The Alabama Law Enforcement and Prosecutors Manual on

Child Exploitation Crimes

Statutory and Case Law

National Law Center for Children and Families

National Center for Missing & Exploited Children

National Law Center for Children and Families'
Preface to the 2008 Second Edition

It is our honor at the National Law Center for Children and Families to provide this second edition of the Alabama State Manual. This manual is an update and refinement of the state legal manual produced by the National Center for Missing and Exploited Children (NCMEC) in 2004.

The National Law Center is a non-profit law center formed in 1991 and based in Alexandria, Virginia. It has since served as an agent of change and education in the area of child sexual exploitation. The NLC is proud to continue that service today in seminars and through its website, www.nationallawcenter.org. In addition to these projects, the National Law Center has entered into a partnership with the NCMEC to update these existing 25 manuals used. Over the next few years we will update these existing manuals and create new manuals for prosecutors and law enforcement professionals to use in the defense of children and families.

Additionally, the manual would not have been completed where it not for the support of NCMEC's Legal Staff and L.J. Decker, NLC Law Clerk (3L Georgetown University Law Center), Christien Oliver, (JD George Washington School of Law 2008) and Tara Steinnerd (3L Catholic University School of Law).

The Editors,

National Law Center for Children and Families
June 2008

ALABAMA

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ALABAMA

Case List by Court

A case with ++ indicates that although the subject matter is not child exploitation, the principle presented may still apply.

I. United States Supreme Court

- *Franks v. Delaware*,[++] 438 U.S. 154 (1978)

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II. Alabama Supreme Court

- *C.B. v. Bobo*, 659 So. 2d 98 (Ala. 1995)
- *Duncan v. State*,[++] 176 So. 2d 840 (Ala. 1965)
- *Ex parte Cofer*, 440 So. 2d 1121 (Ala. 1983)
- *Ex parte Felton*, 526 So. 2d 638 (Ala.1988)
- *Ex parte J.A.P.*, 853 So. 2d 280 (Ala. 2002)
- *Ex parte L.S.B.*, 800 So. 2d 574 (Ala. 2001)
- *Ex parte McAllister*, 541 So. 2d 1104 (Ala. 1989)
- *Ex parte R.L.G.*, 712 So. 2d 372 (Ala. 1998)
- *Ex parte State*, 476 So. 2d 632 (Ala. 1985)
- *Ex parte State*, 538 So. 2d 1226 (Ala. 1988)
- *Ex parte State*, 597 So. 2d 721 (Ala. 1991)
- *Ex parte State*, 636 So. 2d 1260 (Ala. 1993)
- *Ex parte State*, 646 So. 2d 676 (Ala. 1994)
- *Ex parte State*, 718 So. 2d 117 (Ala. 1998)
- *Ex parte State*,[++] 843 So. 2d 229 (Ala. 2001)
- *Ex parte Weddington*, 843 So. 2d 750 (Ala. 2002)
- *Hall v. Van's Photo, Inc*., 595 So. 2d 1368 (Ala. 1992)
- *Johnson v. State*,[++] 2006 WL 2848022 (Ala. 2006)
- *Travis v. Ziter*, 681 So. 2d 1348 (Ala. 1996)
- *W.S. v. T.W.*, 585 So. 2d 26 (Ala. 1991)

III. Alabama Court of Civil Appeals

- *D.J.I. v. W.M.I.*, 660 So. 2d 1333 (Ala. Civ. App. 1995)
- *Mobile County Dep't of Human Res. v. Mims*, 666 So. 2d 22 (Ala. Civ. App. 1995)

IV. Alabama Court of Criminal Appeals

- *Abney v. State*, 586 So. 2d 995 (Ala. Crim. App. 1991)
- *Arnett v. State*, 551 So. 2d 1158 (Ala. Crim. App. 1989)
- *Barger v. State*, 562 So. 2d 650 (Ala. Crim. App. 1989)
- *Baynes v. State*, 423 So. 2d 307 (Ala. Crim. App. 1982)
- *Bell v. State*, 435 So. 2d 772 (Ala. Crim. App. 1983)
- *Brasher v. State*, 555 So. 2d 184 (Ala. Crim. App. 1988)
- *Brownfield v. State*, [++] 2007 WL 1229388 (Ala. Crim. App. 2007)
- *Carroll v. State*, 370 So. 2d 749 (Ala. Crim. App. 1979)
- *Cole v. State*, 721 So. 2d 255 (Ala. Crim. App. 1998)
- *Dannelley v. State*, 397 So. 2d 555 (Ala. Crim. App. 1981)
- *Gillespie v. State*, 549 So. 2d 640 (Ala. Crim. App. 1989)
- *Girard v. State*, 883 So. 2d 717 (Ala. Crim. App. 2002)
- *Glover v. State*, 518 So. 2d 247 (Ala. Crim. App. 1987)
- *Hewlett v. State*, 520 So. 2d 200 (Ala. Crim. App. 1987)
- *Inmon v. State*, 585 So. 2d 261 (Ala. Crim. App. 1991)
- *Johnson v. Inv. Co. of the South, L.L.C.*, [++] 869 So. 2d 1156 (Ala. Crim. App. 2003)
- *K.R.B. v. State*, 834 So. 2d 826 (Ala. Crim. App. 2001)
- *Kennedy v. State*, 640 So. 2d 22 (Ala. Crim. App. 1993)
- *King v. State*, [++] 674 So. 2d 1381 (Ala. Crim. App. 1995)
- *Long v. State*, 611 So. 2d 443 (Ala. Crim. App. 1992)
- *Merton v. State*, 500 So. 2d 1301 (Ala. Crim. App. 1986)
- *Moates v. State*, 545 So. 2d 224 (Ala. Crim. App. 1989)
- *Moore v. State*, [++] 416 So. 2d 770 (Ala. Crim. App. 1982)
- *Morgan v. State*, 570 So. 2d 859 (Ala. Crim. App. 1990)
- *Morgan v. State*, 641 So. 2d 834 (Ala. Crim. App. 1992)
- *Mosely v. State*, 644 So. 2d 1299 (Ala. Crim. App. 1994)
- *Perry v. State*, 568 So. 2d 339 (Ala. Crim. App. 1990)
- *Pettway v. State*, [++] 648 So. 2d 647 (Ala. Crim. App. 1994)
- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)
- *Price v. State*, 590 So. 2d 381 (Ala. Crim. App. 1991)
- *R.K.D. v. State*, 712 So. 2d 754 (Ala. Crim. App. 1997)
- *Rhodes v. State*, 651 So. 2d 1122 (Ala. Crim. App. 1994)
- *Rogers v. State*, 539 So. 2d 451 (Ala. Crim. App. 1988)
- *Rogers v. State*, 555 So. 2d 1168 (Ala. Crim. App. 1989)
- *Rothchild v. State*, 558 So. 2d 981 (Ala. Crim. App. 1989)
- *Rutledge v. State*, 745 So. 2d 912 (Ala. Crim. App. 1999)
- *Schaefer v. State*, 695 So. 2d 656 (Ala. Crim. App. 1996)
- *Sexton v. State*, 529 So. 2d 1041 (Ala. Crim. App. 1988)
- *Sherman v. State*, 778 So. 2d 859 (Ala. Crim. App. 2000)
- *Smith v. State*, 604 So. 2d 434 (Ala. Crim. App. 1992)
- *Stegall v. State*, 628 So. 2d 1009 (Ala. Crim. App. 1993)
- *Strickland v. State*, 550 So. 2d 1042 (Ala. Crim. App. 1988)

- *T.D.T. v. State*, 745 So. 2d 885 (Ala. Crim. App. 1998)
- *Updyke v. State*, 501 So. 2d 566 (Ala. Crim. App. 1986)
- *Watson v. State*, 538 So. 2d 1216 (Ala. Crim. App. 1987)
- *Whiddon v. State*, 299 So. 2d 326 (Ala. Crim App. 1973)
- *Williams v. State*, 548 So. 2d 584 (Ala. Crim. App. 1988)
- *Young v. State*, 453 So. 2d 1074 (Ala. Crim. App. 1984)

ALABAMA

Topic Outline with Cases

A case with ++ indicates that although the subject matter is not child exploitation, the principle presented may still apply.

I. OFFENSES DEFINED

A. Child Abuse

- *T.D.T. v. State*, 745 So. 2d 885 (Ala. Crim. App. 1998)
- *Updyke v. State*, 501 So. 2d 566 (Ala. Crim. App. 1986)

1. "Child Abuse" Defined

- *Hall v. Van's Photo, Inc.*, 595 So. 2d 1368 (Ala. 1992)
- *T.D.T. v. State*, 745 So. 2d 885 (Ala. Crim. App. 1998)
- *Mobile County Dep't of Human Res. v. Mims*, 666 So. 2d 22 (Ala. Civ. App. 1995)

2. Types of Abuse

a. Sexual Abuse

i. Defined

- *Mobile County Dep't of Human Res. v. Mims*, 666 So. 2d 22 (Ala. Civ. App. 1995)

ii. First-Degree Sexual Abuse

- *Ex parte State*, 646 So. 2d 676 (Ala. 1994)
- *K.R.B. v. State*, 834 So. 2d 826 (Ala. Crim. App. 2001)
- *T.D.T. v. State*, 745 So. 2d 885 (Ala. Crim. App. 1998)
- *Young v. State*, 453 So. 2d 1074 (Ala. Crim. App. 1984)

iii. "Sexual Contact" Defined

- *Ex parte State*, 646 So. 2d 676 (Ala. 1994)
- *K.R.B. v. State*, 834 So. 2d 826 (Ala. Crim. App. 2001)
- *T.D.T. v. State*, 745 So. 2d 885 (Ala. Crim. App. 1998)

iv. Intent to Gratify Sexual Desires

- *Ex parte Cofer*, 440 So. 2d 1121 (Ala. 1983)

b. Sexual Exploitation

- *Hall v. Van's Photo, Inc.*, 595 So. 2d 1368 (Ala. 1992)
- *Mobile County Dep't of Human Res. v. Mims*, 666 So. 2d 22 (Ala. Civ. App. 1995)

c. Lesser-Included Offenses of Child Abuse

- *T.D.T. v. State*, 745 So. 2d 885 (Ala. Crim. App. 1998)

B. Child Enticement

1. Generally

- *Williams v. State*, 548 So. 2d 584 (Ala. Crim. App. 1988)

2. Online Enticement/Solicitation for Travel With the Intent to Engage in Sex With a Minor

No relevant state cases reported; however, the "child solicitation by computer" statute can be found at ALA. CODE § 13A-6-110(a).

C. Child Pornography (a.k.a. "Obscene Matter")

1. Offenses

a. Possession

- *Girard v. State*, 883 So. 2d 717 (Ala. Crim. App. 2002)
- *R.K.D. v. State*, 712 So. 2d 754 (Ala. Crim. App. 1997)

b. Possession With the Intent to Disseminate

- *Rutledge v. State*, 745 So. 2d 912 (Ala. Crim. App. 1999)

c. Production

- *Sherman v. State*, 778 So. 2d 859 (Ala. Crim. App. 2000)
- *Cole v. State*, 721 So. 2d 255 (Ala. Crim. App. 1998)
- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)
- *Perry v. State*, 568 So. 2d 339 (Ala. Crim. App. 1990)
- *Dannelley v. State*, 397 So. 2d 555 (Ala. Crim. App. 1981)

d. Use of a Computer

- *Rutledge v. State*, 745 So. 2d 912 (Ala. Crim. App. 1999)

e. Virtual/Simulated Child Pornography

No relevant state cases reported.

2. Definitions

a. "Knowingly"

- *Sherman v. State*, 778 So. 2d 859 (Ala. Crim. App. 2000)
- *Perry v. State*, 568 So. 2d 339 (Ala. Crim. App. 1990)

b. "Lewd"

i. Generally

- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)
- *Perry v. State*, 568 So. 2d 339 (Ala. Crim. App. 1990)

ii. Lewd Showing of a Child's Genitals

- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)

c. "Matter"

- *Girard v. State*, 883 So. 2d 717 (Ala. Crim. App. 2002)
- *Rutledge v. State*, 745 So. 2d 912 (Ala. Crim. App. 1999)
- *R.K.D. v. State*, 712 So. 2d 754 (Ala. Crim. App. 1997)

3. Obscenity Versus Child Pornography

a. Test for Obscenity

- *Cole v. State*, 721 So. 2d 255 (Ala. Crim. App. 1998)
- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)

b. Test for Child Pornography

- *Ex parte Felton*, 526 So. 2d 638 (Ala.1988)
- *Lanham v. State*, 888 So. 2d 1283 (Ala. Crim. App. 2004)
- *Cole v. State*, 721 So. 2d 255 (Ala. Crim. App. 1998)

- *Perry v. State*, 568 So. 2d 339 (Ala. Crim. App. 1990)

i. Local Community Standards

- *Cole v. State*, 721 So. 2d 255 (Ala. Crim. App. 1998)

ii. Prurient Interest

- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)

iii. Patently Offensive

- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)

iv. Value

- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)

D. Interference With Custody

- *Kennedy v. State*, 640 So. 2d 22 (Ala. Crim. App. 1993)

E. Rape

1. First-Degree Rape

- *Ex parte J.A.P.*, 853 So. 2d 280 (Ala. 2002)
- *Ex parte State*, 646 So. 2d 676 (Ala. 1994)
- *Ex parte State*, 597 So. 2d 721 (Ala. 1991)
- *Merton v. State*, 500 So. 2d 1301 (Ala. Crim. App. 1986)
- *Young v. State*, 453 So. 2d 1074 (Ala. Crim. App. 1984)

a. Definitions

i. "Female"

- *Merton v. State*, 500 So. 2d 1301 (Ala. Crim. App. 1986)

ii. "Forcible Compulsion"

(a) Generally

- *Ex parte J.A.P.*, 853 So. 2d 280 (Ala. 2002)
- *Ex parte State*, 597 So. 2d 721 (Ala. 1991)

- *R.E.N. v. State*, 944 So. 2d 981 (Ala. Crim. App. 2004)
- *Ex parte Williford*, 931 So. 2d 10 (Ala. 2004)
- *Ex parte State*, 636 So. 2d 1260 (Ala. 1993)

(b) Relationship Between Children and Adults

- *Ex parte J.A.P.*, 853 So. 2d 280 (Ala. 2002)
- *B.H. v. State*, 941 So. 2d 345 (Ala. Crim. App. 2006)

iii. "Sexual Intercourse"

- *Ex parte State*, 597 So. 2d 721 (Ala. 1991)

b. Penetration

- *Watson v. State*, 538 So. 2d 1216 (Ala. Crim. App. 1987)

2. Attempted Rape in the First Degree

- *Young v. State*, 453 So. 2d 1074 (Ala. Crim. App. 1984)

3. Second-Degree Rape

- *Baynes v. State*, 423 So. 2d 307 (Ala. Crim. App. 1982)

F. Sodomy

1. First Degree

a. Elements

- *Rhodes v. State*, 651 So. 2d 1122 (Ala. Crim. App. 1994)
- *Long v. State*, 611 So. 2d 443 (Ala. Crim. App. 1992)
- *Moates v. State*, 545 So. 2d 224 (Ala. Crim. App. 1989)

b. Definitions

i. "Deviate Sexual Intercourse"

- *Moates v. State*, 545 So. 2d 224 (Ala. Crim. App. 1989)
- *Glover v. State*, 518 So. 2d 247 (Ala. Crim. App. 1987)

ii. "Forcible Compulsion"

- *Rhodes v. State*, 651 So. 2d 1122 (Ala. Crim. App. 1994)

2. Second Degree

- *Glover v. State*, 518 So. 2d 247 (Ala. Crim. App. 1987)

G. Transporting a Minor for the Purposes of Prostitution

No relevant state cases reported.

II. MANDATORY REPORTING

A. Duty to Report

- *C.B. v. Bobo*, 659 So. 2d 98 (Ala. 1995)

B. Basis of an Independent Report

- *Marks v. Tenbrunsel*, 910 So. 2d 1255 (Ala. 2005)
- *Hall v. Van's Photo, Inc.*, 595 So. 2d 1368 (Ala. 1992)

C. Failure to Report

- *C.B. v. Bobo*, 659 So. 2d 98 (Ala. 1995)

D. Privilege

- *C.B. v. Bobo*, 659 So. 2d 98 (Ala. 1995)

E. Immunity

- *Marks v. Tenbrunsel*, 910 So. 2d 1255 (Ala. 2005)
- *Hall v. Van's Photo, Inc.*, 595 So. 2d 1368 (Ala. 1992)

III. SEARCH AND SEIZURE OF ELECTRONIC EVIDENCE

A. Search Warrants

1. Municipal Jurisdiction

- *Merton v. State*, 500 So. 2d 1301 (Ala. Crim. App. 1986)

2. Affidavits

- *Ex parte State*, 476 So. 2d 632 (Ala. 1985)

a. "Probable Cause"

i. Defined

- *Morgan v. State*, 641 So. 2d 834 (Ala. Crim. App. 1992)
- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)

ii. Good-Faith Exception

- *Ex parte State*, 476 So. 2d 632 (Ala. 1985)

b. Specificity

- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)

c. Prior Convictions

- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)

d. Reliance on Hearsay Information

- *Rutledge v. State*, 745 So. 2d 912 (Ala. Crim. App. 1999)

e. Oral Testimony

- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)

f. Informants

- *Rutledge v. State*, 745 So. 2d 912 (Ala. Crim. App. 1999)
- *Dannelley v. State*, 397 So. 2d 555 (Ala. Crim. App. 1981)

g. False Information: The Defendant's Burden

- *Franks v. Delaware*,[++] 438 U.S. 154 (1978)

h. Appellate Review

- *Ex parte State*, 476 So. 2d 632 (Ala. 1985)
- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)

3. Scope of Warrant

- *Dannelley v. State*, 397 So. 2d 555 (Ala. Crim. App. 1981)

4. Staleness

- *Ex parte State*,[++] 843 So. 2d 229 (Ala. 2001)
- *Harrelson v. State*, 897 So. 2d 1237 (Ala. Crim. App. 2004)
- *Moore v. State*,[++] 416 So. 2d 770 (Ala. Crim. App. 1982)

B. Anticipatory Warrants

No relevant state cases reported.

C. Warrantless Arrests

1. Generally

- *Morgan v. State*, 641 So. 2d 834 (Ala. Crim. App. 1992)

2. Probable Cause

- *Morgan v. State*, 641 So. 2d 834 (Ala. Crim. App. 1992)

D. Expectation of Privacy

- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)

1. Reasonable Privacy Interests

- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)

2. Public Exposure

- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)

3. Commercial Premises

- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)

4. Public Rest Rooms

- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)

E. Methods of Searching

No relevant state cases reported.

F. Types of Searches

1. Employer Searches

No relevant state cases reported.

2. Private Searches

No relevant state cases reported.

3. University-Campus Searches

No relevant state cases reported.

4. Warrantless Searches

a. Consent Searches

i. Voluntariness

- *Brownfield v. State*,[++] 2007 WL 1229388 (Ala. Crim. App. 2007)
- *Kennedy v. State*, 640 So. 2d 22 (Ala. Crim. App. 1993)

(a) Open Door

- *Duncan v. State*,[++] 176 So. 2d 840 (Ala. 1965)

(b) Peaceful Submission

- *Duncan v. State*,[++] 176 So. 2d 840 (Ala. 1965)
- *Kennedy v. State*, 640 So. 2d 22 (Ala. Crim. App. 1993)

(c) Display of Weapons

- *Kennedy v. State*, 640 So. 2d 22 (Ala. Crim. App. 1993)

(d) Show of Force

- *Kennedy v. State*, 640 So. 2d 22 (Ala. Crim. App. 1993)

(e) Lack of Incriminating Evidence

- *Kennedy v. State*, 640 So. 2d 22 (Ala. Crim. App. 1993)

(f) Knowledge of the Right to Refuse Consent

- *Kennedy v. State*, 640 So. 2d 22 (Ala. Crim. App. 1993)

ii. Scope of Consent

- *Kennedy v. State*, 640 So. 2d 22 (Ala. Crim. App. 1993)

iii. Burden of Proof

- *Duncan v. State*,[++] 176 So. 2d 840 (Ala. 1965)
- *Kennedy v. State*, 640 So. 2d 22 (Ala. Crim. App. 1993)

iv. Conflict of Evidence

- *Kennedy v. State*, 640 So. 2d 22 (Ala. Crim. App. 1993)

v. Appellate Review

- *Kennedy v. State*, 640 So. 2d 22 (Ala. Crim. App. 1993)

b. Plain-View Searches

- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)

i. Conditions

- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)

ii. "Immediately Apparent"

- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)

iii. Probable Cause

- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)

c. "Sensory" Searches

- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)

G. Computer-Technician/Repairperson Discoveries

- *Rutledge v. State*, 745 So. 2d 912 (Ala. Crim. App. 1999)
  -A computer repairman found pornographic images of children on Rutledge's computer. Rutledge offered the pictures to the repairman, and the repairman informed the police. As an ordinary citizen who informed the police of a crime, the repairman was presumed to have disclosed reliable information. The police were not required to supply the magistrate with information explaining why the repairman was reliable.

H. Photo-Development Discoveries

- *Hall v. Van's Photo, Inc.*, 595 So. 2d 1368 (Ala. 1992)

I. Criminal Forfeiture

No relevant state cases reported.

J. Disciplinary Hearings for Federal and State Officers

No relevant state cases reported.

K. Probation and Parolee Rights

No relevant state cases reported.

IV. JURISDICTION AND NEXUS

A. Jurisdictional Nexus

No relevant state cases reported.

B. Internet Nexus

No relevant state cases reported.

C. State Jurisdiction, Federal Jurisdiction, Concurrent Jurisdiction

1. State

No relevant state cases reported.

2. Federal

No relevant state cases reported.

3. Concurrent

No relevant state cases reported.

D. Interstate Possession of Child Pornography

No relevant state cases reported.

V. DISCOVERY AND EVIDENCE

A. Timely Review of Evidence

No relevant state cases reported.

B. Defense Requests for Copies of Child Pornography

No relevant state cases reported.

C. Accusatory Instruments

- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)

1. How to Charge an Offense

- *Poole v. State*, 596 So. 2d 632 (Ala. Crim. App. 1992)
- *Inmon v. State*, 585 So. 2d 261 (Ala. Crim. App. 1991)
- *Rogers v. State*, 539 So. 2d 451 (Ala. Crim. App. 1988)

2. Notice of the Time or Place of the Alleged Offense

- *Ex parte State*, 718 So. 2d 117 (Ala. 1998)
- *Abney v. State*, 586 So. 2d 995 (Ala. Crim. App. 1991)
- *Inmon v. State*, 585 So. 2d 261 (Ala. Crim. App. 1991)
- *Williams v. State*, 548 So. 2d 584 (Ala. Crim. App. 1988)

3. Duplicitous Indictments

- *Rogers v. State*, 539 So. 2d 451 (Ala. Crim. App. 1988)

D. Chain of Custody

- *Morgan v. State*, 570 So. 2d 859 (Ala. Crim. App. 1990)

1. Standards

- *Morgan v. State*, 570 So. 2d 859 (Ala. Crim. App. 1990)

a. Weak-Link Test

- *Morgan v. State*, 570 So. 2d 859 (Ala. Crim. App. 1990)

b. Missing-Link Test

- *Morgan v. State*, 570 So. 2d 859 (Ala. Crim. App. 1990)

2. Specimens from the Human Body

- *Morgan v. State*, 570 So. 2d 859 (Ala. Crim. App. 1990)

E. Introduction of E-mails into Evidence

1. Hearsay/Authentication Issues

No relevant state cases reported.

2. Circumstantial Evidence

No relevant state cases reported.

3. Technical Aspects of Electronic Evidence Regarding Admissibility

No relevant state cases reported.

F. Text-Only Evidence

1. Introduction into Evidence

No relevant state cases reported.

2. Relevance

No relevant state cases reported.

G. Evidence Obtained from Internet Service Providers

1. Electronic Communications Privacy Act

No relevant state cases reported.

2. Cable Act

No relevant state cases reported.

3. Patriot Act

a. National Trap and Trace Authority

No relevant state cases reported.

b. State-Court-Judge Jurisdictional Limits

No relevant state cases reported.

H. Witness Testimony

1. Incompetence

a. General Rule

- *Price v. State*, 590 So. 2d 381 (Ala. Crim. App. 1991)
- *Rogers v. State*, 555 So. 2d 1168 (Ala. Crim. App. 1989)
- *Rogers v. State*, 539 So. 2d 451 (Ala. Crim. App. 1988)
- *Hewlett v. State*, 520 So. 2d 200 (Ala. Crim. App. 1987)

b. Exception for Competent Child Witnesses

- *Ex parte McAllister*, 541 So. 2d 1104 (Ala. 1989)
- *Schaefer v. State*, 695 So. 2d 656 (Ala. Crim. App. 1996)
- *Long v. State*, 611 So. 2d 443 (Ala. Crim. App. 1992)
- *Price v. State*, 590 So. 2d 381 (Ala. Crim. App. 1991)
- *Arnett v. State*, 551 So. 2d 1158 (Ala. Crim. App. 1989)
- *Barger v. State*, 562 So. 2d 650 (Ala. Crim. App. 1989)
- *Moates v. State*, 545 So. 2d 224 (Ala. Crim. App. 1989)
- *Rogers v. State*, 555 So. 2d 1168 (Ala. Crim. App. 1989)
- *Hewlett v. State*, 520 So. 2d 200 (Ala. Crim. App. 1987)
- *Merton v. State*, 500 So. 2d 1301 (Ala. Crim. App. 1986)

c. Appellate Review

- *Rogers v. State*, 539 So. 2d 451 (Ala. Crim. App. 1988)

2. Complaints by a Victim

a. Admissibility

- *Sexton v. State*, 529 So. 2d 1041 (Ala. Crim. App. 1988)

b. Who May Testify

- *Sexton v. State*, 529 So. 2d 1041 (Ala. Crim. App. 1988)

c. Details

- *Smith v. State*, 604 So. 2d 434 (Ala. Crim. App. 1992)

3. Child Victims

a. Confrontation and Due Process

- *Moates v. State*, 545 So. 2d 224 (Ala. Crim. App. 1989)

b. Psychological Examinations

- *Arnett v. State*, 551 So. 2d 1158 (Ala. Crim. App. 1989)

c. Direct Examination of Child Witnesses

i. Generally

- *Sexton v. State*, 529 So. 2d 1041 (Ala. Crim. App. 1988)

ii. Appellate Review

- *Sexton v. State*, 529 So. 2d 1041 (Ala. Crim. App. 1988)

d. Videotaped Testimony

- *Brasher v. State*, 555 So. 2d 184 (Ala. Crim. App. 1988)
- *Strickland v. State*, 550 So. 2d 1042 (Ala. Crim. App. 1988)

i. Factors to Consider

- *Brasher v. State*, 555 So. 2d 184 (Ala. Crim. App. 1988)
- *Strickland v. State*, 550 So. 2d 1042 (Ala. Crim. App. 1988)

ii. Right to Confrontation

- *Strickland v. State*, 550 So. 2d 1042 (Ala. Crim. App. 1988)

4. The Defense

a. The Defendant As a Witness

- *Ex parte State*, 718 So. 2d 117 (Ala. 1998)

b. Opportunity to Defend

- *Ex parte State*, 718 So. 2d 117 (Ala. 1998)

5. Expert Testimony

- *W.S. v. T.W.*, 585 So. 2d 26 (Ala. 1991)
- *Johnson v. Inv. Co. of the South, L.L.C.*,[++] 869 So. 2d 1156 (Ala. Crim. App. 2003)
- *D.J.I. v. W.M.I.*, 660 So. 2d 1333 (Ala. Civ. App. 1995)
- *Rothchild v. State*, 558 So. 2d 981 (Ala. Crim. App. 1989)
- *Sexton v. State*, 529 So. 2d 1041 (Ala. Crim. App. 1988)

a. Establishing the Proper Predicate

i. Burden

- *W.S. v. T.W.*, 585 So. 2d 26 (Ala. 1991)
- *Johnson v. Inv. Co. of the South, L.L.C.*,[++] 869 So. 2d 1156 (Ala. Crim. App. 2003)

ii. Three-Step Process

- *W.S. v. T.W.*, 585 So. 2d 26 (Ala. 1991)
- *Johnson v. Inv. Co. of the South, L.L.C.*,[++] 869 So. 2d 1156 (Ala. Crim. App. 2003)

b. Hypothetical Questions

i. Facts Already in Evidence

- *Ex parte McAllister*, 541 So. 2d 1104 (Ala. 1989)

ii. Facts Not Yet in Evidence

- *Ex parte McAllister*, 541 So. 2d 1104 (Ala. 1989)

c. Opinion Testimony

i. Ultimate Issue

- *Bell v. State*, 435 So. 2d 772 (Ala. Crim. App. 1983)

ii. Conclusion

- *Bell v. State*, 435 So. 2d 772 (Ala. Crim. App. 1983)

d. Physician Testimony

- *Rothchild v. State*, 558 So. 2d 981 (Ala. Crim. App. 1989)

e. Emotional, Psychiatric, and Psychological Evidence

i. Emotional Effects of Sexual Abuse

- *W.S. v. T.W.*, 585 So. 2d 26 (Ala. 1991)

ii. Psychiatric and Psychological Aspects of Child Abuse

- *Inmon v. State*, 585 So. 2d 261 (Ala. Crim. App. 1991)

f. The Defendant's Use of Expert Testimony

- *Ex parte State*, 718 So. 2d 117 (Ala.1998)

g. Appellate Review

- *W.S. v. T.W.*, 585 So. 2d 26 (Ala. 1991)

6. Hearsay

a. "Hearsay" Defined

- *T.D.T. v. State*, 745 So. 2d 885 (Ala. Crim. App. 1998)

b. Non-Hearsay

- *T.D.T. v. State*, 745 So. 2d 885 (Ala. Crim. App. 1998)

c. Hearsay Exceptions

i. Child's Statement of Sexual Abuse

(a) Generally

- *T.D.T. v. State*, 745 So. 2d 885 (Ala. Crim. App. 1998)
- *Long v. State*, 611 So. 2d 443 (Ala. Crim. App. 1992)

(b) Child Sexual Abuse Victim Protection Act

(i) Generally

- *Mosely v. State*, 644 So. 2d 1299 (Ala. Crim. App. 1994)

(ii) Notice Requirement

- *Mosely v. State*, 644 So. 2d 1299 (Ala. Crim. App. 1994)

ii. Hospital Records

- *Carroll v. State*, 370 So. 2d 749 (Ala. Crim. App. 1979)

iii. Victim's Complaint

- *Inmon v. State*, 585 So. 2d 261 (Ala. Crim. App. 1991)

(a) General Rule

- *Inmon v. State*, 585 So. 2d 261 (Ala. Crim. App. 1991)

(b) Exception

- *Inmon v. State*, 585 So. 2d 261 (Ala. Crim. App. 1991)

d. Restrictions on Admissible Hearsay: Confrontation Clause

- *Inmon v. State*, 585 So. 2d 261 (Ala. Crim. App. 1991)

I. Prior Acts

1. Good

- *Abney v. State*, 586 So. 2d 995 (Ala. Crim. App. 1991)

2. Bad

- *Johnson v. State*,[++] 2006 WL 2848022 (Ala. 2006)
- *Ex parte Cofer*, 440 So. 2d 1121 (Ala. 1983)

a. Inadmissible

- *Ex parte Cofer*, 440 So. 2d 1121 (Ala. 1983)
- *Gillespie v. State*, 549 So. 2d 640 (Ala. Crim. App. 1989)
- *Whiddon v. State*, 299 So. 2d 326 (Ala. Crim App. 1973)

b. Admissible

- *Whiddon v. State*, 299 So. 2d 326 (Ala. Crim App. 1973)

i. "Other Purposes"

(a) Generally

- *Ex parte State*, 538 So. 2d 1226 (Ala. 1988)

(b) Collateral Sexual Misconduct

- *Ex parte State*, 646 So. 2d 676 (Ala. 1994)
- *Ex parte State*, 538 So. 2d 1226 (Ala. 1988)

ii. Identity of the Perpetrator

(a) Generally Admissible

- *Ex parte State*, 538 So. 2d 1226 (Ala. 1988)
- *Stegall v. State*, 628 So. 2d 1009 (Ala. Crim. App. 1993)
- *Watson v. State*, 538 So. 2d 1216 (Ala. Crim. App. 1987)

(b) Inadmissible

- *Ex parte State*, 538 So. 2d 1226 (Ala. 1988)

(c) Sex Crimes

- *Ex parte State*, 538 So. 2d 1226 (Ala. 1988)
- *Watson v. State*, 538 So. 2d 1216 (Ala. Crim. App. 1987)

iii. Intent

- *Whiddon v. State*, 299 So. 2d 326 (Ala. Crim. App. 1973)

iv. Motive

- *Ex parte State*, 646 So. 2d 676 (Ala. 1994)
- *Ex parte State*, 538 So. 2d 1226 (Ala. 1988)

(a) Defined

- *Ex parte State*, 646 So. 2d 676 (Ala. 1994)
- *Ex parte State*, 538 So. 2d 1226 (Ala. 1988)

(b) Evidence of Sexual Misconduct Against the Current Victim

- *Ex parte State*, 538 So. 2d 1226 (Ala. 1988)
- *Inmon v. State*, 585 So. 2d 261 (Ala. Crim. App. 1991)
- *Watson v. State*, 538 So. 2d 1216 (Ala. Crim. App. 1987)

v. Common Scheme or Plan

- *Kennedy v. State*, 640 So. 2d 22 (Ala. Crim. App. 1993)

vi. Evidence of the Defendant's Sexual Activity With Persons Other than the Victim

- *Ex parte State*, 538 So. 2d 1226 (Ala. 1988)
- *Watson v. State*, 538 So. 2d 1216 (Ala. Crim. App. 1987)

vii. Passion or Propensity for Unusual and Abnormal Sexual Relations

- *Ex parte State*, 538 So. 2d 1226 (Ala. 1988)
- *Watson v. State*, 538 So. 2d 1216 (Ala. Crim. App. 1987)

viii. Evidence Introduced by the Defendant

- *Ex parte State*, 718 So. 2d 117 (Ala. 1998)

J. Evidence of Pregnancy

- *Watson v. State*, 538 So. 2d 1216 (Ala. Crim. App. 1987)

K. Character Evidence

1. General Reputation Testimony

- *Schaefer v. State*, 695 So. 2d 656 (Ala. Crim. App.1996)
- *Sexton v. State*, 529 So. 2d 1041 (Ala. Crim. App. 1988)

2. Misdeeds Inadmissible

- *Sexton v. State*, 529 So. 2d 1041 (Ala. Crim. App. 1988)

3. Negative Evidence

- *Williams v. State*, 548 So. 2d 584 (Ala. Crim. App. 1988)

L. Real and Demonstrative Evidence

1. Photographic Evidence

a. Admissibility

- *Kennedy v. State*, 640 So. 2d 22 (Ala. Crim. App. 1993)
- *Updyke v. State*, 501 So. 2d 566 (Ala. Crim. App. 1986)

i. Gruesome Photographs

- *Updyke v. State*, 501 So. 2d 566 (Ala. Crim. App. 1986)

ii. Inflammatory Photographs

- *Kennedy v. State*, 640 So. 2d 22 (Ala. Crim. App. 1993)

iii. Photographs of the Victim

- *Kennedy v. State*, 640 So. 2d 22 (Ala. Crim. App. 1993)

iv. Proof of Motive

- *Kennedy v. State*, 640 So. 2d 22 (Ala. Crim. App. 1993)

b. Necessity for "Creation of Obscene Materials" Convictions

- *Cole v. State*, 721 So. 2d 255 (Ala. Crim. App. 1998)

c. Appellate Review

- *Updyke v. State*, 501 So. 2d 566 (Ala. Crim. App. 1986)

2. Sound Recordings: Seven-Part Test for Admissibility

- *Ex parte Weddington*, 843 So. 2d 750 (Ala. 2002)

3. Proper Foundation

- *Ex parte Weddington*, 843 So. 2d 750 (Ala. 2002)

a. Pictorial-Communication/Pictorial-Testimony Theory

- *Ex parte Weddington*, 843 So. 2d 750 (Ala. 2002)

b. Silent-Witness Theory

- *Ex parte Weddington*, 843 So. 2d 750 (Ala. 2002)

4. Chain of Custody

- *Ex parte Weddington*, 843 So. 2d 750 (Ala. 2002)

M. Privilege Against Self-Incrimination

- *Ex parte L.S.B.*, 800 So. 2d 574 (Ala. 2001)

VI. AGE OF CHILD VICTIM

A. Proving the Age of the Child Depicted

No relevant state cases reported; however, the "proof of age of person depicted" statute can be found at ALA. CODE § 13A-12-193.

B. The Defendant's Knowledge of the Age of the Child Depicted

1. Distributors or Receivers of Child Pornography

- *Sherman v. State*, 778 So. 2d 859 (Ala. Crim. App. 2000)

2. Circumstantial Evidence

- *Sherman v. State*, 778 So. 2d 859 (Ala. Crim. App. 2000)

3. Question of Fact for the Jury

- *Sherman v. State*, 778 So. 2d 859 (Ala. Crim. App. 2000)

VII. MULTIPLE COUNTS

A. What Constitutes an Item of Child Pornography?

- *Girard v. State*, 883 So. 2d 717 (Ala. Crim. App. 2002)

B. Multiplicity

1. Defined

- *King v. State*,[++] 674 So. 2d 1381 (Ala. Crim. App. 1995)

2. Prosecutorial Discretion

- *Ex parte State*, 718 So. 2d 117 (Ala. 1998)

C. Joinder

1. Test to Determine Joinder of Offenses

- *Kennedy v. State*, 640 So. 2d 22 (Ala. Crim. App. 1993)

2. Same or Connected Acts or Transactions

- *Kennedy v. State*, 640 So. 2d 22 (Ala. Crim. App. 1993)

3. Same Type of Offense

- *Kennedy v. State*, 640 So. 2d 22 (Ala. Crim. App. 1993)

D. Issue of Double Jeopardy

1. Generally

- *Ex parte L.S.B.*, 800 So. 2d 574 (Ala. 2001)
- *Girard v. State*, 883 So. 2d 717 (Ala. Crim. App. 2002)

2. Inconsistent Verdicts

a. State Recourse

- *Pettway v. State*,[++] 648 So. 2d 647 (Ala. Crim. App. 1994)

b. Attack by the Defendant

- *Pettway v. State*,[++] 648 So. 2d 647 (Ala. Crim. App. 1994)

E. Strict-Election Rule (a.k.a. "Either/Or Rule")

- *Ex parte R.L.G.*, 712 So. 2d 372 (Ala. 1998)
- *Ex parte State*, 718 So. 2d 117 (Ala. 1998)

VIII. DEFENSES

A. Age of the Accused

- *Merton v. State*, 500 So. 2d 1301 (Ala. Crim. App. 1986)

B. Alibi: Resident-Child-Molester Cases

- *Ex parte State*, 718 So. 2d 117 (Ala. 1998)

C. Consent

1. Assent

- *Glover v. State*, 518 So. 2d 247 (Ala. Crim. App. 1987)

2. Sexual Abuse

- *Glover v. State*, 518 So. 2d 247 (Ala. Crim. App. 1987)

D. Diminished Capacity

1. Addiction to the Internet

No relevant state cases reported.

2. Insanity

- *Glover v. State*, 518 So. 2d 247 (Ala. Crim. App. 1987)

E. First Amendment

No relevant state cases reported.

F. Impossibility

1. Factual

No relevant state cases reported.

2. Legal

No relevant state cases reported.

G. Manufacturing Jurisdiction

No relevant state cases reported.

H. Mistake

1. Of Fact: The Victim's Age

- *Sherman v. State*, 778 So. 2d 859 (Ala. Crim. App. 2000)

2. Of Law

No relevant state cases reported.

I. Outrageous Conduct

No relevant state cases reported.

J. Researcher

No relevant state cases reported.

K. Sexual Orientation

No relevant state cases reported.

L. Statute of Limitations

1. Limitation Period for Assault and Battery Torts

- *Travis v. Ziter*, 681 So. 2d 1348 (Ala. 1996)

2. Dismissal Based on the Statute of Limitations

- *Travis v. Ziter*, 681 So. 2d 1348 (Ala. 1996)

3. Tolling

a. Insanity

- *Travis v. Ziter*, 681 So. 2d 1348 (Ala. 1996)

b. Repressed Memories

- *Travis v. Ziter*, 681 So. 2d 1348 (Ala. 1996)

M. Wrongful Identification: Resident-Child-Molester Cases

- *Ex parte State*, 718 So. 2d 117 (Ala. 1998)

IX. SENTENCING ISSUES

A. Presentence Reports: Psychological and Medical History

- *Schaefer v. State*, 695 So. 2d 656 (Ala. Crim. App. 1996)

B. Enhancement

1. Age of Victim

No relevant state cases reported.

2. Distribution/Intent to Traffic

No relevant state cases reported.

3. Number of Images

No relevant state cases reported.

4. Pattern of Activity for Sexual Exploitation

No relevant state cases reported.

5. Sadistic, Masochistic, or Violent Material

No relevant state cases reported.

6. Use of Computers

No relevant state cases reported.

X. SUPERVISED RELEASE

No relevant state cases reported.

ALABAMA
Case Highlights

A case with ++ indicates that although the subject matter is not child exploitation, the principle presented may still apply.

Abney v. State, 586 So. 2d 995 (Ala. Crim. App. 1991)

The good character of the defendant cannot be proven by specific acts of merit, nor can the defendant prove his own good reputation for associating with other children and not abusing them.

Arnett v. State, 551 So. 2d 1158 (Ala. Crim. App. 1989)

A doctor testified that the minor victim appeared to be of above average intelligence. After hearing the testimony, the trial judge determined that the complainant was competent to testify; therefore, because it was within the trial court's discretion whether to order a psychological examination of the complaining witness, the appellate court concluded that the trial court did not abuse its discretion in denying the request for further examination of the complainant.

Barger v. State, 562 So. 2d 650 (Ala. Crim. App. 1989)

The defendant was not permitted to have a psychological examination performed on the victim because the trial court did not have the authority to require a witness to agree to an interview by defense counsel. There is no statute or other authority that would authorize a trial court to order the psychological examination of a child victim of sexual abuse.

Baynes v. State, 423 So. 2d 307 (Ala. Crim. App. 1982)

The chain of possession of all the exhibits that were allowed into evidence was sufficiently proven. Based on a careful examination of the record, it appeared that the injured party identified the gown and panties introduced into evidence as being the same clothing she had on at the time the crime was committed; the rape kit was sealed by the night nurse and was sealed when she turned it over to the day nurse and when the day nurse turned it over to the police officer; and during the time the rape kit was on the counter in the emergency room either the day nurse or night nurse was present.

Bell v. State, 435 So. 2d 772 (Ala. Crim. App. 1983)

A properly qualified expert may state his or her opinion as to the nature, cause, and effect of a wound or injury, and the manner or means by which the injury could have been inflicted. He or she may also state what kind of weapon or instrument could have caused a particular wound, but not whether that weapon actually did.

Brasher v. State, 555 So. 2d 184 (Ala. Crim. App. 1988)

During the hearing, the trial court had the opportunity to observe the child victim give testimony through viewing the deposition; therefore, the court had first-hand knowledge

of how she would react to questioning on both direct and cross-examination. Based on these observations, including the tender age of the child and the assertions of the district attorney in his motion, the appellate court held that the trial court's decision to admit the deposition was based upon good cause shown. The record reflects the trial court was fully aware of the tender years of the child and of the suffering the child had allegedly endured as a result of the alleged sexual abuse. The trial court's ruling admitting the deposition was proper under the circumstances and was supported by the evidence before the court.

Brownfield v. State, [++] 2007 WL 1229388 (Ala. Crim. App. 2007)

Record supported trial court's finding that defendant's confessions to murders were made voluntarily, even though defendant argued that he had ingested seven or eight alprazolam pills on night of murders and had been using methamphetamine for two weeks before murders, and defendant's first confession was made approximately 36 hours after murders; defendant went to a party after murders and engaged in what witnesses testified could best be described as normal, coherent conversation, and law enforcement officials testified that defendant, when he made his confessions, appeared to be coherent and to understand his rights and did not appear to be under influence of any substance.

C.B. v. Bobo, 659 So. 2d 98 (Ala. 1995)

There is no private right of action for any breach of the duty to report child abuse that is imposed by the Child Abuse Reporting Act. While the Act imposes a duty on an individual to make such a report, there is no indication of any legislative intent to impose civil liability for failure to report.

Carroll v. State, 370 So. 2d 749 (Ala. Crim. App. 1979)

It was not error to permit the State to prove prior acts of hostility by the defendant toward both victims since the two murders were inseparable and such evidence was admissible to show motive, malice, and intent. While it is not permissible to show a difficulty between the accused and a third person not connected with the victim or the offense, the third person in this case was a victim of a double murder occurring within the same time span and under virtually identical circumstances.

Cole v. State, 721 So. 2d 255 (Ala. Crim. App. 1998)

Under Alabama child pornography statutes, the U.S. Supreme Court's *Miller* test is applicable only to depictions of breast nudity and is not applicable to visual reproductions of sexual excitement and genital nudity.

D.J.I. v. W.M.I., 660 So. 2d 1333 (Ala. Civ. App. 1995)

An expert's opinion, even if uncontroverted, is not conclusive. Instead a trial court must look to the entire evidence and its own observations in deciding factual issues. The trier of fact determines the weight and credibility to be attributed to an expert's opinion.

Dannelley v. State, 397 So. 2d 555 (Ala. Crim. App. 1981)

Upon opening a boxed container, the officers unexpectedly discovered obvious evidence of crimes against children in the form of photographs. Before taking further action, the police contacted the district attorney, described the photographs, and asked if they needed another warrant to seize the evidence. They were advised that no additional warrant was

necessary. Due to the fact that the photographs of the children were discovered in a box where a controlled substance could have been concealed during the implementation of a valid and legitimate search warrant, the photographs were properly entered into evidence.

Duncan v. State,[++] 176 So. 2d 840 (Ala. 1965)

Law-enforcement officers did not identify themselves and did not ask to be allowed to search the premises. After gaining admittance without identifying themselves, the officers searched the defendant's room and removed articles without requesting the defendant's permission. The invitation to enter the room, extended by the defendant to the person who knocked on his door, did not constitute consent to the search of his room so as to constitute a waiver of his right to complain that the search and resulting seizure were committed in violation of the Fourth Amendment.

Ex parte Cofer, 440 So. 2d 1121 (Ala. 1983)

A single rape that occurred 10 years prior to the present offense, as reprehensible as it is, was not evidence of a pattern or pre-existing design into which the present charge of sexual abuse fit. Evidence of the prior alleged rape did not fall within any of the other exceptions either; therefore, evidence of the prior rape was erroneously allowed to prove the defendant's intent.

Ex parte Felton, 526 So. 2d 638 (Ala.1988)

Even though the intrusion of an individual's private ownership of obscene material could have First Amendment consequences, this rule is not applicable to child pornography.

Ex parte J.A.P., 853 So. 2d 280 (Ala. 2002)

The holding that the unique relationship between children and adults who exercise a position of domination and control over them may be taken into consideration in determining whether the element of forcible compulsion has been established applied only to cases involving the sexual assault of children by adults who exercised positions of domination and control over the children.

Ex parte L.S.B., 800 So. 2d 574 (Ala. 2001)

The defendant failed to clearly show that there was a risk that further criminal charges would be brought against him arising from the claims of sexual abuse against his minor daughter; therefore, the rule against self-incrimination was not applicable and the daughter's representative was entitled to discovery concerning the incidents of sexual abuse testified to at the defendant's criminal trial.

Ex parte McAllister, 541 So. 2d 1104 (Ala. 1989)

The appellate court held that because the child-sexual-abuse counselor's opinion testimony was partly based on facts not within her personal knowledge and not propounded in a proper hypothetical question (*i.e.*, the facts were not in evidence), the testimony was inadmissible and the trial court was correct in excluding the expert's opinion testimony.

Ex parte R.L.G., 712 So. 2d 372 (Ala. 1998)

The general-election/strict-election rule does not apply in child molestation cases involving purely generic evidence. In cases involving generic evidence, trial and appellate courts are required to resolve the tension between the rights of an alleged victim and the rights of an alleged child molester, and an alleged child molester can be afforded all the process he or she is due.

Ex parte State, 476 So. 2d 632 (Ala. 1985)

Affidavits that consist solely of the affiant's conclusion that the named individual committed an offense, without setting forth the facts upon which the conclusion is based, are fatally defective. A bare-bones affidavit can be validated if it is supplemented with additional facts that the magistrate considered before determining that probable cause was present. Without such additional information, the affidavit and arrest warrant cannot be given any effect.

Ex parte State, 538 So. 2d 1226 (Ala. 1988)

Since there was a real and open issue as to the rapist's identity, the trial court did not err in admitting evidence of the defendant's prior rapes of the prosecutrix and her sister.

Ex parte State, 597 So. 2d 721 (Ala. 1991)

Even though there was no evidence that the victim was overcome by her father's physical force, nor was there evidence of any express threat by the defendant, the appellate court concluded, after considering the totality of the circumstances, primarily the victim's relation to the defendant, that adequate proof existed to sustain the jury's ruling that the defendant engaged in sexual intercourse with his daughter as a result of forcible compulsion.

Ex parte State, 636 So. 2d 1260 (Ala. 1993)

The appellate court held that, under the circumstances of the case, it was for the jury to decide whether the evidence of the relationship of the defendant and the victim and the evidence of prior abuse, sexual intercourse, physical force, and threats established that the act of intercourse alleged to have occurred was accomplished by forcible compulsion. Taking into consideration the totality of the circumstances as presented in the record, the evidence was at least minimally sufficient to support the jury's finding that the defendant had sexual intercourse with his stepdaughter through the use of forcible compulsion. The victim testified that the defendant had previously used physical force and had previously threatened her. Further, the defendant was in a position of authority and dominion over the victim because he was her stepfather, he had been a deputy sheriff, and he was, at the time of the incident, the police chief. Despite the fact that the victim was not a minor at the time of the alleged rape, she was not emancipated.

Ex parte State, 646 So. 2d 676 (Ala. 1994)

The lower court was incorrect in ruling that only in situations involving the crime of incest can proof of a defendant's later acts of incest be presented. The appellate court held that the evidence of the collateral act against one of the victims was relevant to prove what the prosecution contended was the defendant's motive: to gratify sexual desires by having sex with young girls living in his household.

Ex parte State, 718 So. 2d 117 (Ala. 1998)

An expansion of the strict-election rule is needed in sexual-abuse cases that involve a resident child abuser. In cases that involve both generic and specific evidence, where evidence of multiple culpable acts is adduced to prove a single charged offense, jury unanimity must be protected; therefore, in such a case, the defendant is entitled either to have the State elect the single act upon which it is relying for a conviction, or to have the court give a specific unanimity instruction. If the State chooses not to elect the specific act, the trial court must instruct the jury that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, thereby assuring a unanimous verdict on one criminal act.

Ex parte State,[++] 843 So. 2d 229 (Ala. 2001)

Whether the circumstances recited in an affidavit offered in support of an application for a search warrant are such that the probable cause that might once have been demonstrated by them has grown "stale" is a matter that must be determined by the circumstances of each case. The basic criterion as to the duration of probable cause or staleness is the inherent nature of the crime.

Ex parte Weddington, 843 So. 2d 750 (Ala. 2002)

Videotapes that were shown to the jury that the defendant admitted contained child pornography were not privileged communications because there was no evidence tending to show that the making of the tapes and the storing of the tapes in the closet grew out of the confidence inspired by the marital relationship.

Franks v. Delaware,[++] 438 U.S. 154 (1978)

Where a defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in a search warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment of the U.S. Constitution requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

Gillespie v. State, 549 So. 2d 640 (Ala. Crim. App. 1989)

Although the prosecutor did not openly present evidence of other crimes, apparently because he had none, the cumulative effect of his repeated questions and insinuations was such that the jury could have readily inferred that the defendant had engaged in other unspecified acts of sexual misconduct. The prosecutor's questions implying collateral and other acts of sexual misconduct were calculated and deliberate despite the trial judge's rulings. The prosecutor tried to convey to the jury, by insinuation, suggestion, and speculation that the defendant may have committed offenses similar to the one for which

he was being tried. These prejudicial attacks upon the defendant deprived him of a fair trial.

Girard v. State, 883 So. 2d 717 (Ala. Crim. App. 2002)

The possession of any obscene matter, even if the possession is of multiple pieces, is simultaneous and inseparable, more like the simultaneous, single act of transportation or importation of multiple pieces of obscene matter, than the separate transactions involved in the distribution of multiple pieces of obscene matter; therefore, the unit of prosecution was the simultaneous possession of a collection of obscene material.

Glover v. State, 518 So. 2d 247 (Ala. Crim. App. 1987)

Penetration is not an element of sodomy.

Hall v. Van's Photo, Inc., 595 So. 2d 1368 (Ala. 1992)

Photographs a mother took of her naked 3-year-old son presented reasonable cause for the photo developer to make a child-abuse report. Since there is a great need for protecting children from child abuse and, because the report was based on reasonable cause, the photo developer is exempted from liability.

Hewlett v. State, 520 So. 2d 200 (Ala. Crim. App. 1987)

Notwithstanding any other provision of law or rule of evidence, a child victim of sexual abuse or sexual exploitation is a competent witness and can testify without prior qualification in any judicial proceeding.

Inmon v. State, 585 So. 2d 261 (Ala. Crim. App. 1991)

The indictment, by charging that the defendant did knowingly subject the minor victim to sexual contact, tracked the pertinent statutory language. Although the indictment did not explicitly allege the intent element of the offense, it did not omit the intent component of the charged offense. Since sexual contact is defined by law to encompass the intent element required for sexual abuse, its use in an indictment is legally sufficient to charge the offense; therefore, the defendant's motion to dismiss the indictment on the ground that it failed to state an offense was properly denied.

Johnson v. State,[++] 2006 WL 2848022 (Ala. 2006)

The trial court's failure to sua sponte give a limiting instruction to jury regarding its use of evidence of defendant's prior bigamy conviction and prior bad acts, which included her adulterous relationships, sexual manipulations, threats, and proddings in order to enlist a male counterpart to assault or murder victim, did not constitute plain error.

Johnson v. Inv. Co. of the South, L.L.C.,[++] 869 So. 2d 1156 (Ala. Crim. App. 2003)

The trial court retained discretion, in former tenant's action against apartment complex's owners for injuries she sustained when she slipped and fell in complex parking lot, to limit scope of testimony of tenant's expert witness regarding conditions of the parking lot, even after trial court accepted witness as expert late in witness's testimony. The trial court has the discretion to limit the scope of the testimony that the expert witness is allowed to give as well as whether a witness is allowed to testify as an expert.

K.R.B. v. State, 834 So. 2d 826 (Ala. Crim. App. 2001)

The State did not present any evidence that the defendant subjected one of the female victims to sexual contact and the victim denied while testifying that the defendant had kissed her private parts; therefore, the appellate court reversed the defendant's conviction for first-degree sexual abuse.

Kennedy v. State, 640 So. 2d 22 (Ala. Crim. App. 1993)

In determining whether a joint trial of consolidated indictments is permissible, courts should look to see whether evidence of each offense would have been admissible in the trial of the other offense had the indictments been tried separately. The trial court was wrong in not separating the counts from the indictment and trial of the defendant. The appellate court concluded that the offenses against the two victims were not based on the same conduct or otherwise connected in their commission. The criminal acts alleged to have been perpetrated against the two victims took place at different times and under different circumstances. The defendant was not charged with interfering with the custody of one of the victims and was not charged with raping the other victim. Also, the photographs were not taken at the same time and there was no evidence that either girl knew photographs had been taken of the other when nude. At trial, the offenses against the two victims were proved by different bodies of evidence.

King v. State,[++] 674 So. 2d 1381 (Ala. Crim. App. 1995)

There were multiple violations of one statute by separate, individual transactions. Multiplicity is the charging of a single offense in more than one count. An indictment charging separate counts for each violation of the same criminal statute is not multiplicitous.

Long v. State, 611 So. 2d 443 (Ala. Crim. App. 1992)

The trial court examined the 10-year-old victim at length before direct examination to be certain the victim understood his obligation to tell the truth while testifying. The victim testified that he was 10 years old, that he sometimes went to church, that he knew who God was, and that he understood the difference between telling the truth and not telling the truth. The victim further promised that he would tell the truth in court and that he would inform the trial court if he did not understand a question. During questioning by defense counsel, the victim testified that he knew what a lie was and that he would get in trouble if he told a lie. The trial court then ruled that the victim was competent to testify and properly denied the defendant's motion to suppress the victim's testimony.

Merton v. State, 500 So. 2d 1301 (Ala. Crim. App. 1986)

The age of the accused is a defense to first-degree rape and first-degree sodomy.

Moates v. State, 545 So. 2d 224 (Ala. Crim. App. 1989)

The victim testified to the best of his ability that the acts performed orally on him constituted oral and anal sex and he demonstrated these acts with dolls. Although the victim was unable to identify the defendant, there was certainly ample other evidence to

corroborate the victim's testimony. The victim's mother and another individual testified that they witnessed the defendant having anal intercourse with the victim. Further, an expert witness testified that his examination revealed a laceration and blood in the victim's rectum. Consequently, the appellate court concluded that there was sufficient evidence to support the defendant's conviction for first-degree sodomy.

Mobile County Dep't of Human Res. v. Mims, 666 So. 2d 22 (Ala. Civ. App. 1995)

The letters from the Department of Human Resources, the Department's attorney, and the administrative law judge did not contain sufficient allegations of child abuse as the term is defined by statute. The charges, when viewed as to the minor, alleged only verbal misconduct, and such is not actionable as abuse in this case.

Moore v. State,[++] 416 So. 2d 770 (Ala. Crim. App. 1982)

In instances of an isolated violation, probable cause would tend to dwindle rather quickly with the passage of time; however, a pattern of protracted and continuous illegal conduct would cause the time lag to be less significant.

Morgan v. State, 570 So. 2d 859 (Ala. Crim. App. 1990)

The defendant's conviction was reversed because the State did not successfully prove the correct chain of custody before introducing a urine specimen allegedly taken from the victim. The break in the chain of custody cannot be considered a minor break. When such a vital link in the chain of custody was not accounted for, there could not be a reasonable probability that the specimen analyzed was the specimen that originated at the hospital. In light of the testimony as to the presence of a tranquilizer in the victim's urine and the victim's testimony that was disputed by the defendant (that the defendant gave her intravenous injections prior to the sexual abuse and that they made her dizzy and caused her vision to become blurry), the error in the admission of the specimen cannot be deemed harmless.

Morgan v. State, 641 So. 2d 834 (Ala. Crim. App. 1992)

Although there was sufficient probable cause to justify a warrantless arrest for the offense of being a fugitive from justice, the statutory requirement that such an arrest be effected only if law enforcement knows that the accused is charged with a crime punishable by life imprisonment or by death was not met; however, the evidence at trial indicated that there was sufficient probable cause to justify the defendant's arrest for the sexual offenses that were committed in Alabama. The fact that the arresting officer announced that the defendant's arrest was based on the fact that he was a fugitive from justice did not result in an improper arrest because there was probable cause to support the arrest on the other offenses. Furthermore, based on the collective knowledge of law enforcement, there were sufficient facts to cause a reasonable person to believe that the suspect had committed a crime; therefore, because the arrest was proper, the search and seizure of the incriminating evidence was legal and the trial court correctly denied the defendant's motion to suppress.

Mosely v. State, 644 So. 2d 1299 (Ala. Crim. App. 1994)

Testimony concerning the statement made by the victim to a social worker, in which he stated that he was sexually abused by the defendant, was admissible because the defendant had adequate notice of the substance of the statement and because the victim testified and was subject to cross-examination concerning the statement.

Perry v. State, 568 So. 2d 339 (Ala. Crim. App. 1990)

The defendant's argument that the State did not prove that he took explicit photographs to satisfy some lustful urges was without merit. At trial, the defendant's daughter identified various photographs of herself and her friend. Further, both the daughter and her friend testified that the defendant allowed them to drink alcoholic beverages.

Pettway v. State,[++] 648 So. 2d 647 (Ala. Crim. App. 1994)

A defendant convicted by a jury on one count cannot attack the conviction on the ground that it is inconsistent with the jury's verdict of acquittal on another count.

Poole v. State, 596 So. 2d 632 (Ala. Crim. App. 1992)

A person's prior convictions for similar criminal acts may be considered for purposes of establishing probable cause although the probative value of long past acts may be weak.

Price v. State, 590 So. 2d 381 (Ala. Crim. App. 1991)

A child victim of sexual abuse or sexual exploitation is a competent witness and will be allowed to testify without prior qualification in any judicial proceeding. The statute specifically reads "a child victim of sexual abuse or sexual exploitation." No reference is made to child victims of physical abuse; therefore, the trial court erred in allowing the victim to testify without first determining whether she was indeed competent.

R.K.D. v. State, 712 So. 2d 754 (Ala. Crim. App. 1997)

The appellate court carefully reviewed each of the items seized from the defendant's automobile, all of which were offered into evidence at trial. The appellate court found that none of the evidence established that the defendant knowingly possessed obscene matter containing visual reproductions of persons under the age of 17 years engaged in certain proscribed obscene acts. Most of the items found in the suitcase were pictures of fully clothed children cut from fashion magazines and advertisements for the sale of children's clothes and were in no way obscene. Four photographs that were admitted into evidence by the State appeared to depict a girl in her very early teens wearing a swimsuit, but there was nothing obscene about these photographs. The few exhibits that might have satisfied the statutory criteria failed to meet the definition of "matter" because they were neither photographs nor other reproductions of a live act, performance, or event. Although the exhibits depicted acts, some of which involved children, the record was devoid of any evidence that these acts occurred any place other than in the defendant's depraved imagination. There was simply no evidence that a child has been harmed. Had the State presented evidence that either the drawings or the montages did represent acts to which the defendant was a party or that he witnessed, a different result may have been reached.

Rhodes v. State, 651 So. 2d 1122 (Ala. Crim. App. 1994)

Though certain acts occurred during the course of one evening, it was clear from one of the victim's testimony that two separate instances were involved. Sodomy occurred earlier in the evening in the defendant's bedroom and sexual abuse occurred later while the defendant and one of the victims were taking a bath; therefore, the lower court correctly sentenced the defendant for each offense.

Rogers v. State, 539 So. 2d 451 (Ala. Crim. App. 1988)

An indictment that substantially follows the language of the statute is sufficient, provided the statute prescribes with definiteness the constituents of the offense.

Rogers v. State, 555 So. 2d 1168 (Ala. Crim. App. 1989)

Alabama law allows child victims of sexual abuse or sexual exploitation to be witnesses and to testify without prior qualification in any judicial proceeding; therefore, no error was committed by allowing a 5-year-old child to testify.

Rothchild v. State, 558 So. 2d 981 (Ala. Crim. App. 1989)

Physicians, when testifying in a judicial proceeding, are commonly considered experts in the areas for which they are trained. When a treating physician states what could have happened, the extent of his or her knowledge goes to the weight of the testimony and not to the admissibility.

Rutledge v. State, 745 So. 2d 912 (Ala. Crim. App. 1999)

In Alabama's child-pornography statutes, although the term "matter" does not explicitly refer to computer images, the language "electrical or electronic reproduction of a photographic or other visual reproduction" includes computer images depicting child pornography (*i.e.*, computer-generated and stored child pornography, computer diskettes, and the Internet).

Schaefer v. State, 695 So. 2d 656 (Ala. Crim. App. 1996)

A defendant's medical and psychological history, if available, may be made a part of a presentence report.

Sexton v. State, 529 So. 2d 1041 (Ala. Crim. App. 1988)

The expert witness' opinion that it is common for child-abuse victims to delay reporting of the abuse was necessary to rebut the defense implication that the child's testimony was suspect because she waited so long to tell her mother. The expert's testimony that it is common for children who have been sexually abused to downplay the emotional impact of the trauma was necessary in order to explain the victim's rather matter-of-fact description of some of the incidents of abuse. By the same token, the psychologist's testimony that it is common for a child to be unwilling to talk about the abuse or to face the abusing parent, was made necessary by the victim's refusal to describe an incident and to point out her father in the courtroom; therefore, the trial court did not abuse its discretion in allowing the doctor's testimony.

Sherman v. State, 778 So. 2d 859 (Ala. Crim. App. 2000)

Although the defendant had ample opportunity to question the victim, he failed to ascertain her age before taking sexually explicit pictures; therefore, it was reasonable to hold him responsible as a producer of sexually explicit materials. Evidence that the defendant knew the victim's age was not required.

Smith v. State, 604 So. 2d 434 (Ala. Crim. App. 1992)

The details of a complaint made by a rape victim cannot be elicited by the prosecution, especially when the complaint is not made within a reasonable time after the alleged occurrence; however, when the testimony of the prosecutrix is impeached by proof of self-contradictory statements, the prosecution may prove her complaints in detail.

Stegall v. State, 628 So. 2d 1009 (Ala. Crim. App. 1993)

Before a prior conviction could be received into evidence under the identity exception to the hearsay rule, there must be evidence that allows the two crimes to be characterized as signature crimes, having the accused's mark and the peculiarly distinctive *modus operandi* so that they may be said to be the work of the same person. The two crimes involved in the instant case were remarkably similar. Both occurred near the defendant's home, at a curve in the street; and both involved instances where a man pulled down his pants and exposed himself to the passengers in a passing car. Both instances also involved young women driving with small children in the cars; therefore, evidence of the defendant's prior conviction for indecent exposure was correctly received into evidence under the identity exception to the general exclusionary rule.

Strickland v. State, 550 So. 2d 1042 (Ala. Crim. App. 1988)

Details of a complaint made by a sexual abuse victim may be proved in one of two cases. First, they may be elicited, on cross-examination, by the defendant and the State may then proceed to prove, on the rebutting examination, the whole complaint. Second, where the testimony of the prosecutrix is sought to be impeached, by attempting to discredit her story, it is permissible, by way of corroboration, for the State to prove the details and also to prove that the story was told the same way to others, confirmatory of her first statement.

T.D.T. v. State, 745 So. 2d 885 (Ala. Crim. App. 1998)

The trial court's failure to include in its instruction the full text of the statute was not so pivotal to the jury's decision-making process as to call into question the jury's verdict convicting the defendant. Ample evidence in the record would have allowed the jury to determine whether the defendant's actions were of an appropriate nature for a father to use in disciplining his child. In spite of the incomplete instruction, the court did not believe the jury would have convicted the defendant if it had believed that he had reasonably disciplined his children. The evidence overwhelmingly indicated that the defendant did in fact use unreasonable physical force.

Travis v. Ziter, 681 So. 2d 1348 (Ala. 1996)

The Alabama Code does not allow for an extension of the statutory limitations period for actions based on alleged repressed memories.

Updyke v. State, 501 So. 2d 566 (Ala. Crim. App. 1986)

It would be improper to conclude that facts showing the commission of child abuse could never show also the commission of the offense of third-degree assault; therefore, because a 7-year-old boy was beaten, the jury should have been allowed to determine whether or not the offense of third-degree assault was committed.

W.S. v. T.W., 585 So. 2d 26 (Ala. 1991)

The trial court properly excluded the opinion testimony of a doctor witness because the plaintiff failed to lay a proper foundation for the expert testimony. No testimony was given as to the type of questions or approach the doctor used with the minor victim. The doctor relied heavily on the reports and opinions of a social worker involved in the case. No testimony was given as to the approach used by the social worker. The social worker's reports were not offered into evidence. Further, no properly formulated hypothetical question was asked of the doctor.

Watson v. State, 538 So. 2d 1216 (Ala. Crim. App. 1987)

Evidence of the defendant's sexual acts with the prosecutrix's sister fell within an exception for allowing evidence of prior and subsequent crimes because of similarity in circumstances. The defendant's acts against the prosecutrix's sister were so connected by circumstances with the particular crime in issue, such that the proof of one fact with its circumstances has some bearing upon the issue on trial other than to show the defendant's bad character or moral delinquency. Although the evidence of the sexual abuse of the prosecutrix's sister was admissible, the fact of her pregnancy was not.

Whiddon v. State, 299 So. 2d 326 (Ala. Crim App. 1973)

The conduct of the defendant toward the non-prosecutrix, with factual similarity to this case, happening on the same day, shows that he had the intent of offensive molestation that was saturated with immoral depravity toward the prosecutrix. The defendant wanted to get his hands on both children to the end that he might obtain sexual stimulation in violation of law. The enticement and allurement of both children constituted the overt act that was motivated by sexual depravity.

Williams v. State, 548 So. 2d 584 (Ala. Crim. App. 1988)

Negative evidence in support of good character is admissible and its refusal is error.

Young v. State, 453 So. 2d 1074 (Ala. Crim. App. 1984)

The defendant was guilty of the offense of first-degree attempted rape since the defendant had the intent to engage in sexual intercourse with the female victim who was under the age of 12 years; he performed an overt act for purposes of executing his intentions; and he failed to complete the offense. The jury could have found the defendant guilty of rape, first-degree attempted rape, or first-degree sexual abuse.

ALABAMA
Offenses Defined

A case with ++ indicates that although the subject matter is not child exploitation, the principle presented may still apply.

I. Child Abuse

- Child abuse occurs when a responsible person tortures, willfully abuses, cruelly beats, or otherwise willfully maltreats any child under the age of 18 years. ALA. CODE § 26-15-3.
  – *T.D.T. v. State*, 745 So. 2d 885, 889 (Ala. Crim. App. 1998).
  – *Updyke v. State*, 501 So. 2d 566, 567 (Ala. Crim. App. 1986).

A. "Child Abuse" Defined

- "Child abuse" is defined as "harm or threatened harm to a child's health or welfare." ALA. CODE § 26-14-1.
  – *Hall v. Van's Photo, Inc.*, 595 So. 2d 1368, 1370 (Ala. 1992).
  – *Mobile County Dep't of Human Res. v. Mims*, 666 So. 2d 22, 24-25 (Ala. Civ. App. 1995).
  – *T.D.T. v. State*, 745 So. 2d 885,889 (Ala. Crim. App. 1998).

- Harm or threatened harm to a child's health or welfare can occur through non-accidental physical or mental injury, sexual abuse, attempted sexual abuse, sexual exploitation, or attempted sexual exploitation.
  – *Hall v. Van's Photo, Inc.*, 595 So. 2d 1368, 1370 (Ala. 1992).
  – *Mobile County Dep't of Human Res. v. Mims*, 666 So. 2d 22, 24-25 (Ala. Civ. App. 1995).
  – *T.D.T. v. State*, 745 So. 2d 885,889 (Ala. Crim. App. 1998).

B. Types of Abuse

1. Sexual Abuse

a. Defined

- Sexual abuse includes rape, incest, and sexual molestation. ALA. CODE § 26-14-1.
  – *Mobile County Dep't of Human Res. v. Mims*, 666 So. 2d 22, 25 (Ala. Civ. App. 1995).

b. First-Degree Sexual Abuse

- A person commits the crime of first-degree sexual abuse if:
  (1) being 16 years old or older, he or she subjects another person to sexual contact who is less than 12 years old, or
  (2) he or she submits another person to sexual contact by forcible compulsion.
  ALA. CODE § 13A-6-66(a).
  – *Ex parte State*, 646 So. 2d 676, 679 (Ala. 1994).
  – *K.R.B. v. State*, 834 So. 2d 826, 828 (Ala. Crim. App. 2001).
  – *T.D.T. v. State*, 745 So. 2d 885, 898 (Ala. Crim. App. 1998).
  – *Young v. State*, 453 So. 2d 1074, 1075 (Ala. Crim. App. 1984).

c. "Sexual Contact" Defined

- "Sexual contact" is defined as any touching of the sexual or other intimate parts of a person not married to the actor, done for the purpose of gratifying the sexual desire of either party. ALA. CODE § 13A-6-60(3).
  – *Ex parte State*, 646 So. 2d 676, 679 (Ala. 1994).
  – *K.R.B. v. State*, 834 So. 2d 826, 828 (Ala. Crim. App. 2001).
  – *T.D.T. v. State*, 745 So. 2d 885, 898 (Ala. Crim. App. 1998).

d. Intent to Gratify Sexual Desires

- First-degree sexual abuse requires proof that the defendant acted with the intent to gratify the sexual desires of him- or herself or the prosecutrix. ALA. CODE § 13A-6-60; 13A-6-66.
  – *Ex parte Cofer*, 440 So. 2d 1121, 1124 (Ala. 1983).

- Intent may be inferred by the jury from the act itself.
  – *Ex parte Cofer*, 440 So. 2d 1121, 1124 (Ala. 1983).

2. Sexual Exploitation

- Sexual exploitation includes allowing, permitting, encouraging, or engaging in the obscene or pornographic photographing, filming, or depicting of a child for commercial purposes.
  – *Hall v. Van's Photo, Inc.*, 595 So. 2d 1368, 1370 (Ala. 1992).
  – *Mobile County Dep't of Human Res. v. Mims*, 666 So. 2d 22, 25 (Ala. Civ. App. 1995).

- Sexual exploitation includes pornographic photographing and similar conduct.
  – *Mobile County Dep't of Human Res. v. Mims*, 666 So. 2d 22, 25 (Ala. Civ. App. 1995).

3. Lesser-Included Offenses of Child Abuse

- Assault in the third degree may be a lesser offense to child abuse.
  – *T.D.T. v. State*, 745 So. 2d 885, 892 (Ala. Crim. App. 1998).

- While a jury instruction on third-degree assault as a lesser-included offense to child abuse may be necessary in some, it is not mandated in every case.
  – *T.D.T. v. State*, 745 So. 2d 885, 892 (Ala. Crim. App. 1998).

II. Child Enticement

A. Generally

- It is unlawful for any person to, with lascivious intent, entice, allure, persuade, invite, or attempt to entice, allure, persuade, or invite, any child under 16 years of age to enter any vehicle, room, house, office, or other place for the purpose of:
  (1) proposing to the child:
    (a) the performance of an act of sexual intercourse or sodomy;
    (b) the fondling or feeling of the sexual or genital parts of such child or the breasts of such child; or
    (c) that such child fondle or feel the sexual or genital parts of such person; or
  (2) committing an aggravated assault on the child.
  ALA. CODE § 13A-6-69.
  – *Williams v. State*, 548 So. 2d 584, 589 (Ala. Crim. App. 1988).

B. Online Enticement/Solicitation for Travel With the Intent to Engage in Sex With a Minor

No relevant state cases reported; however, the "child solicitation by computer" statute can be found at ALA. CODE § 13A-6-110(a).

III. Child Pornography (a.k.a. "Obscene Matter")

A. Offenses

1. Possession

- Any person who knowingly possesses any obscene matter containing a visual reproduction of a person under the age of 17 years engaged in any act of sadomasochistic abuse, sexual intercourse, sexual excitement, masturbation, genital nudity, or other sexual conduct is guilty of a Class C felony. ALA. CODE § 13A-12-192(b).
  – *Girard v. State*, 883 So. 2d 717 (Ala. Crim. App. 2002).
  – *R.K.D. v. State*, 712 So. 2d 754, 757 (Ala. Crim. App. 1997).

2. Possession With the Intent to Disseminate

- Any person who knowingly possesses with the intent to disseminate any obscene matter containing a visual reproduction of a person under the age of 17 years engaged in any act of sadomasochistic abuse, sexual intercourse, sexual excitement, masturbation, breast nudity, genital nudity, or other sexual conduct is guilty of a Class B felony. ALA. CODE § 13A-12-192(a).
  – *Rutledge v. State*, 745 So. 2d 912, 914 (Ala. Crim. App. 1999).

- Possession of three or more copies of the same obscene material is *prima facie* evidence of possession with intent to disseminate the same.
  – *Rutledge v. State*, 745 So. 2d 912, 914 (Ala. Crim. App. 1999).

3. Production

- Any person who knowingly films, prints, records, photographs, or otherwise produces any obscene matter that contains a visual reproduction of a person under the age of 17 years engaged in any act of sadomasochistic abuse, sexual intercourse, sexual excitement, masturbation, breast nudity, genital nudity, or other sexual conduct is guilty of a Class A felony. ALA. CODE § 13A-12-197.
  – *Cole v. State*, 721 So. 2d 255, 257 (Ala. Crim. App. 1998).
  – *Dannelley v. State*, 397 So. 2d 555, 568 (Ala. Crim. App. 1981).
  – *Poole v. State*, 596 So. 2d 632, 643 (Ala. Crim. App. 1992).
  – *Sherman v. State*, 778 So. 2d 859, 860 (Ala. Crim. App. 2000).

- Any parent or guardian who knowingly permits or allows their child, ward, or dependent under the age of 17 years to engage in the production of any obscene matter containing a visual reproduction of such child, ward, or dependent under the age of 17 years engaged in any act of sadomasochistic abuse, sexual excitement, masturbation, breast nudity, genital nudity, or other sexual conduct is guilty of a Class A felony. ALA. CODE § 13A-12-196.
  – *Cole v. State*, 721 So. 2d 255, 257 (Ala. Crim. App. 1998).
  – *Perry v. State*, 568 So. 2d 339, 340 (Ala. Crim. App. 1990).

4. Use of a Computer

- The possession and dissemination of child pornography by any means, including visual depictions of children engaged in sexual acts displayed on computers, computer diskettes, and the Internet, is prohibited. ALA. CODE § 13A-12-192.
  – *Rutledge v. State*, 745 So. 2d 912, 917 (Ala. Crim. App. 1999).

5. Virtual/Simulated Child Pornography

No relevant state cases reported.

B. Definitions

1. "Knowingly"

- "Knowingly" is defined as follows knowing the nature of the matter when either of the following circumstances exist: the person is aware of the character and content of the matter, or the person recklessly disregards circumstances suggesting the character and content of the matter. ALA. CODE § 13A-12-190(4).
  – *Perry v. State*, 568 So. 2d 339, 342 (Ala. Crim. App. 1990).

- When a statute prescribes as an element of an offense a specified culpable mental state, the mental state is presumed to apply to every element of the offense unless the context thereof indicates to the contrary. ALA. CODE § 13A-2-4(a).
  – *Sherman v. State*, 778 So. 2d 859, 860 (Ala Crim. App. 2000).

2. "Lewd"

a. Generally

- "Lewd" is defined as obscene, lustful, indecent, lascivious, or lecherous.
  – *Perry v. State*, 568 So. 2d 339, 342 (Ala. Crim. App. 1990).

- The term imports a lascivious intent.
  – *Perry v. State*, 568 So. 2d 339, 342 (Ala. Crim. App. 1990).

- Lewd signifies that form of immorality that has relation to moral impurity or that which is carried on in a wanton manner.
  – *Perry v. State*, 568 So. 2d 339, 342 (Ala. Crim. App. 1990).

- Lewdness, within the context of the child pornography statutes, is not a characteristic of the child photographed but of the exhibition that the photographer sets up for an audience, consisting of him or herself and/or likeminded pedophiles.
  – *Poole v. State*, 596 So. 2d 632, 640 (Ala. Crim. App. 1992).

b. Lewd Showing of a Child's Genitals

- To establish a lewd showing of a child's genitals, an overt act by the child depicted is not required.
  – *Poole v. State*, 596 So. 2d 632, 640 (Ala. Crim. App. 1992).

- The child depicted is not required to have assumed a sexually inviting manner, nor is it required that the child even be aware that the depiction is being produced.
  – *Poole v. State*, 596 So. 2d 632, 640 (Ala. Crim. App. 1992).

- The picture of a child engaged in genital nudity is a picture of a child's sex organs displayed lewdly, or so represented by the photographer as to arouse or satisfy the sexual cravings of a voyeur.
  – *Poole v. State*, 596 So. 2d 632, 640 (Ala. Crim. App. 1992).

3. "Matter"

- "Matter" is defined as "any book, magazine, newspaper, or other printed material, or any picture, photograph, motion picture, or electrical or electronic reproduction, or any other articles or materials that either are or contain a photographic or other visual reproduction of a live act, performance, or event. ALA. CODE § 13A-12-190(12).
  – *R.K.D. v. State*, 712 So. 2d 754, 757 (Ala. Crim. App. 1997).
  – *Rutledge v. State*, 745 So. 2d 912, 915 (Ala. Crim. App. 1999).

C. Obscenity Versus Child Pornography

1. Test for Obscenity

- Material is obscene if: the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
  – *Cole v. State*, 721 So. 2d 255, 258 (Ala. Crim. App. 1998).
  – *Poole v. State*, 596 So. 2d 632, 637 (Ala. Crim. App. 1992).

2. Test for Child Pornography

- A separate test for child pornography has been created by adjusting the obscenity test in the following respects:
  (1) a trier of fact need not find that the material appeals to the prurient interest of the average person;
  (2) it is not required that the sexual conduct portrayed be done so in a patently offensive manner; and
  (3) the material at issue need not be considered as a whole.
  – *Cole v. State*, 721 So. 2d 255, 258 (Ala. Crim. App. 1998).
  – *Perry v. State*, 568 So. 2d 339, 341 (Ala. Crim. App. 1990).

- States can constitutionally define the visual depiction of sexual conduct by children as obscenity without having to satisfy the threshold constitutional test for determining whether the material is obscene.
  – *Ex parte Felton*, 526 So. 2d 638, 640 (Ala.1988).

a. Local Community Standards

- A review of local community standards is not necessary to convict a defendant of producing obscene matter containing a visual reproduction of a person under the age of 17 years of age, unless the visual depictions include nudity of the breast. ALA. CODE § 13A-12-190(13).
  – *Cole v. State*, 721 So. 2d 255, 259 (Ala. Crim. App. 1998).

b. Prurient Interest

- Whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work.
  – *Poole v. State*, 596 So. 2d 632, 637 (Ala. Crim. App. 1992).

c. Patently Offensive

- A sexually explicit depiction need not be patently offensive in order to have required the sexual exploitation of a child for its production.
  – *Poole v. State*, 596 So. 2d 632, 637 (Ala. Crim. App. 1992).

d. Value

- Work that, when taken as a whole, contains serious literary, artistic, political, or scientific value, may nevertheless embody the hardest core of child pornography.
  – *Poole v. State*, 596 So. 2d 632, 637 (Ala. Crim. App. 1992).

IV. Interference With Custody

- A person commits the crime of interference with custody if he or she knowingly takes or entices any child under the age of 18 from the lawful custody of the child's parent. ALA. CODE § 13A-6-45(a).
  – *Kennedy v. State*, 640 So. 2d 22, 28 (Ala. Crim. App. 1993).

- A person does not interfere with custody if the actor's sole purpose is to assume lawful control of the child.
  – *Kennedy v. State*, 640 So. 2d 22, 28 (Ala. Crim. App. 1993).

V. Rape

A. First-Degree Rape

- A male commits the crime of rape in the first degree if he, being 16 years or older, engages in sexual intercourse with a female who is less than 12 years old. ALA. CODE § 13A-6-61.
  – *Ex parte State*, 646 So. 2d 676, 679 (Ala. 1994).
  – *Merton v. State*, 500 So. 2d 1301, 1302 (Ala. Crim. App. 1986).
  – *Young v. State*, 453 So. 2d 1074, 1075 (Ala. Crim. App. 1984).

- A person commits the crime of rape in the first degree if he or she engages in sexual intercourse with a member of the opposite sex by forcible compulsion. ALA. CODE § 13A-6-61(a)(1).
  – *Ex parte J.A.P.*, 853 So. 2d 280, 281 (Ala. 2002).
  – *Ex parte State*, 597 So. 2d 721, 724 (Ala. 1991).
  – *Merton v. State*, 500 So. 2d 1301, 1302 (Ala. Crim. App. 1986).

- A male commits the crime of rape in the first degree if he engages in sexual intercourse with a female who is incapable of consent by reason of being physically helpless or mentally incapacitated.
  – *Merton v. State*, 500 So. 2d 1301, 1302 (Ala. Crim. App. 1986).

1. Definitions

a. "Female"

- The definition of "female" is limited to any female person who is not married to the actor. ALA. CODE § 13A-6-60(4).
  – *Merton v. State*, 500 So. 2d 1301, 1302 (Ala. Crim. App. 1986).

- Persons living together in cohabitation are considered, regardless of the legal status of their relationship otherwise. ALA. CODE § 13A-6-60(4).
  – *Merton v. State*, 500 So. 2d 1301, 1302 (Ala. Crim. App. 1986).

b. "Forcible Compulsion"

i. Generally

- "Forcible compulsion" is physical force that overcomes earnest resistance or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to him- or herself or another person. ALA. CODE § 13A-6-60(8).
  – *Ex parte J.A.P.*, 853 So. 2d 280, 281 (Ala. 2002).
  – *Ex parte State*, 597 So. 2d 721, 724 (Ala. 1991).

– *Ex parte State*, 636 So. 2d 1260, 1261 (Ala. 1993).

ii. Relationship Between Children and Adults

- The holding that the unique relationship between children and the adults who exercise a position of domination and control over them may be taken into consideration in determining whether the element of forcible compulsion for rape has been established is limited to cases concerning the sexual assault of children by adults with whom the children are in a relationship of trust or by adults who exercised positions of domination and control over the children.
  – *Ex parte J.A.P.*, 853 So. 2d 280, 284 (Ala. 2002).

c. "Sexual Intercourse"

- "Sexual intercourse" is defined as occurring upon any penetration, however slight. ALA. CODE § 13A-6-60(1).
  – *Ex parte State*, 597 So. 2d 721, 724 (Ala. 1991).

2. Penetration

- The nature of penetration need not be proved in any particular form of words to sustain a conviction for the offense of rape in the first degree.
  – *Watson v. State*, 538 So. 2d 1216, 1218 (Ala. Crim. App. 1987).

B. Attempted Rape in the First Degree

- The elements of attempted rape in the first degree are:
  (1) the intent to have sexual intercourse with a female who is less than 12 years old;
  (2) an overt act to carry out that intent; and
  (3) the failure to consummate the commission of the offense.
  – *Young v. State*, 453 So. 2d 1074, 1075 (Ala. Crim. App. 1984).

C. Second-Degree Rape

- A male commits the crime of rape in the second degree if:
  (1) being 16 years old or older, he engages in sexual intercourse with a female less than 16 and more than 12 years old provided, however, the actor is at least two years older than the female, or
  (2) he engages in sexual intercourse with a female who is incapable of consent by reason of being mentally defective.
  ALA. CODE § 13A-6-62.
  – *Baynes v. State*, 423 So. 2d 307, 308 (Ala. Crim. App. 1982).

VI. Sodomy

A. First Degree

1. Elements

- A male commits the crime of sodomy in the first degree if he engages in:
  (1) deviate sexual intercourse with another person by forcible compulsion;
  (2) deviate sexual intercourse with a person who is incapable of consent by reason of being physically helpless or mentally incapacitated; or
  (3) deviate sexual intercourse with a person who is less than 12 and he is 16 years old or older.

  ALA. CODE § 13A-6-63(a).
  – *Long v. State*, 611 So. 2d 443, 445 (Ala. Crim. App. 1992).
  – *Moates v. State*, 545 So. 2d 224, 227 (Ala. Crim. App. 1989).
  – *Rhodes v. State*, 651 So. 2d 1122, 1123 (Ala. Crim. App. 1994).

- Penetration is not an element of sodomy.
  – *Glover v. State*, 518 So. 2d 247, 248 (Ala. Crim. App. 1987).
  – *Moates v. State*, 545 So. 2d 224, 227 (Ala. Crim. App. 1989).

2. Definitions

a. "Deviate Sexual Intercourse"

- "Deviate sexual intercourse" is defined as "any act of sexual gratification between persons not married to each other, involving the sex organs of one person and the mouth or anus of another." ALA. CODE § 13A-6-60(2).
  – *Glover v. State*, 518 So. 2d 247, 248 (Ala. Crim. App. 1987).
  – *Moates v. State*, 545 So. 2d 224, 227 (Ala. Crim. App. 1989).

b. "Forcible Compulsion"

- "Forcible compulsion" is defined as the "physical force that overcomes earnest resistance or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to him- or herself or another person.
  – *Rhodes v. State*, 651 So. 2d 1122, 1123 (Ala. Crim. App. 1994).

B. Second Degree

- A person commits the crime of sodomy in the second degree if he engages in deviate sexual intercourse with a person:

(1) less than 16 and more than 12 years old and the actor is 16 years or older, or
(2) who is incapable of consent by reason of being mentally defective.
– *Glover v. State*, 518 So. 2d 247, 248 (Ala. Crim. App. 1987).

VII. Transporting a Minor for the Purposes of Prostitution

No relevant state cases reported.

ALABAMA

Mandatory Reporting

I. Duty to Report

- Certain persons (*i.e.*, all school teachers and officials) who are called upon to render aid or medical assistance to any child, when the child is known or suspected to be a victim of child abuse or neglect, must report, or cause a report to be made of the same, orally, either by telephone or direct communication immediately, followed by a written report, to a duly constituted authority. ALA. CODE § 26-14-3.
  – *C.B. v. Bobo*, 659 So. 2d 98, 102 (Ala. 1995).

II. Basis of an Independent Report

- Any person may make a child abuse or neglect report if that person has reasonable cause to suspect that a child is being abused or neglected. ALA. CODE § 26-14-4.
  – *Hall v. Van's Photo, Inc.*, 595 So. 2d 1368, 1370 (Ala. 1992).

III. Failure to Report

- The failure to report is a misdemeanor, punishable by a sentence of not more than six months in prison or a fine of not more than $500.00.
  – *C.B. v. Bobo*, 659 So. 2d 98, 102 (Ala. 1995).

IV. Privilege

- The rule of privileged communication is abrogated, with the exception of the attorney-client privilege, as a ground for excluding any evidence regarding a child's injuries or the cause thereof in any judicial proceeding resulting from a report pursuant to this chapter.
  – *C.B. v. Bobo*, 659 So. 2d 98, 102 (Ala. 1995).

V. Immunity

- Any person, firm, corporation, or official participating in the making of a report or the removal of a child, or participating in a judicial proceeding resulting therefrom, is, in so doing, immune from any liability, civil or criminal, that might otherwise be incurred or imposed. ALA. CODE § 26-14-9.
  – *Hall v. Van's Photo, Inc.*, 595 So. 2d 1368, 1370 (Ala. 1992).

ALABAMA

Search and Seizure of Electronic Evidence

A case with ++ indicates that although the subject matter is not child exploitation, the principle presented may still apply.

I. Search Warrants

A. Municipal Jurisdiction

- Municipal judges are authorized to issue arrest and search warrants for municipal-ordinance violations returnable to the municipal court and for violations of state law returnable to any state court.
  – *Merton v. State*, 500 So. 2d 1301, 1307 (Ala. Crim. App. 1986).

B. Affidavits

- A search-warrant affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause.
  – *Ex parte State*, 476 So. 2d 632, 633-634 (Ala. 1985).

- Affidavits that consist solely of an affiant's conclusion that the named individual committed an offense, without setting forth the facts upon which the conclusion is based, are fatally defective.
  – *Ex parte State*, 476 So. 2d 632, 634 (Ala. 1985).

- A bare-bones affidavit can be validated if it is supplemented with additional facts that the magistrate considered before determining that probable cause was present.
  – *Ex parte State*, 476 So. 2d 632, 634 (Ala. 1985).

1. "Probable Cause"

a. Defined

- Probable cause to search a residence exists when there is a fair probability that contraband or evidence of a crime will be found in a particular place. There is no requirement of a showing that such a belief be correct or more likely true than false.
  – *Morgan v. State*, 641 So. 2d 834, 838 (Ala. Crim. App. 1992).
  – *Poole v. State*, 596 So. 2d 632, 639 (Ala. Crim. App. 1992).

- Probable cause may emanate from the collective knowledge of the police.
  – *Morgan v. State*, 641 So. 2d 834, 838 (Ala. Crim. App. 1992).

- A practical, non-technical probability that incriminating evidence is involved is all that is required.
  – *Poole v. State*, 596 So. 2d 632, 639 (Ala. Crim. App. 1992).

b. Good-Faith Exception

- The good-faith exception to the probable cause requirement for issuing warrants will not apply in cases where the issuing magistrate wholly abandoned his or her judicial role because in such circumstances, no reasonably well-trained officer should rely on the warrant, nor would an officer manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.
  – *Ex parte State*, 476 So. 2d 632, 635 (Ala. 1985).

- Depending on the circumstances of the particular case, a warrant may be so facially deficient (*i.e.*, in failing to particularize the place to be searched or the things to be seized) that the executing officers cannot reasonably presume it to be valid.
  – *Ex parte State*, 476 So. 2d 632, 635 (Ala. 1985).

2. Specificity

- For a search warrant to be sufficient and satisfy the constitutional requirement of probable cause, the affidavit upon which it is based must state specific facts and circumstances that support a finding of probable cause.
  – *Poole v. State*, 596 So. 2d 632, 641 (Ala. Crim. App. 1992).

3. Prior Convictions

- A person's prior convictions for similar criminal acts may be considered for purposes of establishing probable cause although the probative value of long past acts may be weak.
  – *Poole v. State*, 596 So. 2d 632, 642 (Ala. Crim. App. 1992).

4. Reliance on Hearsay Information

- Hearsay information may serve as a basis for an affidavit and may be used to determine probable cause for the issuance of a search warrant.
  – *Rutledge v. State*, 745 So. 2d 912, 918 (Ala. Crim. App. 1999).

5. Oral Testimony

- Oral testimony may be used to supplement an affidavit submitted to obtain a search warrant.
  – *Poole v. State*, 596 So. 2d 632, 641 (Ala. Crim. App. 1992).

6. Informants

- Where an ordinary citizen informs law enforcement that he or she has seen evidence of a crime or that someone has admitted involvement in a crime to him or her, he or she is presumed to be reliable and an officer is not required to supply the magistrate with information explaining why he or she believes the citizen-informant to be reliable.
  – *Rutledge v. State*, 745 So. 2d 912, 918 (Ala. Crim. App. 1999).
- The burden is on the accused to show why disclosure of a confidential informant is necessary to show his or her innocence.
  – *Dannelley v. State*, 397 So. 2d 555, 567 (Ala. Crim. App. 1981).

7. False Information: The Defendant's Burden

- If a defendant establishes by a preponderance of the evidence that a false statement made knowingly, intentionally, or with reckless disregard for the truth was included in a probable-cause affidavit, and if it was material to establish probable cause, the false information must be excised from the affidavit.
  – *Franks v. Delaware*,[++] 438 U.S. 154, 164-65 (1978).

8. Appellate Review

- Reviewing courts will not defer to a warrant based on an affidavit that does not provide the magistrate with a substantial basis for determining the existence of probable cause; however, when a magistrate has found probable cause, courts should not invalidate the warrant by interpreting the affidavit in a hyper-technical rather than a commonsense manner.
  – *Ex parte State*, 476 So. 2d 632, 634 (Ala. 1985).
  – *Poole v. State*, 596 So. 2d 632, 641 (Ala. Crim. App. 1992).

- Doubtful or marginal cases should be resolved according to the preference accorded to warrants.
  – *Poole v. State*, 596 So. 2d 632, 641 (Ala. Crim. App. 1992).

C. Scope of Warrant

- Seizable items that inadvertently come into view of the officer lawfully searching in connection with another crime, or who otherwise has a right to be where he or she is, may be retained and used in prosecution of the crime to which they relate if the officer is already in the constitutionally protected area.
  – *Dannelley v. State*, 397 So. 2d 555, 568 (Ala. Crim. App. 1981).

D. Staleness

- Information shown in the affidavit must be "fresh as opposed to being remote in time."
  – *Moore v. State*,[++] 416 So. 2d 770, 772 (Ala. Crim. App. 1982).

- Whether the circumstances recited in an affidavit offered in support of an application for a search warrant are such that the probable cause that might once have been demonstrated by them has grown "stale" is a matter that must be determined by the circumstances of each case.
  – *Ex parte State*,[++] 843 So. 2d 229, 233 (Ala. 2001).

- The basic criterion as to the duration of probable cause or staleness is the inherent nature of the crime.
  – *Ex parte State*,[++] 843 So. 2d 229, 233 (Ala. 2001).

- The underlying circumstances including such matters as the basis of the informant's knowledge, the ease or difficulty in moving the items since they were last observed, the use or probable use to which the items are put, and the mobile nature or degree of permanence of the place of concealment, must be examined by a neutral and detached magistrate to reach a determination as to the probability of whether the proof speaks as of the time the search warrant is issued.
  – *Ex parte State*,[++] 843 So. 2d 229, 233 (Ala. 2001).
  – *Moore v. State*,[++] 416 So. 2d 770, 772 (Ala. Crim. App. 1982).

- In instances of an isolated violation, probable cause would tend to dwindle rather quickly with the passage of time; however, a pattern of protracted and continuous illegal conduct would cause the time lag to be less significant.
  – *Ex parte State*,[++] 843 So. 2d 229, 233 (Ala. 2001).
  – *Moore v. State*,[++] 416 So. 2d 770, 772 (Ala. Crim. App. 1982).

II. Anticipatory Warrants

No relevant state cases reported.

III. Warrantless Arrests

A. Generally

- The arrest of a person may be lawfully made by an officer or a private citizen without a warrant upon reasonable information that the accused stands charged with a crime punishable by death or life imprisonment in the courts of another state.
  – *Morgan v. State*, 641 So. 2d 834, 836 (Ala. Crim. App. 1992).

- The accused must be taken before a district- or circuit-court judge with all practicable speed and a complaint must be made against him or her, under oath, setting forth the ground for the arrest, and thereafter his or her answer shall be heard as if he or she had been arrested on a warrant.
  – *Morgan v. State*, 641 So. 2d 834, 836 (Ala. Crim. App. 1992).

B. Probable Cause

- The validity of the arrest should be judged by whether the arresting officers actually had probable cause for the arrest, rather than by whether the officers gave the arrested person the right reason for the arrest.
  – *Morgan v. State*, 641 So. 2d 834, 837 (Ala. Crim. App. 1992).

- In determining when an arrest is valid, a law-enforcement officer's subjective intent is immaterial. The only requisite is that the law-enforcement officer, at the time the arrest is made, has probable cause to believe that a felony has been committed and that the defendant committed it.
  – *Morgan v. State*, 641 So. 2d 834, 837 (Ala. Crim. App. 1992).

- Probable cause to support a warrantless arrest must exist at the time of the arrest.
  –*Morgan v. State*, 641 So. 2d 834, 838 (Ala. Crim. App. 1992).

IV. Expectation of Privacy

- When items have been lawfully seized, a separate warrant is required to conduct a search thereof if the individual has a high expectation of privacy in the item seized.
  – *Poole v. State*, 596 So. 2d 632, 642 (Ala. Crim. App. 1992).

A. Reasonable Privacy Interests

- The concept of an interest in privacy that society is prepared to recognize as reasonable is critically different from the mere expectation.
  – *Poole v. State*, 596 So. 2d 632, 635 (Ala. Crim. App. 1992).

- The mere expectation that the possibly illegal nature of one's activities will not come to the attention of the authorities is not one that society is prepared to recognize as reasonable.
  – *Poole v. State*, 596 So. 2d 632, 635 (Ala. Crim. App. 1992).

B. Public Exposure

- What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.
  – *Poole v. State*, 596 So. 2d 632, 635 (Ala. Crim. App. 1992).

C. Commercial Premises

- The Fourth Amendment's prohibition on unreasonable searches and seizures is applicable to commercial premises, as well as to private homes.
  – *Poole v. State*, 596 So. 2d 632, 634 (Ala. Crim. App. 1992).

- An owner or operator of a business has an expectation of privacy in commercial property that society is prepared to consider reasonable; however, a business operator has a reasonable expectation of privacy only in those areas from which the public has been excluded.
  – *Poole v. State*, 596 So. 2d 632, 634 (Ala. Crim. App. 1992).

- A business operator has no reasonable expectation of privacy in areas of the store where the public is invited to enter and to transact business.
  – *Poole v. State*, 596 So. 2d 632, 635 (Ala. Crim. App. 1992).

D. Public Rest Rooms

- Even a public rest room stall does not afford complete privacy, as an occupant of the stall would reasonably expect to enjoy only such privacy as the design of the stall afforded.
  – *Poole v. State*, 596 So. 2d 632, 635 (Ala. Crim. App. 1992).

- To the extent that a defendant's activities were performed beneath a partition and could be viewed by one using the common area of the restroom, a defendant has no subjective expectation of privacy for the purposes of the Fourth Amendment, and even if he or she did, it would not be an expectation of privacy that society would recognize as reasonable.
  – *Poole v. State*, 596 So. 2d 632, 635 (Ala. Crim. App. 1992).

V. Methods of Searching

No relevant state cases reported.

VI. Types of Searches

A. Employer Searches

No relevant state cases reported.

B. Private Searches

No relevant state cases reported.

C. University-Campus Searches

No relevant state cases reported.

D. Warrantless Searches

1. Consent Searches

a. Voluntariness

- A person may consent to a search without a warrant and thereby waive any protection afforded by the U.S. Constitution to his or her right of privacy; however, consent to search must be knowingly, intelligently, and freely given.
  –*Kennedy v. State*, 640 So. 2d 22, 24 (Ala. Crim. App. 1993).

- The question whether a consent to search was in fact voluntary or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.
  –*Kennedy v. State*, 640 So. 2d 22, 24 (Ala. Crim. App. 1993).

i. Open Door

- An open door is not a waiver of one's rights.
  – *Duncan v. State*,[++] 176 So. 2d 840, 853 (Ala. 1965).

ii. Peaceful Submission

- A peaceful submission to a search or seizure is neither consent nor an invitation, but rather merely a demonstration of regard for the supremacy of the law.
  – *Duncan v. State*,[++] 176 So. 2d 840, 853 (Ala. 1965).
  –*Kennedy v. State*, 640 So. 2d 22, 24 (Ala. Crim. App. 1993).

iii. Display of Weapons

- While a display of weapons is a coercive factor that sharply reduces the likelihood of freely given consent, the determination of voluntariness requires careful examination of the unique facts and circumstances of each case.
  –*Kennedy v. State*, 640 So. 2d 22, 24 (Ala. Crim. App. 1993).

iv. Show of Force

- A show of force is a significant factor in the voluntariness equation, but it does not always vitiate consent to search.
  –*Kennedy v. State*, 640 So. 2d 22, 24 (Ala. Crim. App. 1993).

v. Lack of Incriminating Evidence

- A defendant's belief that nothing personally incriminating is to be found in the place the police want to search is a factor tending to show that a consent is voluntary.
  –*Kennedy v. State*, 640 So. 2d 22, 25 (Ala. Crim. App. 1993).

vi. Knowledge of the Right to Refuse Consent

- While knowledge of the right to refuse consent is one factor to be taken into account, the State need not establish such knowledge as the *sine qua non* of an effective consent.
  –*Kennedy v. State*, 640 So. 2d 22, 25 (Ala. Crim. App. 1993).

b. Scope of Consent

- The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness. In other words, what would the typical

reasonable person have understood by the exchange between the officer and the suspect?
–*Kennedy v. State*, 640 So. 2d 22, 24 (Ala. Crim. App. 1993).

c. Burden of Proof

- When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he or she has the burden of proving that the consent was, in fact, freely and voluntarily given.
  –*Kennedy v. State*, 640 So. 2d 22, 24 (Ala. Crim. App. 1993).

- To justify the introduction of evidence seized by a law-enforcement officer within a private residence on the ground that the officer's entry was made by invitation, permission, or consent, there must be evidence of a statement or some overt act by the occupant of such residence sufficient to indicate his or her intent to waive his or her rights to the security and privacy of his or her home and freedom from unwarranted intrusions.
  – *Duncan v. State*,[++] 176 So. 2d 840, 853 (Ala. 1965).

d. Conflict of Evidence

- If the evidence relating to a consent search is in conflict, it is the duty of the trial court to resolve any conflict in the testimony and not within the province of the court.
  –*Kennedy v. State*, 640 So. 2d 22, 24-25 (Ala. Crim. App. 1993).

e. Appellate Review

- The determination of the voluntariness of consent to search will generally not be reversed on appeal unless the judge's finding was clearly erroneous.
  –*Kennedy v. State*, 640 So. 2d 22, 24-25 (Ala. Crim. App. 1993).

2. Plain-View Searches

- Should law enforcement discover from a location open to the public the commission of criminal acts, their observation of what is in plain view involves no search, and is not subject to the strictures of the Fourth Amendment; however, plain view alone is never enough to justify the warrantless seizure of evidence.
  – *Poole v. State*, 596 So. 2d 632, 636 (Ala. Crim. App. 1992).

a. Conditions

- Four conditions must be satisfied before an object may be seized with a warrant under the plain-view exception to the warrant requirement:
  (1) the object must be in plain view;
  (2) the viewing officer cannot have violated the Fourth Amendment in arriving at the place from which the evidence is observed (*i.e.*, the observation is from a place where the officer had a right to be);
  (3) the incriminating character of the evidence must be immediately apparent; and
  (4) the officer must have a lawful right of access to the object itself.
  – *Poole v. State*, 596 So. 2d 632, 636 (Ala. Crim. App. 1992).

b. "Immediately Apparent"

- The phrase "immediately apparent" does not imply that an unduly high degree of certainty as to the incriminatory nature of the evidence is necessary for an application of the plain-view doctrine, nor does it mean that an officer must possess near certainty as to the seizable nature of the items.
  – *Poole v. State*, 596 So. 2d 632, 639 (Ala. Crim. App. 1992).

c. Probable Cause

- The character of the property must be such as to give the law-enforcement officer *probable cause* to associate the property with criminal activity.
  – *Poole v. State*, 596 So. 2d 632, 639 (Ala. Crim. App. 1992).

- Probable cause merely requires that the facts available to the officer would warrant a person of reasonable caution in the belief that certain items may be contraband or useful as evidence of a crime.
  – *Poole v. State*, 596 So. 2d 632, 639 (Ala. Crim. App. 1992).

- Probable cause does not demand any showing that such a belief is correct or more likely true than false.
  – *Poole v. State*, 596 So. 2d 632, 639 (Ala. Crim. App. 1992).

- A practical, non-technical probability that incriminating evidence is involved is all that is required.
  – *Poole v. State*, 596 So. 2d 632, 639 (Ala. Crim. App. 1992).

3. "Sensory" Searches

- When a law-enforcement officer is able to detect something by utilization of one or more of his or her senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a search within the meaning of the Fourth Amendment.
  – *Poole v. State*, 596 So. 2d 632, 636 (Ala. Crim. App. 1992).

VII. Computer-Technician/Repairperson Discoveries

No relevant state cases reported.

VIII. Photo-Development Discoveries

See generally Hall v. Van's Photo, Inc., 595 So. 2d 1368 (Ala. 1992).

IX. Criminal Forfeiture

No relevant state cases reported.

X. Disciplinary Hearings for Federal and State Officers

No relevant state cases reported.

XI. Probation and Parolee Rights

No relevant state cases reported.

ALABAMA

Jurisdiction and Nexus

I. Jurisdictional Nexus

No relevant state cases reported.

II. Internet Nexus

No relevant state cases reported.

III. State Jurisdiction, Federal Jurisdiction, Concurrent Jurisdiction

A. State

No relevant state cases reported.

B. Federal

No relevant state cases reported.

C. Concurrent

No relevant state cases reported.

IV. Interstate Possession of Child Pornography

No relevant state cases reported.

ALABAMA

Discovery and Evidence

A case with ++ indicates that although the subject matter is not child exploitation, the principle presented may still apply.

I. Timely Review of Evidence

No relevant state cases reported.

II. Defense Requests for Copies of Child Pornography

No relevant state cases reported.

III. Accusatory Instruments

- An indictment is sufficient if it contains the elements of the offense charged and fairly informs a defendant of the charge against which he or she must defend and it enables him or her to plead an acquittal or conviction in bar of future prosecutions for the same offense.
  –*Poole v. State*, 596 So. 2d 632, 643 (Ala. Crim. App. 1992).

A. How to Charge an Offense

- An indictment must state the facts constituting the offense in ordinary and concise language, without wordiness or repetition, in such a manner as to enable a person of common understanding to know what is intended and with that degree of certainty which will enable the court, on conviction, to state the proper judgment. ALA. CODE § 15-8-25.
  – *Rogers v. State*, 539 So. 2d 451, 454 (Ala. Crim. App. 1988).

- The words used in an indictment must be construed in their usual acceptation in common language, except words and phrases defined by law, which must be construed according to the legal meanings. ALA. CODE § 15-8-25.
  – *Rogers v. State*, 539 So. 2d 451, 454 (Ala. Crim. App. 1988).

- Reliance upon statutory language is acceptable only if the words of the statute themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense. If the statute omits an essential element, such as *mens rea*, then that element must be added to the pleading.
  – *Inmon v. State*, 585 So. 2d 261, 263 (Ala. Crim. App. 1991).
  – *Poole v. State*, 596 So. 2d 632, 643 (Ala. Crim. App. 1992).

B. Notice of the Time or Place of the Alleged Offense

- An indictment is not void for vagueness because it fails to state the precise time at which the offense was committed.
  – *Williams v. State*, 548 So. 2d 584, 587 (Ala. Crim. App. 1988).

- The defendant has no right to notice of the specific time or place of the alleged offense so long as it occurred within the applicable limitations period.
  – *Ex parte State*, 718 So. 2d 117, 120 (Ala. 1998).

- It is not necessary to state the precise time or date at which or on which the offense is alleged to have been committed, or the place where the offense is alleged to have been committed, unless the time or place is a material element of the offense. ALA. R. CRIM. PROC. 13.2(d).
  – *Ex parte State*, 718 So. 2d 117, 120 (Ala. 1998).
  – *Abney v. State*, 586 So. 2d 995, 997 (Ala. Crim. App. 1991).
  – *Inmon v. State*, 585 So. 2d 261, 264 (Ala. Crim. App. 1991).

C. Duplicitous Indictments

- A duplicitous indictment is when one count of an indictment charges a defendant with two or more separate offenses.
  – *Rogers v. State*, 539 So. 2d 451, 453 (Ala. Crim. App. 1988).

- Unnecessary averments in an indictment do not impair its validity, although they may hold the prosecution to the proof of them.
  – *Rogers v. State*, 539 So. 2d 451, 453 (Ala. Crim. App. 1988).

- As long as the remaining portions of the indictment validly charge a crime, the existence of surplus in the indictment will not affect the validity of a conviction.
  – *Rogers v. State*, 539 So. 2d 451, 453 (Ala. Crim. App. 1988).

IV. Chain of Custody

- A showing that there was no break in the chain of custody is required to establish a sufficient predicate for admission into evidence.
  – *Morgan v. State*, 570 So. 2d 859, 860 (Ala. Crim. App. 1990).

- The identification of the evidence and continuity of possession must be sufficiently established in order to assure the authenticity of the item.
  – *Morgan v. State*, 570 So. 2d 859, 860 (Ala. Crim. App. 1990).

A. Standards

- Alabama employs two separate standards for testing the chain of custody:
  (1) the weak-link test, and
  (2) the missing-link test.
  – *Morgan v. State*, 570 So. 2d 859, 860 (Ala. Crim. App. 1990).

1. Weak-Link Test

- Where a weak link in the chain of custody is found, the weight and credit afforded the evidence, rather than its admissibility, are questioned.
  – *Morgan v. State*, 570 So. 2d 859, 860 (Ala. Crim. App. 1990).

2. Missing-Link Test

- Where a break or a missing link in the chain of custody is shown, the admissibility of the evidence is questioned.
  – *Morgan v. State*, 570 So. 2d 859, 860 (Ala. Crim. App. 1990).

B. Specimens from the Human Body

- When specimens taken from the human body are involved, the prosecution must show that the specimen that was analyzed came from the person from whom the specimen was obtained.
  – *Morgan v. State*, 570 So. 2d 859, 861 (Ala. Crim. App. 1990).

- Where the substance analyzed has passed through several hands, the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis.
  – *Morgan v. State*, 570 So. 2d 859, 861 (Ala. Crim. App. 1990).

V. Introduction of E-mails into Evidence

A. Hearsay/Authentication Issues

No relevant state cases reported.

B. Circumstantial Evidence

No relevant state cases reported.

C. Technical Aspects of Electronic Evidence Regarding Admissibility

No relevant state cases reported.

VI. Text-Only Evidence

A. Introduction into Evidence

No relevant state cases reported.

B. Relevance

No relevant state cases reported.

VII. Evidence Obtained from Internet Service Providers

A. Electronic Communications Privacy Act

No relevant state cases reported.

B. Cable Act

No relevant state cases reported.

C. Patriot Act

1. National Trap and Trace Authority

No relevant state cases reported.

2. State-Court-Judge Jurisdictional Limits

No relevant state cases reported.

VIII. Witness Testimony

A. Incompetence

1. General Rule

- A court must, by examination, decide upon the capacity of one alleged to be incompetent. ALA. CODE § 12-21-165(b).
  – *Rogers v. State*, 539 So. 2d 451, 453 (Ala. Crim. App. 1988).

- Persons who have not the use of reason, such as idiots, lunatics during lunacy, and children who do not understand the nature of an oath, are incompetent witnesses. ALA. CODE § 12-21-165(a).
  – *Hewlett v. State*, 520 So. 2d 200, 202 (Ala. Crim. App. 1987).
  – *Price v. State*, 590 So. 2d 381, 381 (Ala. Crim. App. 1991).
  – *Rogers v. State*, 555 So. 2d 1168, 1169 (Ala. Crim. App. 1989).

2. Exception for Competent Child Witnesses

- A child victim of sexual abuse or sexual exploitation is considered a competent witness and is allowed to testify without prior qualification in any judicial proceeding. ALA. CODE § 15-25-3(c).
  – *Arnett v. State*, 551 So. 2d 1158, 1161 (Ala. Crim. App. 1989).
  – *Barger v. State*, 562 So. 2d 650, 656 (Ala. Crim. App. 1989).
  – *Ex parte McAllister*, 541 So. 2d 1104, 1106 (Ala. 1989).
  – *Hewlett v. State*, 520 So. 2d 200, 202 (Ala. Crim. App. 1987).
  – *Long v. State*, 611 So. 2d 443, 445 (Ala. Crim. App. 1992).
  – *Merton v. State*, 500 So. 2d 1301, 1306 (Ala. Crim. App. 1986).
  – *Moates v. State*, 545 So. 2d 224, 225-26 (Ala. Crim. App. 1989).
  – *Price v. State*, 590 So. 2d 381, 381 (Ala. Crim. App. 1991).
  – *Rogers v. State*, 555 So. 2d 1168, 1169 (Ala. Crim. App. 1989).
  – *Schaefer v. State*, 695 So. 2d 656, 664 (Ala. Crim. App. 1996).

- The trier of fact is permitted to determine the weight and credibility to be given to the testimony. ALA. CODE § 15-25-3(c).
  – *Arnett v. State*, 551 So. 2d 1158, 1161 (Ala. Crim. App. 1989).
  – *Barger v. State*, 562 So. 2d 650, 656 (Ala. Crim. App. 1989).
  – *Ex parte McAllister*, 541 So. 2d 1104, 1106 (Ala. 1989).
  – *Hewlett v. State*, 520 So. 2d 200, 202 (Ala. Crim. App. 1987).
  – *Long v. State*, 611 So. 2d 443, 445 (Ala. Crim. App. 1992).
  – *Merton v. State*, 500 So. 2d 1301, 1306 (Ala. Crim. App. 1986).
  – *Moates v. State*, 545 So. 2d 224, 225-26 (Ala. Crim. App. 1989).
  – *Price v. State*, 590 So. 2d 381, 381 (Ala. Crim. App. 1991).
  – *Rogers v. State*, 555 So. 2d 1168, 1169 (Ala. Crim. App. 1989).
  – *Schaefer v. State*, 695 So. 2d 656, 664 (Ala. Crim. App. 1996).

- The court may also allow leading questions of such child witnesses in the interest of justice. ALA. CODE § 15-25-3(c).
  – *Arnett v. State*, 551 So. 2d 1158, 1161 (Ala. Crim. App. 1989).
  – *Barger v. State*, 562 So. 2d 650, 656 (Ala. Crim. App. 1989).
  – *Ex parte McAllister*, 541 So. 2d 1104, 1106 (Ala. 1989).
  – *Hewlett v. State*, 520 So. 2d 200, 202 (Ala. Crim. App. 1987).
  – *Long v. State*, 611 So. 2d 443, 445 (Ala. Crim. App. 1992).
  – *Merton v. State*, 500 So. 2d 1301, 1306 (Ala. Crim. App. 1986).
  – *Moates v. State*, 545 So. 2d 224, 225-26 (Ala. Crim. App. 1989).
  – *Price v. State*, 590 So. 2d 381, 381 (Ala. Crim. App. 1991).
  – *Rogers v. State*, 555 So. 2d 1168, 1169 (Ala. Crim. App. 1989).
  – *Schaefer v. State*, 695 So. 2d 656, 664 (Ala. Crim. App. 1996).

3. Appellate Review

- In a criminal case, whether a child is qualified to take a witness oath is a matter that is lodged necessarily in the discretion of a trial court because, among other things, the trial court has the opportunity of observing the manner and appearance of the child while being examined, an opportunity the appellate court does not have.
  – *Rogers v. State*, 539 So. 2d 451, 453 (Ala. Crim. App. 1988).

B. Complaints by a Victim

1. Admissibility

- On a charge of rape, even though the victim's non-consent is not an element of the charge, the mere fact of the victim having made a complaint is admissible.
  – *Sexton v. State*, 529 So. 2d 1041, 1048 (Ala. Crim. App. 1988).

2. Who May Testify

- Complaints, when admissible, may be testified to either by the victim or by other third party witnesses.
  – *Sexton v. State*, 529 So. 2d 1041, 1048 (Ala. Crim. App. 1988).

3. Details

- The details of a complaint made by a rape victim cannot be elicited by the prosecution especially when the complaint is not made within a reasonable time after the alleged occurrence; however, where the testimony of the prosecutrix is impeached by proof of self-contradictory statements, the prosecution may prove the complaints in detail.
  – *Smith v. State*, 604 So. 2d 434, 436 (Ala. Crim. App. 1992).

C. Child Victims

1. Confrontation and Due Process

- Allowing a child victim to testify without further qualification does not deprive a defendant of a meaningful opportunity to defend against abuse charges. ALA. CODE § 491.060(2).
  – *Moates v. State*, 545 So. 2d 224, 227 (Ala. Crim. App. 1989).

- A defendant has the opportunity to cross-examine a child as to issues related to the child's maturity and ability to recollect and relate the events of which the defendant was accused.
  – *Moates v. State*, 545 So. 2d 224, 227 (Ala. Crim. App. 1989).

2. Psychological Examinations

- It is within the trial court's discretion whether to order a psychological examination of a complaining child witness.
  – *Arnett v. State*, 551 So. 2d 1158, 1161 (Ala. Crim. App. 1989).

3. Direct Examination of Child Witnesses

a. Generally

- It is generally improper for the prosecutor to sit with a witness during her testimony because of the possibility that a jury might interpret the prosecutor's action as indicating a personal belief in the credibility of the witness or the guilt of the accused.
  – *Sexton v. State*, 529 So. 2d 1041, 1044 (Ala. Crim. App. 1988).

- If, because of age, timidity, or frailty, a witness requires aid in order to testify, that aid should be rendered by someone other than the prosecuting attorney.
  – *Sexton v. State*, 529 So. 2d 1041, 1044 (Ala. Crim. App. 1988).

b. Appellate Review

- The examination of witnesses, on all trials, is for the purpose of eliciting the truth. In attaining this end, a very large discretion must be allowed the presiding judge.
  – *Sexton v. State*, 529 So. 2d 1041, 1045 (Ala. Crim. App. 1988).

- The trial court is vested with discretion in the conduct of a trial, and appellate courts will not interfere unless it clearly appears that there has been an abuse of discretion.
  – *Sexton v. State*, 529 So. 2d 1041, 1045 (Ala. Crim. App. 1988).

- If the age of the witness does not exceed eight years, discretion will not be reviewed unless there are fair reasons to believe that the witness has been led into error.
  – *Sexton v. State*, 529 So. 2d 1041, 1045 (Ala. Crim. App. 1988).

4. Videotaped Testimony

- In any criminal prosecution for a physical offense or a sexual offense wherein the alleged victim is a child under the age of 16 years and in any criminal prosecution involving the sexual exploitation of a child under the age of 16, the court may, upon motion of the district attorney, for good cause shown and after notice to the defendant, order

the taking of a videotaped deposition of an alleged victim of or witness to said crime who is under the age of 16 at the time of such order.
– *Brasher v. State*, 555 So. 2d 184, 188 (Ala. Crim. App. 1988).
– *Strickland v. State*, 550 So. 2d 1042, 1046 (Ala. Crim. App. 1988).

a. Factors to Consider

- On any motion for a videotaped deposition of the victim or a witness, the court shall consider the:
  (1) age and maturity of the child;
  (2) nature of the offense;
  (3) nature of the testimony that may be expected; and
  (4) possible effect that such testimony in person at trial may have on the victim or witness, along with any other relevant matters that may be required by supreme court rule.
  – *Brasher v. State*, 555 So. 2d 184, 188 (Ala. Crim. App. 1988).
  – *Strickland v. State*, 550 So. 2d 1042, 1046 (Ala. Crim. App. 1988).

b. Right to Confrontation

- The right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process; however, its denial or significant diminution calls into question the ultimate integrity of the fact-finding process and requires that the competing interest be closely examined.
  – *Strickland v. State*, 550 So. 2d 1042, 1048 (Ala. Crim. App. 1988).

- The right of confrontation must occasionally give way to considerations of public policy and the necessities of the case. Even though the confrontation clause reflects a preference for face-to-face confrontation at trial, competing interests, if closely examined, may warrant dispensing with confrontation at trial.
  – *Strickland v. State*, 550 So. 2d 1042, 1047 (Ala. Crim. App. 1988).

D. The Defense

1. The Defendant As a Witness

- If a defendant's testimony is credible, his or her testimony should prevail over the unspecific assertions of the young accuser.
  – *Ex parte State*, 718 So. 2d 117, 121 (Ala. 1998).

- In some cases, the very non-specificity of a child victim's testimony, especially if uncorroborated, may offer defense counsel fertile field for challenging the child's credibility.
  – *Ex parte State*, 718 So. 2d 117, 121 (Ala. 1998).

2. Opportunity to Defend

- Generic child molestation charges do not deprive a defendant of a reasonable opportunity to defend because the defendant has the option of taking the witness stand and directly denying any wrongdoing.
  – *Ex parte State*, 718 So. 2d 117, 121 (Ala. 1998).

- In addition to the defendant's direct testimony, his or her cross-examination of the child and supporting witnesses, and the availability of the cautionary instruction that states, in part, that in evaluating the testimony of a child a court should consider all of the factors surrounding the child's testimony, including the age of the child and any evidence regarding the child's level of cognitive development, the defendant may be permitted to introduce expert character evidence, based on standardized tests and personal interviews, to the effect that his or her personality profile does not include a capacity for deviant behavior against children.
  – *Ex parte State*, 718 So. 2d 117, 121 (Ala. 1998).

E. Expert Testimony

- The opinions of experts on any question of science, skill, trade, or like questions are always admissible and such opinions may be given on the facts as proved by other witnesses. ALA. CODE § 12-21-160.
  – *Rothchild v. State*, 558 So. 2d 981, 986 (Ala. Crim. App. 1989).
  – *W.S. v. T.W.*, 585 So. 2d 26, 27 (Ala. 1991).

- The necessity for expert testimony increases if there are certain inferences made by the defense (*i.e.*, the implication that the child's delay in reporting the abuse indicates fabrication) or certain unusual behavior of the child witness that should not be allowed to go unrebutted when there exists a recognized phenomenon that may explain it.
  – *Sexton v. State*, 529 So. 2d 1041, 1049 (Ala. Crim. App. 1988).

- The trier of fact determines the weight and credibility to be attributed to an expert's opinion.
  – *D.J.I. v. W.M.I.*, 660 So. 2d 1333, 1334 (Ala. Civ. App. 1995).

1. Establishing the Proper Predicate

a. Burden

- The party seeking to introduce the expert testimony must lay the proper predicate.
  – *W.S. v. T.W.*, 585 So. 2d 26, 27 (Ala. 1991).

b. Three-Step Process

- First, the expert testimony must be beyond the ken of the average juror. When expert testimony would enable the lay juror to appropriately draw conclusions from evidence that would be beyond the juror's normal experience, the testimony will be admissible.
  – *W.S. v. T.W.*, 585 So. 2d 26, 27-28 (Ala. 1991).

- Second, the person testifying must be qualified as an expert. The competency and qualifications of a person offered as an expert witness are largely left to the trial court's discretion.
  – *W.S. v. T.W.*, 585 So. 2d 26, 27-28 (Ala. 1991).

- Third, the expert witness must base his or her opinion upon either:
  (1) facts of which the witness has firsthand knowledge, or
  (2) facts that are assumed in a hypothetical question asked of the expert.
  – *W.S. v. T.W.*, 585 So. 2d 26, 27-28 (Ala. 1991).

2. Hypothetical Questions

a. Facts Already in Evidence

- If a hypothetical question is asked of an expert to elicit his or her opinion, the question must be based upon facts in evidence. Consequently, the expert witness is normally brought to the stand after all the facts have been introduced upon which the attorney wishes to base the hypothetical question.
  – *Ex parte McAllister*, 541 So. 2d 1104, 1107 (Ala. 1989).

- When asking a hypothetical question, it is very important for the party examining the expert to assume that the facts already introduced into evidence are true, and not call upon the expert witness to decide if they are true.
  – *Ex parte McAllister*, 541 So. 2d 1104, 1107 (Ala. 1989).

b. Facts Not Yet in Evidence

- A party may ask the expert witness a hypothetical question based upon some facts that have not yet been placed in evidence if the party asking the question promises to introduce the facts at a later point in the trial.
  – *Ex parte McAllister*, 541 So. 2d 1104, 1107 (Ala. 1989).

- If a party is allowed to proceed with such questioning and fails to later introduce such facts, then the trial court's action in

striking the opinion of the expert witness will be upheld on appeal.
– *Ex parte McAllister*, 541 So. 2d 1104, 1107 (Ala. 1989).

- When asking a hypothetical question, it is very important for the party examining the expert to assume that the facts to be introduced later are true, and not call upon the expert witness to decide if they are true.
  – *Ex parte McAllister*, 541 So. 2d 1104, 1107 (Ala. 1989).

3. Opinion Testimony

a. Ultimate Issue

- It is a general principle of evidence that a witness may not testify to the ultimate issue in the case; however, a properly qualified expert may state his or her opinion as to the nature, cause, and effect of a wound or injury, and the manner or means by which the injury could have been inflicted.
  – *Bell v. State*, 435 So. 2d 772, 775 (Ala. Crim. App. 1983).

- An expert may state what kind of weapon or instrument could have caused a particular wound, but not whether that weapon actually did.
  – *Bell v. State*, 435 So. 2d 772, 775 (Ala. Crim. App. 1983).

b. Conclusion

- Although the practice of asking an expert to give his or her opinion as to the entire case is frowned upon, admissibility of an expert's conclusion depends on the nature of the issues and the circumstances of the case, and involves a large element of judicial discretion.
  – *Bell v. State*, 435 So. 2d 772, 776 (Ala. Crim. App. 1983).

4. Physician Testimony

- Physicians, when testifying in a judicial proceeding, are commonly considered experts in the areas for which they are trained.
  – *Rothchild v. State*, 558 So. 2d 981, 986 (Ala. Crim. App. 1989).

- When a treating physician states what could have happened, the extent of his or her knowledge goes to the weight of the testimony and not to the admissibility.
  – *Rothchild v. State*, 558 So. 2d 981, 986 (Ala. Crim. App. 1989).

5. Emotional, Psychiatric, and Psychological Evidence

a. Emotional Effects of Sexual Abuse

- Sexual abuse of a child is a subject where expert testimony would be proper.
  – *W.S. v. T.W.*, 585 So. 2d 26, 28 (Ala. 1991).

- The Alabama Supreme Court has determined that expert testimony should be allowed to explain the emotional effects of sexual abuse upon an adolescent so that the triers of fact may appropriately draw conclusions from the testimony.
  – *W.S. v. T.W.*, 585 So. 2d 26, 28 (Ala. 1991).

b. Psychiatric and Psychological Aspects of Child Abuse

- Expert testimony as to the factors likely to affect whether or not a child who has claimed to be sexually abused is telling the truth can assist the jury in understanding the evidence introduced in child sexual assault cases because the average juror is not likely to be familiar with the physiological symptoms of sexual abuse, the presence or absence of which would lead an expert to credit or discredit a report of abuse.
  – *Inmon v. State*, 585 So. 2d 261, 266-67 (Ala. Crim. App. 1991).

- The trial court has discretion to determine whether, based on a psychiatrist's experience in adolescent psychiatry working with sexually abused children, that psychiatrist has become familiar with the patterns and symptoms of a child who has been sexually abused and whether that psychiatrist's testimony can enlighten the jury in an area beyond the average lay person's knowledge and assist it in arriving at the truth.
  – *Inmon v. State*, 585 So. 2d 261, 267 (Ala. Crim. App. 1991).

6. The Defendant's Use of Expert Testimony

- In a molestation case, a defendant may introduce expert testimony refuting or contradicting any physical evidence of molestation.
  – *Ex parte State*, 718 So. 2d 117, 122 (Ala. 1998).

7. Appellate Review

- Even though expert testimony is always admissible, the question of whether a particular witness will be allowed to testify and the scope of that expert testimony are largely discretionary with the trial court and that decision will not be disturbed on appeal without a showing of clear abuse.
  – *W.S. v. T.W.*, 585 So. 2d 26, 27 (Ala. 1991).

F. Hearsay

1. "Hearsay" Defined

- "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ALA. R. EVID. 801(c).
  – *T.D.T. v. State*, 745 So. 2d 885, 894 (Ala. Crim. App. 1998).

2. Non-Hearsay

- Testimony offered for a purpose other than to prove the truth of the matter asserted is not hearsay. ALA. R. EVID. 801(c).
  – *T.D.T. v. State*, 745 So. 2d 885, 894 (Ala. Crim. App. 1998).

- A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is:
  (1) inconsistent with the declarant's testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or
  (2) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.
  – *T.D.T. v. State*, 745 So. 2d 885, 895 (Ala. Crim. App. 1998).

3. Hearsay Exceptions

a. Child's Statement of Sexual Abuse

i. Generally

- An out-of-court statement made by a child under 12 years of age at the time of the proceeding concerning an act that is a material element of any crime involving a child physical offense, sexual offense, or exploitation, is admissible in evidence in criminal proceedings if certain requirements are met. ALA. CODE § 15-25-31.
  – *T.D.T. v. State*, 745 So. 2d 885, 893 (Ala. Crim. App. 1998).

- Before an out-of-court statement made by a child under 12 years of age concerning an act that is a material element of any crime involving child abuse may be admissible in a criminal proceeding, the proponent of the statement must inform the adverse party of the opponent's intention to offer the statement and the content of the statement sufficiently in advance of the

proceeding to provide the defendant with a fair opportunity to prepare a response to the statement from the proceeding at which it is offered. ALA. CODE § 15-25-35.
– *Long v. State*, 611 So. 2d 443, 444 (Ala. Crim. App. 1992).

ii. Child Sexual Abuse Victim Protection Act

(a) Generally

- An out-of-court statement of a child may be admitted pursuant to the Child Sexual Abuse Victim Protection Act if the child testifies at the proceeding and is subject to cross-examination about the out-of-court statement. ALA. CODE § 15-25-32(1).
  – *Mosely v. State*, 644 So. 2d 1299, 1301 (Ala. Crim. App. 1994).

(b) Notice Requirement

- The proponent of a child's out-of-court statement must inform the adverse party of the opponent's intention to use the statement and the content of the statement sufficiently in advance of the proceeding to provide the defendant with a fair opportunity to prepare a response to the statement.
  – *Mosely v. State*, 644 So. 2d 1299, 1301 (Ala. Crim. App. 1994).

b. Hospital Records

- If a hospital record of a physician's diagnosis of a patient in the hospital is shown to have been made in conformity with the Business Records Act, then such record is admissible even though the diagnosis is an opinion because, if the physician is a witness, testimony by him or her as to the diagnosis is admissible as an expert opinion.
  – *Carroll v. State*, 370 So. 2d 749, 758 (Ala. Crim. App. 1979).

- Once a hospital record is shown to have been made in conformity with the Business Records Act and the proper predicate is laid that the records are kept in the regular course of business, the diagnosis of a defendant by a doctor who does not testify at trial, but which is contained in the records, is competent and admissible evidence.
  – *Carroll v. State*, 370 So. 2d 749, 758 (Ala. Crim. App. 1979).

c. Victim's Complaint

- A victim's complaint that he or she has been sexually abused is a firmly-rooted exception to the hearsay rule.
  – *Inmon v. State*, 585 So. 2d 261, 265 (Ala. Crim. App. 1991).

i. General Rule

- The general rule is that testimony regarding a prosecutrix's complaint must be confined to the mere showing that a complaint was made and details of the occurrence are not admissible.
  – *Inmon v. State*, 585 So. 2d 261, 265 (Ala. Crim. App. 1991).

- The details of the victim's complaint include the identification of the person accused.
  – *Inmon v. State*, 585 So. 2d 261, 265-66 (Ala. Crim. App. 1991).

ii. Exception

- The general rule is subject to the exception that if the victim has been subjected to cross-examination calculated to reflect upon his or her credibility as a witness, the details of the complaint are admissible for the purpose of corroborating the victim's testimony on direct examination.
  – *Inmon v. State*, 585 So. 2d 261, 265-66 (Ala. Crim. App. 1991).

4. Restrictions on Admissible Hearsay: Confrontation Clause

- A general approach is to be used to determine when incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause to the U.S. Constitution.
  – *Inmon v. State*, 585 So. 2d 261, 265 (Ala. Crim. App. 1991).

- The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, the Sixth Amendment establishes a rule of necessity. In the usual case, the prosecution must either produce or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant. Second, once a witness is shown to be unavailable, his or her statement is admissible only if it bears adequate indicia of reliability.
  – *Inmon v. State*, 585 So. 2d 261, 265 (Ala. Crim. App. 1991).

- Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be

excluded, at least absent a showing of particularized guarantees of trustworthiness.
– *Inmon v. State*, 585 So. 2d 261, 265 (Ala. Crim. App. 1991).

IX. Prior Acts

A. Good

- Specific good acts are not admissible to show that an accused's conduct conformed to such good acts at the time of a criminal offense.
  – *Abney v. State*, 586 So. 2d 995, 998 (Ala. Crim. App. 1991).

B. Bad

- The State has no absolute right to use evidence of prior acts to prove the elements of an offense or to reinforce inferences created by other evidence. The admission of such evidence constitutes reversible error.
  – *Ex parte Cofer*, 440 So. 2d 1121, 1124 (Ala. 1983).

1. Inadmissible

- Generally, prior criminal acts may not be introduced for the sole purpose of suggesting that the accused is more likely to be guilty of the crime in question.
  – *Ex parte Cofer*, 440 So. 2d 1121, 1123 (Ala. 1983).

- At the trial of a person for the alleged commission of a particular crime, evidence of his or her doing another act, which itself is a crime, is not admissible if the only probative value is to show his or her bad character, inclination, or propensity to commit the type of crime for which he or she is being tried.
  – *Gillespie v. State*, 549 So. 2d 640, 645 (Ala. Crim. App. 1989).
  – *Whiddon v. State*, 299 So. 2d 326, 331 (Ala. Crim App. 1973).

2. Admissible

- The State may prove the accused's commission of another crime if such other crime is relevant for any purpose other than his or her guilt because of bad character.
  – *Whiddon v. State*, 299 So. 2d 326, 331 (Ala. Crim App. 1973).

a. "Other Purposes"

i. Generally

- Any offered "other-purpose" exceptions to the general exclusionary rule must be a material issue.
  – *Ex parte State*, 538 So. 2d 1226, 1232-33 (Ala. 1988).

- The "other purpose" must be a material element of the crime charged about which there is a real and open issue or the other purpose must be rendered material by virtue of other circumstances or evidence present in the case.
  – *Ex parte State*, 538 So. 2d 1226, 1232-33 (Ala. 1988).

ii. Collateral Sexual Misconduct

- The same factors for determining the admissibility of collateral acts of misconduct by the accused in other types of prosecutions are to be applied in determining the admissibility of collateral acts of sexual misconduct in the prosecution of sex crimes; therefore, provided the test for materiality is met, evidence of collateral crimes or misconduct may be admitted.
  – *Ex parte State*, 538 So. 2d 1226, 1232-33 (Ala. 1988).

- Provided a proper showing of materiality is made, evidence of collateral sexual misconduct is admissible to prove a material other purpose; however, if subsequent sexual acts are too remotely related to the act upon which the prosecution is based, in point of time, to be without probative force, such evidence should not be admitted.
  – *Ex parte State*, 538 So. 2d 1226, 1234 (Ala. 1988).

- The admissibility of sexual occurrences before and after the one charged in the indictment is based upon conditions of relevancy, or whether they are probative of the main charge.
  – *Ex parte State*, 538 So. 2d 1226, 1234-35 (Ala. 1988).

- When the third party against whom a defendant is claimed to have committed a collateral sexual offense is the defendant's child, that collateral offense evidence is more relevant in proving the material other purposes for which it is offered in a sex crime prosecution than is evidence of other third party offenses. This of course depends upon the:
  (1) offense charged;
  (2) circumstances surrounding the offense charged and the collateral offense;
  (3) other collateral evidence offered at trial; and
  (4) other purposes for which it is offered.
  Consequently, the analysis must be case-by-case.

– *Ex parte State*, 538 So. 2d 1226, 1237-38 (Ala. 1988).
– *Ex parte State*, 646 So. 2d 676, 678 (Ala. 1994).

b. Identity of the Perpetrator

i. Generally Admissible

- One of the primary exceptions for allowing evidence of prior and subsequent crimes is when such other crimes go to show the identity of the perpetrator of the now-charged offense.
  – *Ex parte State*, 538 So. 2d 1226, 1231 (Ala. 1988).
  – *Stegall v. State*, 628 So. 2d 1009, 1012 (Ala. Crim. App. 1993).
  – *Watson v. State*, 538 So. 2d 1216, 1221 (Ala. Crim. App. 1987).

- The identity exception allows evidence of uniquely similar prior crimes of which the defendant has been convicted to provide circumstantial evidence that the defendant, in fact, committed the crime being prosecuted. In other words, where the *modus operandi* of the crime at trial is characteristically similar to that used by the defendant on prior occasions, evidence of the prior crimes may be used to connect the defendant to the crime at issue.
  – *Ex parte State*, 538 So. 2d 1226, 1234 (Ala. 1988).

- The identity exception has traditionally been applied only when the person who committed the now-charged crime did so in a novel or peculiar manner because it should permit the prosecution to show that the accused committed other similar offenses in the same novel or peculiar manner.
  – *Ex parte State*, 538 So. 2d 1226, 1231 (Ala. 1988).
  – *Stegall v. State*, 628 So. 2d 1009, 1012 (Ala. Crim. App. 1993).
  – *Watson v. State*, 538 So. 2d 1216, 1221 (Ala. Crim. App. 1987).

ii. Inadmissible

- Evidence of collateral acts committed by the accused with third persons cannot be admitted under the pretext that it is relevant to the question of identity when the evidence does nothing more than show the accused's inclination or disposition to commit that type of crime or to show his or her sexual depravity.
  – *Ex parte State*, 538 So. 2d 1226, 1231 (Ala. 1988).

iii. Sex Crimes

- The identity exception seems to have taken on a more liberal definition when the defendant is charged with a sex crime, such as rape.
  – *Ex parte State*, 538 So. 2d 1226, 1231 (Ala. 1988).
  – *Watson v. State*, 538 So. 2d 1216, 1221 (Ala. Crim. App. 1987).

- In sex-crime cases, the courts seem to allow proof of other similar crimes by the accused if they, in any way, go to identify him or her as the person who committed the now-charged crime.
  – *Ex parte State*, 538 So. 2d 1226, 1231 (Ala. 1988).
  – *Watson v. State*, 538 So. 2d 1216, 1221 (Ala. Crim. App. 1987).

- Where there is a real and open issue as to a rapist's identity, the trial court does not err in admitting evidence of the defendant's prior rapes.
  – *Ex parte State*, 538 So. 2d 1226, 1234 (Ala. 1988).

c. Intent

- Other-crimes evidence is admissible to show criminal intent because the unintentional doing of an act is abnormal and unusual and the more a person does other acts similar to the act in question, the greater likelihood that the act in question was not done inadvertently; therefore, in certain crimes the State may prove the accused's doing of similar acts as tending to show that in doing the now-charged act, he or she had the requisite intent for the now-charged crime.
  – *Whiddon v. State*, 299 So. 2d 326, 331 (Ala. Crim. App. 1973).

d. Motive

- Testimony offered for the purpose of showing motive is always admissible in every criminal case to show that there is an influence or an inducement operating on the accused that may lead or tempt him or her to commit the offense.
  – *Ex parte State*, 538 So. 2d 1226, 1235 (Ala. 1988).
  – *Ex parte State*, 646 So. 2d 676, 679 (Ala. 1994).

i. Defined

- "Motive" is defined as an inducement, or that which leads or tempts the mind to do or commit the crime charged.
  – *Ex parte State*, 538 So. 2d 1226, 1235 (Ala. 1988).
  – *Ex parte State*, 646 So. 2d 676, 679 (Ala. 1994).

- Motive is also described as that state of mind that works to supply the reason, nudges the will, and prods the mind to indulge the criminal intent.
  – *Ex parte State*, 538 So. 2d 1226, 1235 (Ala. 1988).
  – *Ex parte State*, 646 So. 2d 676, 679 (Ala. 1994).

ii. Evidence of Sexual Misconduct Against the Current Victim

- Evidence of collateral acts of sexual misconduct committed against a prosecutrix by the accused is admissible for a variety of "other purposes," one of which is the accused's motive, often termed the accused's sexual passion for the victim.
  – *Ex parte State*, 538 So. 2d 1226, 1234 (Ala. 1988).
  – *Watson v. State*, 538 So. 2d 1216, 1222 (Ala. Crim. App. 1987).

- Evidence establishing that a defendant committed acts of sexual abuse toward the victim prior to or subsequent to the offense for which he or she is charged is admissible to prove his or her motive in committing the charged offense.
  – *Inmon v. State*, 585 So. 2d 261, 264-265 (Ala. Crim. App. 1991).

- It is permissible for the State to offer evidence of such acts occurring before and after the alleged act on which the indictment is based as tending to sustain the principal charge by showing the relation and intimacy of the parties.
  – *Ex parte State*, 538 So. 2d 1226, 1234-35 (Ala. 1988).
  – *Inmon v. State*, 585 So. 2d 261, 264-265 (Ala. Crim. App. 1991).
  – *Watson v. State*, 538 So. 2d 1216, 1222 (Ala. Crim. App. 1987).

e. Common Scheme or Plan

- The common-scheme or plan exception to the rule excluding collateral crimes evidence comes into play only when there is a real question as to the identity of the perpetrator.
  – *Kennedy v. State*, 640 So. 2d 22, 30 (Ala. Crim. App. 1993).

f. Evidence of the Defendant's Sexual Activity With Persons Other than the Victim

- A number of decisions have approved the introduction of evidence of the defendant's sexual activity with persons other than the victim in carnal knowledge, rape, and incest cases.
  – *Ex parte State*, 538 So. 2d 1226, 1231 (Ala. 1988).
  – *Watson v. State*, 538 So. 2d 1216, 1220 (Ala. Crim. App. 1987).

g. Passion or Propensity for Unusual and Abnormal Sexual Relations

- Prior acts may be admissible to show the accused's passion or propensity for unusual and abnormal sexual relations, at least in offenses involving sexual aberrations.
  – *Ex parte State*, 538 So. 2d 1226, 1232 (Ala. 1988).
  – *Watson v. State*, 538 So. 2d 1216, 1221 (Ala. Crim. App. 1987).

h. Evidence Introduced by the Defendant

- In a molestation case, a defendant may introduce evidence outlining the victim's past fabrications and offering innocent explanations for the victim's apparent knowledge of or familiarity with sexual behavior generally or the defendant's physical characteristics in particular.
  – *Ex parte State*, 718 So. 2d 117, 122 (Ala. 1998).

X. Evidence of Pregnancy

- Evidence of the prosecutrix's pregnancy, which allegedly results from the charged crime, is material and relevant as tending to prove the *corpus delicti*, for the proof tends to place cause and effect in proper point of time.
  –*Watson v. State*, 538 So. 2d 1216, 1220 (Ala. Crim. App. 1987).

XI. Character Evidence

A. General Reputation Testimony

- When a witness is produced to testify to another's general reputation in a particular community, it is a prerequisite to such testimony that the witness must be either a member of the community or have had a reasonably close connection with the community.
  – *Schaefer v. State*, 695 So. 2d 656, 664 (Ala. Crim. App.1996).

- A witness to character, whether on direct or cross-examination, is confined to a statement of general reputation in the community.
  – *Sexton v. State*, 529 So. 2d 1041, 1051 (Ala. Crim. App. 1988).

B. Misdeeds Inadmissible

- Evidence of particular acts is inadmissible.
  – *Sexton v. State*, 529 So. 2d 1041, 1051 (Ala. Crim. App. 1988).

- Generally, on cross-examination of a defendant's character witness, who has testified to the accused's good reputation, the prosecution may not elicit

personal knowledge of the witness concerning specific misdeeds of the defendant.
– *Sexton v. State*, 529 So. 2d 1041, 1051 (Ala. Crim. App. 1988).

C. Negative Evidence

- Negative evidence in support of good character is admissible and its refusal is error.
  – *Williams v. State*, 548 So. 2d 584, 586 (Ala. Crim. App. 1988).

XII. Real and Demonstrative Evidence

A. Photographic Evidence

1. Admissibility

- As with evidence generally, a photograph will only be admissible if it is relevant to some proposition of fact material to the transaction or occurrence under litigation.
  – *Kennedy v. State*, 640 So. 2d 22, 27 (Ala. Crim. App. 1993).

- Photographic evidence has been readily held admissible if it has a reasonable tendency to prove or disprove some material fact in issue.
  – *Updyke v. State*, 501 So. 2d 566, 567 (Ala. Crim. App. 1986).

a. Gruesome Photographs

- Gruesome, ghastly, and unsightly photographs are admissible in criminal prosecutions if they tend to illustrate the truth of other testimony.
  – *Updyke v. State*, 501 So. 2d 566, 567 (Ala. Crim. App. 1986).

b. Inflammatory Photographs

- Photographic evidence, if relevant, is admissible even if it has a tendency to inflame the minds of the jurors.
  – *Kennedy v. State*, 640 So. 2d 22, 27 (Ala. Crim. App. 1993).

c. Photographs of the Victim

- The basic question to be asked in deciding the admissibility of a photograph of a victim, just as with any other demonstrative evidence, is whether it has a reasonable tendency to prove or disprove some material fact in issue.
  – *Kennedy v. State*, 640 So. 2d 22, 27 (Ala. Crim. App. 1993).

d. Proof of Motive

- Photographs may be admissible to prove motive.
  – *Kennedy v. State*, 640 So. 2d 22, 27 (Ala. Crim. App. 1993).

2. Necessity for "Creation of Obscene Materials" Convictions

- To require the state to produce the photographs to obtain a "creation of obscene materials" conviction would add an element to the proscribed offense because the statutory language is directed against the creation of obscene materials, not the possession of those materials.
  – *Cole v. State*, 721 So. 2d 255, 258 (Ala. Crim. App. 1998).

3. Appellate Review

- The decision to allow photographic evidence is within the sound discretion of the trial court, and will be reviewed only to determine whether there has been an abuse of discretion.
  – *Updyke v. State*, 501 So. 2d 566, 567 (Ala. Crim. App. 1986).

B. Sound Recordings: Seven-Part Test for Admissibility

- The Alabama Court of Criminal Appeals has established a seven-part test for the admissibility of sound recordings. This test requires a showing as to:
  (1) technical information as to the operation of the recording device;
  (2) the expertise of the operator;
  (3) the accuracy of the recording;
  (4) the absence of changes, additions, or deletions;
  (5) the manner of preservation;
  (6) the identity of the persons speaking on the recording; and
  (7) the involuntariness of the statement made in the recording.
  – *Ex parte Weddington*, 843 So. 2d 750, 756 (Ala. 2002).

C. Proper Foundation

- The Alabama Supreme Court recognizes two distinct theories with respect to determining whether a proper foundation has been laid for the admissibility of photographs and electronic recordings.
  – *Ex parte Weddington*, 843 So. 2d 750, 756 (Ala. 2002).

1. Pictorial-Communication/Pictorial-Testimony Theory

- Under the pictorial-communication/pictorial-testimony theory, a person who was present at the time the recording was made can authenticate the recording by stating that it is consistent with his or her recollection.
  – *Ex parte Weddington*, 843 So. 2d 750, 756 (Ala. 2002).

2. Silent-Witness Theory

- The silent-witness theory comes into play when there is no qualified and competent witness who can testify that the sound recording or other medium accurately and reliably represents what he or she sensed at the time in question.
  – *Ex parte Weddington*, 843 So. 2d 750, 756 (Ala. 2002).

- Under the silent-witness theory, a foundation is laid by offering evidence as to the validity of the process or mechanism based upon the seven-part test for the admissibility of sound recordings.
  – *Ex parte Weddington*, 843 So. 2d 750, 756 (Ala. 2002).

D. Chain of Custody

- As long as satisfactory evidence of the integrity of a film or videotape is presented, stringent foundational requirements, such as proof of the continuous chain of custody, are now almost universally rejected as unnecessary.
  – *Ex parte Weddington*, 843 So. 2d 750, 757 (Ala. 2002).

XIII. Privilege Against Self-Incrimination

- The self-incrimination clause of the Fifth Amendment, that no person shall be compelled in any criminal case to be a witness against him- or herself, extends to witnesses and parties in civil actions, regardless of whether a criminal charge has been filed.
  – *Ex parte L.S.B.*, 800 So. 2d 574, 579 (Ala. 2001).

- A party's mere assertion of the privilege is not determinative because a trial court must determine whether the privilege applies under the circumstances of the case.
  – *Ex parte L.S.B.*, 800 So. 2d 574, 579 (Ala. 2001).

- To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.
  – *Ex parte L.S.B.*, 800 So. 2d 574, 579 (Ala. 2001).

- The trial judge, in appraising the claim, must be governed as much by his or her personal perception of the peculiarities of the case as by the facts actually in evidence.
  – *Ex parte L.S.B.*, 800 So. 2d 574, 579 (Ala. 2001).

ALABAMA
Age of Child Victim

I. Proving the Age of the Child Depicted

No relevant state cases reported; however, the "proof of age of person depicted" statute can be found at ALA. CODE § 13A-12-193.

II. The Defendant's Knowledge of the Age of the Child Depicted

A. Distributors or Receivers of Child Pornography

- Knowledge of age must be proven in a case against a distributor or receiver of sexually explicit materials.
  – *Sherman v. State*, 778 So. 2d 859, 861 (Ala. Crim. App. 2000).

- A distributor or receiver lacks opportunity to question an underage performer and, therefore, is in a position different from a producer, who confronts the victim personally and may be reasonably required to ascertain the victim's age.
  – *Sherman v. State*, 778 So. 2d 859, 861 (Ala. Crim. App. 2000).

B. Circumstantial Evidence

- Knowledge usually is established by circumstantial evidence.
  – *Sherman v. State*, 778 So. 2d 859, 861 (Ala. Crim. App. 2000).

C. Question of Fact for the Jury

- Whether the defendant had the requisite knowledge is a question of fact for the jury.
  – *Sherman v. State*, 778 So. 2d 859, 861 (Ala. Crim. App. 2000).

ALABAMA
Multiple Counts

A case with ++ indicates that although the subject matter is not child exploitation, the principle presented may still apply.

I. What Constitutes an Item of Child Pornography?

- The possession of any obscene matter, even if the possession is of multiple pieces of obscene matter, is simultaneous and inseparable, more like the simultaneous, single act of transportation or importation of multiple pieces of obscene matter than the separate transactions involved in the distribution of multiple pieces of obscene matter; therefore, the unit of prosecution is the simultaneous possession of a collection of obscene material.
  – *Girard v. State,* 883 So. 2d 717 (Ala. Crim. App. 2002).

II. Multiplicity

A. Defined

- "Multiplicity" is the charging of a single offense in more than one count.
  – *King v. State*,[++] 674 So. 2d 1381, 1383 (Ala. Crim. App. 1995).

- This is not an instance where the same act or transaction constitutes a violation of two distinct statutory provisions. Rather, it is a case where each successive act has been charged as a separate crime under the same statute.
  – *King v. State*,[++] 674 So. 2d 1381, 1383 (Ala. Crim. App. 1995).

B. Prosecutorial Discretion

- Whether incidents are to be charged separately or brought as one charge is a decision within prosecutorial discretion.
  – *Ex parte State*, 718 So. 2d 117, 122 (Ala. 1998).

III. Joinder

A. Test to Determine Joinder of Offenses

- Two or more offenses may be joined in an indictment, information, or complaint, if they are:
  (1) of the same or similar character;

(2) based on the same conduct or are otherwise connected in their commission; or
(3) alleged to have been part of a common scheme or plan.
– *Kennedy v. State*, 640 So. 2d 22, 28 (Ala. Crim. App. 1993).

B. Same or Connected Acts or Transactions

- When the State joins offenses based on the same acts, transactions, or connected acts or transactions, the prosecution is spared the burden of proving the same set of facts more than once.
  – *Kennedy v. State*, 640 So. 2d 22, 29 (Ala. Crim. App. 1993).

C. Same Type of Offense

- There is no comparable saving of trial time when offenses that are related only by being of the same type are joined, since the offenses are usually proven by different bodies of evidence; therefore, when totally unrelated but similar offenses are joined, the defendant faces a considerable risk of prejudice.
  – *Kennedy v. State*, 640 So. 2d 22, 29 (Ala. Crim. App. 1993).

IV. Issue of Double Jeopardy

A. Generally

- The Double Jeopardy clause of the Fifth Amendment protects an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.
  – *Ex parte L.S.B.*, 800 So. 2d 574, 579 (Ala. 2001).

- A single crime cannot be divided into two or more offenses and thereby subject the perpetrator to multiple convictions for the same offense.
  – *Girard v. State*, 883 So. 2d 717 (Ala. Crim. App. 2002).

B. Inconsistent Verdicts

1. State Recourse

- The State has no recourse if it wishes to correct a jury's error in rendering inconsistent verdicts.
  – *Pettway v. State*,[++] 648 So. 2d 647, 649 (Ala. Crim. App. 1994).

- The State is precluded from appealing or otherwise upsetting such an acquittal by the Double Jeopardy Clause.
  – *Pettway v. State*,[++] 648 So. 2d 647, 649 (Ala. Crim. App. 1994).

2. Attack by the Defendant

- A defendant convicted by a jury on one count cannot attack the conviction on the ground that it is inconsistent with the jury's verdict of acquittal on another count.
  – *Pettway v. State*,[++] 648 So. 2d 647, 649 (Ala. Crim. App. 1994).

V. Strict-Election Rule (a.k.a. "Either/Or Rule")

- Alabama follows a "strict-election rule," by which the State must elect the offense on which it will proceed when the evidence discloses two or more offenses growing out of distinct and separate transactions. If the State chooses not to elect the specific act, the trial court must instruct the jury that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, thereby assuring a unanimous verdict on one criminal act.
  – *Ex parte State*, 718 So. 2d 117, 118-19, 122 (Ala. 1998).

- Where the evidence of more than one incident of sexual molestation to a child victim by a resident child molester is purely generic and where there is no reasonable likelihood of juror disagreement as to particular acts, and the only question for the jury is whether or not the defendant committed all of the incidents, the trial court should instruct the jury that it can find the defendant guilty only if it unanimously agrees that he or she committed all the incidents described by the victim.
  – *Ex parte R.L.G.*, 712 So. 2d 372, 372-73 (Ala. 1998).
  – *Ex parte State*, 718 So. 2d 117, 118-19 (Ala. 1998).

ALABAMA
Defenses

I. Age of the Accused

- The age of the accused is a defense to first-degree sodomy and first-degree rape.
  – *Merton v. State*, 500 So. 2d 1301, 1307 (Ala. Crim. App. 1986).

II. Alibi: Resident-Child-Molester Cases

- If the defendant has lived with the victim for an extensive, uninterrupted period and, therefore, had continuous access to the victim, alibi will most likely not be an available defense.
  – *Ex parte State*, 718 So. 2d 117, 121 (Ala. 1998).

- The fact that the defendant has established an alibi covering some of the time periods alleged in the information could significantly undermine the victim's testimony as to the remaining counts; however, an alibi defense would be unavailing to a resident abuser given that he or she would have lived with the victim for an extensive, uninterrupted period, day and night, and also given that certain of the illicit sexual conduct would have taken but moments to perform, and thus, the similarity and repetition of the acts would make it difficult, if not impossible, for an adult, let alone a child, to pinpoint the specific circumstances of each act.
  – *Ex parte State*, 718 So. 2d 117, 121-22 (Ala. 1998).

III. Consent

A. Assent

- Assent does not constitute consent if it is given by a person whose consent is sought to be prevented by the law defining the offense. ALA. CODE § 13A-2-7(c)(3).
  – *Glover v. State*, 518 So. 2d 247, 248 (Ala. Crim. App. 1987).

B. Sexual Abuse

- A person is deemed incapable of consent if he or she is less than 16 years old and the offense charged is sexual abuse.
  – *Glover v. State*, 518 So. 2d 247, 248 (Ala. Crim. App. 1987).

IV. Diminished Capacity

A. Addiction to the Internet

No relevant state cases reported.

B. Insanity

- The defense of insanity is an affirmative defense.
  – *Glover v. State*, 518 So. 2d 247, 248 (Ala. Crim. App. 1987).

- The burden of proving this defense rests upon the defendant and never shifts to the State.
  – *Glover v. State*, 518 So. 2d 247, 248 (Ala. Crim. App. 1987).

V. First Amendment

No relevant state cases reported.

VI. Impossibility

A. Factual

No relevant state cases reported.

B. Legal

No relevant state cases reported.

VII. Manufacturing Jurisdiction

No relevant state cases reported.

VIII. Mistake

A. Of Fact: The Victim's Age

- In order to establish reasonable mistake of age, the defendant must show, by clear and convincing evidence, that he or she did not know, and could not reasonably have learned the victim's age.
  – *Sherman v. State*, 778 So. 2d 859, 861 (Ala. Crim. App. 2000).

B. Of Law

No relevant state cases reported.

IX. Outrageous Conduct

No relevant state cases reported.

X. Researcher

No relevant state cases reported.

XI. Sexual Orientation

No relevant state cases reported.

XII. Statute of Limitations

A. Limitation Period for Assault and Battery Torts

- An action alleging assault and battery must be brought within six years after the accrual of the cause of action.
  – *Travis v. Ziter*, 681 So. 2d 1348, 1351 (Ala. 1996).

B. Dismissal Based on the Statute of Limitations

- A dismissal based on the statute of limitations is proper only if, from the face of the complaint, it is apparent that the tolling provisions do not apply.
  – *Travis v. Ziter*, 681 So. 2d 1348, 1351 (Ala. 1996).

C. Tolling

1. Insanity

- The disability of insanity allows a plaintiff to file at any time up until three years after the termination of the disability that existed when the cause of action accrued.
  – *Travis v. Ziter*, 681 So. 2d 1348, 1351 (Ala. 1996).

2. Repressed Memories

- There is no extension of the statutory limitations period for actions based on alleged repressed memories. ALA. CODE § 6-2-8.
  – *Travis v. Ziter*, 681 So. 2d 1348, 1355 (Ala. 1996).

XIII. Wrongful Identification: Resident-Child-Molester Cases

- If the defendant has lived with the victim for an extensive, uninterrupted period and, therefore, had continuous access to the victim, wrongful identification will most likely not be an available defense.
  – *Ex parte State*, 718 So. 2d 117, 121 (Ala. 1998).

ALABAMA

Sentencing Issues

I. Presentence Reports: Psychological and Medical History

- A defendant's medical and psychological history, if available, may be made a part of a presentence report. ALA. R. CRIM. PROC. 26.3(b)(6).
  – *Schaefer v. State*, 695 So. 2d 656, 660 (Ala. Crim. App. 1996).

II. Enhancement

A. Age of Victim

No relevant state cases reported.

B. Distribution/Intent to Traffic

No relevant state cases reported.

C. Number of Images

No relevant state cases reported.

D. Pattern of Activity for Sexual Exploitation

No relevant state cases reported.

E. Sadistic, Masochistic, or Violent Material

No relevant state cases reported.

F. Use of Computers

No relevant state cases reported.

ALABAMA

Supervised Release

No relevant state cases reported.