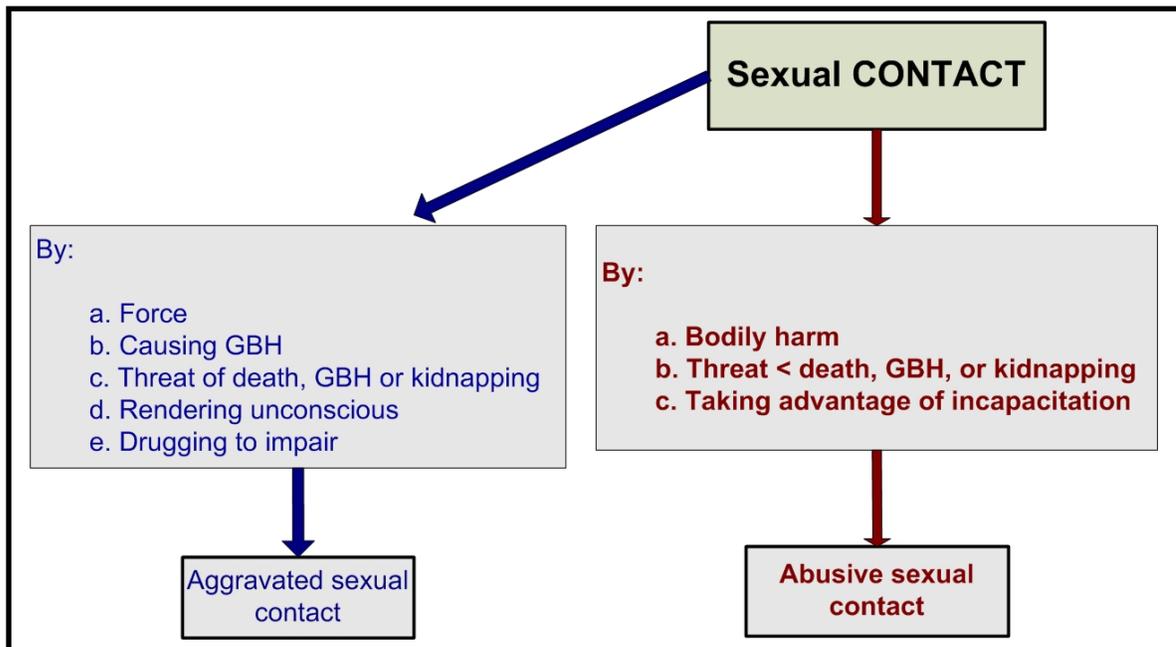
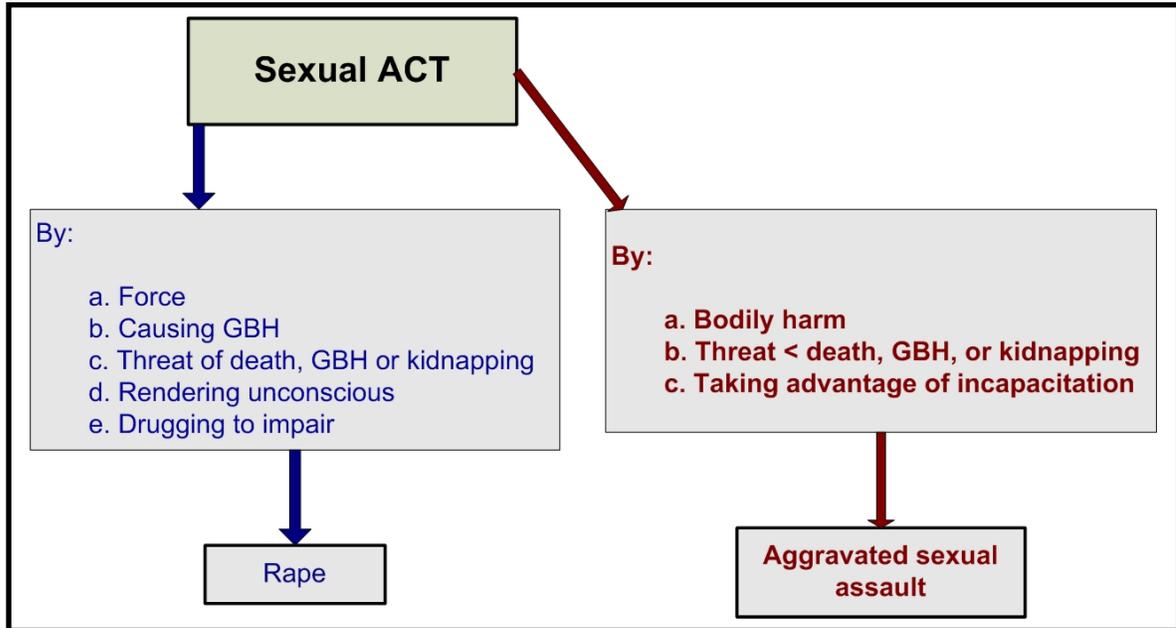
6. Consider possible **AFFIRMATIVE DEFENSES** and develop evidence that supports or refutes that defense.

Offense / MCM Para 45	Possible Affirmative Defense
Aggravated sexual assault of a child / Para 45b(4)	Accused reasonably believed the child had attained the age of 16. In offenses where the child had not yet attained the age of 12, mistake of fact as to the child not yet being 12 years old is NOT a defense.
Aggravated sexual abuse of a child / Para 45b(6)	
Abusive sexual contact with a child / Para 45b(9)	
Indecent liberties with a child / Para 45b(10)	
Rape of non-children / Para 45b(1)(a) through b(1)(e)	Accused reasonably believed the victim consented to the act or conduct.
Wrongful sexual contact / Para 45(b)(13)	
Aggravated sexual assault of non-children / Paras 45b(3)(a) through (c)	
Aggravated sexual contact with non-children / Paras 45b(5)(a) through (e)	
Abusive sexual contact with non-children / Paras 45b(8)(a) through (c).	
Aggravated sexual assault (intoxicated or incapable) / Para 45b(3)(c)	It is an affirmative defense that the actor and the victim were married at the time of the act or conduct PROVIDED the defense is not available if the accused's intent at the time was to abuse, humiliate or degrade.
Aggravated sexual assault of a child over 12 / Para 45b(4)	
Aggravated abuse of a child / Para 45b(6)	
Abusive sexual contact with a child over 12 / Para 45b(9)	
Indecent liberties with a child / Para 45b(10)	
Wrongful sexual contact / Para 45b(13)	
Indecent exposure / Para 45b(14)	

Note about Lesser Included Offenses (LIOs): If an accused successfully raises an affirmative defense as to mistake of fact as to the victim's age and the prosecution is unable to defeat it at trial, an accused could be found guilty of an LIO where the age of the victim is not an element. Similarly, if an accused successfully raises an affirmative defense as to mistake of fact as to consent and the prosecution is unable to defeat it at trial, an accused could be found guilty of an LIO where lack of consent or permission is not an issue or element.

7. **Using these charts.** The following charts simplify the major Article 120 offenses of rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact.

- Identify **WHAT** happened to the victim (sexual act or sexual contact.)
- Identify **HOW** it happened
- Depending on what and how it happened, determine the category of the offense.



**Offenses under Article 120 (1 Oct 2007) and their elements.
(Always confirm the below with the UCMJ and MCM)**

Not shaded	Victim can be of any age
Shaded	Victim must be a child

Part I. “Sexual act” is an element. Victim can be of any age.

Offense		Elements	MCM Para 45
Rape	By using force	That the accused caused another person, who is of any age, to engage in a sexual act by using force against that other person.	b(1)(a)
	By causing grievous bodily harm	That the accused caused another person, who is of any age, to engage in a sexual act by causing grievous bodily harm to any person.	b(1)(b)
	By using threats or placing in fear.	That the accused caused another person, who is of any age, to engage in a sexual act by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.	b(1)(c)
	By rendering another unconscious	That the accused caused another person, who is of any age, to engage in a sexual act by rendering that other person unconscious.	b(1)(d)
	By administration of drug, intoxicant, or other similar substance	(i) That the accused caused another person, who is of any age, to engage in a sexual act by administering to that other person a drug, intoxicant, or other similar substance; (ii) That the accused administered the drug, intoxicant or other similar substance by force or threat of force or without the knowledge or permission of that other person; and (iii) That, as a result, that other person’s ability to appraise or control conduct was substantially impaired.	b(1)(e)
Aggravated sexual assault	By using threats or placing in fear	(i) That the accused caused another person, who is of any age, to engage in a sexual act; and (ii) That the accused did so by threatening or placing that other person in fear that any person would be subjected to bodily harm or other harm (other than by threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping).	b(3)(a)

Part I. “Sexual act” is an element, con’d. Victim can be of any age.

Offense		Elements	MCM Para 45
Aggravated sexual assault Con’d	By causing bodily harm	(i) That the accused caused another person, who is of any age, to engage in a sexual act; and (ii) That the accused did so by causing bodily harm to another person.	b(3)(b)
	Upon a person substantially incapacitated or substantially incapable of appraising the act, declining participation, or communicating unwillingness	(i) That the accused engaged in a sexual act with another person, who is of any age; and (Note: add one of the following elements) (ii) That the other person was substantially incapacitated; (iii) That the other person was substantially incapable of appraising the nature of the sexual act; (iv) That the other person was substantially incapable of declining participation in the sexual act; or (v) That the other person was substantially incapable of communicating unwillingness to engage in the sexual act.	b(3)(c)

Part II. “Sexual act” is an element. Victim is a child.

Offense	Elements	MCM Para 45	
Rape of a child not yet 12.	(i) That the accused engaged in a sexual act with a child; and (ii) That at the time of the sexual act the child had not attained the age of twelve years.	b(2)(a)	
Rape of a child who has attained the age of 12 years but has not attained the age of 16 years	By using force	(i) That the accused engaged in a sexual act with a child; (ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and (iii) That the accused did so by using force against that child.	b(2)(b)
	By causing grievous bodily harm	(i) That the accused engaged in a sexual act with a child; (ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and (iii) That the accused did so by causing grievous bodily harm to any person.	b(2)(c)
	By using threats or placing in fear	(i) That the accused engaged in a sexual act with a child; (ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and (iii) That the accused did so by threatening or placing that child in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.	b(2)(d)
	By rendering that child unconscious	(i) That the accused engaged in a sexual act with a child; (ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and (iii) That the accused did so by rendering that child unconscious.	b(2)(e)
Rape of a child who has attained the age of 12 years but has not attained the age of 16 years	By administration of drug, intoxicant, or other similar substance (i) That the accused engaged in a sexual act with a child; (ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and (iii) (a) That the accused did so by administering to that child a drug, intoxicant, or other similar substance; (b) That the accused administered the drug, intoxicant, or other similar substance by force or threat of force or without the knowledge or permission of that child; and (c) That, as a result, that child’s ability to appraise or control conduct was substantially impaired.	b(2)(f)	

Part II. “Sexual act” is an element, con’d. Victim is a child.

Offense	Elements	MCM Para 45
Aggravated sexual assault of a child who has attained the age of 12 years but has not attained the age of 16 years	(a) That the accused engaged in a sexual act with a child; and (b) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years.	b(4)

Part III. “Sexual contact” is an element. Victim can be of any age.

Offense	Elements	MCM Para 45	
Aggravated sexual contact	By using force	(i) That the accused engaged in sexual contact with another person; or (ii) That the accused caused sexual contact with or by another person; and (iii) That the accused did so by using force against that other person.	b(5)(a)
	By causing grievous bodily harm	(i) That the accused engaged in sexual contact with another person; or (ii) That the accused caused sexual contact with or by another person; and (iii) That the accused did so by causing grievous bodily harm to any person.	b(5)(b)
	By using threats or placing in fear	(i) That the accused engaged in sexual contact with another person; or (ii) That the accused caused sexual contact with or by another person; and (iii) That the accused did so by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.	b(5)(c)
	By rendering another unconscious	(i) That the accused engaged in sexual contact with another person; or (ii) That the accused caused sexual contact with or by another person; and (iii) That the accused did so by rendering that other person unconscious.	b(5)(d)
	By administration of drug, intoxicant, or other similar substance	(i) That the accused engaged in sexual contact with another person; or (ii) That the accused caused sexual contact with or by another person; and (iii)(a) That the accused did so by administering to that other person a drug, intoxicant, or other similar substance; (b) That the accused administered the drug, intoxicant, or other similar substance by force or threat of force or without the knowledge or permission of that other person; and (c) That, as a result, that other person’s ability to appraise or control conduct was substantially impaired.	b(5)(e)

Part III, continued. (“Sexual contact” is an element. Victim can be of any age.)

Offense	Elements	MCM Para 45	
Abusive sexual contact	By using threats or placing in fear	(i) That the accused engaged in sexual contact with another person; or (ii) That the accused caused sexual contact with or by another person; and (iii) That the accused did so by threatening or placing that other person in fear that any person would be subjected to bodily harm or other harm (other than by threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping).	b(8)(a)
	By causing bodily harm	(i) That the accused engaged in sexual contact with another person; or (ii) That the accused caused sexual contact with or by another person; and (iii) That the accused did so by causing bodily harm to another person.	b(8)(b)
	Upon a person substantially incapacitated or substantially incapable of appraising the act, declining participation, or communicating unwillingness	(i) That the accused engaged in sexual contact with another person; or (ii) That the accused caused sexual contact with or by another person; and (Note: add one of the following elements) (iii) That the other person was substantially incapacitated; (iv) That the other person was substantially incapable of appraising the nature of the sexual contact; (v) That the other person was substantially incapable of declining participation in the sexual contact; or (vi) That the other person was substantially incapable of communicating unwillingness to engage in the sexual contact.	b(8)(c)
Wrongful sexual contact	(a) That the accused had sexual contact with another person; (b) That the accused did so without that other person’s permission; and (c) That the accused had no legal justification or lawful authorization for that sexual contact.	b(13)	

Part IV. “Sexual contact” is an element. Victim is a child.

Offense	Elements	MCM Para 45	
Aggravated sexual contact with a child who has not attained the age of 12 years	(i) That the accused engaged in sexual contact with a child; or (ii) That the accused caused sexual contact with or by a child or by another person with a child; and (iii) That at the time of the sexual contact the child had not attained the age of twelve years.	b(7)(a)	
Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years	By using force	(i) That the accused engaged in sexual contact with a child; or (ii) That the accused caused sexual contact with or by a child or by another person with a child; and (iii) That at the time of the sexual contact the child had attained the age of 12 years but had not attained the age of 16 years; and (iv) That the accused did so by using force against that child.	b(7)(b)
	By causing grievous bodily harm	(i) That the accused engaged in sexual contact with a child; or (ii) That the accused caused sexual contact with or by a child or by another person with a child; and (iii) That at the time of the sexual contact the child had attained the age of 12 years but had not attained the age of 16 years; and (iv) That the accused did so by causing grievous bodily harm to any person.	b(7)(c)
	By using threats or placing in fear	(i) That the accused engaged in sexual contact with a child; or (ii) That the accused caused sexual contact with or by a child or by another person with a child; and (iii) That at the time of the sexual contact the child had attained the age of 12 years but had not attained the age of 16 years; and (iv) That the accused did so by threatening or placing that child or that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.	b(7)(d)

Part IV, continued. (“Sexual contact” is an element. Victim is a child.)

Offense	Elements	MCM Para 45
<p>Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years</p> <p>Con'd</p>	<p>By rendering another or that child unconscious</p> <p>(i) That the accused engaged in sexual contact with a child; or (ii) That the accused caused sexual contact with or by a child or by another person with a child; and (iii) That at the time of the sexual contact the child had attained the age of 12 years but had not attained the age of 16 years; and (iv) That the accused did so by rendering that child or that other person unconscious.</p> <p>By administration of drug, intoxicant, or other similar substance</p> <p>(i) That the accused engaged in sexual contact with a child; or (ii) That the accused caused sexual contact with or by a child or by another person with a child; and (iii) That at the time of the sexual contact the child had attained the age of 12 years but had not attained the age of 16 years; and (iv) (a) That the accused did so by administering to that child or that other person a drug, intoxicant, or other similar substance; (b) That the accused administered the drug, intoxicant, or other similar substance by force or threat of force or without the knowledge or permission of that child or that other person; and (c) That, as a result, that child’s or that other person’s ability to appraise or control conduct was substantially impaired.</p>	<p>b(7)(e)</p> <p>b(7)(f)</p>
<p>Abusive sexual contact with a child</p>	<p>(a) That the accused engaged in sexual contact with a child; or (b) That the accused caused sexual contact with or by a child or by another person with a child; and (c) That at the time of the sexual contact the child had attained the age of 12 years but had not attained the age of 16 years.</p>	<p>b(9)</p>

Part V. “Indecency” is an element.

Offense	Elements	MCM Para 45
Indecent liberties with a child	(a) That the accused committed a certain act or communication; (b) That the act or communication was indecent; (c) That the accused committed the act or communication in the physical presence of a certain child; (d) That the child was under 16 years of age; and (e) That the accused committed the act or communication with the intent to: (i) arouse, appeal to, or gratify the sexual desires of any person; or (ii) abuse, humiliate, or degrade any person.	b(10)
Indecent act	(a) That the accused engaged in certain conduct; and (b) That the conduct was indecent conduct.	b(11)
Indecent exposure	(a) That the accused exposed his or her genitalia, anus, buttocks, or female areola or nipple; (b) That the accused’s exposure was in an indecent manner; (c) That the exposure occurred in a place where the conduct involved could reasonably be expected to be viewed by people other than the accused’s family or household; and (d) That the exposure was intentional.	b(14)

Part VI. “Lewd act” is an element.

Offense	Elements	MCM Para 45
Aggravated sexual abuse of a child	(a) That the accused engaged in a lewd act; and (b) That the act was committed with a child who has not attained the age of 16 years.	b(6)

Part VII. Other Article 120 offenses.

Offense	Elements	MCM Para 45
Forcible pandering	<p>(a) That the accused compelled a certain person to engage in an act of prostitution; and (b) That the accused directed another person to said person, who then engaged in an act of prostitution.</p> <p>(Note: If the act of prostitution was not compelled, but “the accused induced, enticed, or procured a certain person to engage in an act of sexual intercourse for hire and reward with a person to be directed to said person by the accused,” see Paragraph 97, Part IV, MCM)</p>	b(12)

Table of Maximum Punishments for Article 120, U.C.M.J. (1 Oct 2007)

Offense	Discharge	Confinement	Forfeitures
Rape and Rape of a Child	DD, BCD	Death/Life	Total
Aggravated Sexual Assault	DD, BCD	30 yrs	Total
Aggravated Sexual Assault of a Child	DD, BCD	20 yrs	Total
Aggravated Sexual Abuse of a Child	DD, BCD	20 yrs	Total
Aggravated Sexual Contact	DD, BCD	20 yrs	Total
Aggravated Sexual Contact with a Child	DD, BCD	20 yrs	Total
Abusive Sexual Contact with a Child	DD, BCD	15 yrs	Total
Indecent Liberty with a Child	DD, BCD	15 yrs	Total
Abusive Sexual Contact	DD, BCD	7 yrs	Total
Indecent Act	DD, BCD	5 yrs	Total
Forcible Pandering	DD, BCD	5 yrs	Total
Wrongful Sexual Contact	DD, BCD	1 yr	Total
Indecent Exposure	DD, BCD	1 yr	Total