IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	**APPELLANT'S REPLY BRIEF**
Appellee	)	**ON SPECIFIED ISSUE**
	)	**(STATUTE OF LIMITATIONS)**
v.	)	
	)	**USCA Dkt. No. 17-0434/AF**
EDZEL D. MANGAHAS	)	
Lieutenant Colonel (O-5)	)	**Crim. App. No. 2016-10**
United States Air Force,	)	
Appellant	)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES

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United States Air Force,	§	
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In accordance with this Court's Order of October 25, 2017, Lt Col Mangahas files this Reply Brief. The Court's specific question is:

> **IN LIGHT OF *COKER V. GEORGIA*, 433 U.S. 584, 598 (1977), AND *UNITED STATES V. HICKSON*, 22 M.J. 146, 154 n.10 (C.M.A. 1986), WAS THE OFFENSE OF RAPE OF AN ADULT WOMAN, A VIOLATION OF ARTICLE 120, UCMJ, 10 U.S.C. § 920 (SUPP. II 1997), A CRIME PUNISHABLE BY DEATH WITHIN THE MEANING OF ARTICLE 43, UCMJ, 10 U.S.C. § 843 (1994)?**

With respect to the offense of rape generally, the answer is, "it depends." If the rape involved the intended or actual death of the victim, the answer is yes, that type of rape was punishable by death. However, *if the alleged offense did not involve the intended or actual death of the victim, as in the instant case, the unequivocal answer to this question is no.*

ARGUMENT

A. Whether Non-Death Rape[1] is Punishable by Death.

1. What does "punishable" mean?

The fundamental question that this Court must answer to determine whether the offense of rape was punishable by death is, "What is the meaning of the word 'punishable'?" As argued in the Appellant's original Brief, the word is not a term of art. It is not ambiguous. Its plain meaning should apply. *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (citing *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002)). When an offense is punishable by a certain penalty, it means that the Government may impose that penalty on a person convicted of that offense.

The Government and this Court agree that under *Coker*, the Government may *not* actually impose the death penalty on a servicemember for the non-death involved rape of an adult woman. Gov't Answer at 6 (citing *Coker's* holding: "We have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment

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[1] Lt Col Mangahas does not challenge the constitutionality of the death penalty for rape involving the intended or actual death of the victim, circumstances not present in the instant case. Therefore, this Reply addresses only the situation in which a servicemember is charged with a "non-death rape."

as cruel and unusual punishment."); *Willenbring v. Neurauter*, 48 M.J. 152, 179 (C.A.A.F. 1998) ("Under the new [R.C.M. 1004] procedures, a rape conviction could not result in a death sentence unless the victim was under the age of 12 or the accused maimed or attempted to kill the victim."). With respect, the Supreme Court's plain language answers the question – it says a sentence of death is unconstitutional, meaning that a legislative body may not *prescribe* it under these circumstances; there is no qualification from *Coker* indicating that only the *imposition* of the sentence is unconstitutional.

However, the Government and this Court in *Willenbring* interpret the word "punishable" to mean a punishment prescribed by the penal code, rather than a punishment that the Government actually can impose. We respectfully disagree because this interpretation violates the principle of *stare decisis* from the highest Court in the land. It contradicts *Coker* and the cases holding that an unconstitutional statute is void *ab initio* and may not be used for any purpose.

2. *Coker* applies to the military justice system.

There is nothing in the Supreme Court's rationale or holding in *Coker* that indicates that it applies to some, but not all, jurisdictions in the United States of America. The Supreme Court did not state, "we find that a civilian federal government or a state government sentence of death for rape of an adult woman is

forbidden by the Constitution." This Court consistently has held that unless there is a justification for limiting the scope of Constitutional protection extended to servicemembers, the same protection applies to them as to our civilian counterparts:

> Constitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable. In general, the Bill of Rights applies to members of the military absent a specific exemption or certain overriding demands of discipline and duty. Though we have consistently applied the Bill of Rights to members of the Armed Forces, except in cases where the express terms of the Constitution make such application inapposite[,] these constitutional rights may apply differently to members of the armed forces than they do to civilians. The burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule.

United States v. Easton, 71 M.J. 168, 174-75 (C.A.A.F. 2012) (quoting *United States v. Marcum*, 60 M.J. 198, 206 (C.A.A.F. 2004), *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A.1976)); *see United States v. Sweeney*, 70 M.J. 296, 300 n.9 (C.A.A.F. 2011) ("This case does not involve a statute, presidential rule, or judicial decision purporting to diminish the protections afforded by the Confrontation Clause in the military urinalysis context; nor has the Government attempted to demonstrate a military exigency requiring diminished protection."); *United States v. Hessler*, 7 M.J. 9, 10 (C.M.A. 1979) ("[I]t is well established that one's constitutional rights are not surrendered upon entering the armed services unless the Constitution expressly or by implication provides for such an exclusion. . . .these constitutional rights require a

different application where unique military exigencies are created as a result of the different character of the military community and its mission.") (citing *Middendorf v. Henry*, 425 U.S. 25, 50 (1976) (Powell, J., concurring); *Burns v. Wilson*, 346 U.S. 137, 142 (1953)); *see also Parker v. Levy*, 417 U.S. 733, 758 (1974) (some rational reason must exist to "render permissible within the military that which would be constitutionally impermissible outside it.").

There is simply no reasonable argument that the death penalty is any less cruel and unusual for a servicemember who commits a non-death rape than for a civilian, or that any "unique military exigency" justifies a different rule. This explains why the multitude of military cases set forth at pages 7-10 of the Appellant's original Brief recognize that the *Coker* analysis applies to the military justice system.

It is significant that the Government was unable to articulate at oral argument before this Court a justification for the argument that a different rule applies in the military. Also, despite the fact that Lt Col Mangahas' Motion to Dismiss (Statute of Limitations) argued that *Coker* applied, trial defense counsel argued it at the motions hearing (R. 38-46), and appellate defense counsel again addressed the issue in response to Judge Ryan's question at oral argument, the Government gives short shrift to the issue of whether *Coker* is applicable to the military justice system in its

Answer. Answer at 29. That is because there is no justification for a different rule to apply to the military.

As argued in our original Brief, the language regarding the military justice system in the only Supreme Court case to mention it in this context does not stand for the proposition that a different rules applies – it merely states that the UCMJ provision was not before the Court in that case. *See* Gov't Answer at 6-7 (citing *Kennedy v. Louisiana*, 129 S.Ct. 1, 2 (2008)). In that case, the Supreme Court initially held that *the state statute providing for the death penalty for rape of a child* was unconstitutional – not just that the actual imposition of the death penalty was unconstitutional. *Kennedy v. Louisiana*, 554 U.S. 407 (2008) ("This case presents the question whether the Constitution bars respondent from imposing the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim. We hold the Eighth Amendment prohibits the death penalty for this offense. *The Louisiana statute is unconstitutional*.") (emphasis added).

In reaching that conclusion, the Court surveyed the various state and federal statutes to see which of them provided the death penalty for that offense to gauge national consensus on the issue. *Id.* at 422-34. In part because most jurisdictions did not provide death for child rape, the Court concluded that there was no national consensus in favor of it and therefore, it was a cruel and unusual punishment for that

"nonhomicide crime." *Id.* at 434. The Court found that even in a horrific situation such as a child rape,

> The constitutional prohibition against excessive or cruel and unusual punishments mandates that the State's power to punish be exercised within the limits of civilized standards. Evolving standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty, a hesitation that has special force where no life was taken in the commission of the crime. It is an established principle that decency, in its essence, presumes respect for the individual and thus moderation or restraint in the application of capital punishment.
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> * * *
>
> As it relates to crimes against individuals, though, the death penalty should not be expanded to instances where the victim's life was not taken.

Id. at 435, 437 (quotations and citations omitted). Specifically citing to *Coker*, the Court found the death penalty to be disproportionate for the offense of child rape. *Id.* at 438.

After the Court's opinion was released, the Government (the losing party) brought to the Court's attention the fact that the survey of laws omitted reference to Article 120, UCMJ, which did provide for the death penalty, and requested rehearing. The Court document on which the Government relies is Justice Kennedy's Statement respecting the Court's denial of that requested rehearing, basically stating that it did not matter what the UCMJ said, the state statute at issue was still unconstitutional.

Kennedy v. Louisiana, 129 S.Ct. at 1. Whether the UCMJ did or did not provide death as an authorized punishment was not central to the Court's decision regarding the constitutionality of the state statute: "[W]e find that the military penalty does not affect our reasoning or conclusions. . . .That the Manual for Courts-Martial retains the death penalty for rape of a child or an adult when committed by a member of the military does not draw into question our conclusions that there is a consensus against the death penalty for the crime [rape of a child] in the civilian context and that the penalty here is unconstitutional." *Id.* at 2.

Further, as explained previously, Article 120's death penalty is not unconstitutional in all circumstances, just in cases such as the instant case where there is no actual or intended death involved. Justice Scalia's Statement respecting denial of rehearing analyzed the history of the death penalty for the offense of rape of a child and concludes that when the President authorized death in the recently amended statute, it was intentional, especially since "it was widely believed that *Coker* took the capital-punishment option off the table." *Id.* at 3-4. Finally, Justice Scalia commented that although in some circumstances military members may receive different treatment than civilians for the same offense, "It is difficult to imagine, however, how rape of a child could sometimes be deserving of death for a soldier but never for a civilian." *Id.* at 4. The same logic applies to rape of an adult. It is

unconstitutional to prescribe the death penalty for an offense that does not involve attempted or actual death of any victim.

B. The Effect on the Statute of Limitations.

The significance of the answer to the question whether rape is punishable by death, and thus the outcome of the instant case, is the answer's effect on the statute of limitations. The Government and the *Willenbring* Court inexplicably opine that for purposes of determining the applicable statute of limitations, it is irrelevant that the crime is not "punishable" by death in terms of the Government actually being able to execute a servicemember convicted of raping an adult without any intended or actual death of the victim involved; due to the fact that the words "death is authorized" physically appear in the text of the statute (Article 120, UCMJ), the theory goes, the offense is "punishable" by death. *Willenbring*, 48 M.J. at 178. Again, we respectfully disagree. This Court is not bound by *Willenbring*. It is wrongly decided, and this Court should overrule it.

1. The False Dichotomy

This Court has noted that the death penalty for non-death rape cannot be "effectuated." *United States v. Matthews*, 16 M.J. 354, 380 (C.M.A. 1983). Nor, despite many penal codes "authorizing" death for rape, can it be "inflicted." *United States v. Hickson*, 22 M.J. 146, 154 n.10 (C.M.A. 1986). The fact that Article 120,

UCMJ states that death is "authorized" does not make it so, especially when the Supreme Court says the punishment is unconstitutional – and thus, by definition, *not* authorized. There is no logical justification for the false dichotomy for which the Government and the *Willenbring* Court advocate – if the punishment is unconstitutional to impose, it is unconstitutional to prescribe. *There is no reason to believe the Supreme Court intended there to be two rules*, one for punishment "authorized" by statute and another for punishment "authorized" by the Constitution.

2. The Effect of Article 120's Unconstitutional Language Authorizing Death

The 1995 version of Article 120 "authorizes" death for rape. However, this Court should consider the word "death" as applied to non-death rape non-existent for all purposes, including for the purpose of extending the statute of limitations. The word "death" as an authorized maximum punishment for a non-death rape is unconstitutional, and thus void *ab initio* – it is as if that part of the statute had never been enacted. This has been the law for more than two centuries. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 760 (1995) (J. Scalia concurring) ("[W]hat a court does with regard to an unconstitutional law is simply to ignore it. It decides the case 'disregarding the unconstitutional law,' because a law repugnant to the Constitution 'is void, and is as no law.'") (quoting *Marbury v. Madison*, 1 Cranch 137 (1803); *Ex parte Siebold*, 100 U.S. 371, 376 (1880)); *Norton v. Shelby County*, 118 U.S. 425,

442 (1886) ("An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.").[2] Apparently, no party ever made that argument to this Court prior to the instant case.

In fact, the *Willenbring* Court's rejection of what may be termed the "*Coker* challenge" was based on the logical argument that whether an offense was considered capital should not depend on whether the Government can prove an aggravating factor under R.C.M. 1004. *Willenbring,* 48 M.J. at 179. That discussion likely was limited to discussing the aggravating factors issue because apparently that was the only challenge that Willenbring made in his case – he did not cite to the Court the cases that hold unconstitutional statutes void *ab initio*, incapable of being used for any purpose. Lt Col Mangahas *does* bring this argument to the Court's attention (after unsuccessfully litigating it in the trial court and before the lower court). *Stare decisis* does not prevent the Court from overruling *Willenbring* based on, *inter alia*,

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[2] We acknowledge that there may be exceptions to this rule, such as when parties take actions in reliance on a statute later declared unconstitutional; however, no such exception applies in the instant case. The offense at issue in the case at bar allegedly occurred in 1997, a full twenty years after the Supreme Court decided *Coker* in 1977. The Charge and Specification were not preferred until 2015. There is no valid argument that anyone relied on the unconstitutional language in Article 120 in any relevant way in this case and thus, the language is void for all purposes (including extending the statute of limitations).

the fact that the Court as then constituted overlooked controlling case law from the Supreme Court.

The fear that the *Willenbring* Court expressed regarding whether adopting Willenbring's argument would limit the statute of limitations for murder is unfounded. It further illustrates the deficiency in Willenbring's challenge due to his focus on the aggravating circumstances rather than the constitutionality of Article 120's death provision in a non-death rape case. First of all, *Coker* does not apply to murder since *Coker* addressed rape allegations (also, by definition, a death is involved in a murder which also makes the death penalty constitutional for that offense under *Coker's* Eighth Amendment analysis). Secondly, what this analysis overlooks is the fact that Article 118, UCMJ provides for death as an authorized punishment and this language is valid; the Supreme Court has not found the death penalty unconstitutional for murder (as it has for non-death rape), so murder is an offense punishable by death based on a constitutional statute and not on aggravating circumstances, and thus Article 43(a) applies. In contrast, it does not matter that the word "death" appears in Article 120 when *Coker* has struck it in non-death rape cases.

A logical construction would be to interpret Article 120 as a bifurcated statute; in cases involving attempted or actual death, the death penalty and Article 43(a) apply. Otherwise, the offense is punishable by life in prison and Article 43(b)

applies. Several states have similar statutory schemes. *See* Analysis of State Rape Statutes at Appendix 2.

3. The Precise Language of Article 43(a) is Significant

The words Congress chose to use when amending Article 43(a) in 1986 are logically and legally significant. The statute simply states that it applies to offenses "punishable by death," not offenses "for which the Code prescribes death." The *Willenbring* Court's quotation of the Senate Committee Report[3] illustrates the point – had Congress intended to write Article 43(a) to apply to any offense for which the UCMJ *prescribed* the death penalty, it could have said so; instead, it used the word "punishable," without referencing any other part of the UCMJ. The fact that Congress knew how to draft the statute to mean what the Government (and the *Willenbring* Court) would like it to say, but did not, is important.[4]

Furthermore, as the Government acknowledges,[5] in 2006 Congress modified Article 43(a) to expressly include rape as an offense for which the unlimited statute of limitations applied. Article 120, UCMJ, meanwhile, remained unchanged until

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[3] *Willenbring*, 48 M.J. at 179.

[4] Additionally, the *Willenbring* Court's reliance on that legislative history was erroneous because when the plain language of the statute is clear, one need not examine the legislative intent at all. *See McPherson*, 73 M.J. at 395 (citing *Barnhart*, 534 U.S. at 450).

[5] Answer at 5.

over ten years later, when the Article was amended to delete death as a maximum punishment. NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2006, Pub.L. No. 109-163, Title V, § 553, 119 Stat. 3264 (2006). Had rape truly been an offense "punishable by death" in 2006 and thus covered by an unlimited statute of limitations, the statutory change to Article 43(a) would have been redundant and unnecessary. Contrary to the Government's argument that this indicated Congress' intent all along,[6] the 2006 amendment clearly illustrated that Congress believed that a change was necessary because this was *not* the law prior to 2006.

4. Lt Col Mangahas' Argument Has Not Previously Been Presented to this Court

The Government states, "Since both *Coker* and *Hickson*, this Court has repeatedly either struck down similar arguments made by Appellant or denied review of cases where every service court has rejected similar arguments." Gov't Answer at 28. As previously explained, this argument is inaccurate – counsel could not find a single military case discussing the fact that an unconstitutional statute is void *ab initio* at all, much less in a case presenting the same challenge that Lt Col Mangahas submits to this Court. Significantly, despite the fact that the Motion to Dismiss (Statute of Limitations) and the oral argument at the motions hearing clearly set forth this argument, and counsel argued it in response to Judge Ryan's question at oral

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[6] Answer at 22.

argument, the Government failed to even acknowledge, much less rebut, the void *ab initio* argument in its Answer.

The Government goes to great lengths to set forth each opinion that has relied upon *Willenbring*. Answer at 9-25. With respect, the fact that this Court continued to follow its own precedent in the absence of an appellant presenting a coherent argument for overruling that precedent, and the lower courts' required following of this Court's precedent, are unpersuasive. The fact remains that *Willenbring* was wrongly decided. Repeated reliance on and citation to an incorrectly decided controlling precedent does not make the precedent correct.

Finally, as discussed more fully in the Appellant's original Brief, the Government relies on civilian cases in which there was no *substantive* bar to the death penalty, only post-*Furman* procedural ones. The death penalty in the instant case is substantively barred by *Coker* and those civilian cases do not control. Counsel are not aware of any appellant presenting this distinction to this (or any) Court.

CONCLUSION

The Supreme Court held over 100 years ago that, "a void statute [is] not law *for any purpose*." *Chicago, I. & L.R. Co. v. Hackett*, 228 U.S. 559, 567 (1913) (emphasis added). It is "as inoperative as if it had never been passed." *Id.* at 566. Therefore, in light of *Coker* and *Hickson*, the death provision of Article 120 is void

for all purposes and death was and is not an authorized punishment for rape of an adult woman without an intended or actual death involved. It follows that Article 43(a) cannot validly incorporate the unconstitutional language of Article 120, and that Article 43(a) is itself unconstitutional if applied to prescribe no statute of limitations for the offense of rape without death or attempted death, such as in the instant case.

PRAYER

Lt Col Mangahas respectfully requests that this Court reverse the opinion of the Air Force Court of Criminal Appeals and dismiss the Charge and Specification with prejudice.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This Reply Brief complies with the type-volume limitation of Rule 24(c) because it contains 3,975 words.

2. This Reply Brief complies with the typeface and type style requirements of Rule 37.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing Reply Brief was electronically mailed to the Court, to opposing counsel, and to the Director, Air Force Government Trial and Appellate Counsel Division, on November 27, 2017.

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State Rape Statute Analysis

State	Has Bifurcated Statute	Explanation	Statute	Maximum Punishment	Punishment Statute	SOL	SOL Statute
Alabama	yes	1st degree rape = by forcible compulsion; 2nd = victim unable to consent	Ala. Code § 13A-6-61(a)(1)	10-99 years	Ala. Code § 13A-5-6(a)(1)	5 years unless use or threat of violence, then unlimited	Ala. Code 1975 § 15-3-5(a)(2)
Alaska	yes	1st degree = lack of consent or SBI; 2nd degree = lack of capacity and other factors	A.S. § 11.41.410(a-b), 11.41.420	99 years unless offense is the defendant's first felony, then 20-30 years	A.S. §§ 12.55.125(i)(1) and (i)(1)(A)(2)	unlimited	A.S. § 12.10.010(a)(4)
Arizona	yes	punishment based on severity of circumstances	A.R.S. § 13-1406(B)	5.25 – 14 years	A.R.S. § 13-1406(B)	7 years from "discovery" of the offense by the State	A.R.S. § 13-107(b)(1)
Arkansas	no	Rape is a Class Y felony regardless	A.C.A. § 5-14-103(a-c)	10-40 years	A.C.A. at § 5-4-401(a)(1)	6 years if no DNA recovered	A.C.A. § 5-1-109(b)(1)(A-B)
California	yes	punishment/SOL increased when threat of injury	West's Ann. Cal. Penal Code § 261	8 years	West's Ann. Cal. Penal Code § 264(a)	6 years	West's Ann. Cal. Penal Code § 800
Colorado	yes	punishment more severe with threat of SBI	C.R.S.A. § 18-3-402	24 years	C.R.S.A. § 18-1.3-401(V)(A)	3 years	C.R.S.A. §16-5-401(1)(a)
Connecticut	no	only one degree of sexual assault involves penetration	C.G.S.A. § 53a-70(a)	25 years	C.G.S.A. § 53-35a(4)	5 years	C.G.S.A. § 54-193(b)
Delaware	yes	1st degree = SBI; 2nd = lack of consent	11 Del. C. § 773(a) and § 772(a)(1)	1st = life, 2nd = 10 years	11 Del. C. § 773(c)(2) and § 772(c)	1st = No SOL, 2nd = 5 years	11 Del. C. § 205(a-b)
D.C.	no	1st = threat of or SBI to any person results; 2nd = force, or threat of or SBI, toward victim	DC ST §§§ 22-3002, -3003, -3004	1st = life, but requires other aggravating circumstances, otherwise 30 years.;2nd = 20 years	DC ST § 22-3002(a) and DC ST § 22-3003(a)	15 years	DC ST § 23-113(a)(2)(A-B)
Florida	yes	Rape with SBI = life felony, Rape w/o SBI = 1st degree felony	F.S.A. § 794.011(3-4)	life felony = life, 1st degree = 30 years	F.S.A. § 775.082(3)(a)(3) and § 775.082(3)(b)(1)	Life felony = no SOL, 1st degree = 4 years	F.S.A. § 775.15(1-2)
Georgia	no	everything is equal	Ga. Code Ann. § 16-6-1(a)	death, life, or min. of 25 years	Ga. Code Ann. § 16-6-1(b)	DNA = no SOL, no DNA = 15 years	Ga. Code Ann. § 17-3-1(b-d)
Hawaii	yes	1st degree = SBI, force, or weapon, 2nd degree = lack of consent	H.R.S. §§ 707-730 and 707-731	1st degree = 20 years, 2nd degree = 10 years	H.R.S. § 706-659 and § 706-660	No SOL	H.R.S. § 701-108(1)
Idaho	no	punishment ranges at discretion of judge	I.C. § 18-6101(4)	1 year to life	I.C. § 18-6104	No SOL	I.C. § 19-401(3)
Illinois	no	everything is equal	720 I.L.C.S §5/11-1.20(a-b)	4-15 years	730 I.L.C.S. §5/5-4.5-30(a)	DNA = no SOL, no DNA = 3 years	720 I.L.C.S. § 5/3-5(a-b)
Indiana	yes	Level 1 felony = weapon, threat of or SBI, Level 3 = force	I.C. § 35-42-4-1	non-aggravated = 3-16 years, aggravated = 20-40 years	I.C. § 35-50-2-5(b) and § 35-50-2-4(b)	non-aggravated = 5 or 1 year from "disovery", aggravated = no SOL	I.C. § 35-41-2(a)(1) and § 35-41-2(c)
Iowa	yes	1st degree = SBI, 2nd degree = weapon, or threat of SBI, 3rd degree = lack of consent	I.C.A. § 709.2, § 709.3, § 709.4	1st degree = life, 2nd degree = 25 years, 3rd degree = 10 years	I.C.A. § 902.1, and §902.9(b) and (d)	10 year or 3 years from date DNA identification	I.C.A. § 802.2
Kansas	no	everything is equal	K.S.A. § 21-5503(a)(1)(A)	20 years	K.S.A. § 21-6804(a)	No SOL	K.S.A. § 21-5503(b)(1)(A)
Kentucky	yes	1st degree w/SBI = Class A felony, 1st degree w/o SBI = Class B felony	K.R.S. § 510.040(1-2)	Class A = life, Class B = 20 years	K.R.S. § 532.060(2)(a-b)	No SOL	K.R.S. § 500.050(1)
Louisiana	yes	1st degree = "utmost resistance overcome by force," use of a deadly weapon, or threat of SBI, 2nd degree = "forcible" rape, 3rd degree = lack of consent	L.S.A.-R.S. § 14:42, § 14:42.1, § 14:43	1st degree = life, 2nd degree = 40 years, 3rd degree = 25 years	L.S.A.-R.S. § 14:42(D), § 14:42.1(B), § 14:43(B)	1st-2nd = No SOL, 3rd = 6 year SOL	1st degree - L.S.A.-R.S. § 14:42(A-B), 2nd degree - L.S.A.-C.Cr.P. Art. 571, 3rd degree = L.S.A.-C.Cr.P. Art. 572
Maine	yes	Forcible sexual assault = Class A felony, CW unable to consent = Class B felony, lack of consent = Class C felony	17-A M.R.S.A. § 253(1-2)	Class A = 30 years, Class B = 10 years, Class C = 5 years	17-A M.R.S.A. § 1252(2)	8 years	17-A M.R.S.A. § 8(2-A)
Maryland	yes	1st degree = deadly weapon, use/threat of SBI, 2nd degree = use/threat of force	M.D. Code, Criminal Law, §3-303, and § 3-304	1st degree = life, 2nd degree = 20 years	M.D. Code, Criminal Law, § 3-303(d)(1) and §3-304(c)(1)	No SOL	*Clarke v. State*, 364 Md. 611, 774 A.2d 1136 (M.D. 2011)
Massachusetts	yes	punishment varies depending on circumstances	M.G.L.A. 265 § 22(a-b)	SBI = life, no SBI = 20 years	M.G.L.A. 265 § 22(a-b)	15 years	M.G.L.A. 272 § 63
Michigan	yes	1st degree = personal injury to CW, 3rd degree = force but no personal injury	M.C.L.A. § 750.520b(1)(f), and § 750.520d(1)(b)	1st degree = life, 3rd degree = 15 years	M.C.L.A. § 750.520b(b)(2)(a), § 750.520d(2)	1st degree = no SOL, 3rd degree = 10 year SOL, or 10 year from date DNA identification	M.C.L.A. §767.24
Minnesota	yes	2nd degree = reasonable fear if imminent SBI, armed with a deadly weapon, causes personal injury while using force; 3rd degree = force or coercion is used to accomplish	Minn. Stat. Ann. §§ 609.344 (West 2017)				
Mississippi		Forcible Sexual Intercourse = without consent	Miss. Ann. Code § 97-3-65(4)(a)	Life	Miss. Ann. Code § 97-3-65(4)(a)	No SOL	Miss. Ann. Code § 99-1-5
Missouri	yes	1st degree = forceable compulsion, 2nd degree = lack of consent	Mo. Ann. Stat. §§ 566.030 (West 2017)	5 years to Life imprisonment	Mo. Ann. Stat. § 566.030 (West 2017)	1st degree = Unlimited; 2nd degree = 3 years	Mo. Ann. Stat. § 556.036 (West 2017)
Montana	yes	Aggravated sexual assault = force, Sexual assault = without consent	Mont. Code Ann. §§ 45-5-508 and 45-5-503 (West 2017)	Life imprisonment	Mont. Code Ann. § 45-5-503 (West 2017)	agg = 10 years, otherwise 5 years	Mont. Code Ann. § 45-1-205(1)(b) (West 2017)
Nebraska	yes	1st degree sexual assault = sexual penetration witout consent; 2nd degree = capacity or no penetration	Neb. Rev. Stat. Ann. § 28-319 (West 2017)	1st degree = 50 years; 2nd degree = 20 years	Neb. Rev. Stat. Ann. § 28-105 (West 2017)	Unlimited	Neb. Rev. Stat. Ann. § 29-110(8) (West 2017)
Nevada	yes	SBI increases penalty, but not statute of limitations.	Nev. Rev. Stat. Ann. § 200.366 (West 2017)	Life imprisonment (parole eligibility depends on SBI)	Nev. Rev. Stat. Ann. § 200.366(2)(b) (West 2017)	20 years	Nev. Rev. Stat. Ann. § 171.085 (West 2017)

State Rape Statute Analysis

State	Has Bifurcated Statute	Explanation	Statute	Maximum Punishment	Punishment Statute	SOL	SOL Statute
New Hampshire	yes	Aggravated sexual assault = use of force, physical violence, or threats to accomplish sexual penetration; felonious sexual assault = capacity or non-penetration	N.H. Rev. Stat. Ann. § 632-A:2 (West 2017)	Agg = 20 years; fel = 7 years	N.H. Rev. Stat. Ann. § 632-A:10-a (West 2017)	6 years	N.H. Rev. Stat. Ann. § 625:8 (West 2017)
New Jersey	yes	1st degree = SBI/attempted homicide, 2nd degree = lack of consent	N.J. Stat. Ann. § 2C:14-2 (West 2017)	1st degree = Life Imprisonment, 2nd degree = 20 years	N.J. Stat. Ann. § 2C:43-7 (West 2017)	Unlimited	N.J. Stat. Ann. § 2C:1-6 (West 2017)
New Mexico	yes	1st degree = causes SBI; 2nd degree = causes personal injury; 3rd degree = sexual penetration accomplished by force.	N.M. Stat. Ann. § 30-9-11 (West 2017)	1st degree = life, 2nd degree = 9 years, 3rd degree = 3 years ** NM also provides increased punishments if a "death" occurs	N.M. Stat. Ann. § 31-18-15 (West 2017)	1st degree = No SOL, 2nd degree = 6 years, 3rd degree = 5 years	N.M. Stat. Ann. § 30-1-8 (West 2017)
New York	yes	1st degree = forceable compulsion; 2nd = no capacity to consent; 3rd = no consent	N.Y. Penal Law § 130.35, 130.30, 130.25 (McKinney 2017)	1st = 25 years; 2nd = 7 years; 3rd = 4 years	N.Y. Penal Law § 70.00(2)(b) (McKinney 2017)	1st degree = Unlimited; 2nd degree = 5 years	N.Y. Penal Law § 30.10(2)(a) (McKinney 2017)
North Carolina	yes	1st degree = use of deadly weapon and/or SBI results; 2nd degree = vaginal penetration accomplished by force	N.C. Gen. Stat. Ann. §§ 14-27.21 and 14-27.22	1st degree = 25 years, 2nd degree = 7 years, 8 months	N.C. Gen. Stat. Ann. § 15A-1340.17	Unlimited	No statute; *State v. Stanford* , 169 N.C. App. 214, 216 (2005).
North Dakota	yes	Gross sexual imposition is use of force or threat of SBI "to engage in a sexual act" against the victim's will; offense is aggravated if SBI results; Sexual imposition is use of threats or coercion that do not amount to gross sexual imposition to accomplish the same.	N.D. Cent. Code Ann. §§ 12.1-20-03 and 12.1-20-04 (West 2017)	20 years if no SBI, otherwise life for gross sexual imposition; sexual imposition = 10 years	N.D. Cent. Code Ann. § 12.1-32-01 (West 2017)	gross sexual imposition = 7 years, sexual imposition = 3 years	N.D. Cent. Code Ann. § 29-04-02 (West)
Ohio	no	Sexual penetration compelled by force or threat of force against another person.	Ohio Rev. Code Ann. § 2907.02 (West 2017)	Life imprisonment	Ohio Rev. Code Ann. § 2971.03 (West 2017)	25 years	Ohio Rev. Code Ann. § 2901.13 (West 2017)
Oklahoma	yes	1st degree = accomplished by use or threats of force or violence; 2nd degree = not accomplished by use or threats of force or violence.	Okla. Stat. Ann. tit. 21, § 1114 (West 2017)	1st degree = life; 2nd degree = 15 years	Okla. Stat. Ann. tit. 21, § 1116 (West 2017	12 years	Okla. Stat. Ann. tit. 22, § 152 (West 2017)
Oregon	no	Sexual penetration accomplished by force against another person.	Or. Rev. Stat. Ann. § 163.375 (West 2017)	20 years	Or. Rev. Stat. Ann. § 161.605 (West 2017)	12 years	Or. Rev. Stat. Ann. § 131.125(2) (West 2017)
Pennsylvania	no	Sexual penetration accomplished by force or threat of force against another person.	18 Pa. Stat. and Cons. Stat. Ann. § 3121 (West 2017)	20 years	18 Pa. Stat. and Cons. Stat. Ann. § 1103 (West 2017)	12 years	42 Pa. Stat. and Cons. Stat. Ann. § 5552(b.1) (West 2017)
Rhode Island	no	Sexual penetration accomplished by force or coercion	11 R.I. Gen. Laws Ann. § 11-37-2 (West 2017)	Life imprisonment	11 R.I. Gen. Laws Ann. § 11-37-3 (West 2017)	Unlimited	12 R.I. Gen. Laws Ann. § 12-12-17 (West 2017)
South Carolina	yes	1st degree = sexual intercourse against the victim's will with use of aggravated force; 2nd degree = with threat of aggravated force or retaliation; 3rd degree = use of force or coercion "in the absence of aggravating circumstances.	S.C. Code Ann. §§ 16-3-651 and 16-3-654	1st degree = 30 years; 2nd degree = 20 years; 3rd degree = 10 years	S.C. Code Ann. §16-3-654	Unlimited	No statute; 2014 WL 3352174, at *1 (S.C.A.G. June 30, 2014)
South Dakota	no	Sexual penetration achieved through "force, coercion, or threats of immediate and great bodily harm."	S.D. Codified Laws § 22-22-1 (2017)	50 years	S.D. Codified Laws § 22-6-1(4) (2017)	Unlimited	S.D. Codified Laws § 22-22-1 (2017)
Tennessee	yes	Sexual penetration accomplished through use of a weapon and/or when SBI results is aggravated rape; Rape is sexual penetration accomplished through force or coercion absent aggravating circumstances.	Tenn. Code Ann. §§ 39-13-502 and 39-13-503 (West 2017)	Aggravated rape = 60 years; rape = 25 years	Tenn. Code Ann. § 40-35-111 (West 2017)	Unlimited	Tenn. Code Ann. § 40-2-101(l)(1) (West 2017)
Texas	yes	Aggravated sexual assault = use of deadly weapon and/or SBI results; Sexual assault = sexual penetration without victim's consent without aggravating circumstances. Aggravated sexual assault has greater punishment, but not greater statute of limitations	Tex. Penal Code Ann. §§ 22.021(a)(2) and 22.011(a) (West 2017)	Aggravated sexual assault = life; sexual assault = 20 years	Tex. Penal Code Ann. § 12.33 (West 2017)	Ten years	Tex. Crim. Proc. Code Ann. § 12.01(2)(E) (West 2017)
Utah	yes	Sexual penetration without the victim's consent; punished more severely if SBI occurs.	Utah Code Ann. § 76-5-402 (West 2017)	Life imprisonment	Utah Code Ann. § 76-5-402 (West 2017).	Unlimited	Utah Code Ann. § 76-1-301(2)(h) (West 2017)
Vermont	yes	Sexual assault consists of performing a sexual act on another person against his/her will; aggravated sexual assault = results in SBI or deadly force was used or while kidnapping	Vt. Stat. Ann. tit. 13, §§ 3252 and 3253 (West 2017)	Life imprisonment	Vt. Stat. Ann. tit. 13, § 3252 (West 2017)	Unlimited	Vt. Stat. Ann. tit. 13, § 4501(a) (West 2017)
Virginia	no	Rape consists of causing a person to "engage in sexual intercourse . . . by force, threat, or intimidation."	Va. Code Ann. § 18.2=61 (West 2017)	Life imprisonment	Va. Code Ann. § 18.2-61 (West 2017)	Unlimited	Va. Code Ann. § 19.2-8 (West 2017)
Washington	yes	1st degree = SBI results; 2nd degree = by forcible compulsion; 3rd degree = without consent and lack of consent was clearly expressed	Wash. Rev. Code Ann. §§ 9A.44.040, 9A.44.050, and 9A.44.060 (West 2017)	1st and 2nd degree = Life imprisonment; 3rd degree = 10 years	Wash. Rev. Code Ann. § 9A.20.021 (West 2017)	10 years	Wash. Rev. Code Ann. § 9A.04.080(b)(iii) (West 2017)
West Virginia	yes	1st degree = Use of deadly weapon and/or SBI results; 2nd degree = sexual penetration without consent accomplished by force.	W. Va. Code Ann. §§ 61-8B-3 and 61-8B-4 (West 2017)	1st degree = 35 years; 2nd degree = 25 years	W. Va. Code Ann. § 61-8B-4 (West 2017)	Unlimited	No statute; *State v. Davis* , 205 W. Va. 569, 578 (1999).
Wisconsin	yes	1st degree = Use of deadly weapon and/or SBI results; 2nd degree = use of, or threat of, violence and/or causing injury to the victim; 3rd degree = sexual penetration without consent	Wis. Stat. Ann. § 940.225 (West 2017)	1st degree = 60 years; 2nd degree = 40 years; 3rd degree = 10 years	Wis. Stat. Ann. § 939.50 (West 2017)	1st and 2nd degree = unlimited; 3rd degree = 10 years	Wis. Stat. Ann. § 939.74 (West 2017)
Wyoming	yes	1st degree = sexual penetration accomplished through "physical force or forcible confinement," or threats of death or SBI; 2nd degree = sexual penetration accomplished "by any means that would prevent resistance by a victim of ordinary resolution."	Wyo. Stat. Ann. §§ 6-2-302 and 6-2-303 (West 2017)	1st degree = 50 years; 2nd degree = 20 years	Wyo. Stat. Ann. § 6-2-306 (West 2017)	Unlimited	No statute; *Tilley v. State* , 267 P.3d 552, 555 (Wyo. 2011)