The Colorado 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 Colorado State Manual. This manual is an update and refinement of the 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. 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 were it not for the support of NCMEC's Legal Staff and L.J. Decker, NLC Law Clerk (3L Georgetown University Law Center), Christien Oliver, NLC Law Clerk (JD George Washington School of Law 2008), Tara Steinnerd. NLC Law Clerk (3L Catholic University School of Law), Michael Bare (Valparaiso University School of Law), Amanda Rekow (University of Idaho College of Law), Leigh Darrell (University of Baltimore School of Law), Aeri Yum (University of Hawaii Richardson School of Law), Aimee Conway (Suffolk University Law School), Jennifer Allen (University of Hawaii Richardson School of Law), Judith Harris (University of Hawaii Richardson School of Law), Lianne Aoki (University of Hawaii Richardson School of Law), Jeffrey Van Der Veer (University of Colorado School of Law), and Kelly Higa (University of Hawaii Richardson School of Law).

The Editors,

National Law Center for Children and Families
June 2008

COLORADO

Topic Outline

I. OFFENSES DEFINED

A. Child Abuse and Neglect

B. Child Pornography (a.k.a. "Sexual Exploitation of a Child")

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F. Sexual Assault

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Case List by Court

A case with + indicates a memorandum decision that does not create legal precedent.

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

I. United States Supreme Court

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

II. Supreme Court of Colorado

- *Adrian v. People*, 770 P.2d 1243 (Colo. 1989)
- *Briones v. Juv. Ct.*, 534 P.2d 624 (Colo. 1975)
- *Ferguson v. People*, 824 P.2d 803 (Colo. 1992)
- *In re J.A.*, 733 P.2d 1197 (Colo. 1987)
- *Kogan v. People*, 756 P.2d 945 (Colo. 1988)
- *Martin v. People*, 27 P.3d 846 (Colo. 2001)
- *People v. Allen*, 973 P.2d 620 (Colo. 1999)
- *People v. Batchelor*, 800 P.2d 599 (Colo. 1990)
- *People v. Chard*, 808 P.2d 351 (Colo. 1991)
- *People v. Corbett*, 656 P.2d 687 (Colo. 1983)
- *People v. Dist. Ct.*, 585 P.2d 913 (Colo. 1978)
- *People v. Dist. Ct.*, 785 P.2d 141 (Colo. 1990)
- *People v. Enea*, 665 P.2d 1026 (Colo. 1983)
- *People v. Gritchen*, 908 P.2d 70 (Colo. 1995)
- *People v. Kaiser*, 32 P.3d 480 (Colo. 2001)
- *People v. Kyler*, 991 P.2d 810 (Colo. 1999)
- *People v. Patrick*, 772 P.2d 98 (Colo. 1989)
- *People v. San Emerterio,*[++] 839 P.2d 1161 (Colo. 1992)
- *People v. Sisneros*, 55 P.3d 797 (Colo. 2002)
- *People v. Sprouse*, 983 P.2d 771 (Colo. 1999)
- *People v. Trujillo*, 938 P.2d 117 (Colo. 1997)
- *People v. West*, 724 P.2d 623 (Colo. 1986)
- *People v. Young*, 694 P.2d 841 (Colo. 1985)
- *Warren v. People*, 213 P.2d 381 (Colo. 1949)
- *Watso v. Dep't of Social Servs.*, 841 P.2d 299 (Colo. 1992)
- *Woertman v. People*, 804 P.2d 188 (Colo. 1991)

III. Colorado Court of Appeals

- *McPeck v. Dep't of Social Servs.*, 919 P.2d 942 (Colo. Ct. App. 1996)
- *People v. Aldrich*, 849 P.2d 821 (Colo. Ct. App. 1992)
- *People v. Arapahoe County Ct.*, 74 P.3d 429 (Colo. Ct. App. 2003)
- *People v. Atencio*, 780 P.2d 46 (Colo. Ct. App. 1989)
- *People v. Bachofer*, 85 P.3d 615 (Colo. Ct. App. 2003)
- *People v. Bath*, 890 P.2d 269 (Colo. Ct. App. 1994)
- *People v. Bowman*, 812 P.2d 725 (Colo. Ct. App. 1991)
- *People v. Campbell*, 94 P.3d 1186 (Colo. Ct. App. 2004)
- *People v. Dalton*, 70 P.3d 517 (Colo. Ct. App. 2002)
- *People v. Elsbach*, 934 P.2d 877 (Colo. Ct. App. 1997)
- *People v. Esch*, 786 P.2d 462 (Colo. Ct. App. 1989)
- *People v. Gagnon*, 997 P.2d 1278 (Colo. Ct. App. 1999)
- *People v. Gholston*, 26 P.3d 1 (Colo. Ct. App. 2000)
- *People v. Grady*, 126 P.3d 218 (Colo. Ct. App. 2005)
- *People v. Hamer*,[++] 689 P.2d 1147 (Colo. Ct. App. 1984)
- *People v. Haynie*, 826 P.2d 371 (Colo. Ct. App. 1991)
- *People v. Honeysette*, 53 P.3d 714 (Colo. Ct. App. 2002)
- *People v. Jacobs*, 91 P.3d 438 (Colo. Ct. App. 2003)
- *People v. Lenzini*, 986 P.2d 980 (Colo. Ct. App. 1999)
- *People v. Martinez*, 83 P.3d 1174 (Colo. Ct. App. 2003)
- *People v. Martinez*, 165 P.3d 907 (Colo. Ct. App. 2007)
- *People v. McKibben*, 862 P.2d 991 (Colo. Ct. App. 1993)
- *People v. Meidinger*, 987 P.2d 937 (Colo. Ct. App. 1999)
- *People v. Oglethorpe*, 87 P.3d 129 (Colo. Ct. App. 2003)
- *People v. Raehal*, 971 P.2d 256 (Colo. Ct. App. 1998)
- *People v. Renander*, 151 P.3d 657 (Colo. Ct. App. 2006)
- *People v. Salazar*, 920 P.2d 893 (Colo. Ct. App. 1996)
- *People v. Shepard*, 98 P.3d 905 (Colo. Ct. App. 2004)
- *People v. Slusher*, 844 P.2d 1222 (Colo. Ct. App. 1992)
- *People v. St. James*, 75 P.3d 1122 (Colo. Ct. App. 2002)
- *People v. Stead*, 66 P.3d 117 (Colo. Ct. App. 2002)
- *People v. Valdez*, 874 P.2d 415 (Colo. Ct. App. 1993)
- *People v. Vinson*, 42 P.3d 86 (Colo. Ct. App. 2002)
- *Sailsbery v. Parks*, 983 P.2d 137 (Colo. Ct. App. 1999)
- *Sandoval v. Archdiocese of Denver*, 8 P.3d 598 (Colo. Ct. App. 2000)
- *Swentkowski v. Dawson*, 881 P.2d 437 (Colo. Ct. App. 1994)

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Topic Outline with Cases

A case with + indicates a memorandum decision that does not create legal precedent.

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I. OFFENSES DEFINED

A. Child Abuse and Neglect

- *Watso v. Dep't of Social Servs.*, 841 P.2d 299 (Colo. 1992)
- *People v. Corbett*, 656 P.2d 687 (Colo. 1983)

B. Child Pornography (a.k.a. "Sexual Exploitation of a Child")

1. Offenses

a. Causing, Inducing, Enticing, Permitting Explicit Sexual Conduct

- *People v. Enea*, 665 P.2d 1026 (Colo. 1983)
- *People v. St. James*, 75 P.3d 1122 (Colo. Ct. App. 2002)
- *People v. Gagnon*, 997 P.2d 1278 (Colo. Ct. App. 1999)
- *People v. Bath*, 890 P.2d 269 (Colo. Ct. App. 1994)

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i. Elements

- *People v. Campbell*, 94 P.3d 1186 (Colo. Ct. App. 2004)
- *People v. St. James*, 75 P.3d 1122 (Colo. Ct. App. 2002)

ii. Undeveloped Film

- *People v. St. James*, 75 P.3d 1122 (Colo. Ct. App. 2002)

c. Possessing or Controlling Sexually Exploitative Material

- *People v. Arapahoe County Ct.*, 74 P.3d 429 (Colo. Ct. App. 2003)

d. Procuring a Child for Sexual Exploitation

- *People v. Esch*, 786 P.2d 462 (Colo. Ct. App. 1989)

e. Producing Sexually Exploitative Material

- *People v. Batchelor*, 800 P.2d 599 (Colo. 1990)
- *People v. Enea*, 665 P.2d 1026 (Colo. 1983)
- *People v. Arapahoe County Ct.*, 74 P.3d 429 (Colo. Ct. App. 2003)
- *People v. Bath*, 890 P.2d 269 (Colo. Ct. App. 1994)
- *People v. Esch*, 786 P.2d 462 (Colo. Ct. App. 1989)

f. Virtual/Simulated Child Pornography

No relevant state cases reported.

g. Internet Sexual Exploitation of a Child

2. Definitions

a. "Child"

- *People v. Campbell*, 94 P.3d 1186 (Colo. Ct. App. 2004)
- *People v. Bath*, 890 P.2d 269 (Colo. Ct. App. 1994)

b. Sexually Exploitative Material

- *People v. Batchelor*, 800 P.2d 599 (Colo. 1990)
- *People v. St. James*, 75 P.3d 1122 (Colo. Ct. App. 2002)
- *People v. Gagnon*, 997 P.2d 1278 (Colo. Ct. App. 1999)

c. Explicit Sexual Conduct

- *People v. Batchelor*, 800 P.2d 599 (Colo. 1990)
- *People v. Gagnon*, 997 P.2d 1278 (Colo. Ct. App. 1999)

d. Erotic Nudity

- *People v. Batchelor*, 800 P.2d 599 (Colo. 1990)
- *People v. Grady*, 126 P.3d 218 (Colo. Ct. App. 2005)
- *People v. Gagnon*, 997 P.2d 1278 (Colo. Ct. App. 1999)

3. Scienter

- *People v. Batchelor*, 800 P.2d 599 (Colo. 1990)
- *People v. Bath*, 890 P.2d 269 (Colo. Ct. App. 1994)

C. Child Prostitution

1. Inducement of Child Prostitution

a. Elements

- *People v. Young*, 694 P.2d 841 (Colo. 1985)

b. Definitions

i. "Prostitution By a Child"

- *People v. Young*, 694 P.2d 841 (Colo. 1985)

ii. "Masturbation"

- *People v. Young*, 694 P.2d 841 (Colo. 1985)

2. Soliciting for Child Prostitution

- *People v. Gritchen*, 908 P.2d 70 (Colo. 1995)
- *People v. Jacobs*, 91 P.3d 438 (Colo. Ct. App. 2003)

3. Transporting a Minor for the Purposes of Prostitution

No relevant state cases reported.

D. Kidnapping

1. First Degree

a. Elements

- *People v. San Emerterio*,[++] 839 P.2d 1161 (Colo. 1992)

b. Concessions

i. Generally

- *People v. San Emerterio*,[++] 839 P.2d 1161 (Colo. 1992)

ii. Submission to Sexual Assault

- *People v. San Emerterio*,[++] 839 P.2d 1161 (Colo. 1992)

2. Second Degree: Kidnapping Involving Sexual Assault

- *People v. Haynie*, 826 P.2d 371 (Colo. Ct. App. 1991)

E. Online Enticement/Solicitation for Travel with the Intent to Engage in Sex with a Minor

1. Internet Luring of a Child

F. Sexual Assault

1. Sexual Assault on a Child

a. Elements

- *People v. Kyler*, 991 P.2d 810 (Colo. 1999)
- *Kogan v. People*, 756 P.2d 945 (Colo. 1988)
- *In re J.A.*, 733 P.2d 1197 (Colo. 1987)
- *People v. West*, 724 P.2d 623 (Colo. 1986)
- *People v. Honeysette*, 53 P.3d 714 (Colo. Ct. App. 2002)
- *People v. Gholston*, 26 P.3d 1 (Colo. Ct. App. 2000)
- *People v. Salazar*, 920 P.2d 893 (Colo. Ct. App. 1996)
- *People v. Valdez*, 874 P.2d 415 (Colo. Ct. App. 1993)

b. Mental State

- *Swentkowski v. Dawson*, 881 P.2d 437 (Colo. Ct. App. 1994)

c. Definitions

i. "Intimate Parts"

- *People v. Vinson*, 42 P.3d 86 (Colo. Ct. App. 2002)

ii. "Sexual Contact"

- *Kogan v. People*, 756 P.2d 945 (Colo. 1988)
- *In re J.A.*, 733 P.2d 1197 (Colo. 1987)
- *People v. West*, 724 P.2d 623 (Colo. 1986)
- *People v. Vinson*, 42 P.3d 86 (Colo. Ct. App. 2002)

iii. "Touch"

- *People v. Vinson*, 42 P.3d 86 (Colo. Ct. App. 2002)

d. Pattern of Sexual Abuse

i. "Pattern of Sexual Abuse" Defined

- *People v. Honeysette*, 53 P.3d 714 (Colo. Ct. App. 2002)
- *People v. Gholston*, 26 P.3d 1 (Colo. Ct. App. 2000)

ii. Proof of a Pattern of Sexual Abuse

- *People v. Honeysette*, 53 P.3d 714 (Colo. Ct. App. 2002)
- *People v. Valdez*, 874 P.2d 415 (Colo. Ct. App. 1993)

iii. Date or Time for a Pattern of Sexual Abuse

- *People v. Honeysette*, 53 P.3d 714 (Colo. Ct. App. 2002)
- *People v. Gholston*, 26 P.3d 1 (Colo. Ct. App. 2000)

iv. Classes of Felony

- *People v. Gholston*, 26 P.3d 1 (Colo. Ct. App. 2000)
- *People v. Valdez*, 874 P.2d 415 (Colo. Ct. App. 1993)

2. Sexual Assault on a Child by One in a Position of Trust

a. Elements

- *People v. Kyler*, 991 P.2d 810 (Colo. 1999)
- *People v. Honeysette*, 53 P.3d 714 (Colo. Ct. App. 2002)
- *People v. Valdez*, 874 P.2d 415 (Colo. Ct. App. 1993)

b. Proof

- *People v. Valdez*, 874 P.2d 415 (Colo. Ct. App. 1993)

c. Classes of Felony

- *People v. Valdez*, 874 P.2d 415 (Colo. Ct. App. 1993)

d. Sexual Assault on Child as Part of Pattern of Sexual Abuse Versus Sexual Assault on Child by One in Position of Trust

- *People v. Valdez*, 874 P.2d 415 (Colo. Ct. App. 1993)

3. Sexual Assault on a Client by a Psychotherapist

a. Elements

- *Ferguson v. People*, 824 P.2d 803 (Colo. 1992)

b. Mental State

- *Ferguson v. People*, 824 P.2d 803 (Colo. 1992)

c. Definitions

i. "Sexual Penetration" Defined

- *Ferguson v. People*, 824 P.2d 803 (Colo. 1992)

ii. "Sexual Contact"

- *Ferguson v. People*, 824 P.2d 803 (Colo. 1992)

II. SEARCH AND SEIZURE OF ELECTRONIC EVIDENCE

A. Search Warrants

1. Probable Cause

a. Standard

- *People v. Campbell*, 94 P.3d 1186 (Colo. Ct. App. 2004)
- *People v. Bachofer*, 85 P.3d 615 (Colo. Ct. App. 2003)
- *People v. Slusher*, 844 P.2d 1222 (Colo. Ct. App. 1992)

b. Totality of the Circumstances

- *People v. Bachofer*, 85 P.3d 615 (Colo. Ct. App. 2003)

c. Affidavits

i. Vague Allegations

- *People v. Bachofer*, 85 P.3d 615 (Colo. Ct. App. 2003)

ii. False Information: The Defendant's Burden

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

d. Appellate Review

- *People v. Slusher*, 844 P.2d 1222 (Colo. Ct. App. 1992)

2. Scope of the Search Warrant: Particularity Requirement

a. Items to Be Seized

i. Generally

- *People v. Slusher*, 844 P.2d 1222 (Colo. Ct. App. 1992)

ii. Protected Materials

- *People v. Slusher*, 844 P.2d 1222 (Colo. Ct. App. 1992)

b. Degree of Specificity

- *People v. Slusher*, 844 P.2d 1222 (Colo. Ct. App. 1992)

c. Necessary Particularity in an Affidavit

- *People v. Slusher*, 844 P.2d 1222 (Colo. Ct. App. 1992)

d. Overbreadth of a Warrant

- *People v. Slusher*, 844 P.2d 1222 (Colo. Ct. App. 1992)

3. Good Faith

- *People v. Bachofer*, 85 P.3d 615 (Colo. Ct. App. 2003)

4. Staleness

- *People v. Hamer*,[++] 689 P.2d 1147 (Colo. Ct. App. 1984)

B. Anticipatory Warrants

No relevant state cases reported.

C. Types of Searches

1. Warrantless Searches

a. Consent Searches

i. Generally

- *People v. Bachofer*, 85 P.3d 615 (Colo. Ct. App. 2003)

ii. Third-Party Consent

- *People v. Bachofer*, 85 P.3d 615 (Colo. Ct. App. 2003)

b. Plain-View Searches

i. Generally

- *People v. Campbell*, 94 P.3d 1186 (Colo. Ct. App. 2004)

ii. Immediately Apparent Requirement

- *People v. Campbell*, 94 P.3d 1186 (Colo. Ct. App. 2004)

2. Civilian Searches

No relevant state cases reported.

3. Employer Searches

No relevant state cases reported.

4. University-Campus Searches

No relevant state cases reported.

D. Unreasonable Government Searches

- *People v. Atencio*, 780 P.2d 46 (Colo. Ct. App. 1989)

E. Computer-Technician/Repairperson Discoveries

No relevant state cases reported.

F. Photo-Development Discoveries

No relevant state cases reported.

G. Interrogation

1. Custodial Interrogation

a. "Custodial Interrogation" Defined

- *People v. Trujillo*, 938 P.2d 117 (Colo. 1997)

b. When Is Person in Custody?

i. Generally

- *People v. Trujillo*, 938 P.2d 117 (Colo. 1997)

ii. Reasonable-Person Standard

(a) Objective Standard

- *People v. Trujillo*, 938 P.2d 117 (Colo. 1997)

(b) Factors to Consider

- *People v. Trujillo*, 938 P.2d 117 (Colo. 1997)

(c) Interrogation at a Stationhouse

- *People v. Trujillo*, 938 P.2d 117 (Colo. 1997)

2. Witness Tampering

- *People v. Trujillo*, 938 P.2d 117 (Colo. 1997)

3. Waiver of Miranda Rights

a. Two-Part Inquiry

- *People v. Kaiser*, 32 P.3d 480 (Colo. 2001)

i. Voluntariness

- *People v. Trujillo*, 938 P.2d 117 (Colo. 1997)
- *People v. Bowman*, 812 P.2d 725 (Colo. Ct. App. 1991)

(a) Burden

- *People v. Trujillo*, 938 P.2d 117 (Colo. 1997)

(b) Factors to Consider

- *People v. Trujillo*, 938 P.2d 117 (Colo. 1997)

ii. Knowing and Intelligent

(a) Decision to Talk to Law Enforcement

- *People v. Kaiser*, 32 P.3d 480 (Colo. 2001)

(b) Diminished Mental Capacity

- *People v. Kaiser*, 32 P.3d 480 (Colo. 2001)

(c) Burden of Proof

- *People v. Kaiser*, 32 P.3d 480 (Colo. 2001)

b. Totality of the Circumstances

- *People v. Kaiser*, 32 P.3d 480 (Colo. 2001)

i. Factors to Consider

- *People v. Kaiser*, 32 P.3d 480 (Colo. 2001)

4. Mental-Health Professionals

- *People v. Bowman*, 812 P.2d 725 (Colo. Ct. App. 1991)

H. Criminal Forfeiture

No relevant state cases reported.

I. Disciplinary Hearings for Federal and State Officers

No relevant state cases reported.

J. Probation and Parolee Rights

No relevant state cases reported.

III. JURISDICTION AND NEXUS

A. Jurisdictional Nexus

No relevant state cases reported.

B. Internet Nexus

No relevant state cases reported.

C. State Jurisdiction, Federal Jurisdiction, and Concurrent Jurisdiction

1. State Jurisdiction

a. Generally

- *People v. Jacobs*, 91 P.3d 438 (Colo. Ct. App. 2003)

b. Omission to Perform Duty

- *People v. Haynie*, 826 P.2d 371 (Colo. Ct. App. 1991)

2. Federal Jurisdiction

No relevant state cases reported.

3. Concurrent Jurisdiction

No relevant state cases reported.

D. Juvenile Proceedings

1. Delinquency Proceedings

a. Intentional Acts of Child

- *Swentkowski v. Dawson*, 881 P.2d 437 (Colo. Ct. App. 1994)

b. Constitutional Protections

- *Swentkowski v. Dawson*, 881 P.2d 437 (Colo. Ct. App. 1994)

2. Transfer Hearing

- *Briones v. Juv. Ct.*, 534 P.2d 624 (Colo. 1975)

a. Mental Illness

- *Briones v. Juv. Ct.*, 534 P.2d 624 (Colo. 1975)

b. Judicial Discretion

- *People v. Dist. Ct.*, 585 P.2d 913 (Colo. 1978)

3. Trial As an Adult

- *People v. Dalton*, 70 P.3d 517 (Colo. Ct. App. 2002)

E. Interstate Possession of Child Pornography

No relevant state cases reported.

IV. DISCOVERY AND EVIDENCE

A. Timely Review of Evidence

No relevant state cases reported.

B. Accusatory Instruments

1. Crimes Occurring in Single Transaction

- *People v. Jacobs*, 91 P.3d 438 (Colo. Ct. App. 2003)

2. Multiplicity

- *Woertman v. People*, 804 P.2d 188 (Colo. 1991)
- *Kogan v. People*, 756 P.2d 945 (Colo. 1988)

3. Specificity of Time

- *Woertman v. People*, 804 P.2d 188 (Colo. 1991)

C. Discovery by the Defendant

1. Defense Requests for Copies of Child Pornography: Duplication of Photographs

- *People v. Arapahoe County Ct.*, 74 P.3d 429 (Colo. Ct. App. 2003)

2. Requests for Examinations of a Victim

a. Involuntary Psychological Examinations

i. Generally

- *People v. Chard*, 808 P.2d 351 (Colo. 1991)

ii. Compelling Reason or Need Test

- *People v. Chard*, 808 P.2d 351 (Colo. 1991)

b. Compelled Physical Examinations

- *People v. Chard*, 808 P.2d 351 (Colo. 1991)

i. Split of Authority

- *People v. Chard*, 808 P.2d 351 (Colo. 1991)

iii. Discretionary Power

(a) Substantial Need and Justification

- *People v. Chard*, 808 P.2d 351 (Colo. 1991)

(b) Factors to Consider

- *People v. Chard*, 808 P.2d 351 (Colo. 1991)

D. Introduction of E-mails into Evidence

1. Hearsay/Authentication Issues

No relevant state cases reported.

2. Circumstantial Evidence

- *People v. Martinez*, 165 P.3d 907 (Colo. Ct. App. 2007)

3. Technical Aspects of Electronic Evidence Regarding Admissibility

No relevant state cases reported.

E. Introduction of Text-Only Evidence

No relevant state cases reported.

F. 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

No relevant state cases reported.

G. Prior Acts, Crimes, and Wrongs

1. Inadmissible

- *Adrian v. People*, 770 P.2d 1243 (Colo. 1989)

2. Admissible

a. Relevance

- *People v. McKibben*, 862 P.2d 991 (Colo. Ct. App. 1993)

b. Evidence Surrounding the Crime

- *People v. Esch*, 786 P.2d 462 (Colo. Ct. App. 1989)

c. Similar Acts/Transaction Evidence

i. Relevance

- *Adrian v. People*, 770 P.2d 1243 (Colo. 1989)

ii. Judicial Discretion

- *Adrian v. People*, 770 P.2d 1243 (Colo. 1989)

iii. Factors to Consider

(a) Remoteness

- *Adrian v. People*, 770 P.2d 1243 (Colo. 1989)

(b) Other Factors

- *Adrian v. People*, 770 P.2d 1243 (Colo. 1989)

d. Common Plan, Scheme, Design, Identity, *Modus Operandi*, Motive, Guilty Knowledge, or Intent

i. Generally

- *Adrian v. People*, 770 P.2d 1243 (Colo. 1989)
- *People v. McKibben*, 862 P.2d 991 (Colo. Ct. App. 1993)

ii. Jury Instructions

- *Woertman v. People*, 804 P.2d 188 (Colo. 1991)

H. Rape-Shield Statute

- *People v. Gholston*, 26 P.3d 1 (Colo. Ct. App. 2000)
- *People v. Aldrich*, 849 P.2d 821 (Colo. Ct. App. 1992)

1. Preliminary Judicial Determination

- *People v. Aldrich*, 849 P.2d 821 (Colo. Ct. App. 1992)

2. Right to Confrontation

- *People v. Gholston*, 26 P.3d 1 (Colo. Ct. App. 2000)

I. Witnesses and Testimony

1. Competency of Child Witnesses

a. Incompetence

- *People v. Aldrich*, 849 P.2d 821 (Colo. Ct. App. 1992)

b. Appellate Review

- *People v. Aldrich*, 849 P.2d 821 (Colo. Ct. App. 1992)

2. Leading Questions

a. Permissible

- *People v. Raehal*, 971 P.2d 256 (Colo. Ct. App. 1998)

b. Cases Involving Sexual Assault of a Minor

- *Warren v. People*, 213 P.2d 381 (Colo. 1949)

3. Hearsay

a. What Is <u>Not</u> Hearsay?

i. Recent Fabrication or Improper Influence or Motive

- *People v. Salazar*, 920 P.2d 893 (Colo. Ct. App. 1996)

ii. Impeachment or Establishment of Substantive Fact

- *People v. Aldrich*, 849 P.2d 821 (Colo. Ct. App. 1992)

b. Hearsay Exceptions

i. Admissions by a Co-Conspirator

- *People v. Esch*, 786 P.2d 462 (Colo. Ct. App. 1989)

(a) Burden

- *People v. Esch*, 786 P.2d 462 (Colo. Ct. App. 1989)

(b) Consideration by the Trial Court

- *People v. Esch*, 786 P.2d 462 (Colo. Ct. App. 1989)

iii. Child's Statement of Sexual Abuse

- *People v. Patrick*, 772 P.2d 98 (Colo. 1989)
- *McPeck v. Dep't of Social Servs.*, 919 P.2d 942 (Colo. Ct. App. 1996)
- *People v. Haynie*, 826 P.2d 371 (Colo. Ct. App. 1991)

(a) "Corroborative Evidence" Defined

- *McPeck v. Dep't of Social Servs.*, 919 P.2d 942 (Colo. Ct. App. 1996)

(b) Weight and Credit of Statement

- *McPeck v. Dep't of Social Servs.*, 919 P.2d 942 (Colo. Ct. App. 1996)

(c) Reliability

- *McPeck v. Dep't of Social Servs.*, 919 P.2d 942 (Colo. Ct. App. 1996)

(d) Unavailability

- *People v. Haynie*, 826 P.2d 371 (Colo. Ct. App. 1991)

(e) Cautionary Instruction

- *People v. Aldrich*, 849 P.2d 821 (Colo. Ct. App. 1992)

c. Former Testimony of an Unavailable Declarant

- *People v. Patrick*, 772 P.2d 98 (Colo. 1989)

d. *Res Gestae* Evidence

i. "*Res Gestae*" Defined

- *Woertman v. People*, 804 P.2d 188 (Colo. 1991)

ii. Excited Utterance

- *People v. Martinez*, 83 P.3d 1174 (Colo. Ct. App. 2003)

(a) Requirements for Admissibility

- *People v. Martinez*, 83 P.3d 1174 (Colo. Ct. App. 2003)

(b) Unavailability

- *People v. Martinez*, 83 P.3d 1174 (Colo. Ct. App. 2003)

(c) Confrontation Clause

- *People v. Martinez*, 83 P.3d 1174 (Colo. Ct. App. 2003)

(d) Court Discretion

- *People v. Martinez*, 83 P.3d 1174 (Colo. Ct. App. 2003)

J. Scientific Evidence: Polygraphs

- *People v. Dist. Ct.*, 785 P.2d 141 (Colo. 1990)

K. Scienter Evidence

- *People v. Salazar*, 920 P.2d 893 (Colo. Ct. App. 1996)

L. Privileges

- *People v. Corbett*, 656 P.2d 687 (Colo. 1983)

1. Marital Privilege

a. Consent of Parties

- *People v. Corbett*, 656 P.2d 687 (Colo. 1983)

b. When Is Privilege Not Applicable?

- *People v. Corbett*, 656 P.2d 687 (Colo. 1983)

2. Psychotherapist-Patient Privilege

- *People v. Sisneros*, 55 P.3d 797 (Colo. 2002)
- *Ferguson v. People*, 824 P.2d 803 (Colo. 1992)
- *People v. Bowman*, 812 P.2d 725 (Colo. Ct. App. 1991)

a. Attachment of Privilege

- *People v. Sisneros*, 55 P.3d 797 (Colo. 2002)

b. Waiver of Privilege: Consent

- *People v. Sisneros*, 55 P.3d 797 (Colo. 2002)

i. Determination of Waiver

- *People v. Sisneros*, 55 P.3d 797 (Colo. 2002)

ii. Burden of Proof

- *People v. Sisneros*, 55 P.3d 797 (Colo. 2002)

V. AGE OF CHILD VICTIM

A. Proving the Age of the Child Victim

No relevant state cases reported.

B. The Defendant's Knowledge of the Age of the Child: Ignorance and Mistake of Law

- *People v. Bath*, 890 P.2d 269 (Colo. Ct. App. 1994)

VI. MULTIPLE COUNTS

A. What Constitutes an Item of Child Pornography?

- *People v. Renander*, 151 P.3d 657 (Colo. Ct. App. 2006)

B. Joinder of Multiple Offenses

- *People v. Dalton*, 70 P.3d 517 (Colo. Ct. App. 2002)

1. Series of Acts Arising from the Same Criminal Episode

- *People v. Dalton*, 70 P.3d 517 (Colo. Ct. App. 2002)

2. Sex Offenses and Similar Crimes: Jury Instructions

- *Woertman v. People*, 804 P.2d 188 (Colo. 1991)

C. Merger: Prosecution of Multiple Counts for Same Act

- *People v. Valdez*, 874 P.2d 415 (Colo. Ct. App. 1993)

D. Issues of Double Jeopardy

- *People v. Renander*, 151 P.3d 657 (Colo. Ct. App. 2006)
- *People v. Shepard*, 98 P.3d 905 (Colo. Ct. App. 2004)

1. Dual-Sovereignty Doctrine

- *People v. Esch*, 786 P.2d 462 (Colo. Ct. App. 1989)

2. Lesser-Included Offenses

a. *Blockburger* Test

- *People v. Gholston*, 26 P.3d 1 (Colo. Ct. App. 2000)

b. Multiple Punishments

- *People v. Gholston*, 26 P.3d 1 (Colo. Ct. App. 2000)

c. Double Jeopardy Versus Merger

- *People v. Gholston*, 26 P.3d 1 (Colo. Ct. App. 2000)

3. Penalty Enhancer

- *People v. Gholston*, 26 P.3d 1 (Colo. Ct. App. 2000)

4. Guilty Pleas

- *People v. Shepard*, 98 P.3d 905 (Colo. Ct. App. 2004)

VII. DEFENSES

A. Abandonment and Renunciation

1. Attempt and Solicitation

- *People v. Jacobs*, 91 P.3d 438 (Colo. Ct. App. 2003)

2. Soliciting for Child Prostitution

- *People v. Jacobs*, 91 P.3d 438 (Colo. Ct. App. 2003)

B. Alibi

- *Woertman v. People*, 804 P.2d 188 (Colo. 1991)

C. Consent

1. "Consent" Defined

- *People v. McKibben*, 862 P.2d 991 (Colo. Ct. App. 1993)

2. Informed Consent

- *People v. Campbell*, 94 P.3d 1186 (Colo. Ct. App. 2004)

3. Assent

- *Ferguson v. People*, 824 P.2d 803 (Colo. 1992)

4. Submission

- *People v. McKibben*, 862 P.2d 991 (Colo. Ct. App. 1993)

5. Specific Offenses

a. Kidnapping

- *People v. Haynie*, 826 P.2d 371 (Colo. Ct. App. 1991)

b. Sexual Assault

- *People v. Campbell*, 94 P.3d 1186 (Colo. Ct. App. 2004)

c. Sexual Assault on a Client by a Psychotherapist

- *Ferguson v. People*, 824 P.2d 803 (Colo. 1992)

D. Diminished Capacity

1. Insanity

No relevant state cases reported.

2. Internet Addiction

No relevant state cases reported.

E. First Amendment

- *People v. Enea*, 665 P.2d 1026 (Colo. 1983)

F. Impossibility

No relevant state cases reported.

G. Manufacturing Jurisdiction

No relevant state cases reported.

H. Mistake

1. Of Fact: Age

- *People v. Salazar*, 920 P.2d 893 (Colo. Ct. App. 1996)
- *People v. Bath*, 890 P.2d 269 (Colo. Ct. App. 1994)

2. Of Law

No relevant state cases reported.

I. Outrageous Governmental Conduct v. Entrapment

1. Generally

- *People v. Sprouse*, 983 P.2d 771 (Colo. 1999)

2. Entrapment

- *People v. Sprouse*, 983 P.2d 771 (Colo. 1999)

a. Subjective Test: State of Mind

- *People v. Sprouse*, 983 P.2d 771 (Colo. 1999)

b. Inducement

- *People v. Sprouse*, 983 P.2d 771 (Colo. 1999)

c. Burden

i. Generally

- *People v. Sprouse*, 983 P.2d 771 (Colo. 1999)

ii. Proof of Predisposition

- *People v. Sprouse*, 983 P.2d 771 (Colo. 1999)

J. Sexual Orientation

No relevant state cases reported.

K. Statute of Limitations

1. General Provisions

- *Sailsbery v. Parks*, 983 P.2d 137 (Colo. Ct. App. 1999)

2. Sexual Offenses

a. Commencement of Action

- *Sandoval v. Archdiocese of Denver*, 8 P.3d 598 (Colo. Ct. App. 2000)
- *Sailsbery v. Parks*, 983 P.2d 137 (Colo. Ct. App. 1999)

b. Definitions

i. "Person Under Disability" Defined

- *Sandoval v. Archdiocese of Denver*, 8 P.3d 598 (Colo. Ct. App. 2000)
- *Sailsbery v. Parks*, 983 P.2d 137 (Colo. Ct. App. 1999)

ii. "Special Relationship"

- *Sandoval v. Archdiocese of Denver*, 8 P.3d 598 (Colo. Ct. App. 2000)
- *Sailsbery v. Parks*, 983 P.2d 137 (Colo. Ct. App. 1999)

c. Burden of Proof

- *Sandoval v. Archdiocese of Denver*, 8 P.3d 598 (Colo. Ct. App. 2000)

VIII. SENTENCING ISSUES

A. Pre-Sentence Reports for Sex Offenders

- *People v. Lenzini*, 986 P.2d 980 (Colo. Ct. App. 1999)

1. Participation in a Sex-Offender-Specific Evaluation and Identification

- *People v. Lenzini*, 986 P.2d 980 (Colo. Ct. App. 1999)

2. Treatment

- *People v. Lenzini*, 986 P.2d 980 (Colo. Ct. App. 1999)

3. Results of Evaluation and Identification

- *People v. Lenzini*, 986 P.2d 980 (Colo. Ct. App. 1999)

B. Presumptive Sentencing Ranges

1. Class-Four Felonies

- *People v. Oglethorpe*, 87 P.3d 129 (Colo. Ct. App. 2003)

2. Enticement of a Child

- *People v. Oglethorpe*, 87 P.3d 129 (Colo. Ct. App. 2003)

3. Sexual Assault on a Child: Pattern of Abuse

- *People v. Lenzini*, 986 P.2d 980 (Colo. Ct. App. 1999)

4. Sexual Exploitation of a Child

- *People v. Lenzini*, 986 P.2d 980 (Colo. Ct. App. 1999)

C. Sentencing Imposition

1. Trial-Court Discretion

- *People v. Gagnon*, 997 P.2d 1278 (Colo. Ct. App. 1999)

2. Factors to Consider

a. Generally

- *People v. Gholston*, 26 P.3d 1 (Colo. Ct. App. 2000)
- *People v. Gagnon*, 997 P.2d 1278 (Colo. Ct. App. 1999)

b. Sentence Enhancement

i. Aggravated Ranges

- *People v. Shepard*, 98 P.3d 905 (Colo. Ct. App. 2004)
- *People v. Gholston*, 26 P.3d 1 (Colo. Ct. App. 2000)

ii. Plea Agreements

- *People v. Shepard*, 98 P.3d 905 (Colo. Ct. App. 2004)

iii. Aggravating Factors

(a) Age of Victim

No relevant state cases reported.

(b) Distribution/Intent to Traffic

No relevant state cases reported.

(c) Criminal History: Habitual Criminal

- *People v. Martinez*, 83 P.3d 1174 (Colo. Ct. App. 2003)

(i) Burden of Proof

- *People v. Martinez*, 83 P.3d 1174 (Colo. Ct. App. 2003)

(ii) Proof of Prior Convictions

- *People v. Martinez*, 83 P.3d 1174 (Colo. Ct. App. 2003)

(d) Number of Images

No relevant state cases reported.

(e) Pattern of Activity for Sexual Exploitation

- *People v. Honeysette*, 53 P.3d 714 (Colo. Ct. App. 2002)
- *People v. Gholston*, 26 P.3d 1 (Colo. Ct. App. 2000)

(f) Sadistic, Masochistic or Violent Material

No relevant state cases reported.

(g) Use of Computers

No relevant state cases reported.

iv. Extraordinary Aggravating Circumstances

- *People v. Gholston*, 26 P.3d 1 (Colo. Ct. App. 2000)

v. Increase of Maximum Penalty

- *People v. Stead*, 66 P.3d 117 (Colo. Ct. App. 2002)

3. Allocution

- *People v. Martinez*, 83 P.3d 1174 (Colo. Ct. App. 2003)

4. Concurrent Versus Consecutive Sentences

a. Concurrent Sentences

- *People v. Gholston*, 26 P.3d 1 (Colo. Ct. App. 2000)

b. Consecutive Sentences

- *People v. Shepard*, 98 P.3d 905 (Colo. Ct. App. 2004)
- *People v. Esch*, 786 P.2d 462 (Colo. Ct. App. 1989)

5. Indeterminate Sentence: Soliciting for Child Prostitution

- *People v. Jacobs*, 91 P.3d 438 (Colo. Ct. App. 2003)

6. Proportionality Review

a. Abbreviated

- *People v. Martinez*, 83 P.3d 1174 (Colo. Ct. App. 2003)

b. Extended

- *People v. Martinez*, 83 P.3d 1174 (Colo. Ct. App. 2003)

D. Sex Offender Registration and Notification

1. Definitions

a. "Sex Offender"

- *People v. Meidinger*, 987 P.2d 937 (Colo. Ct. App. 1999)

b. "Sexually Violent Predator"

- *People v. Stead*, 66 P.3d 117 (Colo. Ct. App. 2002)

2. Sex-Offender Evaluations

- *People v. Meidinger*, 987 P.2d 937 (Colo. Ct. App. 1999)

3. Registration

a. Generally

- *People v. Stead*, 66 P.3d 117 (Colo. Ct. App. 2002)

b. Lifetime Duty to Register

- *People v. Stead*, 66 P.3d 117 (Colo. Ct. App. 2002)

4. Internet Notification

a. Generally

- *People v. Stead*, 66 P.3d 117 (Colo. Ct. App. 2002)

b. Sexually Violent Predators

- *People v. Stead*, 66 P.3d 117 (Colo. Ct. App. 2002)

c. Cost of Photograph and Fingerprints

- *People v. Stead*, 66 P.3d 117 (Colo. Ct. App. 2002)

d. Internet Notification As Punishment

- *People v. Stead*, 66 P.3d 117 (Colo. Ct. App. 2002)

e. Imposition of a Disability or Restraint

- *People v. Stead*, 66 P.3d 117 (Colo. Ct. App. 2002)

IX. SUPERVISED RELEASE

A. Probation

1. Right Against Self-Incrimination

- *People v. Elsbach*, 934 P.2d 877 (Colo. Ct. App. 1997)

2. Therapeutic Questioning

- *People v. Elsbach*, 934 P.2d 877 (Colo. Ct. App. 1997)

B. Parole

1. Parole Eligibility

a. Generally

- *Martin v. People*, 27 P.3d 846 (Colo. 2001)

b. Sex Offenders

- *Martin v. People*, 27 P.3d 846 (Colo. 2001)

2. Parole Hearing

- *People v. Oglethorpe*, 87 P.3d 129 (Colo. Ct. App. 2003)

3. Parole Violations: Warrantless Searches

a. Reasonable Grounds for Belief

- *People v. Slusher*, 844 P.2d 1222 (Colo. Ct. App. 1992)

b. Admissibility of Evidence Seized Within the Scope of a Reasonable Search

- *People v. Slusher*, 844 P.2d 1222 (Colo. Ct. App. 1992)

C. Revocation Proceedings: The Defendant's Rights

- *People v. Allen*, 973 P.2d 620 (Colo. 1999)

COLORADO

Case Highlights

A case with + indicates a memorandum decision that does not create legal precedent.

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

Adrian v. People, 770 P.2d 1243 (Colo. 1989)

The defendant was convicted of two counts of sexual assault on a child. Two months before trial, the prosecution filed a "Notice of Intent to Use Evidence of Similar Transactions," to advise both the court and the defendant that the prosecution intended to introduce evidence of specific prior sexual assaults by the defendant on a minor child. The notice stated that the prosecution would introduce evidence of sexual contact between the defendant and D.B. (the uncle of the two current victims, C.B. and J.B.), and that the evidence was being offered to show notice, opportunity, intent, and the absence of mistake. On the morning of the trial, the defendant moved to exclude D.B.'s testimony because the sexual assault on D.B. occurred over 10 years prior to the assaults on C.B. and J.B. The trial court held an *in limine* hearing to determine whether D.B.'s testimony was admissible and, at the conclusion of the hearing, the court found that although "a lot of time had elapsed" since the assaults on D.B., D.B.'s testimony related to *modus operandi* and motive. The trial court ruled the evidence was admissible provided a limiting instruction was given before D.B. testified. The lower court's decision was upheld.

Briones v. Juv. Ct., 534 P.2d 624 (Colo. 1975)

A delinquency petition was filed in juvenile court charging Briones with rape, deviate sexual intercourse, kidnapping, conspiracy, and criminal attempt to rape. Briones was over 14 but under 18 years of age, and was charged in the petition with acts that would constitute a felony if committed by an adult. Under such circumstances, the juvenile court receives evidence as to probable cause that the child committed the offenses; then the court in its discretion may retain jurisdiction or decide to transfer jurisdiction to the district court.

Ferguson v. People, 824 P.2d 803 (Colo. 1992)

The issue of consent is of no more significance in the prosecution of a psychotherapist for aggravated sexual assault on a client than is the issue of consent in the prosecution of other sexual crimes, the essential elements of which are defined without regard to the consent of the person victimized by the offender's behavior and must be proven by the prosecution beyond a reasonable doubt for a valid conviction. The notion that the elimination of the consent defense somehow relieves the prosecution of its burden of proving any mental culpability of the crime, and therefore results in a strict liability offense, is both legally and logically invalid.

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.

In re J.A., 733 P.2d 1197 (Colo. 1987)

The statutory definition of "sexual contact" was construed to mean the intentional touching of the victim's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's (or the actor's) intimate parts for the purpose of sexual arousal, gratification, or abuse. This rendered sexual contact a specific-intent type of criminal conduct. The offense of sexual assault on a child and the statutory definition of sexual contact were found to be constitutional.

Kogan v. People, 756 P.2d 945 (Colo. 1988)

Where there is evidence of many acts, any one of which would constitute the offense charged, the State may be compelled to select the transaction relied on for a conviction. The State is not required to identify the exact date of the offense, but must select a specific act.

Martin v. People, 27 P.3d 846 (Colo. 2001)

Under the statutes in effect when the defendant was sentenced, a person convicted of a sexual offense committed before July 1, 1996, was subject to a period of discretionary parole no longer than the remainder of the maximum sentence of incarceration imposed by the court or 5 years, whichever period of time is shorter. In this case, the defendant was sentenced to a 4-year period of incarceration and erroneously 5 five years of mandatory parole. The maximum period of parole to which the defendant may rightfully have been subject could not have exceeded 4 years.

McPeck v. Dep't of Social Servs., 919 P.2d 942 (Colo. Ct. App. 1996)

Day-care-license-revocation proceedings are civil in nature, but occur in an administrative agency context; therefore, the statute regarding a child's statement of sexual abuse, an exception to the hearsay rule, apply to such proceedings when the admissibility of a child's hearsay statement regarding sexual abuse is at issue.

People v. Aldrich, 849 P.2d 821 (Colo. Ct. App. 1992)

On appeal, the defendant contended that a psychotherapist's testimony concerning out-of-court statements made to her by one of the victims during the course of therapy was hearsay, subject to certain procedural requirements; however, the psychotherapist was not called for the purpose of relating the substance of what the victim had told her. Rather, she testified as an expert witness and her purpose was to describe professionally-accepted-validation criteria used by experts to assess the credibility of children claiming sexual abuse. It was not the content of the victim's statements to her psychotherapist that was important in this case. Instead, the significance of the psychotherapist's testimony was to explain the scientific data in the area of child abuse and to assist the jury by relating how the victim's statements fit into that criteria.

People v. Allen, 973 P.2d 620 (Colo. 1999)

In a hearing to revoke a deferred judgment and sentence, the only advisement required is one on first appearance. The trial court's failure to affirmatively advise the defendant of his right to testify was not reversible error. Revocation proceedings are not entitled to the full range of constitutional guarantees afforded to defendants in criminal prosecutions and an affirmative advisement is not required by statute in Colorado. As such, the trial court was not mandated to completely inform the defendant of his right to provide testimony in revocation-of-probation proceedings.

People v. Arapahoe County Ct., 74 P.3d 429 (Colo. Ct. App. 2003)

The defendant was charged with 200 counts of sexual exploitation of a child, based upon his possession of certain photographs of his son. The county court did not abuse its discretion in compelling the prosecution to give duplicates of the photographs to the defense. The prosecution is required to provide, upon the defendant's request, duplicates of any photographs held as evidence in connection with the case.

People v. Atencio, 780 P.2d 46 (Colo. Ct. App. 1989)

When the defendant delivered unexposed film to a film processor with the request that a proof sheet of prints be prepared and returned to him, he forfeited any expectation of privacy in the film's contents; therefore, the intrusion of the government, namely repackaging and delivering the prints to the defendant and then recovering the prints under a valid search warrant, failed to constitute an unreasonable search under the Fourth Amendment and the trial court properly denied the defendant's motion to suppress the seized prints.

People v. Bachofer, 85 P.3d 615 (Colo. Ct. App. 2003)

Probable cause to search must be established with respect to each place to be searched. Vague allegations in an affidavit will not suffice. A connection must be shown between the crime suspected and the area to be searched. Where the affidavit describes a variety of locations without specifying the crime being perpetrated at each, the geographic scope of the affidavit comes under close scrutiny.

People v. Batchelor, 800 P.2d 599 (Colo. 1990)

"Knowingly" is the degree of culpability required to violate the statute for sexual exploitation of a child.

People v. Bath, 890 P.2d 269 (Colo. Ct. App. 1994)

The defendants participated in a party held in a local motel room. Five of the six people attending, including the defendants, took part in various sexual activities while the sixth person videotaped the happenings. All of the participants were over eighteen years of age, with the exception of the victim who was 17 years, 9 months old at the time of the event. At trial, the defendants were convicted of sexual exploitation of a child and conspiracy. On appeal, the defendants contended that the trial court erred in ruling that the State was not required to prove the defendants had actual knowledge that one of the participants was under 18 years of age and in applying the following affirmative-defense provision: "If the criminality of conduct depends on a child's being below the age of [18] and the child was in fact at least [15] years of age, it shall be an affirmative defense that the defendant reasonably believed the child to be [18] years of age or older." COLO. REV. STAT. § 18-3-406(1). The appellate court disagreed with the defendants. The correct standard is to replace the requisite mental state for sexual exploitation of a child ("knowingly") with "lack of reasonable belief." The trial court found that neither defendant had made inquiry as to the age of the victim and that this failure to inquire was unreasonable; however, the appellate court found nothing in the record that would have required such an inquiry. Additionally, the trial court did not make findings as to what facts placed the burden on the defendants to make an inquiry. Instead, the undisputed testimony was that the victim appeared to be older; he was less than 3 months underage, and nothing in his appearance or the circumstances known to the defendants indicated that he was not yet 18. Consequently, because there was nothing in the statute nor any evidence in the record that supported requiring the defendants to make an inquiry regarding the victim's age, the defendants' convictions could not be sustained based solely upon their failure to do so.

People v. Bowman, 812 P.2d 725 (Colo. Ct. App. 1991)

During an intake interview by a social worker employed by an alcohol-treatment facility, the defendant admitted engaging in sexual conduct with his minor step-daughter. The social worker reported the alleged sexual abuse to the appropriate county child-welfare authority who, in turn, informed law enforcement. While the defendant's communication with the social worker was privileged and should not have been admitted, any error in allowing the statements into evidence was harmless. The social worker did not testify at trial and the only testimony regarding the defendant's statement came from a member of the Child Protection Team (CPT) responsible for investigating the child abuse, whose testimony consisted of two sentences made by the defendant to the social worker regarding the abuse; the record also showed that the testimony of the CPT member was admitted as background information for the further investigation of the defendant; and there was overwhelming evidence against the defendant, including the testimony of the victim and two separate confessions to law enforcement. Thus, under these circumstances, any error was harmless.

People v. Campbell, 94 P.3d 1186 (Colo. Ct. App. 2004)

In executing a search warrant to uncover possible evidence of drug activity at the defendant's house, law enforcement came across a photograph that depicted two young females engaged in sexually explicit conduct. Law enforcement seized the photograph and subsequently determined that one person depicted in the photograph was a 15-year-old girl, and the other was the defendant's 18-year-old wife. At trial, the girl testified that she had had a consensual sexual relationship with the defendant's wife and that the defendant had posed them for and then taken the sexually explicit photograph seized by law enforcement. Under the sexual-assault statute, a 15-year-old can effectively consent to have sex with a person not more than 10 years older than he or she is; however, under the sexual-exploitation-of-children statute, a person below the age of 18 years is incapable of giving informed consent to the use of his or her body for a sexual purpose. As such, the defendant's wife could not be prosecuted for having sex with the minor, but the defendant could be prosecuted for photographing his wife having sex with the minor.

People v. Chard, 808 P.2d 351 (Colo. 1991)

The trial court did not abuse its discretion in denying the defendant's motion for an involuntary psychological examination of the minor victim. The defendant had not demonstrated a compelling reason for ordering a second psychological examination and any benefits to be obtained from a further examination were too speculative in nature. The record clearly indicated that the defendant's attempt to demonstrate a compelling reason was inadequate to show that the likelihood of producing material evidence, as opposed to speculative evidence, outweighed the possible trauma, embarrassment, or intimidation that the victim might feel. The trial court applied the proper balancing test and did not abuse its discretion in denying the defendant's motion for a second physical examination. The record indicated that even if evidence of ongoing sexual abuse was found, it would not prove that the defendant did not sexually abuse the victim previously. Any evidence discovered by a second examination of the victim would be speculative and could at best produce results equivocal on the defendant's innocence.

People v. Corbett, 656 P.2d 687 (Colo. 1983)

The defendant was charged with sexually assaulting his wife's 11-year-old sister. At the preliminary hearing, the investigating law-enforcement officer testified that he had interviewed the victim twice within a few hours after the assault. She told him that the defendant and his wife had been out with her parents and she was spending the night at the home of her sister and the defendant. About 2:00 A.M., the defendant came home and told the victim to come to his bedroom. Although the girl was frightened, she acquiesced. The defendant forced her to take her clothes off, and he then attempted to have intercourse with her. The victim told law enforcement that this had happened on two previous occasions. The defendant's wife testified that when she got home the victim was crying, shaking, and hysterical and told her that the defendant had forced her to go to his bedroom. The wife then went to the bedroom and found the defendant in bed naked and found the victim's panties on the floor beside the bed. She then took her sister to the hospital. After the wife's testimony on direct examination, the defendant moved to have her testimony stricken on the basis of the marital privilege. The trial court reserved its

ruling until the conclusion of cross-examination and redirect examination. It then granted the motion and ordered the case dismissed, holding that although with the wife's testimony was sufficient evidence to establish probable cause, there was not sufficient evidence once her testimony was stricken. The privileged communications between husband and wife are not grounds for excluding evidence in any judicial proceeding resulting from a report of child abuse; therefore, the trial judge erred in striking the testimony of the wife.

People v. Dalton, 70 P.3d 517 (Colo. Ct. App. 2002)

The prosecution filed a direct criminal information against the defendant in district court charging him with sexual assault on a child by one in a position of trust (count one) and sexual assault on a child as part of a pattern of sexual abuse (count two). The defendant was 18 years old when the charges against him were filed, but a juvenile when the charged offenses occurred. The defendant entered into a plea bargain under which he pleaded guilty to count one and the prosecution agreed to dismissal of count two. He was sentenced to 10 years in the Department of Corrections. Subsequently, he filed a postconviction motion to vacate the plea agreement, alleging the district court lacked jurisdiction over count one. The trial court agreed and vacated the resulting sentence. The appellate court vacated the trial court's order finding that, while the defendant disputed the applicability of the direct-filing statute in effect in 1997, it was undisputed that the crime charged in count two required sentencing under the crime-of-violence statute; therefore, the trial court had jurisdiction over that count under the direct-filing statute. It follows that the district court had ancillary jurisdiction over count one because it had jurisdiction over count two, a crime mandating sentencing under the crime-of-violence statute.

People v. Dist. Ct., 585 P.2d 913 (Colo. 1978)

Whenever criminal charges against a juvenile are either transferred to or filed directly in the district court, the judge of the district court has the power to make any disposition of the case that any juvenile court would have, and has the power to remand the case to the juvenile court for disposition at its discretion.

People v. Dist. Ct., 785 P.2d 141 (Colo. 1990)

The factors that make the results of polygraph examinations unreliable and inadmissible do not necessarily apply to statements made to a polygraph technician during pre-examination interviews. Further, the defendant's mistaken belief that his statements were inadmissible does not vitiate their voluntariness.

People v. Elsbach, 934 P.2d 877 (Colo. Ct. App. 1997)

As part of a plea agreement in an earlier case, the defendant was given a suspended sentence and was placed on probation. One condition of the defendant's probation was that he continue participating in offense-specific therapy for sex offenders. As part of the sex-offender-treatment program, the defendant was directed by his probation officer to submit to a polygraph examination, the purpose of which was to ask the defendant about other incidents of abuse and, through full disclosure, overcome any denial which might impede the therapeutic progress. The defendant

testified he was told to disclose conduct involving both of his stepdaughters, D.N. and A.N. The probation officer testified he directed the defendant to disclose only a touching incident with D.N. During the examination, the defendant disclosed that he had touched D.N. on the clothing covering her pubic area while she was asleep. He also disclosed that he had had inappropriate sexual fantasies while giving a back massage to A.N. The defendant's probation officer directed him to reveal the disclosures he had made regarding D.N. to the Department of Social Services and to D.N.'s mother (the defendant's then-wife). As a result of the defendant's disclosures to the Department of Social Services, a law-enforcement investigation was begun, and, in the course of that investigation, A.N. reported that the defendant had digitally penetrated her vagina on numerous occasions. Based on this alleged molestation of A.N., the defendant was charged with sexual assault by one in a position of trust and aggravated incest. Prior to trial, the defendant moved to dismiss the charges on the ground that, in his prior case, the prosecution had agreed not to prosecute him on the basis of any information disclosed during therapy. An appeal followed. The appellate court held that a governmental promise not to prosecute is enforceable if a defendant detrimentally relies on that promise. In the present case, the defendant was mistaken in asserting that all testimonial conflicts concerning whether any such promise was made must be resolved in his favor. If, as here, a trial court is called upon to determine what, if anything, a prosecutor actually said that might be interpreted as a promise, then the court's function is to weigh the evidence and make factual findings resolving the dispute about what was communicated. If this were not the case, a trial court would be obligated to apply an irrebuttable presumption in favor of the defendant's testimony no matter how extreme a prosecutorial promise the defendant alleged. Accordingly, the appellate court reviewed the trial court's factual findings with the same degree of deference due to evidentiary findings made in other pretrial rulings. The trial court found that the prosecutor did not promise to refrain from prosecuting the defendant for incidents of sexual abuse that the defendant disclosed in court-ordered therapy. In reaching this conclusion, the court relied upon the prosecutor's recollection of her statements to defense counsel denying existence of a promise not to prosecute, and on the testimony of the defendant's former counsel. The latter testified that he believed the prosecution was free to prosecute the defendant for revelations of "serious" conduct. As the finder of fact, the trial court was in the best position to assess the witnesses' credibility and recollective abilities; therefore, because the trial court's factual findings were supported by the record, the appellate court sustained them.

People v. Enea, 665 P.2d 1026 (Colo. 1983)

Participation in the sale of child pornography is not constitutionally protected conduct; such materials are without First-Amendment protection.

People v. Esch, 786 P.2d 462 (Colo. Ct. App. 1989)

Evidence surrounding a crime is admissible to establish the context in which the crime was committed, even if such events indicate commission of unrelated crimes. A central issue in dispute was whether the defendant was sexually exploiting her children. Letters and statements concerning the defendant's sexual practices and preferences constituted

relevant evidence of this issue and, even though the letters and statements indicated the defendant's participation in other sexual activities, the trial court did not abuse its discretion in determining that their probative value outweighed their prejudicial effect, as they established the context in which the crimes were committed.

People v. Gagnon, 997 P.2d 1278 (Colo. Ct. App. 1999)

The defendant met a 16-year-old girl through an electronic bulletin board commonly used by children at school as an Internet chatline. During one of the chat sessions, the defendant advised the girl that he was a photographer. They exchanged phone numbers and later arranged for the girl to pose for photographs at a park near her home. During the photo session, the girl agreed to pose for photographs with her bra removed, her blouse completely unbuttoned, and her breasts partially exposed. In two photographs, her back was arched and her arms were spread, and in a third her hands appeared to be opening the blouse. She also agreed to pose in a skirt with her legs spread, exposing her underwear. She declined the defendant's requests that she pose in lingerie, topless, without underwear, or completely naked. The defendant was convicted at a bench trial of felony sexual exploitation of a child, attempted sexual exploitation of a child, and misdemeanor sexual exploitation of a child. On appeal, the defendant argued that the sexual-exploitation-of-children statute should not be construed to apply to his conduct because the photographs, although showing portions of the girl's breasts, did not display a whole breast. The appellate court rejected the defendant's argument, holding that explicit sexual conduct includes erotic nudity. A display or picture qualifies as erotic nudity upon finding that the display or picture meets two separate conditions. First, in the context of this case, the display or picture must depict the human breasts or undeveloped or developing breast area of a child; second, the display or picture must be for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved. No more is required. The defendant's construction overemphasized the first requirement to the exclusion of the second. The determination of whether the sexual-exploitation-of-children statute applied required consideration of both.

People v. Gholston, 26 P.3d 1 (Colo. Ct. App. 2000)

Sexual assault on a child is a lesser-included offense of second-degree sexual assault; therefore, the defendant could not be convicted of sexual assault on a child by a person in a position of trust and also convicted of second-degree sexual assault.

People v. Grady, 126 P.3d 218 (Colo. Ct. App. 2005)

Defendant produced "glamour photographs" of models age 13 to 17. The photos were not only used for modeling purposes, but defendant also posted them on his website, "True Teen Babes." Court ruled that a jury should be instructed to consider whether the content of the photographs, viewed objectively, would lead to sexual gratification or stimulation of a reasonable viewer. Trial court erred in limiting the scope of sexual gratification to the subjective perspective of the defendant.

People v. Gritchen, 908 P.2d 70 (Colo. 1995)

An express admission of factual guilt is not a constitutional prerequisite for a court to accept a plea of guilty. When a defendant protests his or her innocence, however, the trial judge should inquire into factual guilt.

People v. Hamer,[++] 689 P.2d 1147 (Colo. Ct. App. 1984)

Even though the passage of time may reduce the likelihood that evidence remains in the place to be searched, new information that indicates the evidence could still be located in that place may cure the staleness of information included in the affidavit.

People v. Haynie, 826 P.2d 371 (Colo. Ct. App. 1991)

The defendant contented that the trial court erred in finding a child victim unavailable as a witness, which therefore permitted the use of the child's hearsay testimony as evidence that the defendant sexually assaulted him. The appellate court found no error by the trial court in admitting the child's hearsay statements. The trial court heard evidence from the child's treating therapist, advocate, foster mother, and the defendant's own expert. Based upon this evidence, the trial court concluded that the statements had sufficient safeguards to ensure reliability. Based upon expert opinion indicating long-term and substantial emotional impairment, the trial court found that the child witness was unavailable. There was sufficient corroborative evidence, in the form of physical evidence and expert opinion, to satisfy the statutory safeguards.

People v. Honeysette, 53 P.3d 714 (Colo. Ct. App. 2002)

The appellate court rejected the defendant's argument that the trial court's instructions defining a "pattern of abuse" were flawed because they did not require the jury to make a specific finding that he had sexual contact with the victim during the 10-year period preceding the dates of abuse alleged in the information. The appellate court held that both the predicate act and the earlier pattern act(s) may occur within the period alleged in the pattern-of-sexual-assault count of the information. Under the instructions given, it would have been impossible for the jury to find the defendant guilty of the pattern-of-abuse enhancer unless it found, beyond a reasonable doubt, that he had committed at least 2 separate acts of sexual contact upon the same victim within the period alleged in the information. Because that period was less than 10 years and because the victim was under the age of 10 when she testified at trial, the requirements for finding a pattern of sexual abuse were satisfied because the later occurring act of abuse constituted the predicate act and the earlier act(s) of abuse constituted the pattern act(s) within the prior 10 years.

People v. Jacobs, 91 P.3d 438 (Colo. Ct. App. 2003)

The record was full of evidence that the defendant committed all the elements of the crime of soliciting for child prostitution within Colorado's borders. In his E-mails to the detective, the defendant repeatedly identified Colorado as the place where the sex acts would occur. He inquired whether there were any contacts for young attractive female escorts in Colorado. He also mentioned that he lived in a particular place in Colorado and asked when the detective would be in that area. Thus, the court concluded that this evidence, when considered in the light most favorable to the prosecution, was sufficient to establish that defendant committed his crime wholly or partly within Colorado.

People v. Kaiser, 32 P.3d 480 (Colo. 2001)

The record did not support the trial court's finding that the defendant's waiver of her *Miranda* rights was not knowing and intelligent. Instead, the record demonstrated that the defendant understood both the nature of her rights and the consequences of her waiver. Because the questioning during the first and second interviews was lawful, the court also held that the third interview was not tainted by a prior illegality. Law enforcement modified the *Miranda* warnings to the defendant's level in order to make the advisement clearer; clearly advised the defendant of her rights; repeated to her what her rights were; and the officers asked the defendant whether she comprehended them. The defendant's

responses to the officers' questions were coherent and receptive. Further, the defendant's mental capability was deemed sufficient because there was proof that she tried to deceive the officers in order to evade prosecution. Additionally, there were no language barriers. Thus, the suppression order was reversed.

People v. Kyler, 991 P.2d 810 (Colo. 1999)

To determine whether a guilty plea is voluntary, the constitutionality of restraints placed upon the defendant is irrelevant.

People v. Lenzini, 986 P.2d 980 (Colo. Ct. App. 1999)

The trial court erred in denying the defendant's motion to have a sex-offender-specific evaluation included in her pre-sentence report for the court's consideration for sentencing purposes. The court is required to order a sex-offender-specific evaluation to be conducted as part of the pre-sentence report for sex offenders and to consider that evaluation in sentencing; therefore, the trial court was wrong in holding that such sex-offender specific evaluations were necessary only with regards to probation.

People v. Martinez, 83 P.3d 1174 (Colo. Ct. App. 2003)

The trial court did not commit reversible error as a result of admitting, as an excited utterance, the victim's testimony that a third person entered the room during the sexual assault and stated, "oh my God." The record supported the trial court's determination that the three requirements for admission of the statement as an excited utterance were satisfied. The appellate court also concluded that it was not necessary to produce the declarant herself to lay the foundation to admit the statement; therefore, the appellate court perceived no abuse of discretion, nor did the trial court's admission of the statement violate the defendant's confrontation rights.

People v. Martinez, 165 P.3d 907 (Colo. Ct. App. 2007)

Appellate court could not say that circumstantial evidence was insufficient to prove defendant knowingly possessed images of child pornography on a computer where forensic evidence showed that a person using a password-protected America Online account had joined an online list-serve group that distributed emails relating to sexual activity with young girls, and where defendant admitted during cross-examination that he used this computer and AOL account for personal correspondence.

People v. McKibben, 862 P.2d 991 (Colo. Ct. App. 1993)

The appellate court rejected the defendant's contention that the trial court erred in admitting the similar-transaction evidence. The record unequivocally established a compelling pattern and remarkable similarity of the defendant's sexual misconduct. The boys were all young teenage boys, befriended by the defendant who had attempted to sexually assault them. The assaults or attempted assaults occurred while the boys were at the defendant's home, and the methodology employed by the defendant was similar in each case.

People v. Meidinger, 987 P.2d 937 (Colo. Ct. App. 1999)

Since the defendant had a history of enumerated sex offenses, she could properly be characterized as a sex offender, and therefore could be ordered to undergo evaluation and treatment as such; therefore, the trial court did not err in concluding that the defendant was a sex offender, despite the fact that the offense for which she was found guilty (contributing to the delinquency of a minor) was not a sex offense. However, the trial court was wrong to impose sex-offender conditions as part of the defendant's probation, without ordering a sex-offender evaluation. Completion of such an evaluation, under the circumstances of the present case, is mandatory.

People v. Oglethorpe, 87 P.3d 129 (Colo. Ct. App. 2003)

The defendant pleaded guilty to enticement of a child, a class-four felony. The trial court rejected his motion to refuse application of the Colorado Sex Offender Lifetime Supervision Act of 1998 on grounds that it was unconstitutional. It then found extraordinary aggravating circumstances and sentenced him to the Department of Corrections to an indeterminate sentence of 12 years to life. On appeal, the defendant argued that his sentence was disproportionate; however, the trial court, in finding extraordinary aggravating circumstances, noted the appalling nature of the crime (sexual assault of a 4-year-old girl). Testimony indicated the victim and her family were suffering lingering effects from the incident. Consequently, the court concluded the defendant's sentence was not disproportionate to the offense.

People v. Patrick, 772 P.2d 98 (Colo. 1989)

In considering challenges to hearsay evidence based on the confrontation clauses of the federal and state constitutions, a case-by-case analysis is applied; therefore, it was imperative that there be some factual record made by the trial court stating why the out-of-court statements made by a child concerning sexual abuse were inadmissible and caused the statute to be unconstitutional as applied. The scant record before the Colorado Supreme Court did not indicate what factual circumstances caused the trial court to conclude that the statute was unconstitutional, and therefore could not determine the as-applied constitutionality of a statute based upon an incomplete record of the facts.

People v. Raehal, 971 P.2d 256 (Colo. Ct. App. 1998)

Evidence from both parties established that the defendant and the victim were in contact at the defendant's trailer. The real dispute was whether the defendant committed the alleged assault; therefore, the appellate court concluded that the use of dates in the leading questions and in opening statement did not undermine the fundamental fairness of the trial. Further, considering the intimate nature of the acts alleged and the difficulty the young victim had in testifying, the appellate court concluded that the use of leading questions to clarify the confusing testimony was warranted.

People v. Renander, 151 P.3d 657 (Colo. Ct. App. 2006)

Defendant allegedly possessed and produced photographic images of children engaged in various acts of explicit sexual conduct. Prosecution charged defendant with counts based on each particular image, resulting in several different counts that involved the same child. Trial court ordered prosecution to reassemble the counts by victim, rather than by

image. Appellate court held that each offending image constitutes a separate and distinct sexual exploitation and therefore is a separate chargeable offense. However, each separate viewing of the sexually explicit material is not a separate chargeable offense.

People v. Salazar, 920 P.2d 893 (Colo. Ct. App. 1996)

If the criminality of conduct depends upon a child being below the age of 15, it shall be no defense that the defendant did not know the child's age or that he or she reasonably believed the child to be 15 years of age or older. The trial court did not relieve the prosecution of its burden to prove essential elements of the offense charged, nor did the court violate the defendant's due-process rights by precluding him from presenting a defense of "reasonable mistake of age" and instructing the jury to apply the scienter element ("knowingly") only to his conduct.

People v. San Emerterio,[++] 839 P.2d 1161 (Colo. 1992)

All of the elements of first-degree kidnapping are present if a defendant forcibly seizes a victim and carries him or her away with the intent to force him or her to make such a promise in order to secure his or her release.

People v. Shepard, 98 P.3d 905 (Colo. Ct. App. 2004)

If the trial court imposes a sentence in the aggravated range, it must state on the record the circumstances justifying the sentence. A reasonable explanation of the sentence imposed is sufficient. In the present case, the sentence imposed was a stipulated sentence and was part of the defendant's plea agreement. Appellate review of the propriety of a sentence is precluded if the sentence is within a range agreed upon by the parties pursuant to a plea agreement. The defendant was fully apprised that an aggravated sentence would be imposed, and the prosecutor stated the factual basis underlying the offenses to which the defendant pleaded guilty. Thus, the appellate court held that where the defendant stipulates to a sentence in the aggravated range as part of a plea agreement, the defendant is also stipulating that sufficient facts exist to warrant an aggravated sentence, and the trial court need not make additional findings on the record.

People v. Sisneros, 55 P.3d 797 (Colo. 2002)

The original proceeding arose out of a criminal case pending in the Pueblo County District Court. The Petitioner, Dr. Nancy Aldrich, sought to prevent the District Court from enforcing a subpoena *duces tecum* requiring her to provide "any and all files, documents, and reports" relating to her treatment of the victim of the alleged sexual assault at issue in the criminal case. The trial court denied her motion to quash the subpoena *duces tecum*. Instead, it ordered her to turn over the records for an *in camera* review. The Colorado Supreme Court held that the psychologist-patient privilege applied and shielded the documents requested by the defendant from discovery, even *in camera* review by the trial court. Once the privilege attaches, the privilege holder must waive, explicitly or implicitly, the privilege before the defendant can obtain discovery. The victim's testimony at the preliminary hearing did not constitute a waiver of the privilege. Since there was no waiver, the subpoena *duces tecum* should have been quashed. The trial court did not have discretion to conduct an *in camera* review of the documents. The rule to show cause is made absolute.

People v. Slusher, 844 P.2d 1222 (Colo. Ct. App. 1992)

The trial court did not err in determining that the defendant's parole officer had reasonable grounds to believe the defendant might be sexually exploiting a minor child, thereby violating his parole and making a parole search appropriate; therefore, slides depicting a young, nude boy, which were discovered in the defendant's home lying on a bed, were properly seized. The fact that a person is on parole does not justify a search without a warrant by any law-enforcement officer other than a parole officer; however, evidence seized within the scope of a reasonable search by a parole officer, even if unrelated to the parole violation, is admissible in the prosecution of another crime. Here, the investigating officer and another law-enforcement officer waited outside while the parole officers conducted a search of the defendant's house and did not take part in the parole search. Thus, the slides that the parole officers discovered during their search and that they subsequently turned over to other law-enforcement officers were admissible in a prosecution against the defendant.

People v. Sprouse, 983 P.2d 771 (Colo. 1999)

The defendant came under investigation by a law-enforcement-crimes-against-children unit when he placed a personal advertisement in a legal, sexually explicit publication. The advertisement caught the attention of a detective who had been monitoring the paper for advertisements placed by persons indicating an interest in exploiting children. The detectives sent an application to the defendant inviting him to join a fictitious pen-pal organization. The defendant claimed that the Court of Appeals correctly held that the prosecution's evidence was insufficient to support a finding that he was predisposed to commit the crime of criminal attempt to commit sexual assault on a child. The Colorado Supreme Court held that there was ample evidence in the record to support the jury's finding that the defendant was predisposed to violate the law by attempting to commit sexual assault on a child, irrespective of the government inducement. For instance, both the defendant's initial personal advertisement and his responses on the questionnaire arguably contained veiled terms, which suggested that he was interested in a sexual encounter with a child; his response to a fictitious mother's ambiguous request for a man to be a special teacher for her fictitious daughter was immediate and enthusiastic; his enthusiastic responses indicated no hesitancy in his decision to undertake the fictitious daughter's sexual training; the evidence tended to indicate he was ready and able to commit the crime; he indicated a desire to get started as soon as possible; he gave detailed descriptions of the sexual acts that he planned on using in the training, thereby indicating that he had given the subject of sexually training a child a good deal of thought at some time in the past; and he candidly admitted in his letters that he had previously sexually trained a 15-year-old girl, giving a detailed description not only of the methods he employed, but also of the current status of his relationship with her.

People v. St. James, 75 P.3d 1122 (Colo. Ct. App. 2002)

Prosecution under the sexual-exploitation-of-a-child statute may be predicated upon an individual's photographing a child engaged in sexually explicit conduct, even if the individual has not developed the film.

People v. Stead, 66 P.3d 117 (Colo. Ct. App. 2002)

The Internet posting provision of the sex-offender statute does not constitute additional punishment; therefore, the trial court's adjudication of the defendant as a sexually violent predator did not violate his constitutional rights to trial by jury and due process.

People v. Trujillo, 938 P.2d 117 (Colo. 1997)

The trial court suppressed statements made by the defendant during an interview conducted at a police station. During the interview, the defendant made statements before and after he was given his *Miranda* warnings. The trial court suppressed the pre-*Miranda* statements after concluding the defendant had been subjected to custodial interrogation. The trial court also suppressed the post-*Miranda* statements, deeming the *Miranda* warning, once given, insufficient to purge the taint of the initial improper questioning because the *Miranda* warning "should have been given when the custodial interrogation began." The State filed an interlocutory appeal with the Colorado Supreme Court. Due to the absence of findings of historical fact resolving conflicting testimony, the Court was unable to review the trial court's conclusion that the defendant was subjected to custodial interrogation; therefore, the trial court's ruling suppressing the defendant's pre-*Miranda* statements was vacated. Regarding the post-*Miranda* statements, the Court concluded that because the trial court later found that all of the defendant's statements were made voluntarily, as a matter of law, the trial court's ruling suppressing the post-*Miranda* statements could not stand. Accordingly, the Court reversed the trial court's ruling suppressing the defendant's pre- and post-*Miranda* statements, and remanded with directions that the trial court conduct further proceedings as it deems appropriate, to make findings of fact regarding whether the defendant was subjected to custodial interrogation before he was advised of his *Miranda* rights.

People v. Valdez, 874 P.2d 415 (Colo. Ct. App. 1993)

The crimes of sexual assault on a child as part of a pattern of sexual abuse and sexual assault on a child by one in a position of trust are not sentence enhancers for the same offense, but rather separate crimes

People v. Vinson, 42 P.3d 86 (Colo. Ct. App. 2002)

Seminal fluid from one masturbating and ejaculating onto clothing covering the intimate parts of another constitutes sexual contact for the purposes of the sexual-assault-on-a-child and sexual-assault-on-a-child-by-one-in-a-position-of-trust statutes.

People v. West, 724 P.2d 623 (Colo. 1986)

The statutory definition of "sexual contact," an essential component of the crime of sexual assault on a child, is not unconstitutionally vague.

People v. Young, 694 P.2d 841 (Colo. 1985)

The defendant was found guilty of the crime of attempted inducement of child prostitution. The Colorado Supreme Court held that the statute evinced a clear legislative intent to prohibit the sexual exploitation of children by monetary or other economic inducement. The defendant's conduct of offering the victim money to masturbate in his

presence constituted one type of conduct that was intended to be punished. Thus, the defendant's vagueness claim was without merit.

Sailsbery v. Parks, 983 P.2d 137 (Colo. Ct. App. 1999)

A cause of action accrues on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence. Notwithstanding any other statute of limitations, any civil action based on a sexual assault or a sexual offense against a child must be commenced within six years after a disability has been removed for a person under disability, or within six years after a cause of action accrues, whichever occurs later, and not thereafter.

Sandoval v. Archdiocese of Denver, 8 P.3d 598 (Colo. Ct. App. 2000)

The six-year-statute-of-limitations period pertaining to sexual assault or sexual offenses against a child does not apply to claims against parties other than a perpetrator of a sexual offense.

Swentkowski v. Dawson, 881 P.2d 437 (Colo. Ct. App. 1994)

The plaintiff, a minor, sued the defendant and his minor son for the son's sexual assault on the plaintiff. The plaintiff alleged that the minor son acted intentionally in sexually assaulting him. The minor son was adjudicated delinquent in the juvenile court for sexually molesting the plaintiff. The plaintiff also alleged that the defendant negligently failed to warn the assaulted child's parents of his son's problems, negligently supervised his son's babysitting, and negligently failed to act to prevent the sexual assault on the plaintiff. On appeal, the defendant asserted that because his son was adjudicated delinquent, and not convicted as an adult of a criminal offense, he could not conclusively be presumed to have acted intentionally. The appellate court rejected the defendant's argument, holding that the defendant's son was adjudicated a delinquent by virtue of his having engaged in conduct that would constitute the crime of sexual assault on a child by one in a position of trust. Since an adjudication of delinquency requires a higher burden of proof and constitutional protections not present in most civil cases, the appellate court held that an adjudication of delinquency is sufficient to establish a conclusive presumption of intent when intent is an element of the offense.

Warren v. People, 213 P.2d 381 (Colo. 1949)

When a minor testifies, it is for counsel on the opposing side to make an objection if it appears that the child testifying does not comprehend the nature of an oath or understand the effect of the testimony he or she is giving. If the testimony of the child is admitted, it is for the jury to determine what weight is to be given to it.

Watso v. Dep't of Social Servs., 841 P.2d 299 (Colo. 1992)

The plaintiffs asserted that they were entitled to an adversary proceeding prior to the inclusion of their names as suspects on the state central registry, thereby asserting that they had been denied procedural protections guaranteed by the due-process clauses of the federal and state constitutions. The Colorado Supreme Court held that the State has a substantial interest in ensuring that children are not subject to abuse or neglect. Inclusion on the registry of persons known or suspected to have neglected or abused children is

reasonably related to that interest. Further, the Child Protection Act provides that confirmed reports of child abuse or neglect filed in the registry are confidential, are not public information, and can be accessed only in limited circumstances. The availability of an adversary proceeding prior to the inclusion of confirmed reports on the registry would provide heightened protection for the liberty interests of alleged perpetrators, and the fiscal burdens of such procedures would prove minimal. The availability of such hearings as a prerequisite to the inclusion of a suspect's name on the registry would frustrate the legitimate legislative goal of encouraging quick action to protect children from child abuse or neglect by diverting administrative resources from efforts to protect children. Thus, the State's interest in protecting children from actual or potential abuse or neglect is sufficiently significant to justify the absence of any adversary proceeding prior to the filing of a confirmed report with the registry in view of all of the procedural safeguards contained in the Child Protection Act.

Woertman v. People, 804 P.2d 188 (Colo. 1991)

The State introduced over 50 acts of alleged sexual abuse on a child, but did not specify what evidence went to the different charges against the defendant, and what evidence simply represented similar transactions by which the jury could place the sexual assaults in context. The trial court did not instruct the jury on the specific acts relied on to prove the charges set forth in the information. The failure to provide an instruction, coupled with an inadequate limiting instruction and the absence of a proper unanimity instruction provided a margin for error that mandated reversal. Some of the jurors may have decided to convict on one act, while others may have decided to convict on another. Thus, the Colorado Supreme Court held that under these circumstances, although the defendant arguably had enough information to properly prepare his defense and ensure that he would not be tried twice for the same offense, it was impossible to be reasonably certain of the reliability of the judgment of conviction.

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Offenses Defined

A case with + indicates a memorandum decision that does not create legal precedent.

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

I. Child Abuse and Neglect

- "Abuse," "child abuse," and "neglect" means an act or omission in one of the following categories which threatens the health or welfare of a child, including but not limited to any case in which a child:
  (1) exhibits evidence of skin bruising, bleeding, malnutrition, failure to thrive, burns, fracture of any bone, subdural hematoma, soft-tissue swelling, or death:
    (a) such condition or death is not justifiably explained;
    (b) the history given concerning such condition is at variance with the degree or type of such condition or death; or
    (c) the circumstances indicate that such condition may not be the product of an accidental occurrence; or
  (2) is subjected to sexual assault, molestation, sexual exploitation, or prostitution.
  – *People v. Corbett*, 656 P.2d 687, 689 (Colo. 1983).
  – *Watso v. Dep't of Social Servs.*, 841 P.2d 299, 303 (Colo. 1992).

II. Child Pornography (a.k.a. "Sexual Exploitation of a Child")

A. Offenses

1. Causing, Inducing, Enticing, Permitting Explicit Sexual Conduct

- A person commits sexual exploitation of a child if, for any purpose, he or she knowingly causes, induces, entices, or permits a child to engage in, or be used for, any explicit sexual conduct for the making of any sexually exploitative material. COLO. REV. STAT. § 18-6-403.
  – *People v. Grady*, 126 P.3d 218, 219 (Colo. Ct. App. 2005).

2. Photographing Explicit Sexual Conduct

a. Elements

- A person commits the crime of sexual exploitation of a child by, among other things, taking a photograph depicting explicit sexual conduct by a child under 18 years of age. COLO. REV. STAT. § 18-6-403.
  – *People v. Campbell*, 94 P.3d 1186, 1188 (Colo. Ct. App. 2004).

- A violation occurs at the time a person causes a child to be photographed for the purpose of making sexually exploitative material.
  – *People v. St. James*, 75 P.3d 1122, 1124 (Colo. Ct. App. 2002).

- The critical question for the jury to resolve is whether, when the individual photographed the child, he or she did so for the purpose of producing a visual depiction of explicit sexual conduct.
  – *People v. St. James*, 75 P.3d 1122, 1124 (Colo. Ct. App. 2002).

b. Undeveloped Film

- It is inconsequential whether film is ever developed.
  – *People v. St. James*, 75 P.3d 1122, 1124 (Colo. Ct. App. 2002).

3. Possessing or Controlling Sexually Exploitative Material

- A person commits sexual exploitation of a child if, for any purpose, he or she knowingly possesses or controls any sexually exploitative material for any purpose, except that this paragraph does not apply to peace officers or court personnel in the performance of their official duties. COLO. REV. STAT. § 18-6-403(3)(b.5).
  – *People v. Arapahoe County Ct.*, 74 P.3d 429, 430 (Colo. Ct. App. 2003).

4. Procuring a Child for Sexual Exploitation

- Any person who intentionally gives, transports, provides, or makes available, or who offers to give, transport, provide, or make available, to another person a child for the purpose of sexual exploitation commits procurement of a child for sexual exploitation. COLO. REV. STAT. § 18-6-404.
  – *People v. Esch*, 786 P.2d 462, 466 (Colo. Ct. App. 1989).

5. Producing Sexually Exploitative Material

- A person commits sexual exploitation of a child if, for any purpose, he or she knowingly prepares, arranges for, publishes, produces, promotes, makes, sells, finances, offers, exhibits, advertises, deals in, or distributes any sexually exploitative material. COLO. REV. STAT. § 18-6-403(3)(b).
  – *People v. Arapahoe County Ct.*, 74 P.3d 429, 430 (Colo. Ct. App. 2003).
  – *People v. Batchelor*, 800 P.2d 599, 601 (Colo. 1990).
  – *People v. Bath*, 890 P.2d 269, 271 (Colo. Ct. App. 1994).
  – *People v. Enea*, 665 P.2d 1026, 1029 (Colo. 1983).
  – *People v. Esch*, 786 P.2d 462, 466 (Colo. Ct. App. 1989).

6. Virtual/Simulated Child Pornography

No relevant state cases reported.

7. Internet Sexual Exploitation of a Child

- A person commits internet sexual exploitation of a child if a person, who is at least four years older than a child who is under fifteen years of age, knowingly importunes, invites, or entices the child through communication via a computer network or system to: (a) Expose or touch the child's own or another person's intimate parts while communicating with the person via a computer network or system; or (b) Observe the person's intimate parts while communicating with the person via a computer network or system. COLO. REV. STAT. § 18-6-405.4(1).
- It shall not be an affirmative defense to this section that the child was actually a law enforcement officer posing as a child under fifteen years of age. COLO. REV. STAT. § 18-6-405.4(2).

B. Definitions

1. "Child"

- "Child" means a person who is less than 18 years of age. COLO. REV. STAT. § 18-6-403(2)(a).
  – *People v. Bath*, 890 P.2d 269, 271 (Colo. Ct. App. 1994).
  – *People v. Campbell*, 94 P.3d 1186, 1190 (Colo. Ct. App. 2004).

2. Sexually Exploitative Material

- "Sexually exploitative material" is defined as any photograph, motion picture, videotape, print, negative, slide, or other mechanically, electronically, chemically, or digitally reproduced visual material that depicts a child engaged in, participating in, observing, or being used

for explicit sexual conduct. COLO. REV. STAT. § 18-6-403(2)(j).
– *People v. Batchelor*, 800 P.2d 599, 601 (Colo. 1990).
– *People v. Gagnon*, 997 P.2d 1278, 1281 (Colo. Ct. App. 1999).
– *People v. St. James*, 75 P.3d 1122, 1124 (Colo. Ct. App. 2002).

3. Explicit Sexual Conduct

- "Explicit sexual conduct" includes:
  (1) sexual intercourse;
  (2) erotic fondling;
  (3) erotic nudity;
  (4) masturbation;
  (5) sadomasochism; or
  (6) sexual excitement.

  COLO. REV. STAT. § 18-6-403(2)(e).
  – *People v. Batchelor*, 800 P.2d 599, 601 (Colo. 1990).
  – *People v. Gagnon*, 997 P.2d 1278, 1281 (Colo. Ct. App. 1999).

4. Erotic Nudity

- "Erotic nudity" means the display of the human male or female genitals or pubic area, the undeveloped or developing genitals or pubic area of the human male or female child, the human female breast, or the undeveloped or developing breast area of the human female child, for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved. COLO. REV. STAT. § 18-6-403(2)(d).
  – *People v. Batchelor*, 800 P.2d 599, 601 (Colo. 1990).
  – *People v. Gagnon*, 997 P.2d 1278, 1281-82 (Colo. Ct. App. 1999).

- In making a determination concerning erotic nudity, factors to consider in determining whether the display or picture depicts the human breast or underdeveloped or developing breast area of a child include whether the:
  (1) focal point of the visual depiction is on the child's breasts, genitals or pubic area;
  (2) setting of the visual depiction is sexually suggestive, such as in a place or pose generally associated with sexual activity;
  (3) child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
  (4) child is fully or partially clothed, or nude;
  (5) visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and
  (6) visual depiction appears to be intended or designed to elicit a sexual response in the viewer.
  – *People v. Gagnon*, 997 P.2d 1278, 1282 (Colo. Ct. App. 1999).

- The "sexual gratification of one or more of the persons involved" element of the definition of erotic nudity is properly defined objectively, so as to include a reasonable viewer of sexual materials that have been distributed. It will not be limited to the defendant's own subjective gratification.
  – *People v. Grady*, 126 P.3d 218, 219 (Colo. Ct. App. 2005).

C. Scienter

- Absent a clear intent to the contrary, the requisite mental state of "knowingly" must be deemed to apply to every element of the offense of sexual exploitation of a child, including the element of age.
  – *People v. Batchelor*, 800 P.2d 599, 602 (Colo. 1990).
  – *People v. Bath*, 890 P.2d 269, 271 (Colo. Ct. App. 1994).

III. Child Prostitution

A. Inducement of Child Prostitution

1. Elements

- Any person who, by word or action, induces a child to engage in an act that is prostitution by a child commits inducement of child prostitution. COLO. REV. STAT. § 18-7-405.5.
  – *People v. Young*, 694 P.2d 841, 842 (Colo. 1985).

2. Definitions

a. "Prostitution By a Child"

- "Prostitution by a child" means a child performing, offering, or agreeing to perform any act of sexual intercourse, fellatio, cunnilingus, masturbation, or anal intercourse with any person not the child's spouse in exchange for money or other thing of value.
  – *People v. Young*, 694 P.2d 841, 842 (Colo. 1985).

b. "Masturbation"

- "Masturbation" means stimulation of the genital organs by manual or other bodily contact, or by any object, exclusive of sexual intercourse.
  – *People v. Young*, 694 P.2d 841, 842 (Colo. 1985).

B. Soliciting for Child Prostitution

- A person commits soliciting for child prostitution if he or she:

(1) solicits another for the purpose of prostitution of a child or by a child;
(2) arranges or offers to arrange a meeting of persons for the purpose of prostitution of a child or by a child; or
(3) directs another to a place knowing such direction is for the purpose of prostitution of a child or by a child.

COLO. REV. STAT. § 18-7-402.
– *People v. Gritchen*, 908 P.2d 70, 71 (Colo. 1995).
– *People v. Jacobs*, 91 P.3d 438, 441 (Colo. Ct. App. 2003).

- The statutory elements of the general inchoate offense of solicitation do not apply to the separate substantive offense of soliciting for child prostitution.
  – *People v. Jacobs*, 91 P.3d 438, 441 (Colo. Ct. App. 2003).

- Soliciting for child prostitution is not an inchoate offense. It is a separate substantive criminal offense.
  – *People v. Jacobs*, 91 P.3d 438, 441 (Colo. Ct. App. 2003).

C. Transporting a Minor for the Purposes of Prostitution

No relevant state cases reported.

IV. Kidnapping

A. First Degree

1. Elements

- Any person who forcibly seizes and carries any person from one place to another with the intent thereby to force the victim or any other person to make any concession or give up anything of value in order to secure a release of a person under the offender's actual or apparent control commits first-degree kidnapping. COLO. REV. STAT. § 18-3-301(1).
  – *People v. San Emerterio*,[++] 839 P.2d 1161, 1164 (Colo. 1992).

- All of the elements of first-degree kidnapping are present if a defendant forcibly seizes a victim and carries him or her away with the intent to force him or her to make such a promise in order to secure his or her release.
  – *People v. San Emerterio*,[++] 839 P.2d 1161, 1167 (Colo. 1992).

2. Concessions

a. Generally

- First-degree kidnapping requires an intent to force a concession. It does not require that the concession be made,

much less that the actor have the ability to assure receipt of the benefits of the concession.
– *People v. San Emerterio,*[++] 839 P.2d 1161, 1167 (Colo. 1992).

- The correct focus is on the defendant's state of mind and whether he or she acted with the requisite intent, not on whether the victim made or followed through on the promise.
  – *People v. San Emerterio,*[++] 839 P.2d 1161, 1167 (Colo. 1992).

- To satisfy the statute's intent element, it is not necessary that the victim perceive that his or her release is contingent upon the giving of some concession; however, evidence of this perception may provide proof from which a fact finder could infer that the defendant intended such a result.
  – *People v. San Emerterio,*[++] 839 P.2d 1161, 1167 (Colo. 1992).

b. Submission to Sexual Assault

- Proof of a victim's submission to a sexual assault may establish a concession if the defendant warranted, and the victim perceived, that his or her freedom was dependent upon his or her submission to the sexual assault.
  – *People v. San Emerterio,*[++] 839 P.2d 1161, 1167 (Colo. 1992).

B. Second Degree: Kidnapping Involving Sexual Assault

- Under the second-degree kidnapping statute, kidnapping involving sexual assault only increases the severity of the crime if the person kidnapped is a victim of sexual assault.
  – *People v. Haynie*, 826 P.2d 371, 374 (Colo. Ct. App. 1991).

V. Online Enticement/Solicitation for Travel with the Intent to Engage in Sex with a Minor

A. Internet Luring of a Child

- An actor commits internet luring of a child if the actor knowingly communicates a statement over a computer or computer network to a person who the actor knows or believes is under fifteen years of age, describing explicit sexual conduct as defined in section 18-6-403 (2) (e), and, in connection with the communication, makes a statement persuading or inviting the person to meet the actor for any purpose, and the actor is more than four years older than the person or than the age the actor believes the person to be. COLO. REV. STAT. § 18-3-306(1).
- It shall not be a defense to this section that a meeting did not occur. COLO. REV. STAT. § 18-3-306(2).

- Internet luring of a child is a class 5 felony; except that luring of a child is a class 4 felony if committed with the intent to meet for the purpose of engaging in sexual exploitation as defined in section 18-6-403 or sexual contact as defined in section 18-3-401. COLO. REV. STAT. § 18-3-306(3).

VI. Sexual Assault

A. Sexual Assault on a Child

1. Elements

- Sexual assault on a child involves a defendant knowingly subjecting another person, who is not his or her spouse, to any sexual contact. The victim must be less than 15 years of age and the defendant must be at least 4 years older than the victim. COLO. REV. STAT. § 18-3-405(1).
  – *In re J.A.*, 733 P.2d 1197, 1198 (Colo. 1987).
  – *Kogan v. People*, 756 P.2d 945, 947 (Colo. 1988).
  – *People v. Gholston*, 26 P.3d 1, 12 (Colo. Ct. App. 2000).
  – *People v. Honeysette*, 53 P.3d 714, 716 (Colo. Ct. App. 2002).
  – *People v. Kyler*, 991 P.2d 810, 812 (Colo. 1999).
  – *People v. Salazar*, 920 P.2d 893, 895 (Colo. Ct. App. 1996).
  – *People v. Valdez*, 874 P.2d 415, 417 (Colo. Ct. App. 1993).
  – *People v. West*, 724 P.2d 623, 626-627 (Colo. 1986).

- Sexual contact is a specific-intent type of criminal conduct.
  – *In re J.A.*, 733 P.2d 1197, 1199 (Colo. 1987).

2. Mental State

- The sexual-assault-on-a-child statute mandates that there be a knowingly culpable mental state on the part of the defendant.
  – *Swentkowski v. Dawson*, 881 P.2d 437, 440 (Colo. Ct. App. 1994).

3. Definitions

a. "Intimate Parts"

- For purposes of establishing sexual contact, intimate parts is defined as, among other things, the buttocks.
  – *People v. Vinson*, 42 P.3d 86, 87 (Colo. Ct. App. 2002).

b. "Sexual Contact"

- "Sexual contact" is defined as the knowing or intentional touching of a victim's intimate parts by an actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the intimate parts of the victim or the actor, if that contact can reasonably be

construed as being for the purposes of sexual arousal, gratification, or abuse.
– *In re J.A.*, 733 P.2d 1197, 1198 (Colo. 1987).
– *Kogan v. People*, 756 P.2d 945, 948 (Colo. 1988).
– *People v. Vinson*, 42 P.3d 86, 87 (Colo. Ct. App. 2002).
– *People v. West*, 724 P.2d 623, 627 (Colo. 1986).

c. "Touch"

- There is no statutory definition of the word touching.
  – *People v. Vinson*, 42 P.3d 86, 87 (Colo. Ct. App. 2002).

- "Touch" is defined as the act or fact of touching, feeling, striking lightly, or coming in contact.
  – *People v. Vinson*, 42 P.3d 86, 87 (Colo. Ct. App. 2002).

- For purposes of establishing sexual contact, the word touching need not be direct person-to-person contact.
  – *People v. Vinson*, 42 P.3d 86, 87 (Colo. Ct. App. 2002).

- Ejaculating semen onto clothing covering another person's intimate parts may constitute touching for purposes of establishing the sexual contact element of both sexual assault on a child and sexual assault on a child by one in a position of trust.
  – *People v. Vinson*, 42 P.3d 86, 87-88 (Colo. Ct. App. 2002).

4. Pattern of Sexual Abuse

a. "Pattern of Sexual Abuse" Defined

- "Pattern of sexual abuse" means the commission of two or more incidents of sexual contact involving a child when such offenses are committed by an actor upon the same victim.
  – *People v. Gholston*, 26 P.3d 1, 14 (Colo. Ct. App. 2000).
  – *People v. Honeysette*, 53 P.3d 714, 716 (Colo. Ct. App. 2002).

b. Proof of a Pattern of Sexual Abuse

- To be convicted of sexual assault on a child as part of a pattern of sexual abuse, the prosecution does not have to prove that the defendant was in a position of trust, but must prove the commission of the sexual contact charged and at least 1 other incident of sexual contact on the same child within 10 years of the offense charged.
  – *People v. Valdez*, 874 P.2d 415, 418 (Colo. Ct. App. 1993).

- A pattern of abuse is established where there is sufficient proof that the defendant commits at least 2 discrete acts of sexual

contact against the same child within a 10-year period and within the period alleged in the information. Since one of those acts of abuse must necessarily have preceded the other, both acts may occur within the period alleged in the information.
– *People v. Honeysette*, 53 P.3d 714, 717 (Colo. Ct. App. 2002).

c. Date or Time for a Pattern of Sexual Abuse

- No specific date or time must be alleged for the pattern of sexual abuse, except that the acts constituting the pattern of sexual abuse must have been committed within 10 years prior to the offense charged in the information or indictment.
  – *People v. Gholston*, 26 P.3d 1, 12-13 (Colo. Ct. App. 2000).
  – *People v. Honeysette*, 53 P.3d 714, 716 (Colo. Ct. App. 2002).

- The offense charged in the information or indictment must constitute one of the incidents of sexual contact involving a child necessary to form a pattern of sexual abuse.
  – *People v. Gholston*, 26 P.3d 1, 12-13 (Colo. Ct. App. 2000).
  – *People v. Honeysette*, 53 P.3d 714, 716 (Colo. Ct. App. 2002).

d. Classes of Felony

- The offense of sexual assault on a child is designated as a Class Four felony; however, it becomes a Class Three felony if the actor commits the offense as a part of a pattern of sexual abuse.
  – *People v. Gholston*, 26 P.3d 1, 12 (Colo. Ct. App. 2000).
  – *People v. Valdez*, 874 P.2d 415, 417 (Colo. Ct. App. 1993).

B. Sexual Assault on a Child by One in a Position of Trust

1. Elements

- The elements of sexual assault on a child and the elements of sexual assault on a child by one in a position of trust are identical except that the latter offense requires proof that the defendant was in a "position of trust" with respect to a victim under the age of 18. COLO. REV. STAT. § 18-3-405.3.
  – *People v. Honeysette*, 53 P.3d 714, 718 (Colo. Ct. App. 2002).
  – *People v. Kyler*, 991 P.2d 810, 812 (Colo. 1999).
  – *People v. Valdez*, 874 P.2d 415, 417 (Colo. Ct. App. 1993).

2. Proof

- To be convicted of sexual assault on a child by one in a position of trust, the prosecution does not have to prove a pattern of sexual contact, but must prove that the actor was in a position of trust with respect to the victim.
  – *People v. Valdez*, 874 P.2d 415, 418 (Colo. Ct. App. 1993).

3. Classes of Felony

- Sexual assault on a child by one in a position of trust is a Class-Three felony if the victim is less than 15 years old, and a Class-Four felony if the victim is 15 or more but less than 18.
  – *People v. Valdez*, 874 P.2d 415, 417-18 (Colo. Ct. App. 1993).

4. Sexual Assault on Child as Part of Pattern of Sexual Abuse Versus Sexual Assault on Child by One in Position of Trust

- Neither offense requires proof of the same or less than all of the facts required to establish the other.
  – *People v. Valdez*, 874 P.2d 415, 418 (Colo. Ct. App. 1993).

C. Sexual Assault on a Client by a Psychotherapist

1. Elements

- Any actor who knowingly inflicts sexual penetration on a victim commits aggravated sexual assault on a client if the actor is a psychotherapist and the victim is:
  (1) a client of the psychotherapist; or
  (2) a client and the sexual penetration occurred by means of therapeutic deception.
  COLO. REV. STAT. § 18-3-405.5.
  – *Ferguson v. People*, 824 P.2d 803, 805 (Colo. 1992).

2. Mental State

- The culpable mental state of "knowingly" is expressly incorporated into the statutory definition of aggravated sexual assault on a client by a psychotherapist. COLO. REV. STAT. § 18-3-405.5.
  – *Ferguson v. People*, 824 P.2d 803, 812 (Colo. 1992).

- A psychotherapist acts "knowingly" with respect to inflicting sexual penetration on a client when the psychotherapist is aware that he or she is inflicting sexual penetration on a person who seeks or is receiving psychotherapy from him or her, or when the psychotherapist is aware that his or her conduct is practically certain to cause submission of the client to an act of sexual penetration.
  – *Ferguson v. People*, 824 P.2d 803, 812 (Colo. 1992).

3. Definitions

a. "Sexual Penetration" Defined

- "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, analingus, or anal intercourse.
  – *Ferguson v. People*, 824 P.2d 803, 806 (Colo. 1992).

- Emission need not be proved as an element of any sexual penetration.
  – *Ferguson v. People*, 824 P.2d 803, 806 (Colo. 1992).

- Any penetration, however slight, is sufficient to complete the crime.
  – *Ferguson v. People*, 824 P.2d 803, 806 (Colo. 1992).

b. "Sexual Contact"

- "Sexual contact" means the knowing touching of a victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that contact can reasonably be construed as being for the purposes of sexual arousal, gratification, or abuse.
  – *Ferguson v. People*, 824 P.2d 803, 806 (Colo. 1992).

COLORADO

Search and Seizure of Electronic Evidence

A case with + indicates a memorandum decision that does not create legal precedent.

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

I. Search Warrants

A. Probable Cause

1. Standard

- Probable cause exists when an affidavit for a search warrant alleges sufficient facts to lead a person of reasonable caution to believe that contraband or evidence of criminal activity is located at the place to be searched.
  – *People v. Slusher*, 844 P.2d 1222, 1226 (Colo. Ct. App. 1992).

- Probable cause must be established with respect to each place to be searched.
  – *People v. Bachofer*, 85 P.3d 615, 617 (Colo. Ct. App. 2003).

- Probable cause is not measured by a more likely true than false level of certitude but by a commonsense, non-technical standard of reasonable cause to believe.
  – *People v. Campbell*, 94 P.3d 1186, 1188 (Colo. Ct. App. 2004).

2. Totality of the Circumstances

- The totality of the circumstances must be such that a person of reasonable caution would suspect that criminal activity is taking place at the place to be searched.
  – *People v. Bachofer*, 85 P.3d 615, 617-18 (Colo. Ct. App. 2003).

3. Affidavits

a. Vague Allegations

- Vague allegations in the affidavit will not suffice.
  – *People v. Bachofer*, 85 P.3d 615, 617 (Colo. Ct. App. 2003).

- There must be a connection shown between the crime suspected and the area to be searched.
  – *People v. Bachofer*, 85 P.3d 615, 617 (Colo. Ct. App. 2003).

- Where the affidavit describes a variety of locations without specifying the crime being perpetrated at each, the geographic scope of the affidavit comes under close scrutiny.
  – *People v. Bachofer*, 85 P.3d 615, 617 (Colo. Ct. App. 2003).

b. 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).

4. Appellate Review

- The reviewing court's duty upon review is to determine whether the district court had a substantial basis for concluding that probable cause to support the search warrant existed.
  – *People v. Slusher*, 844 P.2d 1222, 1226 (Colo. Ct. App. 1992).

- Deference must be given to the issuing court's determination of probable cause.
  – *People v. Slusher*, 844 P.2d 1222, 1226 (Colo. Ct. App. 1992).

B. Scope of the Search Warrant: Particularity Requirement

1. Items to Be Seized

a. Generally

- A warrant is invalid on its face where it does not particularly describe the items to be seized.
  – *People v. Slusher*, 844 P.2d 1222, 1227 (Colo. Ct. App. 1992).

- The Fourth Amendment prohibits general exploratory searches and requires that a search warrant describe with particularity the objects to be seized.
  – *People v. Slusher*, 844 P.2d 1222, 1227 (Colo. Ct. App. 1992).

- The description of the property to be seized should be such that the law-enforcement officer charged with executing the warrant will be advised with a reasonable degree of certainty of

the property to be seized.
– *People v. Slusher*, 844 P.2d 1222, 1228 (Colo. Ct. App. 1992).

b. Protected Materials

- The particularity requirement may be more stringent if the items to be seized have the presumptive protection of the First Amendment.
  – *People v. Slusher*, 844 P.2d 1222, 1228 (Colo. Ct. App. 1992).

- The requirement that warrants must describe such presumptively protected materials with scrupulous exactitude applies only if the basis for their seizure is the ideas they contain.
  – *People v. Slusher*, 844 P.2d 1222, 1228 (Colo. Ct. App. 1992).

2. Degree of Specificity

- The degree of specificity required when describing the goods to be seized will vary with the level of information available to law enforcement and the type of items involved.
  – *People v. Slusher*, 844 P.2d 1222, 1228 (Colo. Ct. App. 1992).

3. Necessary Particularity in an Affidavit

- In deciding whether an affidavit may provide the necessary particularity for a warrant, courts generally consider, in varying degrees, two criteria:
  (1) whether the affidavit accompanies the warrant; and
  (2) whether the affidavit is incorporated by reference into the warrant.
  – *People v. Slusher*, 844 P.2d 1222, 1227 (Colo. Ct. App. 1992).

4. Overbreadth of a Warrant

- A warrant's overbreadth can be cured by an affidavit that more particularly describes the items to be seized.
  – *People v. Slusher*, 844 P.2d 1222, 1227 (Colo. Ct. App. 1992).

C. Good Faith

- Where the law-enforcement officers executing a warrant reasonably and, in good faith, believe they are executing a legitimate warrant, the evidence obtained may be admissible, even if the warrant is found to be defective.
  – *People v. Bachofer*, 85 P.3d 615, 618 (Colo. Ct. App. 2003).

- The good-faith exception provides that evidence should not be suppressed if it is seized by a peace officer as a result of a good-faith mistake or of a technical violation. COLO. REV. STAT. § 16-3-308(1).
  – *People v. Bachofer*, 85 P.3d 615, 618 (Colo. Ct. App. 2003).

- The statute presumes good faith where the evidence is obtained pursuant to and within the scope of a warrant, unless the warrant is obtained through intentional material misrepresentation.
  – *People v. Bachofer*, 85 P.3d 615, 618 (Colo. Ct. App. 2003).

D. Staleness

- Even though the passage of time may reduce the likelihood that evidence remains in the place to be searched, new information that indicates the evidence could still be located in that place may cure the staleness of information included in the affidavit.
  – *People v. Hamer*,[++] 689 P.2d 1147, 1151 (Colo. Ct. App. 1984).

II. Anticipatory Warrants

No relevant state cases reported.

III. Types of Searches

A. Warrantless Searches

1. Consent Searches

a. Generally

- A valid consent for a search may be obtained either from the individual whose property is searched or from a third party who possesses common authority over the property.
  – *People v. Bachofer*, 85 P.3d 615, 619 (Colo. Ct. App. 2003).

b. Third-Party Consent

- Colorado has adopted the common authority doctrine under which a law-enforcement officer must have an objectively reasonable belief that a third person has authority to allow a search.
  – *People v. Bachofer*, 85 P.3d 615, 619 (Colo. Ct. App. 2003).

2. Plain-View Searches

a. Generally

- Law enforcement may seize, without a warrant, plainly visible evidence, so long as:
  (1) their initial intrusion onto the premises was legitimate;
  (2) they had a lawful right of access to the object; and
  (3) they had a reasonable belief that the evidence seized was incriminating.
  – *People v. Campbell*, 94 P.3d 1186, 1188 (Colo. Ct. App. 2004).

b. Immediately Apparent Requirement

- Under the plain-view exception, a reasonable belief that evidence is incriminating exists when the incriminating nature of the evidence is immediately apparent to the searching officer.
  – *People v. Campbell*, 94 P.3d 1186, 1188 (Colo. Ct. App. 2004).

- The immediately apparent requirement is satisfied if, without further search, law enforcement has probable cause to associate an item with criminal activity.
  – *People v. Campbell*, 94 P.3d 1186, 1188 (Colo. Ct. App. 2004).

B. Civilian Searches

No relevant state cases reported.

C. Employer Searches

No relevant state cases reported.

D. University-Campus Searches

No relevant state cases reported.

IV. Unreasonable Government Searches

- When challenging governmental investigative activity as an unreasonable search, the first inquiry is whether or not the intrusion constitutes a search: did the individual have a reasonable expectation of privacy with respect to the governmental intrusion?
  – *People v. Atencio*, 780 P.2d 46, 48 (Colo. Ct. App. 1989).

V. Computer-Technician/Repairperson Discoveries

No relevant state cases reported.

VI. Photo-Development Discoveries

No relevant state cases reported.

VII. Interrogation

A. Custodial Interrogation

1. "Custodial Interrogation" Defined

- "Custodial interrogation" is questioning initiated by law-enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way.
  – *People v. Trujillo*, 938 P.2d 117, 123 (Colo. 1997).

2. When Is Person in Custody?

a. Generally

- A person is in custody not only when he or she has been subjected to the constraints associated with a formal arrest, but also when a law-enforcement interrogation is conducted under circumstances where the person interrogated has been deprived of his or her freedom of action in a significant way.
  – *People v. Trujillo*, 938 P.2d 117, 123 (Colo. 1997).

b. Reasonable-Person Standard

i. Objective Standard

- An objective standard applies to the issue of custody: whether a reasonable person in the suspect's position would have considered him- or herself deprived of his or her freedom of action in a significant way. Under this standard, neither the interrogating officer's subjective state of mind nor the suspect's mental state is conclusive on the issue of whether a reasonable person in that situation would have considered the interrogation to be custodial.
  – *People v. Trujillo*, 938 P.2d 117, 123 (Colo. 1997).

- Unlike a subjective test, the reasonable-person standard is not solely dependent either on the self-serving declarations of the law-enforcement officers or the defendant, nor does it place upon law enforcement the

burden of anticipating the frailties or idiosyncrasies of every person whom they question.
– *People v. Trujillo*, 938 P.2d 117, 123 (Colo. 1997).

ii. Factors to Consider

- In making the determination of whether a reasonable person in a defendant's circumstances would have believed that he or she was free to leave a law-enforcement officer's presence, numerous factors must be considered, including:
  (1) the time, place, and purpose of the encounter;
  (2) the persons present during the interrogation;
  (3) the words spoken by the officer to the defendant;
  (4) the officer's tone of voice and general demeanor;
  (5) the length and mood of the interrogation;
  (6) whether any limitation of movement or other form of restraint was placed on the defendant during the interrogation;
  (7) the officer's response to any questions asked by the defendant;
  (8) whether directions were given to the defendant during the interrogation; and
  (9) the defendant's verbal or nonverbal response to such directions.
  – *People v. Trujillo*, 938 P.2d 117, 124 (Colo. 1997).

- No one factor is determinative; however, each factor should be considered in turn.
  – *People v. Trujillo*, 938 P.2d 117, 124 (Colo. 1997).

iii. Interrogation at a Stationhouse

- Interrogation at a stationhouse does not necessarily render the interrogation custodial for purposes of the *Miranda* warning.
  – *People v. Trujillo*, 938 P.2d 117, 124 (Colo. 1997).

- To determine whether the interrogation of a citizen at a stationhouse is custodial, the other factors must be considered.
  – *People v. Trujillo*, 938 P.2d 117, 124 (Colo. 1997).

B. Witness Tampering

- Interrogation under *Miranda* refers not only to express questioning by a law-enforcement officer, but also to any words or actions on the part of the officer

that the officer should know are reasonably likely to elicit an incriminating response from a suspect.
– *People v. Trujillo*, 938 P.2d 117, 124 (Colo. 1997).

C. Waiver of Miranda Rights

1. Two-Part Inquiry

- The validity of a defendant's waiver of his or her *Miranda* rights involves a two-part inquiry. The waiver must have been made:
  (1) voluntarily, in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception; and
  (2) knowingly and intelligently.
  – *People v. Kaiser*, 32 P.3d 480, 484 (Colo. 2001).

a. Voluntariness

- In determining whether a defendant's statements are voluntary, a trial court must consider the totality of the circumstances surrounding the statements.
  – *People v. Trujillo*, 938 P.2d 117, 126 (Colo. 1997).

- Voluntariness of a statement is not an issue if the statement is not made to law-enforcement authorities or their agents.
  – *People v. Bowman*, 812 P.2d 725, 729 (Colo. Ct. App. 1991).

i. Burden

- The burden is on the prosecution to prove, by a preponderance of evidence, that the statement was made voluntarily.
  – *People v. Trujillo*, 938 P.2d 117, 126 (Colo. 1997).

ii. Factors to Consider

- One of the factors to be considered in determining voluntariness is the individual's state of mind.
  – *People v. Trujillo*, 938 P.2d 117, 126 (Colo. 1997).

- Statements are voluntary if they are the product of the individual's free and rational choice.
  – *People v. Trujillo*, 938 P.2d 117, 126 (Colo. 1997).

- Another factor to be considered is the actions of the law-enforcement officer during the interview.
  – *People v. Trujillo*, 938 P.2d 117, 126 (Colo. 1997).

- Coercive police activity is a necessary predicate to the finding that a confession is not voluntary.
  – *People v. Trujillo*, 938 P.2d 117, 126 (Colo. 1997).

- Voluntary statements are those that are not extracted by threats or violence and not obtained by direct or implied promises or the exertion of improper influence.
  – *People v. Trujillo*, 938 P.2d 117, 126 (Colo. 1997).

b. Knowing and Intelligent

i. Decision to Talk to Law Enforcement

- Just because a defendant's decision to talk to law enforcement might be ill-advised does not mean that the defendant's decision was not knowing and intelligent.
  – *People v. Kaiser*, 32 P.3d 480, 484 (Colo. 2001).

- Law enforcement is not required to tell the defendant that it might be against his or her self-interest to confess to law enforcement.
  – *People v. Kaiser*, 32 P.3d 480, 484 (Colo. 2001).

ii. Diminished Mental Capacity

- Diminished mental capacity does not automatically make the defendant's waiver of *Miranda* rights unknowing and unintelligent.
  – *People v. Kaiser*, 32 P.3d 480, 487 (Colo. 2001).

iii. Burden of Proof

- It is the prosecution's burden to prove by a preponderance of the evidence that the defendant's waiver of *Miranda* rights was knowing and intelligent.
  – *People v. Kaiser*, 32 P.3d 480, 484 (Colo. 2001).

- This determination requires a finding that the person was fully aware of the nature of the right to remain silent and the consequences of abandoning that right.
  – *People v. Kaiser*, 32 P.3d 480, 484 (Colo. 2001).

2. Totality of the Circumstances

- The trial court must consider the waiver of *Miranda* rights based on the totality of the circumstances surrounding the custodial interrogation.

– *People v. Kaiser*, 32 P.3d 480, 484 (Colo. 2001).

a. Factors to Consider

- In analyzing the totality of the circumstances surrounding the waiver of *Miranda* rights, factors to consider include, but are not limited to:
  (1) the time interval between the initial Miranda advisement and any subsequent interrogation;
  (2) whether the defendant or the interrogating officer initiated the interview;
  (3) whether and to what extent the interrogating officer reminded the defendant of his or her rights prior to the interrogation by asking him or her if he or she recalled his or her rights, understood them, or wanted an attorney;
  (4) the clarity and form of the defendant's acknowledgment and waiver, if any;
  (5) the background and experience of the defendant in connection with the criminal justice system;
  (6) any language barriers encountered by a defendant; and
  (7) the defendant's age, experience, education, background, and intelligence.
  – *People v. Kaiser*, 32 P.3d 480, 484 (Colo. 2001).

- In analyzing the totality of the circumstances, the defendant's mental capacity is certainly relevant in determining whether the defendant is capable of making a knowing and intelligent waiver of *Miranda* rights; however, it is not determinative.
  – *People v. Kaiser*, 32 P.3d 480, 486 (Colo. 2001).

D. Mental-Health Professionals

- The requirement that certain mental-health professionals report suspected incidents of child abuse or neglect does not, by itself, render such professionals agents of law-enforcement officials.
  – *People v. Bowman*, 812 P.2d 725, 729-730 (Colo. Ct. App. 1991).

VIII. Criminal Forfeiture

No relevant state cases reported.

IX. Disciplinary Hearings for Federal and State Officers

No relevant state cases reported.

X. Probation and Parolee Rights

No relevant state cases reported.

COLORADO

Jurisdiction and Nexus

A case with + indicates a memorandum decision that does not create legal precedent.

I. Jurisdictional Nexus

No relevant state cases reported.

II. Internet Nexus

No relevant state cases reported.

III. State Jurisdiction, Federal Jurisdiction, and Concurrent Jurisdiction

A. State Jurisdiction

1. Generally

- Colorado courts have jurisdiction over offenses if they are committed wholly or partly within the state.
  – *People v. Jacobs*, 91 P.3d 438, 442 (Colo. Ct. App. 2003).

2. Omission to Perform Duty

- Whether an offender is in- or outside of the state is immaterial to the commission of an offense based on an omission to perform a duty imposed by the law of Colorado.
  – *People v. Haynie*, 826 P.2d 371, 373 (Colo. Ct. App. 1991).

B. Federal Jurisdiction

No relevant state cases reported.

C. Concurrent Jurisdiction

No relevant state cases reported.

IV. Juvenile Proceedings

A. Delinquency Proceedings

1. Intentional Acts of Child

- A child may be liable for his or her intentional acts if he or she had the intent to make harmful contact and he or she appreciated that such contact might be injurious.
  – *Swentkowski v. Dawson*, 881 P.2d 437, 439 (Colo. Ct. App. 1994).

2. Constitutional Protections

- Although delinquency proceedings are considered civil in nature, the respondent child is nevertheless entitled to receive constitutional protections, including that the claims and accusations be proved beyond a reasonable doubt prior to the respondent child being adjudicated delinquent.
  – *Swentkowski v. Dawson*, 881 P.2d 437, 440 (Colo. Ct. App. 1994).

B. Transfer Hearing

- Upon request of the district attorney, the court shall continue the case for further investigation and a transfer hearing to determine whether the jurisdiction of the juvenile court over the child should be waived; therefore, the transfer hearing really is a continuation of the adjudicatory process already begun as the judge hears the same evidence and, at some point, the court must decide whether to transfer the child or to proceed with a separate adjudication.
  – *Briones v. Juv. Ct.*, 534 P.2d 624, 625 (Colo. 1975).

- At a transfer hearing, the court must consider whether the interests of the child would be better served by a juvenile court waiving its jurisdiction and by transferring jurisdiction to a district court.
  – *Briones v. Juv. Ct.*, 534 P.2d 624, 626 (Colo. 1975).

1. Mental Illness

- A court, while a minor is still under its jurisdiction, cannot ignore the competent evidence of an expert witness relating to the mental condition of the minor.
  – *Briones v. Juv. Ct.*, 534 P.2d 624, 626 (Colo. 1975).

- Mental illness prevents a juvenile, who is not fully cognizant of the nature of the proceedings or who is not in full command of his or her mental facilities, from having to answer on a delinquency matter.
  – *Briones v. Juv. Ct.*, 534 P.2d 624, 625-26 (Colo. 1975).

- A mentally-ill or deficient juvenile shall not be required to go through ordinary juvenile proceedings. Rather, the sick child shall be examined in a hospital or other suitable facility and if the results of such examination confirm the mental illness, then transfer shall be made to

a probate court. Such a court not only specializes in mental health problems but also has the power to order appropriate treatment.
– *Briones v. Juv. Ct.*, 534 P.2d 624, 626 (Colo. 1975).

2. Judicial Discretion

- Whenever criminal charges are either transferred to or filed directly in the district court, the judge of the district court shall have the power to make any disposition of the case that any juvenile court would have, and shall have the power to remand the case to the juvenile court for disposition at its discretion.
–*People v. Dist. Ct.*, 585 P.2d 913, 915 (Colo. 1978).

C. Trial As an Adult

- A juvenile may be charged by the direct filing of an information in the district court or by indictment only when he or she is:
(1) 14 years of age or older; and
(2) alleged to have committed a felony enumerated as a crime of violence.
COLO. REV. STAT. §18-1.3-406.
– *People v. Dalton*, 70 P.3d 517, 519-20 (Colo. Ct. App. 2002).

- Once charges are directly filed in district court against a juvenile, the sentencing of that juvenile for any conviction resulting from those charges must be done by the district court.
– *People v. Dalton*, 70 P.3d 517, 522-23 (Colo. Ct. App. 2002).

V. Interstate Possession of Child Pornography

No relevant state cases reported.

COLORADO

Discovery and Evidence

A case with + indicates a memorandum decision that does not create legal precedent.

I. Timely Review of Evidence

No relevant state cases reported.

II. Accusatory Instruments

A. Crimes Occurring in Single Transaction

- Where a defendant is charged with crimes occurring in a single transaction, the prosecution is not required to specify the acts that are the basis for the separate counts.
  – *People v. Jacobs*, 91 P.3d 438, 443 (Colo. Ct. App. 2003).

B. Multiplicity

- Where there is evidence of many acts, any one of which would constitute the offense charged, the prosecution may be compelled to select the transaction on which it relies for a conviction; however, the prosecution is not required to identify the exact date of the offense, but it must individualize and select a specific act.
  – *Kogan v. People*, 756 P.2d 945, 956 (Colo. 1988).
  – *Woertman v. People*, 804 P.2d 188, 191 (Colo. 1991).

- Selection of a specific act allows the defendant to organize, prepare, and make his or her defense to a particular charge, and warrants that some jurors do not convict on one offense and other jurors on a separate offense.
  – *Woertman v. People*, 804 P.2d 188, 191 (Colo. 1991).

- The presentation of common-scheme or design evidence pursuant to the statute regarding evidence of similar transactions does not obviate the need for the prosecution to individualize and select a specific act.
  – *Kogan v. People*, 756 P.2d 945, 957 (Colo. 1988).

C. Specificity of Time

- When time does not constitute a material element of the crime, the exact time at which the offense charged was committed is not significant, and thus not

required in a bill of particulars.
– *Woertman v. People*, 804 P.2d 188, 190 (Colo. 1991).

- A precise time may be required if it is essential to allow the defendant to properly prepare his or her defense or protect against later prosecutions for the same crime.
  – *Woertman v. People*, 804 P.2d 188, 190-191 (Colo. 1991).

III. Discovery by the Defendant

A. Defense Requests for Copies of Child Pornography: Duplication of Photographs

- Upon the defendant's request, the prosecution must provide duplicates of any photographs held as evidence in connection with the case. COLO. R. CRIM. PROC. 16(a)(1).
  – *People v. Arapahoe County Ct.*, 74 P.3d 429, 430 (Colo. Ct. App. 2003).

B. Requests for Examinations of a Victim

1. Involuntary Psychological Examinations

a. Generally

- In deciding whether to grant a defendant's motion for the involuntary psychological examination of a child-sexual-abuse victim, the court must weigh the defendant's right to a fair trial against the invasion of the victim's privacy interests, as children are entitled to the same constitutional guarantees as adults, including protection from unreasonable searches and seizures under the fourth amendment.
  – *People v. Chard*, 808 P.2d 351, 353 (Colo. 1991).

b. Compelling Reason or Need Test

- Colorado has adopted the compelling reason or need test with regard to involuntary psychological examinations.
  – *People v. Chard*, 808 P.2d 351, 353 (Colo. 1991).

- The ordering of an involuntary psychological examination is within the discretion of the trial court.
  – *People v. Chard*, 808 P.2d 351, 353 (Colo. 1991).

- The trial court must balance the possible emotional trauma, embarrassment, or intimidation to the complainant against the likelihood of the examination producing material, as

distinguished from speculative, evidence.
– *People v. Chard*, 808 P.2d 351, 353 (Colo. 1991).

2. Compelled Physical Examinations

- A defendant's right to discovery in criminal cases does not include compelled physical examinations of child victims.
  – *People v. Chard*, 808 P.2d 351, 355 (Colo. 1991).

a. Split of Authority

- There is a split of authority with regard to a trial court's power to order an involuntary physical examination of a child victim in the absence of statutory authority.
  – *People v. Chard*, 808 P.2d 351, 355 (Colo. 1991).

- Some jurisdictions hold that, in the absence of specific statutory authority, a trial court may not order an unwilling witness to submit to a physical examination; however, the majority of courts considering the issue of whether a trial court has the power to order a compelled physical examination of a child victim in the absence of statutory authority has sought to balance a defendant's right to discover possible exculpatory evidence against the victim's privacy interests by holding that it is within a trial court's discretion to order an involuntary physical examination, but only on a showing by a defendant of a compelling need or reason for the examination.
  – *People v. Chard*, 808 P.2d 351, 355 (Colo. 1991).

b. Discretionary Power

i. Substantial Need and Justification

- A trial justice has discretionary power to require a witness in a criminal trial to submit to an independent physical examination only under the most compelling of circumstances.
  – *People v. Chard*, 808 P.2d 351, 355 (Colo. 1991).

- In situations in which the defendant has shown substantial need and justification and no violation of substantial rights will result, the trial justice has discretionary power to order the complainant to undergo a physical examination.
  – *People v. Chard*, 808 P.2d 351, 355 (Colo. 1991).

ii. Factors to Consider

- In determining whether to order an independent medical examination, the trial justice should consider:
  (1) the complainant's age;
  (2) the remoteness in time of the alleged criminal incident to the proposed examination;
  (3) the degree of intrusiveness and humiliation associated with the procedure;
  (4) the potentially debilitating physical effects of such an examination; and
  (5) any other relevant considerations.
  – *People v. Chard*, 808 P.2d 351, 355 (Colo. 1991).

IV. Introduction of E-mails into Evidence

A. Hearsay/Authentication Issues

No relevant state cases reported.

B. Circumstantial Evidence

- Appellate court could not say that circumstantial evidence was insufficient to prove defendant knowingly possessed images of child pornography on a computer where forensic evidence showed that a person using a password-protected America Online account had joined an online list-serve group that distributed emails relating to sexual activity with young girls, and where defendant admitted during cross-examination that he used this computer and AOL account for personal correspondence.
  – *People v. Martinez*, 165 P.3d 907, 915 (Colo. Ct. App. 2007).

C. Technical Aspects of Electronic Evidence Regarding Admissibility

No relevant state cases reported.

V. Introduction of Text-Only Evidence

No relevant state cases reported.

VI. 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

No relevant state cases reported.

VII. Prior Acts, Crimes, and Wrongs

A. Inadmissible

- Evidence of prior criminal conduct is not admissible to prove the defendant's guilt of the crime charged.
  – *Adrian v. People*, 770 P.2d 1243, 1244 (Colo. 1989).

B. Admissible

1. Relevance

- To be admissible, evidence of prior bad acts must meet the following four-part test:
  (1) the evidence must relate to a material fact in the case;
  (2) it must be logically relevant to the material fact;
  (3) the logical relevance must be independent of the prohibited inference that the defendant committed the crime charged because of his or her criminal propensities; and
  (4) the probative value of the evidence must substantially outweigh the danger of unfair prejudice.
  – *People v. McKibben*, 862 P.2d 991, 992-93 (Colo. Ct. App. 1993).

2. Evidence Surrounding the Crime

- Evidence surrounding a crime is admissible to establish the context in which a crime was committed, even if such events indicate commission of unrelated crimes.
  – *People v. Esch*, 786 P.2d 462, 465 (Colo. Ct. App. 1989).

3. Similar Acts/Transaction Evidence

a. Relevance

- The prosecution may not offer evidence of similar acts until a *prima facie* case has been made that would warrant submitting the case to the jury. COLO. REV. STAT. § 16-10-301(3).
  – *Adrian v. People*, 770 P.2d 1243, 1244 (Colo. 1989).

- Before offering evidence of similar acts, the prosecution must advise the trial court of the purpose for the admission of the evidence. The court must then determine if the evidence is relevant to a material issue in the case, and whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. COLO. REV. STAT. § 16-10-301(3).
  – *Adrian v. People*, 770 P.2d 1243, 1244 (Colo. 1989).

- Before evidence of similar acts is admitted, the trial judge must advise the jury of the limited purpose for the admission and consideration of the evidence. COLO. REV. STAT. § 16-10-301(3).
  – *Adrian v. People*, 770 P.2d 1243, 1244 (Colo. 1989).

b. Judicial Discretion

- The trial court is vested with substantial discretion in deciding the admissibility of evidence or prior similar acts.
  – *Adrian v. People*, 770 P.2d 1243, 1245 (Colo. 1989).

- The trial court must decide admissibility on a case-by-case basis.
  – *Adrian v. People*, 770 P.2d 1243, 1245 (Colo. 1989).

c. Factors to Consider

i. Remoteness

- In determining the relevance of similar-transaction evidence, remoteness as well as other circumstances must be considered.
  – *Adrian v. People*, 770 P.2d 1243, 1245 (Colo. 1989).

- There is no fixed standard for determining remoteness.
  – *Adrian v. People*, 770 P.2d 1243, 1245 (Colo. 1989).

- The determination of whether evidence is too remote to be relevant is left to the discretion of the trial judge, and his or her decision will not be reversed in the absence of clear proof of an abuse of that discretion.
  – *Adrian v. People*, 770 P.2d 1243, 1245 (Colo. 1989).

- Remoteness does not prevent the admission of evidence of prior sexual assaults when such evidence is otherwise relevant.
  – *Adrian v. People*, 770 P.2d 1243, 1246 (Colo. 1989).

ii. Other Factors

- In addition to remoteness, the trial court must also consider the:
  (1) strength of evidence of the commission of prior acts;
  (2) similarities between the acts;
  (3) interval of time elapsed between the acts;
  (4) need for the evidence;
  (5) efficacy of alternative proof; and
  (6) degree to which the evidence will rouse the jury to overmastering hostility.
  – *Adrian v. People*, 770 P.2d 1243, 1246 (Colo. 1989).

4. Common Plan, Scheme, Design, Identity, *Modus Operandi*, Motive, Guilty Knowledge, or Intent

a. Generally

- Evidence of prior similar transactions in cases involving sexual assault on a child is admissible if its is offered for the limited purpose of establishing a common plan, scheme, design, identity, *modus operandi*, motive, guilty knowledge, or intent.
  COLO. REV. STAT. § 16-10-301; COLO. R. EVID. 404(b).
  – *Adrian v. People*, 770 P.2d 1243, 1244 (Colo. 1989).
  – *People v. McKibben*, 862 P.2d 991, 992 (Colo. Ct. App. 1993).

b. Jury Instructions

- If the trial court allows proof of similar transactions in order to show intent, motive, *modus operandi*, plan, or identity, the court shall instruct the jury at the time such evidence is admitted concerning the limited purpose for which the evidence is being received. The court shall also instruct the jurors in the general charge on the limited purpose for the admission of such evidence.
  – *Woertman v. People*, 804 P.2d 188, 190 (Colo. 1991).

VIII. Rape-Shield Statute

- Evidence of specific instances of the victim's prior or subsequent sexual conduct is presumed to be irrelevant unless it is evidence of:
  (1) sexual conduct with the defendant; or
  (2) evidence of the source or origin of semen, pregnancy, disease, or any similar evidence of sexual intercourse offered for the purpose of showing that the acts charged were or were not committed by the defendant.

If neither of these exceptions is applicable and the defendant wishes to present evidence of the victim's prior or subsequent sexual conduct, he or she must file a written motion and an affidavit stating his or her offer of proof 30 days prior to trial, or later for good cause shown, after which the court must hold an *in camera* hearing to determine if the proposed evidence is relevant to a material issue in the pending case. COLO. REV. STAT. § 18-3-407.
– *People v. Aldrich*, 849 P.2d 821, 824 (Colo. Ct. App. 1992).
– *People v. Gholston*, 26 P.3d 1, 6-7 (Colo. Ct. App. 2000).

A. Preliminary Judicial Determination

- The purposes of the rape-shield statute are served by requiring a preliminary judicial determination of the relevance of prior sexual assault.
  – *People v. Aldrich*, 849 P.2d 821, 824 (Colo. Ct. App. 1992).

B. Right to Confrontation

- The rape-shield statute does not deny defendants their confrontation rights because the statute permits evidence of the victim's sexual history to be admitted on a preliminary showing of relevance.
  – *People v. Gholston*, 26 P.3d 1, 8 (Colo. Ct. App. 2000).

IX. Witnesses and Testimony

A. Competency of Child Witnesses

1. Incompetence

- Children under 10 years of age who appear incapable of receiving just impressions of the facts with respect to which they are examined or of relating them truthfully may not be witnesses. COLO. REV. STAT. § 13-90-106.
  – *People v. Aldrich*, 849 P.2d 821, 826-827 (Colo. Ct. App. 1992).

2. Appellate Review

- Determining the competency of a witness of tender years is ordinarily for the trial court. Unless there is an abuse of discretion, a ruling on that question will not be disturbed on review.
  – *People v. Aldrich*, 849 P.2d 821, 827 (Colo. Ct. App. 1992).

B. Leading Questions

1. Permissible

- Where the testimony of a witness is confusing and unclear, it is permissible to ask leading questions designed to develop and clarify the witness' testimony.
  – *People v. Raehal*, 971 P.2d 256, 258 (Colo. Ct. App. 1998).

- Leading questions are permitted on direct examination only as may be necessary to develop the witness' testimony; however, the examiner should not format the questions so that one version of the disputed facts is assumed to be true.
  – *People v. Raehal*, 971 P.2d 256, 258 (Colo. Ct. App. 1998).

2. Cases Involving Sexual Assault of a Minor

- In cases involving the alleged sexual assault of a minor, there is wider latitude in asking leading questions, both because of the youth of the witness and the intimate nature of the questions.
  – *Warren v. People*, 213 P.2d 381, 384 (Colo. 1949).

C. Hearsay

1. What Is <u>Not</u> Hearsay?

a. Recent Fabrication or Improper Influence or Motive

- A statement is not hearsay if the:
  (1) declarant testifies at trial and is subject to cross examination;
  (2) statement offered is consistent with the declarant's testimony; and
  (3) statement is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

  COLO. R. EVID. 801(d)(1)(B).

  This rule encompasses only those statements made prior to the opportunity or motive to fabricate statements.
  – *People v. Salazar*, 920 P.2d 893, 896 (Colo. Ct. App. 1996).

b. Impeachment or Establishment of Substantive Fact

- A prior inconsistent statement may be used for impeachment or to establish a substantive fact; however, when the statement is introduced to establish a substantive fact and the witness denies its truth, certain foundational requirements must be satisfied

before extrinsic proof of the statement is admissible. COLO. REV. STAT. § 16-10-201.
– *People v. Aldrich*, 849 P.2d 821, 826 (Colo. Ct. App. 1992).

- The witness, while testifying, must either be given an opportunity to explain or must be available to testify further at the trial, and the statement must relate to matters within the witness' own knowledge. Even when a witness is not given an opportunity to explain or deny a prior statement, the court does not err in permitting extrinsic evidence concerning the statement if the witness remains available to give further testimony.
  – *People v. Aldrich*, 849 P.2d 821, 826 (Colo. Ct. App. 1992).

2. Hearsay Exceptions

a. Admissions by a Co-Conspirator

- Colorado's Rules of Evidence allow a statement by a co-conspirator of a party during the course and in furtherance of a conspiracy to be admitted into evidence.
  – *People v. Esch*, 786 P.2d 462, 464 (Colo. Ct. App. 1989).

i. Burden

- In resolving preliminary questions of admissibility, the prosecution, as proponent of a co-conspirator's statement, bears the burden of establishing by a preponderance of the evidence that a defendant and declarant were members of a conspiracy and that a declarant's statement was made during the course of and in furtherance of the conspiracy.
  – *People v. Esch*, 786 P.2d 462, 464 (Colo. Ct. App. 1989).

ii. Consideration by the Trial Court

- A trial court may consider the statements of an alleged co-conspirator in determining whether the prosecution has established the evidentiary prerequisites for admissibility, but a co-conspirator's statement itself cannot be the sole basis for establishing those fundamental requirements.
  – *People v. Esch*, 786 P.2d 462, 464 (Colo. Ct. App. 1989).

b. Child's Statement of Sexual Abuse

- An out-of-court statement made by a child describing any act of sexual contact, intrusion, or penetration performed with, by, on, or in the presence of the child declarant, not otherwise admissible by a statute or court rule that provides an exception to the objection of hearsay, is admissible in evidence in any criminal, delinquency, or civil proceedings in which a child is a victim of an unlawful sexual offense if the trial court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability and the child either:
  (1) testifies at the proceeding; or
  (2) is unavailable as a witness and there is corroborative evidence of the act that is the subject of the statement.

  COLO. REV. STAT. § 13-25-129.
  – *McPeck v. Dep't of Social Servs.*, 919 P.2d 942, 945 (Colo. Ct. App. 1996).
  – *People v. Haynie*, 826 P.2d 371, 376 (Colo. Ct. App. 1991).
  – *People v. Patrick*, 772 P.2d 98, 99 (Colo. 1989).

i. "Corroborative Evidence" Defined

- Corroborative evidence means evidence, whether direct or circumstantial, that tends to establish the sexual offense described by the child.
  – *McPeck v. Dep't of Social Servs.*, 919 P.2d 942, 947 (Colo. Ct. App. 1996).

- The quantum of corroborative evidence necessary to support the admission of a child's hearsay statement must be sufficient to induce a person of ordinary prudence and caution conscientiously to entertain a reasonable belief that the sexual abuse occurred.
  – *McPeck v. Dep't of Social Servs.*, 919 P.2d 942, 947 (Colo. Ct. App. 1996).

ii. Weight and Credit of Statement

- If a statement is admitted, it is for the fact finder to determine the weight and credit to be given the statement.
  – *McPeck v. Dep't of Social Servs.*, 919 P.2d 942, 945 (Colo. Ct. App. 1996).

- In making the determination, the fact finder shall consider the:
  (1) age and maturity of the child;

(2) nature of the statement;
(3) circumstances under which the statement is made; and
(4) any other relevant factors.

– *McPeck v. Dep't of Social Servs.*, 919 P.2d 942, 945 (Colo. Ct. App. 1996).

iii. Reliability

- In determining whether the time, content, and circumstances of the statement provide sufficient indicia of reliability, the following factors, which are neither exclusive nor dispositive, provide guidance:
  (1) whether the statement is spontaneous;
  (2) whether the statement is made while the child is still upset or in pain from the alleged abuse;
  (3) whether the language of the statement is likely to have been used by a child the declarant's age;
  (4) whether the allegation is made in response to a leading question;
  (5) whether either the child or the hearsay witness has any bias against the accused person or any motive for lying;
  (6) whether any other event occurs between the time of the abuse and the time of the statement that could account for the contents of the statement;
  (7) whether more than one person heard the statement; and
  (8) the general character of the child.

  – *McPeck v. Dep't of Social Servs.*, 919 P.2d 942, 946 (Colo. Ct. App. 1996).

iv. Unavailability

- A finding of unavailability is appropriate if the trial court concludes that the child's emotional or physical health would be substantially impaired if forced to testify and that such impairment would be long standing.

  – *People v. Haynie*, 826 P.2d 371, 376 (Colo. Ct. App. 1991).

v. Cautionary Instruction

- The court must give a cautionary instruction to the jury both at the time the evidence is received and again in the general charge.

  – *People v. Aldrich*, 849 P.2d 821, 826 (Colo. Ct. App. 1992).

3. Former Testimony of an Unavailable Declarant

- A general exception to the hearsay rule provides that if the declarant is unavailable, the hearsay rule does not exclude a statement not specifically covered by any of the foregoing exceptions, but having equivalent circumstantial guarantees of trustworthiness, if the court determines that the:
  (1) statement is offered as evidence of a material fact;
  (2) statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and
  (3) general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.

  COLO. R. EVID. 804(b)(5).
  – *People v. Patrick*, 772 P.2d 98, 99 (Colo. 1989).

- A statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party sufficiently in advance of the trial or hearing his or her intention to offer the statement and the particulars of it, including the name and address of the declarant.
  – *People v. Patrick*, 772 P.2d 98, 99 (Colo. 1989).

4. *Res Gestae* Evidence

a. "*Res Gestae*" Defined

- "*Res gestae*" is defined as matter secondary to the main fact and explanatory of it, including acts and words that are so closely linked as to represent a part of the transaction, and without a knowledge of which the main fact might not be properly understood.
  – *Woertman v. People*, 804 P.2d 188, 190 (Colo. 1991).

- They are the events themselves, which speak through the instinctive words and acts of the participants. The circumstances, facts, and statements that grow out of the main fact are contemporaneous with it and serve to exemplify and demonstrate its character.
  – *Woertman v. People*, 804 P.2d 188, 190 (Colo. 1991).

b. Excited Utterance

- An excited utterance is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
  – *People v. Martinez*, 83 P.3d 1174, 1177 (Colo. Ct. App. 2003).

- Excited utterances are admissible even though the declarant is available as a witness. COLO. R. EVID. 803(2).
  – *People v. Martinez*, 83 P.3d 1174, 1177 (Colo. Ct. App. 2003).

i. Requirements for Admissibility

- The requirements for admissibility of an excited utterance are:
  (1) the event must be sufficiently startling to render normal reflective thought processes of the observer inoperative;
  (2) the statement must be a spontaneous reaction to the occurrence; and
  (3) direct or circumstantial evidence must exist to allow the jury to infer that the declarant had the opportunity to observe the startling event.
  – *People v. Martinez*, 83 P.3d 1174, 1177 (Colo. Ct. App. 2003).

ii. Unavailability

- The Sixth Amendment does not require a showing of unavailability when there are sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule; however, the Colorado Supreme Court has never expressly disavowed the requirement that unavailability be demonstrated.
  – *People v. Martinez*, 83 P.3d 1174, 1178 (Colo. Ct. App. 2003).

iii. Confrontation Clause

- Where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied.
  – *People v. Martinez*, 83 P.3d 1174, 1178 (Colo. Ct. App. 2003).

- Excited utterances have the necessary indicia of reliability and constitute a firmly rooted exception to the Confrontation Clause.
  – *People v. Martinez*, 83 P.3d 1174, 1178 (Colo. Ct. App. 2003).

iv. Court Discretion

- A trial court is in the best position to consider the effect of the startling event on the declarant; therefore, that court is afforded wide discretion in determining admissibility under the excited-utterance exception.
  – *People v. Martinez*, 83 P.3d 1174, 1177 (Colo. Ct. App. 2003).

X. Scientific Evidence: Polygraphs

- Evidence of polygraph results is *per se* inadmissible in a criminal trial because of the inherent unreliability of polygraph results; however, the factors that make the results of polygraph examinations unreliable and inadmissible do not necessarily apply to statements made to a polygraph technician during pre-examination interviews.
  – *People v. Dist. Ct.*, 785 P.2d 141, 145 (Colo. 1990).

XI. Scienter Evidence

- If a statute defining an offense prescribes a specified culpable mental state, then that mental state applies to every element of the offense unless an intent to limit its application clearly appears.
  – *People v. Salazar*, 920 P.2d 893, 895 (Colo. Ct. App. 1996).

XII. Privileges

- The privileged communication between patient and physician and between husband and wife shall not be a ground for excluding evidence in any judicial proceeding resulting from a report of child abuse.
  – *People v. Corbett*, 656 P.2d 687, 689 (Colo. 1983).

A. Marital Privilege

1. Consent of Parties

- A husband shall not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor during the marriage or afterward shall either be examined without the consent of the other as to any communications made by one to the other during the marriage. COLO. REV. STAT. § 13-90-107(1)(a).
  – *People v. Corbett*, 656 P.2d 687, 688 (Colo. 1983).

2. When Is Privilege Not Applicable?

- The marital privilege does not apply to a civil action or proceeding by one spouse against the other nor to a criminal action or proceeding for a crime committed by one spouse against the other.
  – *People v. Corbett*, 656 P.2d 687, 688 (Colo. 1983).

B. Psychotherapist-Patient Privilege

- A person shall not be examined as a witness in the following cases:
  (1) a licensed psychologist shall not be examined without the consent of his or her client as to any communication made by the client to him or her or his or her advice given in the course of professional employment;
  (2) nor shall a licensed psychologist's secretary, stenographer, or clerk be examined without the consent of his or her employer concerning any fact, the knowledge of which he or she has acquired in such capacity;
  (3) nor shall any person who has participated in any psychological therapy, conducted under the supervision of a person authorized by law to conduct such therapy, including but not limited to group therapy sessions, be examined concerning any knowledge gained during the course of such therapy without the consent of the person to whom the testimony sought relates.

COLO. REV. STAT. § 13-90-107.
– *Ferguson v. People*, 824 P.2d 803, 809 (Colo. 1992).
– *People v. Bowman*, 812 P.2d 725, 727-28 (Colo. Ct. App. 1991).
– *People v. Sisneros*, 55 P.3d 797, 800 (Colo. 2002).

1. Attachment of Privilege

- The psychologist-patient privilege shields more than just communications between the psychologist and the patient.
  – *People v. Sisneros*, 55 P.3d 797, 800 (Colo. 2002).

- Once the privilege attaches, it protects testimonial disclosures as well as pretrial discovery of files or records derived or created in the course of the treatment.
  – *People v. Sisneros*, 55 P.3d 797, 800 (Colo. 2002).

- Once the privilege has attached, the defendant may not compel discovery unless it is waived.
  – *People v. Sisneros*, 55 P.3d 797, 800 (Colo. 2002).

2. Waiver of Privilege: Consent

- Privileged information cannot be disclosed without the consent of the privilege holder. This consent requires an evidentiary showing that the privilege holder expressly or impliedly has given up any claim of confidentiality as to communications with the psychologist. COLO. REV. STAT. § 13-90-107(1)(g).
  – *People v. Sisneros*, 55 P.3d 797, 800 (Colo. 2002).

- An evidentiary showing of waiver is required before the trial court may order the documents produced for an *in camera* review.
  – *People v. Sisneros*, 55 P.3d 797, 800 (Colo. 2002).

a. Determination of Waiver

- To determine whether there was a waiver, the proper inquiry is not whether the information sought may be relevant, but rather whether the victim has injected his or her physical or mental condition into the case as the basis of a claim or an affirmative defense.
  – *People v. Sisneros*, 55 P.3d 797, 801 (Colo. 2002).

b. Burden of Proof

- The defendant bears the burden of establishing a waiver of the privilege by presenting evidence showing that the privilege holder, by words or conduct, has expressly or impliedly forsaken his or her claim of confidentiality with respect to the information in question.
  – *People v. Sisneros*, 55 P.3d 797, 801 (Colo. 2002).

COLORADO

Age of Child Victim

I. Proving the Age of the Child Victim

No relevant state cases reported.

II. The Defendant's Knowledge of the Age of the Child: Ignorance and Mistake of Law

- If the criminality of the conduct depends on a child's being below the age of 18 and the child was in fact at least 15 years of age, it is an affirmative defense that the defendant reasonably believed the child to be 18 years of age or older; however, if the criminality of the conduct depends upon a child being below the age of 15, it is no defense that the defendant did not know the child's age or that he or she reasonably believed the child to be 15 years of age or older. COLO. REV. STAT. § 18-3-406 (repealed; current provisions relating to criminality of conduct are contained in § 18-1-503.5).
  – *People v. Bath*, 890 P.2d 269, 271 (Colo. Ct. App. 1994).

COLORADO

Multiple Counts

A case with + indicates a memorandum decision that does not create legal precedent.

I. What Constitutes an Item of Child Pornography?

- Each offending image of sexually explicit material constitutes a separate and distinct sexual exploitation and therefore is a separate chargeable offense. However, each separate viewing of such material is not a separate chargeable offense.
  – *People v. Renander*, 151 P.3d 657, 661-662 (Colo. App. Ct. 2006).

II. Joinder of Multiple Offenses

- The mandatory-joinder statute requires joinder of multiple offenses in a single prosecution if they are based on the same act or series of acts arising from the same criminal episode.
  – *People v. Dalton*, 70 P.3d 517, 522 (Colo. Ct. App. 2002).

A. Series of Acts Arising from the Same Criminal Episode

- A series of acts arising from the same criminal episode would include physical acts that are committed simultaneously or in close sequence, that occur in the same place or closely related places, and that form part of a schematic whole.
  – *People v. Dalton*, 70 P.3d 517, 522 (Colo. Ct. App. 2002).

B. Sex Offenses and Similar Crimes: Jury Instructions

- When the prosecutor is not required to select a specific instance of sexual abuse following the introduction of evidence of multiple occurrences of sexual abuse, the jurors must be instructed that in order to find the defendant guilty, they should either unanimously agree that the defendant committed the same act or acts or that the defendant committed all of the acts explained by the victim and included within the time period charged.
  – *Woertman v. People*, 804 P.2d 188, 192 (Colo. 1991).

III. Merger: Prosecution of Multiple Counts for Same Act

- The prosecution for multiple offenses arising out of the same criminal conduct is authorized; however, multiple convictions are expressly prohibited when one offense is a lesser included of the other. COLO. REV. STAT. § 18-1-408(1).
  – *People v. Valdez*, 874 P.2d 415, 417 (Colo. Ct. App. 1993).

- An offense is lesser included when it is established by proof of the same or less than all of the facts required to establish the commission of the offense charged.
  – *People v. Valdez*, 874 P.2d 415, 417 (Colo. Ct. App. 1993).

IV. Issues of Double Jeopardy

- Double jeopardy protects an accused from being twice punished for the same offense.
  – *People v. Shepard*, 98 P.3d 905, 906 (Colo. Ct. App. 2004).

- No double jeopardy issues arise from the prosecution of multiple offending sexually explicit images as separate chargeable offenses.
  – *People v. Renander*, 151 P.3d 657, 660 (Colo. App. Ct. 2006).

A. Dual-Sovereignty Doctrine

- Under the dual-sovereignty doctrine, both the state and federal governments may prosecute a defendant based upon the same criminal conduct; however, acquittal or conviction of federal charges based on the same conduct will act as a bar to a state prosecution unless a federal action requires proof of a fact not required by a state offense.
  – *People v. Esch*, 786 P.2d 462, 465 (Colo. Ct. App. 1989).

- Prosecution in Colorado following conviction in a state or federal court based on the same conduct is barred unless the offense for which a defendant was formerly convicted or acquitted requires proof of a fact not required by an offense for which he or she is subsequently prosecuted and the law defining each of the offenses is intended to prevent a substantially different harm or evil. COLO. REV. STAT. § 18-1-303.
  – *People v. Esch*, 786 P.2d 462, 465 (Colo. Ct. App. 1989).

B. Lesser-Included Offenses

1. *Blockburger* Test

- Whether one offense is included in another is determined by applying the *Blockburger* strict-elements test.
  – *People v. Gholston*, 26 P.3d 1, 10 (Colo. Ct. App. 2000).

- Under the strict-elements test, if proof of the facts establishing the statutory elements of the greater offense necessarily establishes all of the elements of the lesser offense, the lesser offense is included for purposes of double jeopardy and the statute regarding prosecution of multiple counts for the same act. If each offense necessarily requires proof of a fact that the other does not, the strict-elements test is not satisfied and a presumption arises that convictions for both offenses are consistent with legislative intent. COLO. REV. STAT. § 18-1-408(1)(a).
  – *People v. Gholston*, 26 P.3d 1, 10 (Colo. Ct. App. 2000).

2. Multiple Punishments

- A court is prohibited from imposing multiple punishments for a greater- and lesser-included offense by the double-jeopardy clauses of the federal and state constitutions, by statute, and by the rule of merger.
  – *People v. Gholston*, 26 P.3d 1, 10 (Colo. Ct. App. 2000).

3. Double Jeopardy Versus Merger

- Regardless of whether double jeopardy or merger principles are invoked, courts employ an identical analysis to determine whether a lesser offense is included within a greater offense.
  – *People v. Gholston*, 26 P.3d 1, 10 (Colo. Ct. App. 2000).

C. Penalty Enhancer

- For purposes of a double-jeopardy analysis, a penalty enhancer is not a substantive element of the charged offense.
  – *People v. Gholston*, 26 P.3d 1, 11 (Colo. Ct. App. 2000).

D. Guilty Pleas

- A guilty plea does not waive a valid double-jeopardy claim of being punished twice for the same offense.
  – *People v. Shepard*, 98 P.3d 905, 906-907 (Colo. Ct. App. 2004).

COLORADO

Defenses

A case with + indicates a memorandum decision that does not create legal precedent.

I. Abandonment and Renunciation

A. Attempt and Solicitation

- The attempt-and-solicitation statutes expressly state that abandonment and renunciation is an affirmative defense to those inchoate offenses.
  – *People v. Jacobs*, 91 P.3d 438, 442 (Colo. Ct. App. 2003).

B. Soliciting for Child Prostitution

- The soliciting-for-child-prostitution statute does not list abandonment and renunciation as an affirmative defense.
  – *People v. Jacobs*, 91 P.3d 438, 442 (Colo. Ct. App. 2003).

II. Alibi

- An alibi defense requires evidence that the defendant was not available to commit the crime since he or she was not present at the place where the offense was carried out.
  – *Woertman v. People*, 804 P.2d 188, 191 (Colo. 1991).

III. Consent

A. "Consent" Defined

- "Consent" means cooperation in the act or an attitude pursuant to an exercise of free will and with knowledge of the nature of the act.
  – *People v. McKibben*, 862 P.2d 991, 993 (Colo. Ct. App. 1993).

B. Informed Consent

- Under the sexual-exploitation-of-children statute, a person below the age of 18 years is incapable of giving informed consent to the use of his or her body for a sexual purpose.
  – *People v. Campbell*, 94 P.3d 1186, 1189 (Colo. Ct. App. 2004).

C. Assent

- Unless otherwise provided by the state criminal code or by the law defining the offense, assent does not constitute consent if it is:
  (1) given by a person whose consent is sought to be prevented by the law defining the offense; or
  (2) induced by deception.
  – *Ferguson v. People*, 824 P.2d 803, 811-12 (Colo. 1992).

D. Submission

- Submission under the influence of fear does not constitute consent.
  – *People v. McKibben*, 862 P.2d 991, 993 (Colo. Ct. App. 1993).

E. Specific Offenses

1. Kidnapping

- A minor child cannot consent to being taken by another. Consent must be given by one having legal custody of the child.
  – *People v. Haynie*, 826 P.2d 371, 373 (Colo. Ct. App. 1991).

2. Sexual Assault

- Under the sexual-assault statute, a 15-year-old can effectively consent to having sex with a person not more than 10 years older than him or her. COLO. REV. STAT. § 18-3-402(1)(e).
  – *People v. Campbell*, 94 P.3d 1186, 1189 (Colo. Ct. App. 2004).

3. Sexual Assault on a Client by a Psychotherapist

- Consent by the client to sexual penetration is not a defense to the offense of sexual assault on a client by a psychotherapist. COLO. REV. STAT. § 18-3-405.5.
  – *Ferguson v. People*, 824 P.2d 803, 805 (Colo. 1992).

IV. Diminished Capacity

A. Insanity

No relevant state cases reported.

B. Internet Addiction

No relevant state cases reported.

V. First Amendment

- Child pornography materials are without the protection of the First Amendment.
  – *People v. Enea*, 665 P.2d 1026, 1028 (Colo. 1983).

- The manufacture, sale, and distribution of photographs and films depicting children involved in sexual activity is intrinsically related to the physical, psychological, and sexual abuse of children.
  – *People v. Enea*, 665 P.2d 1026, 1028 (Colo. 1983).

- Any interest a defendant may have in profiting, directly or indirectly, from the dissemination of child pornography is substantially outweighed by the compelling state interest in protecting children from such abuse.
  – *People v. Enea*, 665 P.2d 1026, 1028 (Colo. 1983).

VI. Impossibility

No relevant state cases reported.

VII. Manufacturing Jurisdiction

No relevant state cases reported.

VIII. Mistake

A. Of Fact: Age

- If the criminality of the conduct depends on a child's being below the age of 18 and the child was in fact at least 15 years of age, it is an affirmative defense that the defendant reasonably believed the child to be 18 years of age or older; however, if the criminality of the conduct depends upon a child being below the age of 15, it is no defense that the defendant did not know the child's age or that he or she reasonably believed the child to be 15 years of age or older. COLO. REV. STAT. § 18-3-406 (repealed; current provisions relating to criminality of conduct are contained in § 18-1-503.5).
  – *People v. Bath*, 890 P.2d 269, 271 (Colo. Ct. App. 1994).
  – *People v. Salazar*, 920 P.2d 893, 895 (Colo. Ct. App. 1996).

B. Of Law

No relevant state cases reported.

IX. Outrageous Governmental Conduct v. Entrapment

A. Generally

- The constitutional defense of outrageous governmental conduct provides a mechanism by which the court may curtail overzealous law-enforcement activity that the court finds shocking to the conscience; however, judicial pronouncements of law regarding the propriety of law-enforcement conduct are not appropriate in the context of the entrapment defense because the defense of entrapment rests upon a determination of the defendant's state of mind, which is a factual issue for the jury.
  – *People v. Sprouse*, 983 P.2d 771, 775 (Colo. 1999).

B. Entrapment

- Entrapment is an affirmative defense.
  – *People v. Sprouse*, 983 P.2d 771, 776 (Colo. 1999).

1. Subjective Test: State of Mind

- The entrapment statute creates a subjective test that focuses on the state of mind of the defendant and does not set a general standard for law-enforcement conduct. This does not mean that law-enforcement conduct should be ignored, but rather that the existence of any predisposition on the part of the defendant must be considered first, then the extent of any such predisposition must be considered in relation to the character of the inducements.
  – *People v. Sprouse*, 983 P.2d 771, 776 (Colo. 1999).

2. Inducement

- Inducement is not irrelevant to the entrapment inquiry.
  – *People v. Sprouse*, 983 P.2d 771, 776 (Colo. 1999).

- The stronger the inducement, the more likely that any resulting criminal conduct by the defendant occurred as the result of the inducement rather than of the defendant's own predisposition.
  – *People v. Sprouse*, 983 P.2d 771, 776 (Colo. 1999).

3. Burden

a. Generally

- Once the defendant has presented some credible evidence on the issue, the prosecution must prove beyond a reasonable doubt that the defendant was not entrapped; therefore, when the entrapment defense is raised, the jury must be convinced beyond a reasonable doubt that the defendant was predisposed to commit the crime in question before a guilty verdict is entered.
  – *People v. Sprouse*, 983 P.2d 771, 775-76 (Colo. 1999).

- The prosecution must also prove beyond a reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by law-enforcement agents.
  – *People v. Sprouse*, 983 P.2d 771, 776 (Colo. 1999).

b. Proof of Predisposition

- Depending upon the particular circumstances of the case, the prosecution may offer a wide variety of evidence and testimony in an attempt to demonstrate that the defendant was predisposed to commit a particular crime. The most commonly invoked forms of proof include the:
  (1) defendant's conduct in response to the government inducement, particularly whether he or she evidenced reluctance to commit the offense;
  (2) amount of persuasion the government was required to employ in order to overcome any reluctance;
  (3) nature of the defendant's ability to perform the illegal acts; and
  (4) defendant's prior acts, including his or her criminal record; hearsay evidence of reputation; and the defendant's conduct during negotiations with the government agent.

  A consideration of these common forms of proof demonstrates that, in the overwhelming number of cases, resolution of the entrapment defense is properly reserved for the jury, as predisposition frequently depends upon a fact-intensive credibility determination.
  – *People v. Sprouse*, 983 P.2d 771, 776 (Colo. 1999).

- Courts have noted that the defendant's response to the inducement, that is, whether he or she demonstrates strong reluctance, mild reluctance, indifference, or eagerness, is often the most persuasive evidence of his or her state of mind just

prior to the governmental inducement.
– *People v. Sprouse*, 983 P.2d 771, 776 (Colo. 1999).

- A demonstrable lack of reluctance on the part of the defendant weighs heavily in favor of a finding that the defendant was predisposed to commit a crime, even though such evidence does not arise until after the government contacts the defendant and suggests the crime.
  – *People v. Sprouse*, 983 P.2d 771, 777 (Colo. 1999).

- A defendant who readily responds to the mere suggestion of criminal activity by the government should not be shielded by a rule requiring that all evidence of predisposition be obtained prior to the government's contact, as it is often the case that the sole proof of predisposition consists of evidence of the defendant's response to the overtures of the government agents.
  – *People v. Sprouse*, 983 P.2d 771, 777 (Colo. 1999).

X. Sexual Orientation

No relevant state cases reported.

XI. Statute of Limitations

A. General Provisions

- A cause of action accrues on the date both the injury and its cause are known or should have been known by the exercise of reasonable diligence. COLO. REV. STAT. § 13-80-108.
  – *Sailsbery v. Parks*, 983 P.2d 137, 138 (Colo. Ct. App. 1999).

B. Sexual Offenses

1. Commencement of Action

- Notwithstanding any other statute of limitations, any civil action based on a sexual assault or a sexual offense against a child shall be commenced within six years after a disability has been removed for a person under disability, or within six years after a cause of action accrues, whichever occurs later, and not thereafter. COLO. REV. STAT. § 13-80-103.7.
  – *Sailsbery v. Parks*, 983 P.2d 137, 138-39 (Colo. Ct. App. 1999).
  – *Sandoval v. Archdiocese of Denver*, 8 P.3d 598, 600 (Colo. Ct. App. 2000).

2. Definitions

a. "Person Under Disability" Defined

- "Person under disability" means any person who is a minor under 18 years of age, a mental incompetent, or a person under other legal disability who does not have a legal guardian.
  – *Sailsbery v. Parks*, 983 P.2d 137, 138 (Colo. Ct. App. 1999).
  – *Sandoval v. Archdiocese of Denver*, 8 P.3d 598, 600 (Colo. Ct. App. 2000).

- "Person under disability" also includes a victim of a sexual assault when the victim is in a special relationship with the perpetrator of the assault, and where the victim is psychologically or emotionally unable to acknowledge the assault or offense and the harm resulting therefrom.
  – *Sailsbery v. Parks*, 983 P.2d 137, 138 (Colo. Ct. App. 1999).
  – *Sandoval v. Archdiocese of Denver*, 8 P.3d 598, 600 (Colo. Ct. App. 2000).

b. "Special Relationship"

- "Special relationship" means a relationship between the victim and the perpetrator of the sexual assault that is a confidential, trust-based relationship, such as teacher-student, doctor-patient, or familial relationship.
  – *Sailsbery v. Parks*, 983 P.2d 137, 138-39 (Colo. Ct. App. 1999).
  – *Sandoval v. Archdiocese of Denver*, 8 P.3d 598, 600 (Colo. Ct. App. 2000).

3. Burden of Proof

- As elements of the cause of action, a person under disability has the burden of proving that the assault or offense occurred and that he or she was actually psychologically or emotionally unable to acknowledge the assault and the harm resulting therefrom.
  – *Sandoval v. Archdiocese of Denver*, 8 P.3d 598, 600 (Colo. Ct. App. 2000).

COLORADO

Sentencing Issues

A case with + indicates a memorandum decision that does not create legal precedent.

I. Pre-Sentence Reports for Sex Offenders

- When a defendant has been found guilty of or entered a plea of guilty or *nolo contendere* to an offense, the probation department is required to prepare a pre-sentence report for the court before sentencing.
  – *People v. Lenzini*, 986 P.2d 980, 981 (Colo. Ct. App. 1999).

A. Participation in a Sex-Offender-Specific Evaluation and Identification

- Every sex offender sentenced for an offense committed on or after January 1, 1994, is required to submit to an evaluation for treatment, an evaluation for risk, procedures required for monitoring of behavior to protect victims and potential victims, and an identification.
  – *People v. Lenzini*, 986 P.2d 980, 982 (Colo. Ct. App. 1999).

B. Treatment

- Each sex offender sentenced by the court for an offense committed on or after January 1, 1994, is required as a part of any sentence to probation, community corrections, or incarceration with the Department of Corrections to undergo treatment to the extent appropriate to such offender based upon the recommendations of the evaluation and identification or based upon any subsequent recommendations by the Department of Corrections, the judicial department, the Department of Human Services, or the Division of Criminal Justice of the Department of Public Safety, whichever is appropriate.
  – *People v. Lenzini*, 986 P.2d 980, 982 (Colo. Ct. App. 1999).

C. Results of Evaluation and Identification

- Any pre-sentence report prepared regarding any sex offender, with respect to any offense committed on or after January 1, 1996, must contain the results of an evaluation and identification.
  – *People v. Lenzini*, 986 P.2d 980, 982 (Colo. Ct. App. 1999).

II. Presumptive Sentencing Ranges

A. Class-Four Felonies

- The presumptive range for a class-four felony is two to six years imprisonment.
  – *People v. Oglethorpe*, 87 P.3d 129, 136 (Colo. Ct. App. 2003).

B. Enticement of a Child

- A defendant who pleads guilty to enticement of a child is subject to sentencing that requires the district court to sentence the offender for an indeterminate term of at least the minimum of the presumptive range and a maximum of the sex offender's natural life.
  – *People v. Oglethorpe*, 87 P.3d 129, 136 (Colo. Ct. App. 2003).

C. Sexual Assault on a Child: Pattern of Abuse

- Since it is both an "extraordinary-risk-of-harm" crime and a crime of violence, the class-three felony of sexual assault on a child demonstrating a pattern of abuse has a presumptive sentencing range of 10 to 32 years.
  – *People v. Lenzini*, 986 P.2d 980, 981 (Colo. Ct. App. 1999).

D. Sexual Exploitation of a Child

- The presumptive sentencing range for sexual exploitation of a child is 4 to 12 years with an aggravated range of up to 24 years.
  – *People v. Lenzini*, 986 P.2d 980, 981 (Colo. Ct. App. 1999).

III. Sentencing Imposition

A. Trial-Court Discretion

- A trial judge has broad discretion when imposing a sentence, and that sentence will not be overturned in the absence of a clear abuse of discretion.
  – *People v. Gagnon*, 997 P.2d 1278, 1284 (Colo. Ct. App. 1999).

- If the sentence is within the range required by law, is based on appropriate considerations as reflected in the record, and is factually supported by the circumstances of the case, an appellate court must uphold the sentence.
  – *People v. Gagnon*, 997 P.2d 1278, 1284 (Colo. Ct. App. 1999).

B. Factors to Consider

1. Generally

- In exercising sentencing discretion, a trial court must consider the:

(1) nature of the offense;
(2) character and rehabilitative potential of the offender;
(3) development of respect for the law;
(4) deterrence of crime; and
(5) protection of the public.
– *People v. Gagnon*, 997 P.2d 1278, 1284 (Colo. Ct. App. 1999).
– *People v. Gholston*, 26 P.3d 1, 16 (Colo. Ct. App. 2000).

- The trial court may consider:
(1) unusual aspects of the defendant's character;
(2) past conduct;
(3) habits;
(4) health;
(5) age;
(6) events surrounding the crime;
(7) a pattern of conduct that indicates whether the defendant is a serious danger to society; and
(8) past convictions.
– *People v. Gholston*, 26 P.3d 1, 16 (Colo. Ct. App. 2000).

2. Sentence Enhancement

a. Aggravated Ranges

- A sentencing court may impose a sentence up to twice the maximum authorized in the presumptive range based on the presence of extraordinary aggravating circumstances.
– *People v. Gholston*, 26 P.3d 1, 16 (Colo. Ct. App. 2000).

- Generally, if a trial court imposes a sentence in the aggravated range, it is required to state on the record the circumstances justifying the sentence.
– *People v. Shepard*, 98 P.3d 905, 906 (Colo. Ct. App. 2004).

- A reasonable explanation of the sentence imposed is sufficient.
– *People v. Shepard*, 98 P.3d 905, 906 (Colo. Ct. App. 2004).

b. Plea Agreements

- When a defendant stipulates to a sentence in the aggravated range as part of a plea agreement, the defendant is also stipulating that sufficient facts exist to warrant an aggravated sentence, and the trial court need not make additional findings on the record.
– *People v. Shepard*, 98 P.3d 905, 906 (Colo. Ct. App. 2004).

c. Aggravating Factors

i. Age of Victim

No relevant state cases reported.

ii. Distribution/Intent to Traffic

No relevant state cases reported.

iii. Criminal History: Habitual Criminal

- Every person convicted in Colorado of any felony, who has been three times previously convicted, upon charges separately brought and tried, and arising out of separate and distinct criminal episodes, either in Colorado or elsewhere, of a felony must be adjudged a habitual criminal and must be punished for the felony offense of which he or she is convicted by imprisonment in a correctional facility for a term of four times the maximum of the presumptive range for the class of felony of which such person is convicted. COLO. REV. STAT. § 18-1.3-801(2).
  – *People v. Martinez*, 83 P.3d 1174, 1179 (Colo. Ct. App. 2003).

(a) Burden of Proof

- In a habitual-criminal action, the prosecution bears the burden of proving beyond a reasonable doubt that the accused is the person named in the prior convictions.
  – *People v. Martinez*, 83 P.3d 1174, 1179 (Colo. Ct. App. 2003).

(b) Proof of Prior Convictions

- A duly authenticated copy of the record of a former conviction and judgment is *prima facie* evidence of the conviction and may be used as evidence at the habitual offender sentencing.
  – *People v. Martinez*, 83 P.3d 1174, 1179 (Colo. Ct. App. 2003).

- The prosecution may also carry its burden of proof by using certified copies of public records or documents that are admissible as public records or self-authenticating documents.
  – *People v. Martinez*, 83 P.3d 1174, 1179 (Colo. Ct. App. 2003).

iv. Number of Images

No relevant state cases reported.

v. Pattern of Activity for Sexual Exploitation

- A pattern of sexual abuse is a sentence enhancer to the offense of sexual assault on a child. It is not a separate crime.
  – *People v. Gholston*, 26 P.3d 1, 14 (Colo. Ct. App. 2000).

- A pattern of sexual abuse is a sentence enhancement that, like the substantive predicate offense, must be proven beyond a reasonable doubt.
  – *People v. Honeysette*, 53 P.3d 714, 716 (Colo. Ct. App. 2002).

vi. Sadistic, Masochistic or Violent Material

No relevant state cases reported.

vii. Use of Computers

No relevant state cases reported.

d. Extraordinary Aggravating Circumstances

- The trial court may consider as extraordinary aggravating circumstances facts tending to establish an element of an offense, as long as the court relates those facts to the particular defendant and the circumstances of the crime.
  – *People v. Gholston*, 26 P.3d 1, 16 (Colo. Ct. App. 2000).

e. Increase of Maximum Penalty

- Any fact, other than the fact of a prior conviction, that increases the maximum penalty for a crime beyond the prescribed statutory maximum for that crime must be submitted to the jury and proved beyond a reasonable doubt.
  – *People v. Stead*, 66 P.3d 117, 119-20 (Colo. Ct. App. 2002).

C. Allocution

- Before imposing sentence, the court must afford the defendant an opportunity to make a statement in his or her own behalf and to present any information in mitigation of punishment.
  – *People v. Martinez*, 83 P.3d 1174, 1181 (Colo. Ct. App. 2003).

- To afford a defendant the opportunity to make a statement on his or her behalf, the trial court must address the defendant in a manner that leaves no doubt that the defendant is personally invited to speak before sentencing; however, the right of allocution is a statutory right, not a constitutional one, and reversal is not required if the error is harmless.
  – *People v. Martinez*, 83 P.3d 1174, 1181 (Colo. Ct. App. 2003).

D. Concurrent Versus Consecutive Sentences

1. Concurrent Sentences

- When convictions are based on identical evidence, the sentences must run concurrently rather than consecutively.
  – *People v. Gholston*, 26 P.3d 1, 15 (Colo. Ct. App. 2000).

2. Consecutive Sentences

- A trial court does not abuse its discretion in imposing consecutive sentences if the consecutive sentences involve different victims and, as such, constituted separate wrongs.
  – *People v. Esch*, 786 P.2d 462, 467 (Colo. Ct. App. 1989).

- A trial court may impose consecutive sentences for multiple convictions arising from the same episode, even if there is only one victim, provided that different evidence supports each conviction.
  – *People v. Shepard*, 98 P.3d 905, 907 (Colo. Ct. App. 2004).

E. Indeterminate Sentence: Soliciting for Child Prostitution

- Before a defendant convicted of soliciting for child prostitution can be sentenced to an indeterminate sentence, an assessment must be made that it is likely that the defendant will commit an enumerated sexually violent predator crime under certain specific circumstances. COLO. REV. STAT. § 18-1.3-1004.
  – *People v. Jacobs*, 91 P.3d 438, 443 (Colo. Ct. App. 2003).

F. Proportionality Review

1. Abbreviated

- An abbreviated proportionality review consists of a comparison of two sub-parts:
  (1) the gravity of the offense; and
  (2) the harshness of the penalty,
  to discern whether an inference of gross disproportionality is raised.
  – *People v. Martinez*, 83 P.3d 1174, 1180 (Colo. Ct. App. 2003).

- A court determines whether a crime is grave or serious by considering the harm caused or threatened to the victim or to society and the culpability of the offender.
  – *People v. Martinez*, 83 P.3d 1174, 1180 (Colo. Ct. App. 2003).

- In almost every case, the abbreviated proportionality review will result in a finding that the sentence is constitutionally proportionate. For example, solicitation for child prostitution and aggravated incest are serious offenses for sentencing proportionality purposes because they pose a great risk of harm to the victim.
  – *People v. Martinez*, 83 P.3d 1174, 1180 (Colo. Ct. App. 2003).

2. Extended

- Only if an inference of gross disproportionality is raised must the abbreviated-proportionality review be followed by an extended-proportionality review involving a comparison of a defendant's sentence with those of other similar offenders.
  – *People v. Martinez*, 83 P.3d 1174, 1180 (Colo. Ct. App. 2003).

IV. Sex Offender Registration and Notification

A. Definitions

1. "Sex Offender"

- "Sex offender" means any person who is convicted in Colorado of any sex offense or of any criminal offense, if such person has previously been convicted of a sex offense in Colorado, or if such person has previously been convicted in any other jurisdiction of any offense that would constitute a sex offense, or if such person has a history of any sex offenses.
  – *People v. Meidinger*, 987 P.2d 937, 938 (Colo. Ct. App. 1999).

2. "Sexually Violent Predator"

- A sexually violent predator is a sex offender:
  (1) who is 18 years of age or older as of the date of the offense;
  (2) who has been convicted on or after July 1, 1999, of one of several enumerated offenses committed on or after July 1, 1997, including second-degree sexual assault and sexual assault on a child;
  (3) whose victim was a stranger to the offender or a person with whom the offender established or promoted a relationship primarily for the purpose of sexual victimization; and
  (4) who, based on the results of a risk assessment screening instrument, is likely to subsequently commit an enumerated offense.
  – *People v. Stead*, 66 P.3d 117, 120 (Colo. Ct. App. 2002).

  - If the victim is not a stranger, the trial court must be satisfied that the offender had a specific intent in forming the relationship. This finding applies only to persons categorized as sexually violent predators.
    – *People v. Stead*, 66 P.3d 117, 122 (Colo. Ct. App. 2002).

B. Sex-Offender Evaluations

- Completion of a sex-offender evaluation before imposing sex-offender conditions is mandatory.
  – *People v. Meidinger*, 987 P.2d 937, 939 (Colo. Ct. App. 1999).

C. Registration

1. Generally

- Requiring a person to register as a sex offender does not increase the time that person spends in custody.
  – *People v. Stead*, 66 P.3d 117, 120 (Colo. Ct. App. 2002).

2. Lifetime Duty to Register

- Any person sentenced as a sexually violent predator has a lifetime duty to register with local law-enforcement agencies in the jurisdiction in which he or she resides.
  – *People v. Stead*, 66 P.3d 117, 119 (Colo. Ct. App. 2002).

- The fact that the duty to register as a sexually violent predator lasts for life, as opposed to lasting indefinitely, does not transform it into a punishment.
  – *People v. Stead*, 66 P.3d 117, 120 (Colo. Ct. App. 2002).

D. Internet Notification

1. Generally

- A link to an Internet list of the personal information of certain sex offenders, including persons classified as sexually violent predators, re-offenders, and persons failing to register, will be posted on the State of Colorado home page.
  – *People v. Stead*, 66 P.3d 117, 120 (Colo. Ct. App. 2002).

2. Sexually Violent Predators

- Internet-posting requirements for sexually violent predators are part of the criminal code and are triggered upon conviction of specified sexual offenses.
  – *People v. Stead*, 66 P.3d 117, 122 (Colo. Ct. App. 2002).

- The Colorado Bureau of Investigation is required to post a link on the State of Colorado Internet home page to a list containing the following sexually-violent-predator-registration information:
  (1) name;
  (2) address;
  (3) place of employment;
  (4) physical description; and
  (5) digitized photograph.
  – *People v. Stead*, 66 P.3d 117, 119 (Colo. Ct. App. 2002).

3. Cost of Photograph and Fingerprints

- An offender must pay for the cost of the photograph and for a set of fingerprints to verify his or her identity.
  – *People v. Stead*, 66 P.3d 117, 119 (Colo. Ct. App. 2002).

4. Internet Notification As Punishment

- The dissemination of a sex offender's personal information over the Internet does not serve as punishment.
  – *People v. Stead*, 66 P.3d 117, 121 (Colo. Ct. App. 2002).

- The Internet notification scheme may have the purpose or effect of a punishment in that it is triggered by a criminal offense, and it may require an additional finding of scienter; however, the scheme is not punitive in that it:
  (1) imposes no fine, confinement, or restraint;
  (2) has an expressly non-punitive intent and purpose;
  (3) is not traditionally considered a type of punishment; and

(4) is not excessive in relation to the public safety purposes it serves. Consequently, taken as a whole, the Internet-posting provision of the sex-offender statute does not constitute additional punishment.
– *People v. Stead*, 66 P.3d 117, 123 (Colo. Ct. App. 2002).

5. Imposition of a Disability or Restraint

- The Internet-notification program does not impose a disability or restraint as it does not by itself restrict where sex offenders may live and work and it does not affect the length of an offender's incarceration or parole eligibility.
– *People v. Stead*, 66 P.3d 117, 121 (Colo. Ct. App. 2002).

COLORADO

Supervised Release

I. Probation

A. Right Against Self-Incrimination

- A probationer has a Fifth Amendment right against compelled self-incrimination; however, because that right is not self-executing, it is incumbent upon the probationer to invoke it.
  – *People v. Elsbach*, 934 P.2d 877, 881 (Colo. Ct. App. 1997).

B. Therapeutic Questioning

- If, as a condition of probation, a probationer is required to participate in therapy that involves truthfully answering questions designed to solicit incriminating responses, no Fifth Amendment violation occurs unless the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation.
  – *People v. Elsbach*, 934 P.2d 877, 881 (Colo. Ct. App. 1997).

- Requiring a probationer to be truthful in his or her responses to therapeutic questioning does not amount to an implicit requirement that he or she forego legitimate objections to making statements that could be incriminating.
  – *People v. Elsbach*, 934 P.2d 877, 881 (Colo. Ct. App. 1997).

- If a probationer is required to submit to therapeutic questioning in conjunction with a polygraph examination, the probationer's Fifth Amendment right against compelled self-incrimination is not violated unless the State threatens to revoke probation on the basis of the probationer's invocation of those rights.
  – *People v. Elsbach*, 934 P.2d 877, 881 (Colo. Ct. App. 1997).

II. Parole

A. Parole Eligibility

1. Generally

- For any offender who is incarcerated for an offense committed on or after July 1, 1993, upon application for parole, the state board of

parole shall determine whether or not to grant parole. COLO. REV. STAT. § 17-22.5-403(7)(a).
– *Martin v. People*, 27 P.3d 846, 859 (Colo. 2001).

- The state board of parole, if it determines that placing an offender on parole is appropriate, shall set the length of parole at the mandatory period of parole. COLO. REV. STAT. § 17-22.5-403(7)(a).
  – *Martin v. People*, 27 P.3d 846, 859 (Colo. 2001).

2. Sex Offenders

- As to any person sentenced for conviction of an offense involving unlawful sexual behavior committed prior to July 1, 1996, the board has the sole power to grant or refuse to grant parole and to fix the condition, and has full discretion to set the duration of the term of parole granted; however, in no event shall the term of parole exceed the maximum sentence imposed upon the inmate by the court or five years, whichever is less. COLO. REV. STAT. § 17-2-201(5)(a).
  – *Martin v. People*, 27 P.3d 846, 852 (Colo. 2001).

- The meaning of the phrase "in no event shall the term of parole exceed the maximum sentence imposed upon the inmate by the court" means that the period of parole granted by the parole board cannot be longer than the unserved portion of the sentence of incarceration.
  – *Martin v. People*, 27 P.3d 846, 855 (Colo. 2001).

B. Parole Hearing

- After the minimum period of incarceration imposed is completed, the parole board schedules a hearing to determine whether a sex offender may be released on parole.
  – *People v. Oglethorpe*, 87 P.3d 129, 134 (Colo. Ct. App. 2003).

- The parole board must determine, *inter alia*, whether there is a strong and reasonable probability that the person will not thereafter violate the law.
  – *People v. Oglethorpe*, 87 P.3d 129, 134 (Colo. Ct. App. 2003).

C. Parole Violations: Warrantless Searches

1. Reasonable Grounds for Belief

- When a parolee is the subject of the investigation, the requirement of reasonable searches and seizures is satisfied if the parole officer who is investigating a parole violation has reasonable grounds to believe that a parole violation has occurred. Under such circumstances, the need for a search warrant is eliminated.
  – *People v. Slusher*, 844 P.2d 1222, 1225 (Colo. Ct. App. 1992).

2. Admissibility of Evidence Seized Within the Scope of a Reasonable Search

- Evidence seized within the scope of a reasonable search by a parole officer, even if unrelated to the parole violation, is admissible in the prosecution of another crime.
  – *People v. Slusher*, 844 P.2d 1222, 1225-26 (Colo. Ct. App. 1992).

III. Revocation Proceedings: The Defendant's Rights

- Defendants in revocation proceedings are not entitled to the full range of constitutional guarantees afforded to defendants in criminal prosecutions.
  – *People v. Allen*, 973 P.2d 620, 622 (Colo. 1999).

- Procedural due-process rights include a defendant's right to testify in some extra-judicial proceedings, like probation and parole revocation.
  – *People v. Allen*, 973 P.2d 620, 622 (Colo. 1999).

- A defendant in a proceeding to revoke a deferred judgment and sentence is provided with the same procedural safeguards as a defendant in a proceeding to revoke probation.
  – *People v. Allen*, 973 P.2d 620, 623 (Colo. 1999).

- On first appearance or at a commencement of the hearing, a court must inform the defendant that he or she need not make a statement and that if he or she does, the statement may be used against him or her. COLO. R. CRIM. P. 32(f).
  – *People v. Allen*, 973 P.2d 620, 622 (Colo. 1999).