The Florida 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 Florida State Manual. This manual is an update and refinement of the state legal manual produced by the National Center for Missing and Exploited Children (NCMEC) in 2004.

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

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

The Editors,

National Law Center for Children and Families
June 2008

This Manual has been prepared for educational and information purposes only. It does not constitute legal advice or legal opinion on any specific matter. Dissemination or transmission of the information contained herein is not intended to create, and receipt does not constitute, a lawyer-client relationship between the National Law Center for Children and Families® (NLC), The National Center for Missing and Exploited Children (NCMEC), their respective boards, employees or agents and the reader. The reader should not act upon this information without seeking professional counsel. No person should act or fail to act on any legal matter based on the contents of this Manual.

Copyright 1999 - 2006 by the National Law Center for Children and Families® and the National Center for Missing and Exploited Children
All rights reserved. No part of this publication may be used or reproduced in any manner whatsoever, in any form or by any electronic or mechanical means, including information storage and retrieval systems, without permission in writing from the National Law Center for Children and Families® and the National Center for Missing and Exploited Children, except in the case of brief quotations embodied in news articles, critical articles, or reviews, if the context is preserved and credit is given. NLC and NCMEC request notification in the event of reproduction. The views expressed in this publication are those of the contributing authors and do not necessarily reflect the views of the editors, staffs, officers or boards of directors of NLC or NCMEC.

The National Law Center for Children and Families® is a registered trademark.

FLORIDA
Topic Outline

I. OFFENSES DEFINED

A. Aggravated Child Abuse

1. Elements
2. "Knowingly" or "Willfully"

B. Child Abuse or Neglect

C. Child Enticement

D. Child Pornography (a.k.a. "Sexual Performance by a Child")

1. Possession
2. Possession With Intent to Promote
    a. Elements
    b. Number of "Images"
3. Production of Child Pornography
    a. Minor
    b. Sexual Conduct
        i. Nudity
            (a) Generally
            (b) As Sexual Abuse
        ii. Lewd and Lascivious
    c. Sexual Excitement
    d. Sadomasochistic Abuse
    e. Harmful to Minors
4. Computer Images
5. Virtual/Simulated Child Pornography

E. Computer Pornography

F. Lewd or Lascivious Conduct

1. Committing a Lewd or Lascivious Act in the Presence of a Child
2. Committing a Lewd or Lascivious Assault on a Child Under 16

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

H. Prostitution

1. Procuring a Person Under the Age of 18 for Prostitution
    a. Procure
    b. Prostitution

2. Solicitation of Another to Commit Prostitution
    a. Elements
    b. "Solicit" Defined

I. Sexual Exploitation of a Child

J. Sexual Performance by a Child

1. Promoting a Sexual Performance by a Child
2. Use of a Child in a Sexual Performance
3. Definitions
    a. Sexual Performance
    b. Promote
    c. Performance
    d. Sexual Conduct
        i. Deviate Sexual Intercourse
        ii. Sexual Bestiality
        iii. Sadomasochistic Abuse
        iv. Sexual Battery
        v. Simulated

K. Transporting Minor for the Purposes of Prostitution

L. Unlawful Sexual Activity With Certain Minors

1. Elements
2. Sexual Activity
3. Victim's Prior Sexual Conduct

II. MANDATORY REPORTING

A. Who Must Report?

B. Failure to Report

III. SEARCH AND SEIZURE OF ELECTRONIC EVIDENCE

A. Search Warrants

1. Probable Cause
    a. "Probable Cause" Defined
    b. Determination of Probable Cause by a Magistrate
    c. Offer of Proof
    d. Affidavits for Search Warrants
    e. Confidential Informants
    f. Undated Information
    g. The Defendant's Burden
    h. "Good-Faith" Exception
2. Scope of Search: Contraband Not Listed in Search Warrant
3. Staleness

B. Anticipatory Warrants

C. Methods of Searching

D. Types of Searches

1. Consent Searches
    a. Scope of Search
    b. Evidentiary Standard
2. Employer Searches
3. Private Searches
    a. Successive Government Search
    b. Application of Exclusionary Rule to Private Searches
4. Civilian Searches
5. University-Campus Searches

E. Computer Technician/Repairperson Discoveries

F. Photo-Development Discoveries

G. Criminal Forfeiture

H. Disciplinary Hearings for Federal and State Officers

I. Probation and Parolee Rights

IV. JURISDICTION AND NEXUS

A. Jurisdictional Nexus

B. Internet Nexus

C. State Jurisdiction, Federal Jurisdiction, Concurrent Jurisdiction

1. State
2. Federal
3. Concurrent

D. Interstate Possession of Child Pornography

V. DISCOVERY AND EVIDENCE

A. Timely Review of Evidence

B. Defense Requests for Copies of Child Pornography

C. Introduction of E-mails into Evidence

1. Hearsay/Authentication Issues
2. Circumstantial Evidence
3. Technical Aspects of Electronic Evidence Regarding Admissibility

D. Text-Only Evidence

1. Introduction into Evidence
2. Relevance

E. Evidence Obtained from Internet Service Providers

1. Electronic Communications Privacy Act
2. Cable Act
3. Patriot Act
    a. National Trap and Trace Authority
    b. State-Court-Judge Jurisdictional Limits

F. Fair Presentation of the Evidence

G. Witnesses and Testimony

1. Hearsay Exception for Child Victims of Sexual Abuse
2. Credibility Testimony
3. Expert Testimony

H. Prior Bad Acts

1. Evidence of Prior Sexual Abuse of a Child in a Familial Context
2. “Familial Relationship” Defined
3. Admissibility
    a. Evidence of a Defendant’s Other Crimes, Wrongs, or Acts

b. To Impeach a Witness
c. To Establish a Material Issue
d. When a Defendant Opens the Door

I. Privileges

1. Waiver of Patient-Psychotherapist Privilege in Child Abuse and Neglect Proceedings
2. Waiver of Marital Privilege in Child Abuse and Neglect Proceedings

VI. AGE OF CHILD VICTIM

A. Proving the Age of the Child Victim

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

1. Possession of Child Pornography/Sexual Performance by a Child
2. Procuring a Person Under the Age of 18 for Prostitution
3. Promoting a Sexual Performance by a Child
4. Use of Child in a Sexual Performance

VII. MULTIPLE COUNTS

A. What Constitutes an "Item" of Child Pornography?

1. Possession
2. Possession With Intent to Promote
3. Promoting a Sexual Performance by a Child

B. Issues of Double Jeopardy: Zip Files and Images Contained Therein

VIII. DEFENSES

A. Specific Offenses

1. Lewd or Lascivious Act in the Presence of a Child
2. Lewd, Lascivious, or Indecent Assault Upon a Child
3. Procuring a Person Under the Age of 18 for Prostitution
4. Promoting a Sexual Performance by a Child
5. Possession of Child Pornography/Sexual Performance by a Child
6. Sexual Battery of a Minor
7. Use of Child in a Sexual Performance

B. General

1. Age

a. Of Offender
b. Of Victim

2. Consent
3. Diminished Capacity
   a. Addiction to the Internet
   b. Insanity
4. Entrapment
5. First Amendment
6. Impossibility
   a. Factual
   b. Legal
7. Manufacturing Jurisdiction
8. Outrageous Conduct
9. Researcher
10. Sexual Orientation

IX. SENTENCING ISSUES

A. Mitigating Factors and Downward Departure

1. Trial Judge's Discretion
2. Appellate Review
3. Mitigating Factors
   a. Specialized Treatment
   b. Victim as Initiator, Willing Participant, Aggressor, or Provoker of Incident
   c. Minor Victim
   d. Consent

B. Enhancement

1. Acts of Sexual Battery Committed by More than One Person
2. Age of Victim
3. Distribution/Intent to Traffic
4. Sadistic, Masochistic, or Violent Material
5. Pattern of Activity for Sexual Exploitation
6. Use of Computers
7. Number of Images
8. Victim Injury Points for Purposes of Sentencing Guidelines Scoresheet
   a. "Victim Injury" Defined
   b. Sexual Contact

X. SUPERVISED RELEASE

FLORIDA
Case List by Court

An asterisk (*) next to a case name indicates that the decision is not final until time expires to file rehearing motion and, if filed, determined.

I. United States Supreme Court

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

II. Supreme Court of Florida

- *Griffin v. State*, 396 So. 2d 152 (Fla. 1981)
- *J.A.S. v. State*, 705 So .2d 1381 (Fla. 1998)
- *Jones v. State*, 640 So. 2d 1084 (Fla. 1994)
- *Randall v. State*, 760 So. 2d 892 (Fla. 2000)
- *Schmitt v. State*, 590 So. 2d 404 (Fla. 1991)
- *State v. Rife*, 789 So. 2d 288 (Fla. 2001)
- *Whitfield v. State*, 706 So. 2d 1 (Fla. 1997)

III. District Court of Appeal of Florida

A. First District

- *Brown v. State*, 424 So. 2d 950 (Fla. Dist. Ct. App. 1983)
- *Ladd v. State*, 715 So. 2d 1012 (Fla. Dist. Ct. App. 1998)
- *Register v. State*, 715 So. 2d 274 (Fla. Dist. Ct. App. 1998)
- *Roberts v. State*, 443 So. 2d 1082 (Fla. Dist. Ct. App. 1984)
- *State v. A.R.S.*, 684 So. 2d 1383 (Fla. Dist. Ct. App. 1996)
- *Weatherford v. State*, 561 So. 2d 629 (Fla. Dist. Ct. App. 1990)

B. Second District

- *Beattie v. State*, 636 So. 2d 744 (Fla. Dist. Ct. App. 1993)
- *Conyers v. State*, 638 So. 2d 1055 (Fla. Dist. Ct. App. 1994)
- *Crosby v. State*, 757 So. 2d 584 (Fla. Dist. Ct. App. 2000)
- *Fletcher v. State*, 787 So. 2d 232 (Fla. Dist. Ct. App. 2001)
- *Haworth v. State*, 637 So. 2d 267 (Fla. Dist. Ct. App. 1994)
- *Pendarvis v. State*, 752 So. 2d 75 (Fla. Dist. Ct. App. 2000)
- *State v. Cunningham*, 712 So. 2d 1221 (Fla. Dist. Ct. App. 1998)
- *State v. Pasko*, 815 So. 2d 680 (Fla. Dist. Ct. App. 2002)
- *State v. Ridgway*, 718 So. 2d 318 (Fla. Dist. Ct. App. 1998)
- *State v. Walborn*, 729 So. 2d 504 (Fla. Dist. Ct. App. 1999)

- *Thibeault v. State*, 732 So. 2d 28 (Fla. Dist. Ct. App. 1999)
- *Wade v. State*, 751 So. 2d 669 (Fla. Dist. Ct. App. 2000)

C. Third District

- *Fischer v. Metcalf*, 543 So. 2d 785 (Fla. Dist. Ct. App. 1989)
- *Mayberry v. State*, 430 So. 2d 908 (Fla. Dist. Ct. App. 1982)
- *Petty v. State*, 761 So. 2d 474 (Fla. Dist. Ct. App. 2000)
- *Pomerantz v. State*, 372 So. 2d 104 (Fla. Dist. Ct. App. 1979)
- *State v. Fuksman*, 468 So. 2d 1067 (Fla. Dist. Ct. App. 1985)

D. Fourth District

- *Burk v. State*, 705 So. 2d 1003 (Fla. Dist. Ct. App. 1998)
- *Kobel v. State*, 745 So. 2d 979 (Fla. Dist. Ct. App. 1999)
- *Leding v. State*, 725 So. 2d 1221 (Fla. Dist. Ct. App. 1999)
- *Nicholson v. State*, 748 So. 2d 1092 (Fla. Dist. Ct. App. 2000)
- *Schmitt v. State*, 563 So. 2d 1095 (Fla. Dist. Ct. App. 1990)
- *Schneider v. State*, 700 So. 2d 1239 (Fla. Dist. Ct. App. 1997)
- *State v. Cohen*, 696 So. 2d 435 (Fla. Dist. Ct. App. 1997)
- *State v. Guertin*, 650 So. 2d 1041 (Fla. Dist. Ct. App. 1995)
- *State v. Parrella*, 736 So. 2d 94 (Fla. Dist. Ct. App. 1999)
- *Young v. State*, 791 So. 2d 1121 (Fla. Dist. Ct. App. 2000)

E. Fifth District

- *Grady v. State*, 701 So. 2d 1181 (Fla. Dist. Ct. App. 1997)
- *Jett v. State*, 605 So. 2d 926 (Fla. Dist. Ct. App. 1992)
- *State v. Beckman*, 547 So. 2d 210 (Fla. Dist. Ct. App. 1989)
- *State v. Brooks*, 739 So. 2d 1223 (Fla. Dist. Ct. App. 1999)
- *State v. Enstice*, 573 So. 2d 340 (Fla. Dist. Ct. App. 1990)
- *State v. Farnham*, 752 So. 2d 12 (Fla. Dist. Ct. App. 2000)
- *State v. Griffen*, 694 So. 2d 122 (Fla. Dist. Ct. App. 1997)
- *State v. Olsen*, 745 So. 2d 454 (Fla. Dist. Ct. App. 1999)
- *State v. Osborn*, 717 So. 2d 1110 (Fla. Dist. Ct. App. 1998)
- *State v. Patterson*, 694 So. 2d 55 (Fla. Dist. Ct. App. 1997)
- *State v. Raleigh*, 686 So. 2d 621 (Fla. Dist. Ct. App. 1996)
- *State v. Rife*, 733 So. 2d 541 (Fla. Dist. Ct. App. 1999)
- *State v. Ross*, 792 So. 2d 699 (Fla. Dist. Ct. App. 2001)
- *State v. Smith*, 668 So. 2d 639 (Fla. Dist. Ct. App. 1996)
- *State v. Tirohn*, 556 So. 2d 447 (Fla. Dist. Ct. App. 1990)
- *Witt v. State*, 780 So. 2d 946 (Fla. Dist. Ct. App. 2001)

FLORIDA

Topic Outline With Cases

An asterisk (*) next to a case name indicates that the decision is not final until time expires to file rehearing motion and, if filed, determined.

I. OFFENSES DEFINED

A. Aggravated Child Abuse

1. Elements

- *Witt v. State*, 780 So. 2d 946 (Fla. Dist. Ct. App. 2001)

2. "Knowingly" or "Willfully"

- *Witt v. State*, 780 So. 2d 946 (Fla. Dist. Ct. App. 2001)

B. Child Abuse or Neglect

- *S.J.C. v. State*, 906 So. 2d 1115 (Fla. Dist. Ct. App. 2005) ("child abuse")
  - Criminal child abuse, as defined in FLA. STAT. § 827.03, includes an intentional act that could reasonably be expected to result in physical or mental injury to a child. Corporal punishment that could reasonably be expected to injure a child is criminally punishable abuse, even if the intent behind the punishment was not to bring about the expected injury.

- *Hyde v. State*, 929 So. 2d 1183 (Fla. Dist. Ct. App. 2006) ("neglect")
  - Evidence that a premature baby suffered from rashes, allergic reactions, ear infections, coughing, wheezing, fevers, and diarrhea was insufficient to support the mother's conviction for the charge of neglect or a child pursuant to FLA. STAT. § 827.03(3)(c). Additional evidence showed that the child was current was current on all her medications, and was growing as expected, despite being small for her age.

C. Child Enticement

- *Leding v. State*, 725 So. 2d 1221 (Fla. Dist. Ct. App. 1999)

D. Child Pornography (a.k.a. "Sexual Performance by a Child")

1. Possession

- *Strouse v. State*, 932 So. 2d 326 (Fla. Dist. Ct. App. 2006)
  - Evidence that defendant had new icons of child pornography on his computer screen established that the image was not merely an automatically stored temporary Internet file. Thus the evidence was sufficient to support a conviction of possession of child pornography.
- *Beattie v. State*, 636 So. 2d 744 (Fla. Dist. Ct. App. 1993)
- *Crosby v. State*, 757 So. 2d 584 (Fla. Dist. Ct. App. 2000)
- *Ladd v. State*, 715 So. 2d 1012 (Fla. Dist. Ct. App. 1998)
- *Nicholson v. State*, 748 So. 2d 1092 (Fla. Dist. Ct. App. 2000)
- *Schmitt v. State*, 563 So. 2d 1095 (Fla. Dist. Ct. App. 1990)
- *Schmitt v. State*, 590 So. 2d 404 (Fla. 1991)
- *Schneider v. State*, 700 So. 2d 1239 (Fla. Dist. Ct. App. 1997)
- *State v. Beckman*, 547 So. 2d 210 (Fla. Dist. Ct. App. 1989)
- *State v. Cohen*, 696 So. 2d 435 (Fla. Dist. Ct. App. 1997)
- *State v. Farnham*, 752 So. 2d 12 (Fla. Dist. Ct. App. 2000)
- *State v. Tirohn*, 556 So. 2d 447 (Fla. Dist. Ct. App. 1990)

2. Possession With Intent to Promote

a. Elements

- *Crosby v. State*, 757 So. 2d 584 (Fla. Dist. Ct. App. 2000)
- *Wade v. State*, 751 So. 2d 669 (Fla. Dist. Ct. App. 2000)

b. Number of "Images"

- *Crosby v. State*, 757 So. 2d 584 (Fla. Dist. Ct. App. 2000)

3. Production of Child Pornography

- *State v. Snyder*, 807 So. 2d 117 (Fla. Dist. Ct. App. 2002)
  - The words "employs" and "induces," as used in Fla. Stat. § 827.071(2) have clear and very plain meanings. The word "authorizes" refers to an adult, regardless of their relationship to the minor, that knowingly permits or allows that minor to engage in a sexual performance in an area over which the adult has authority, dominion, or control.
- *Griffin v. State*, 396 So. 2d 152 (Fla. 1981)

a. Minor

- *Griffin v. State*, 396 So. 2d 152 (Fla. 1981)

b. Sexual Conduct

- *Fletcher v. State*, 787 So. 2d 232 (Fla. Dist. Ct. App. 2001)
- *Griffin v. State*, 396 So. 2d 152 (Fla. 1981)
- *Schmitt v. State*, 563 So. 2d 1095 (Fla. Dist. Ct. App. 1990)
- *Schmitt v. State*, 590 So. 2d 404 (Fla. 1991)
- *State v. Tirohn*, 556 So. 2d 447 (Fla. Dist. Ct. App. 1990)

i. Nudity

(a) Generally

- *Schmitt v. State*, 563 So. 2d 1095 (Fla. Dist. Ct. App. 1990)
- *State v. Pasko*, 815 So. 2d 680 (Fla. Dist. Ct. App. 2002)

(b) As Sexual Abuse

- *Schmitt v. State*, 590 So. 2d 404 (Fla. 1991)

ii. Lewd and Lascivious

- *Schmitt v. State*, 563 So. 2d 1095 (Fla. Dist. Ct. App. 1990)
- *Schmitt v. State*, 590 So. 2d 404 (Fla. 1991)

c. Sexual Excitement

- *Griffin v. State*, 396 So. 2d 152 (Fla. 1981)

d. Sadomasochistic Abuse

- *Griffin v. State*, 396 So. 2d 152 (Fla. 1981)

e. Harmful to Minors

- *Griffin v. State*, 396 So. 2d 152 (Fla. 1981)

4. Computer Images

- *State v. Cohen*, 696 So. 2d 435 (Fla. Dist. Ct. App. 1997)
- *State v. Farnham*, 752 So. 2d 12 (Fla. Dist. Ct. App. 2000)
- *Schneider v. State*, 700 So. 2d 1239 (Fla. Dist. Ct. App. 1997)

5. Virtual/Simulated Child Pornography

No state cases reported.

E. Computer Pornography

- *State v. Cohen*, 696 So. 2d 435 (Fla. Dist. Ct. App. 1997)

F. Lewd or Lascivious Conduct

1. Committing a Lewd or Lascivious Act in the Presence of a Child

- *J.A.S. v. State*, 705 So. 2d 1381 (Fla. 1998)
- *Schmitt v. State*, 590 So. 2d 404 (Fla. 1991)

2. Committing a Lewd or Lascivious Assault on a Child Under 16

- *Conyers v. State*, 638 So. 2d 1055 (Fla. Dist. Ct. App. 1994)
- *Jones v. State*, 640 So. 2d 1084 (Fla. 1994)
- *State v. A.R.S.*, 684 So. 2d 1383 (Fla. Dist. Ct. App. 1996)
- *State v. Raleigh*, 686 So. 2d 621 (Fla. Dist. Ct. App. 1996)

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

- *Grohs v. State*, 944 So. 2d 450 (Fla. Dist. Ct. App. 2006)

H. Prostitution

1. Procuring a Person Under the Age of 18 for Prostitution

- *Kobel v. State*, 745 So. 2d 979 (Fla. Dist. Ct. App. 1999)
- *Randall v. State*, 919 So. 2d 265 (Fla. Dist. Ct. App. 2006)
- *Petty v. State*, 761 So. 2d 474 (Fla. Dist. Ct. App. 2000)
- *Register v. State*, 715 So. 2d 274 (Fla. Dist. Ct. App. 1998)

a. Procure

- *Kobel v. State*, 745 So. 2d 979 (Fla. Dist. Ct. App. 1999)
- *Petty v. State*, 761 So. 2d 474 (Fla. Dist. Ct. App. 2000)
- *Register v. State*, 715 So. 2d 274 (Fla. Dist. Ct. App. 1998)

b. Prostitution

- *Register v. State*, 715 So. 2d 274 (Fla. Dist. Ct. App. 1998)

2. Solicitation of Another to Commit Prostitution

a. Elements

- *Register v. State*, 715 So. 2d 274 (Fla. Dist. Ct. App. 1998)

b. "Solicit" Defined

- *Register v. State*, 715 So. 2d 274 (Fla. Dist. Ct. App. 1998)

I. Sexual Exploitation of a Child

- *Burk v. State*, 705 So. 2d 1003 (Fla. Dist. Ct. App. 1998)

J. Sexual Performance by a Child

1. Promoting a Sexual Performance by a Child

- *Burk v. State*, 705 So. 2d 1003 (Fla. Dist. Ct. App. 1998)
- *Ladd v. State*, 715 So. 2d 1012 (Fla. Dist. Ct. App. 1998)
- *McMillian v. State*, 896 So. 2d 873 (Fla. Dist. Ct. App. 2005)
- *Nicholson v. State*, 748 So. 2d 1092 (Fla. Dist. Ct. App. 2000)
- *State v. A.R.S.*, 684 So. 2d 1383 (Fla. Dist. Ct. App. 1996)

2. Use of a Child in a Sexual Performance

- *Ladd v. State*, 715 So. 2d 1012 (Fla. Dist. Ct. App. 1998)
- *State v. A.R.S.*, 684 So. 2d 1383 (Fla. Dist. Ct. App. 1996)

3. Definitions

a. Sexual Performance

- *Ladd v. State*, 715 So. 2d 1012 (Fla. Dist. Ct. App. 1998)
- *Schmitt v. State*, 563 So. 2d 1095 (Fla. Dist. Ct. App. 1990)
- *Schmitt v. State*, 590 So. 2d 404 (Fla. 1991)

b. Promote

- *Burk v. State*, 705 So. 2d 1003 (Fla. Dist. Ct. App. 1998)
- *Ladd v. State*, 715 So. 2d 1012 (Fla. Dist. Ct. App. 1998)
- *State v. A.R.S.*, 684 So. 2d 1383 (Fla. Dist. Ct. App. 1996)

c. Performance

- *Burk v. State*, 705 So. 2d 1003 (Fla. Dist. Ct. App. 1998)
- *Ladd v. State*, 715 So. 2d 1012 (Fla. Dist. Ct. App. 1998)

- *Schmitt v. State*, 563 So. 2d 1095 (Fla. Dist. Ct. App. 1990)

d. Sexual Conduct

- *Ladd v. State*, 715 So. 2d 1012 (Fla. Dist. Ct. App. 1998)

i. Deviate Sexual Intercourse

- *Ladd v. State*, 715 So. 2d 1012 (Fla. Dist. Ct. App. 1998)

ii. Sexual Bestiality

- *Ladd v. State*, 715 So. 2d 1012 (Fla. Dist. Ct. App. 1998)

iii. Sadomasochistic Abuse

- *Ladd v. State*, 715 So. 2d 1012 (Fla. Dist. Ct. App. 1998)

iv. Sexual Battery

- *Ladd v. State*, 715 So. 2d 1012 (Fla. Dist. Ct. App. 1998)

v. Simulated

- *Ladd v. State*, 715 So. 2d 1012 (Fla. Dist. Ct. App. 1998)

K. Transporting Minor for the Purposes of Prostitution

No state cases reported.

L. Unlawful Sexual Activity With Certain Minors

1. Elements

- *State v. Cunningham*, 712 So. 2d 1221 (Fla. Dist. Ct. App. 1998)
- *State v. Walborn*, 729 So. 2d 504 (Fla. Dist. Ct. App. 1999)

2. Sexual Activity

- *State v. Cunningham*, 712 So. 2d 1221 (Fla. Dist. Ct. App. 1998)
- *State v. Walborn*, 729 So. 2d 504 (Fla. Dist. Ct. App. 1999)

3. Victim's Prior Sexual Conduct

- *State v. Cunningham*, 712 So. 2d 1221 (Fla. Dist. Ct. App. 1998)

II. MANDATORY REPORTING

A. Who Must Report?

- *Fischer v. Metcalf*, 543 So. 2d 785 (Fla. Dist. Ct. App. 1989)
- *Welker v. S. Baptist Hosp. of Fla., Inc.*, 864 So. 2d 1178 (Fla. Dist. Ct. App. 2004)

B. Failure to Report

- *Fischer v. Metcalf*, 543 So. 2d 785 (Fla. Dist. Ct. App. 1989)
- *Welker v. S. Baptist Hosp. of Fla., Inc.*, 864 So. 2d 1178 (Fla. Dist. Ct. App. 2004)
  - Failure to report known or suspected child abuse is punishable as a first-degree misdemeanor, pursuant to FLA. STAT. § 39.205.

III. SEARCH AND SEIZURE OF ELECTRONIC EVIDENCE

A. Search Warrants

1. Probable Cause

a. "Probable Cause" Defined

- *Schmitt v. State*, 590 So. 2d 404 (Fla. 1991)
- *Doorbal v. State*, 837 So. 2d 940 (Fla. 2003)

b. Determination of Probable Cause by a Magistrate

- *Schmitt v. State*, 563 So. 2d 1095 (Fla. Dist. Ct. App. 1990)
- *Schmitt v. State*, 590 So. 2d 404 (Fla. 1991)
- *Chavez v. State*, 832 So. 2d 730 (Fla. 2002)
- *State v. Enstice*, 573 So. 2d 340 (Fla. Dist. Ct. App. 1990)
- *Brachlow v. State*, 907 So. 2d 626 (Fla. Dist. Ct. App. 2005)
- *State v. Guertin*, 650 So. 2d 1041 (Fla. Dist. Ct. App. 1995)

c. Offer of Proof

- *Fletcher v. State*, 787 So. 2d 232 (Fla. Dist. Ct. App. 2001)
- *Schmitt v. State*, 563 So. 2d 1095 (Fla. Dist. Ct. App. 1990)

- *Schmitt v. State*, 590 So. 2d 404 (Fla. 1991)

d. Affidavits for Search Warrants

- *Schmitt v. State*, 563 So. 2d 1095 (Fla. Dist. Ct. App. 1990)
- *State v. Guertin*, 650 So. 2d 1041 (Fla. Dist. Ct. App. 1995)

e. Confidential Informants

- *State v. Enstice*, 573 So. 2d 340 (Fla. Dist. Ct. App. 1990)

f. Undated Information

- *State v. Enstice*, 573 So. 2d 340 (Fla. Dist. Ct. App. 1990)

g. The Defendant's Burden

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

h. "Good-Faith" Exception

- *State v. Enstice*, 573 So. 2d 340 (Fla. Dist. Ct. App. 1990)

2. Scope of Search: Contraband Not Listed in Search Warrant

- *State v. Ridgway*, 718 So. 2d 318 (Fla. Dist. Ct. App. 1998)

3. Staleness

- *Fletcher v. State*, 787 So. 2d 232 (Fla. Dist. Ct. App. 2001)
- *State v. Felix*, 942 So. 2d 5 (Fla. Dist. Ct. App. 2006)
- *Haworth v. State*, 637 So. 2d 267 (Fla. Dist. Ct. App. 1994)
- *State v. Jenkins*, 910 So. 2d 934 (Fla. Dist. Ct. App. 2005)
- *State v. Enstice*, 573 So. 2d 340 (Fla. Dist. Ct. App. 1990)
- *Brachlow v. State*, 907 So. 2d 626 (Fla. Dist. Ct. App. 2005)

B. Anticipatory Warrants

No state cases reported.

C. Methods of Searching

No state cases reported.

D. Types of Searches

1. Consent Searches

- *State v. Fuksman*, 468 So. 2d 1067 (Fla. Dist. Ct. App. 1985)

a. Scope of Search

- *State v. Fuksman*, 468 So. 2d 1067 (Fla. Dist. Ct. App. 1985)

b. Evidentiary Standard

- *State v. Fuksman*, 468 So. 2d 1067 (Fla. Dist. Ct. App. 1985)

2. Employer Searches

- *Pendarvis v. State*, 752 So. 2d 75 (Fla. Dist. Ct. App. 2000)

3. Private Searches

- *Pomerantz v. State*, 372 So. 2d 104 (Fla. Dist. Ct. App. 1979)
- *State v. Olsen*, 745 So. 2d 454 (Fla. Dist. Ct. App. 1999)
- *Alexander v. State*, 902 So. 2d 292 (Fla. Dist. Ct. App. 2005)
  - The private security guards at a flea market that searched defendant were not government actors. Thus, the security guards were not subject to the requirements of the Fourth Amendment of the United States Constitution.

a. Successive Government Search

- *State v. Olsen*, 745 So. 2d 454 (Fla. Dist. Ct. App. 1999)

b. Application of Exclusionary Rule to Private Searches

- *Roberts v. State*, 443 So. 2d 1082 (Fla. Dist. Ct. App. 1984)

4. Civilian Searches

No state cases reported.

5. University-Campus Searches

No state cases reported.

E. Computer Technician/Repairperson Discoveries

- *State v. Cohen*, 696 So. 2d 435 (Fla. Dist. Ct. App. 1997)

F. Photo-Development Discoveries

- *Burk v. State*, 705 So. 2d 1003 (Fla. Dist. Ct. App. 1998)

G. Criminal Forfeiture

No state cases reported.

H. Disciplinary Hearings for Federal and State Officers

No state cases reported.

I. Probation and Parolee Rights

No state cases reported.

IV. JURISDICTION AND NEXUS

A. Jurisdictional Nexus

No state cases reported.

B. Internet Nexus

No state cases reported.

C. State Jurisdiction, Federal Jurisdiction, Concurrent Jurisdiction

1. State

No state cases reported.

2. Federal

No state cases reported.

3. Concurrent

No state cases reported.

D. Interstate Possession of Child Pornography

No state cases reported.

V. DISCOVERY AND EVIDENCE

A. Timely Review of Evidence

No state cases reported.

B. Defense Requests for Copies of Child Pornography

- *State v. Ross*, 792 So. 2d 699 (Fla. Dist. Ct. App. 2001)

C. Introduction of E-mails into Evidence

1. Hearsay/Authentication Issues

No state cases reported.

2. Circumstantial Evidence

No state cases reported.

3. Technical Aspects of Electronic Evidence Regarding Admissibility

No state cases reported.

D. Text-Only Evidence

1. Introduction into Evidence

No state cases reported.

2. Relevance

No state cases reported.

E. Evidence Obtained from Internet Service Providers

1. Electronic Communications Privacy Act

No state cases reported.

2. Cable Act

No state cases reported.

3. Patriot Act

a. National Trap and Trace Authority

No state cases reported.

b. State-Court-Judge Jurisdictional Limits

No state cases reported.

F. Fair Presentation of the Evidence

- *Pendarvis v. State*, 752 So. 2d 75 (Fla. Dist. Ct. App. 2000)

G. Witnesses and Testimony

1. Hearsay Exception for Child Victims of Sexual Abuse

- *Leding v. State*, 725 So. 2d 1221 (Fla. Dist. Ct. App. 1999)
- *Weatherford v. State*, 561 So. 2d 629 (Fla. Dist. Ct. App. 1990)
- *Beber v. State*, 887 So. 2d 1248 (Fla. 2004)

2. Credibility Testimony

- *Weatherford v. State*, 561 So. 2d 629 (Fla. Dist. Ct. App. 1990)
- *Essex v. State*, 917 So. 2d 953 (Fla. Dist. Ct. App. 2005)
  - A witness's testimony offered to vouch for the credibility of another is inadmissible.

3. Expert Testimony

- *Weatherford v. State*, 561 So. 2d 629 (Fla. Dist. Ct. App. 1990)

H. Prior Bad Acts

1. Evidence of Prior Sexual Abuse of a Child in a Familial Context

- *State v. Griffen*, 694 So. 2d 122 (Fla. Dist. Ct. App. 1997)

2. "Familial Relationship" Defined

- *State v. Griffen*, 694 So. 2d 122 (Fla. Dist. Ct. App. 1997)

3. Admissibility

a. Evidence of a Defendant's Other Crimes, Wrongs, or Acts

- *Mayberry v. State*, 430 So. 2d 908 (Fla. Dist. Ct. App. 1982)

- *Randall v. State*, 760 So. 2d 892 (Fla. 2000)
- *Conde v. State*, 860 So. 2d 953 (Fla. Dist. Ct. App. 2005)

b. To Impeach a Witness

- *Brown v. State*, 424 So. 2d 950 (Fla. Dist. Ct. App. 1983)

c. To Establish a Material Issue

- *Whitfield v. State*, 706 So. 2d 1 (Fla. 1997)

d. When a Defendant Opens the Door

- *Young v. State*, 791 So. 2d 1121 (Fla. Dist. Ct. App. 2000)

I. Privileges

1. Waiver of Patient-Psychotherapist Privilege in Child Abuse and Neglect Proceedings

- *Jett v. State*, 605 So. 2d 926 (Fla. Dist. Ct. App. 1992)
- *State v. Patterson*, 694 So. 2d 55 (Fla. Dist. Ct. App. 1997)

2. Waiver of Marital Privilege in Child Abuse and Neglect Proceedings

- *State v. Patterson*, 694 So. 2d 55 (Fla. Dist. Ct. App. 1997)

VI. AGE OF CHILD VICTIM

A. Proving the Age of the Child Victim

No state cases reported.

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

1. Possession of Child Pornography/Sexual Performance by a Child

- *Nicholson v. State*, 748 So. 2d 1092 (Fla. Dist. Ct. App. 2000)

2. Procuring a Person Under the Age of 18 for Prostitution

- *Witt v. State*, 780 So. 2d 946 (Fla. Dist. Ct. App. 2001)

3. Promoting a Sexual Performance by a Child

- *Nicholson v. State*, 748 So. 2d 1092 (Fla. Dist. Ct. App. 2000)

4. Use of Child in a Sexual Performance

- *Nicholson v. State*, 748 So. 2d 1092 (Fla. Dist. Ct. App. 2000)

5. Unlawful Sexual Activity with a Minor

- *Hodge v. State*, 866 So. 2d 1270 (Fla. Dist. Ct. App. 2004)

VII. MULTIPLE COUNTS

A. What Constitutes an "Item" of Child Pornography?

- *State v. Farnham*, 752 So. 2d 12 (Fla. Dist. Ct. App. 2000)
- *State v. Parrella*, 736 So. 2d 94 (Fla. Dist. Ct. App. 1999)
- *Thibeault v. State*, 732 So. 2d 28 (Fla. Dist. Ct. App. 1999)

1. Possession

- *Crosby v. State*, 757 So. 2d 584 (Fla. Dist. Ct. App. 2000)
- *Schmitt v. State*, 563 So. 2d 1095 (Fla. Dist. Ct. App. 1990)
- *State v. Farnham*, 752 So. 2d 12 (Fla. Dist. Ct. App. 2000)

2. Possession With Intent to Promote

- *Crosby v. State*, 757 So. 2d 584 (Fla. Dist. Ct. App. 2000)
- *Wade v. State*, 751 So. 2d 669 (Fla. Dist. Ct. App. 2000)

3. Promoting a Sexual Performance by a Child

- *Burk v. State*, 705 So. 2d 1003 (Fla. Dist. Ct. App. 1998)

B. Issues of Double Jeopardy: Zip Files and Images Contained Therein

- *State v. Farnham*, 752 So. 2d 12 (Fla. Dist. Ct. App. 2000)

VIII. DEFENSES

A. Specific Offenses

1. Lewd or Lascivious Act in the Presence of a Child

- *J.A.S. v. State*, 705 So. 2d 1381 (Fla. 1998)

2. Lewd, Lascivious, or Indecent Assault Upon a Child

- *State v. A.R.S.*, 684 So. 2d 1383 (Fla. Dist. Ct. App. 1996)
- *State v. Brooks*, 739 So. 2d 1223 (Fla. Dist. Ct. App. 1999)
- *State v. Raleigh*, 686 So. 2d 621 (Fla. Dist. Ct. App. 1996)
- *State v. Rife*, 733 So. 2d 541 (Fla. Dist. Ct. App. 1999)

3. Procuring a Person Under the Age of 18 for Prostitution

- *Grady v. State*, 701 So. 2d 1181 (Fla. Dist. Ct. App. 1997)

4. Promoting a Sexual Performance by a Child

- *Nicholson v. State*, 748 So. 2d 1092 (Fla. Dist. Ct. App. 2000)

5. Possession of Child Pornography/Sexual Performance by a Child

- *Nicholson v. State*, 748 So. 2d 1092 (Fla. Dist. Ct. App. 2000)

6. Sexual Battery of a Minor

- *State v. Rife*, 789 So. 2d 288 (Fla. 2001)

7. Use of Child in a Sexual Performance

- *Nicholson v. State*, 748 So. 2d 1092 (Fla. Dist. Ct. App. 2000)

B. General

- *J.A.S. v. State*, 705 So. 2d 1381 (Fla. 1998)

1. Age

a. Of Offender

- *J.A.S. v. State*, 705 So. 2d 1381 (Fla. 1998)

b. Of Victim

See infra "Specific Offenses," Part VIII.A.

2. Consent

- *Schmitt v. State*, 590 So. 2d 404 (Fla. 1991)

3. Diminished Capacity

a. Addiction to the Internet

No state cases reported.

b. Insanity

No state cases reported.

4. Entrapment

- *Beattie v. State*, 636 So. 2d 744 (Fla. Dist. Ct. App. 1993)

5. First Amendment

No state cases reported.

6. Impossibility

a. Factual

No state cases reported.

b. Legal

No state cases reported.

7. Manufacturing Jurisdiction

No state cases reported.

8. Outrageous Conduct

No state cases reported.

9. Researcher

No state cases reported.

10. Sexual Orientation

No state cases reported.

IX. SENTENCING ISSUES

A. Mitigating Factors and Downward Departure

- *State v. Smith*, 668 So. 2d 639 (Fla. Dist. Ct. App. 1996)

1. Trial Judge's Discretion

- *State v. Rife*, 733 So. 2d 541 (Fla. Dist. Ct. App. 1999)
- *State v. Rife*, 789 So. 2d 288 (Fla. 2001)

2. Appellate Review

- *State v. Brooks*, 739 So. 2d 1223 (Fla. Dist. Ct. App. 1999)
- *State v. Rife*, 789 So. 2d 288 (Fla. 2001)

3. Mitigating Factors

a. Specialized Treatment

- *State v. Osborn*, 717 So. 2d 1110 (Fla. Dist. Ct. App. 1998)

b. Victim as Initiator, Willing Participant, Aggressor, or Provoker of Incident

- *State v. Brooks*, 739 So. 2d 1223 (Fla. Dist. Ct. App. 1999)
- *State v. Rife*, 733 So. 2d 541 (Fla. Dist. Ct. App. 1999)

c. Minor Victim

- *State v. Rife*, 789 So. 2d 288 (Fla. 2001)

d. Consent

- *State v. Rife*, 789 So. 2d 288, 290 (Fla. 2001)

B. Enhancement

1. Acts of Sexual Battery Committed by More than One Person

- *State v. Smith*, 668 So. 2d 639 (Fla. Dist. Ct. App. 1996)

2. Age of Victim

No state cases reported.

3. Distribution/Intent to Traffic

No state cases reported.

4. Sadistic, Masochistic, or Violent Material

No state cases reported.

5. Pattern of Activity for Sexual Exploitation

No state cases reported.

6. Use of Computers

No state cases reported.

7. Number of Images

No state cases reported.

8. Victim Injury Points for Purposes of Sentencing Guidelines Scoresheet

a. "Victim Injury" Defined

- *Ladd v. State*, 715 So. 2d 1012 (Fla. Dist. Ct. App. 1998)

b. Sexual Contact

- *Ladd v. State*, 715 So. 2d 1012 (Fla. Dist. Ct. App. 1998)

X. SUPERVISED RELEASE

No state cases reported.

FLORIDA
Case Highlights

An asterisk (*) next to a case name indicates that the decision is not final until time expires to file rehearing motion and, if filed, determined.

Beattie v. State, 636 So. 2d 744 (Fla. Dist. Ct. App. 1993)

There is a three-part test to determine if entrapment has occurred: whether an agent of the government induced the accused to commit the offense charged; whether the accused was awaiting a propitious opportunity or was ready and willing, without persuasion, to commit the offense; and whether the entrapment evaluation should be submitted to a jury.

Brown v. State, 424 So. 2d 950 (Fla. Dist. Ct. App. 1983)

Normally, testimony that concerns the moral character and prior bad acts of a witness is not admissible to impeach a witness; however, such testimony is admissible to show a possible bias or motive on the part of the witness.

Burk v. State, 705 So. 2d 1003 (Fla. Dist. Ct. App. 1998)

The production or promotion of each individual photograph of child pornography is a crime.

Conyers v. State, 638 So. 2d 1055 (Fla. Dist. Ct. App. 1994)

Florida has an obligation and a compelling interest in protecting children from sexual activity and exploitation before their minds and bodies have sufficiently matured to make it appropriate, safe, and healthy for them; therefore, the state statute addressing the commission of lewd and lascivious acts upon a child under the age of 16 is constitutional.

Crosby v. State, 757 So. 2d 584 (Fla. Dist. Ct. App. 2000)

The defendant, found in possession of several copies of the same article of child pornography, was correctly tried and convicted upon each article; however, if the defendant, found in possession of multiple copies of the same article of child pornography during a single episode, was charged with possession with the intent to promote, then he may be prosecuted for only one count of this offense.

Fischer v. Metcalf, 543 So. 2d 785 (Fla. Dist. Ct. App. 1989)

A child is not afforded a civil cause of action for the failure of his or her father's psychiatrist to report alleged child abuse.

Fletcher v. State, 787 So. 2d 232 (Fla. Dist. Ct. App. 2001)

Florida courts have held that the rule of thumb on staleness determinations is 30 days.

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.

Grady v. State, 701 So. 2d 1181 (Fla. Dist. Ct. App. 1997)

The defendant's ignorance of the age of the victim is not a defense to the crime of procuring a person under the age of 18 for prostitution.

Griffin v. State, 396 So. 2d 152 (Fla. 1981)

Because the well-being of children is a subject within the State's constitutional power to regulate, a state may adopt more stringent controls on communicative materials available to minors than on those available to adults.

Haworth v. State, 637 So. 2d 267 (Fla. Dist. Ct. App. 1994)

Since the events at issue were, at a very minimum, more than 16 months old and since there was no evidence, beyond speculation, of an ongoing pattern of criminal activity, the evidence upon which the search warrant was based was stale.

J.A.S. v. State, 705 So. 2d 1381 (Fla. 1998)

Whatever privacy interest a 15-year-old minor has in carnal intercourse is clearly outweighed by the State's interest in protecting 12-year-old children from harmful sexual conduct, irrespective of whether the 12-year-old "consented" to the sexual activity.

Jett v. State, 605 So. 2d 926 (Fla. Dist. Ct. App. 1992)

The waiver of the psychotherapist-patient privilege makes the information available to the alleged perpetrator as well as the victim.

Jones v. State, 640 So. 2d 1084 (Fla. 1994)

Although the right to be let alone protects adults from government intrusion into matters relating to marriage, contraception, and abortion, the State may exercise control over the sexual conduct of children beyond the scope of its authority to control adults.

Kobel v. State, 745 So. 2d 979 (Fla. Dist. Ct. App. 1999)

While "procure" may mean to act as a "pimp" and not necessarily procure the person for oneself, it is also clear that "procure" may mean persuading, inducing, or prevailing upon the person to do something sexual for oneself.

Ladd v. State, 715 So. 2d 1012 (Fla. Dist. Ct. App. 1998)

The legislature may select as the age of consent for any particular statute designed to further that compelling interest any age within a range that bears a clear relationship to the objectives the legislature is advancing.

Leding v. State, 725 So. 2d 1221 (Fla. Dist. Ct. App. 1999)

A father was allowed to testify as to what his child said under the "excited-utterances" hearsay exception.

Mayberry v. State, 430 So. 2d 908 (Fla. Dist. Ct. App. 1982)

Evidence of prior bad acts is admissible as relevant to establish criminal intent, motive, common scheme, and absence of mistake.

Nicholson v. State, 748 So. 2d 1092 (Fla. Dist. Ct. App. 2000)

Florida's "promoting-a-sexual-performance-by-a-child" and "possession-of-child-pornography" statutes, which are aimed at protecting persons under the age of 18 from being sexually exploited, do not require that a defendant know that the victim is less than 18 years of age.

Pendarvis v. State, 752 So. 2d 75 (Fla. Dist. Ct. App. 2000)

To underhandedly characterize the defendant to the jury as a pervert is not only improper in that it was obviously intended to inflame the jury, but also was a clear violation of a prosecutor's duty to fairly present the evidence and permit the jury to come to a fair and impartial verdict.

Petty v. State, 761 So. 2d 474 (Fla. Dist. Ct. App. 2000)

In the context of prostitution, the term "procure" must be given its specialized meaning, which is to obtain as a prostitute for another, connoting a commercial motive.

Pomerantz v. State, 372 So. 2d 104 (Fla. Dist. Ct. App. 1979)

Where a government agent participates in a lawless private search or where the individual perpetrates a lawless search at the suggestion, order, or request of law enforcement such as to make him or her their agent, the evidence produced may be excluded as in derogation of the constitutional mandate against unreasonable searches and seizures by governmental action.

Randall v. State, 760 So. 2d 892 (Fla. 2000)

Evidence of other crimes, wrongs, or acts by a defendant may be admitted if such evidence is relevant to prove material facts in issue such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or absence of accident.

Register v. State, 715 So. 2d 274 (Fla. Dist. Ct. App. 1998)

The mere offer of money to a person under 18 to have sex with the offeror is solicitation, rather than procurement for prostitution.

Roberts v. State, 443 So. 2d 1082 (Fla. Dist. Ct. App. 1984)

Even if persons conducting a search are government employees purportedly acting in furtherance of their employment duties, to the extent that their actions are unconnected with law-enforcement purposes the exclusionary rule, intended to deter over-zealous law enforcement, should not apply.

Schmitt v. State, 563 So. 2d 1095 (Fla. Dist. Ct. App. 1990)

Conduct that might be purely innocent, such as nudity, can be found to be lewd and lascivious if accompanied by the requisite improper intent.

Schmitt v. State, 590 So. 2d 404 (Fla. 1991)

While nudity alone usually does not suffice to fulfill the "lewdness" element, the overall focus of the defendant's conduct tended to show a lewd intent and thus created a substantial basis for believing that the search would fairly probably yield evidence of a violation of Florida's "prohibition-sexual-performances-by-a-child" statute.

Schneider v. State, 700 So. 2d 1239 (Fla. Dist. Ct. App. 1997)

Exposed but undeveloped film is subject to Florida's child-pornography statute.

State v. A.R.S., 684 So. 2d 1383 (Fla. Dist. Ct. App. 1996)

The rights of privacy that have been granted to minors do not vitiate the legislature's efforts to protect minors from the conduct of others.

State v. Beckman, 547 So. 2d 210 (Fla. Dist. Ct. App. 1989)

The state of Florida has a compelling interest in the eradication of child pornography that outweighs a defendant's interest in possessing such material, whether in the home or elsewhere.

State v. Brooks, 739 So. 2d 1223 (Fla. Dist. Ct. App. 1999)

A sentencing judge is permitted to mitigate a sentence following a conviction for lewd, lascivious, or indecent assault upon a child because the child was the initiator, willing participant, aggressor, or provoker of the incident.

State v. Cohen, 696 So. 2d 435 (Fla. Dist. Ct. App. 1997)

A pornographic computer image of an actual child constitutes a photograph, representation, or other presentation for purposes of Florida's child-pornography statute.

State v. Cunningham, 712 So. 2d 1221 (Fla. Dist. Ct. App. 1998)

A Florida statute prohibiting unlawful sexual activity with certain minors furthers a compelling state interest in protecting minors from harmful sexual conduct and possible sexual exploitation by adults and has employed the least intrusive means in order to accomplish that goal.

State v. Enstice, 573 So. 2d 340 (Fla. Dist. Ct. App. 1990)

The standard to be applied by the trial court in evaluating a search warrant is whether there was a substantial basis for the issuing magistrate to conclude that probable cause existed. The magistrate is charged with making a practical, common-sense decision whether there is a "fair probability" that evidence of a crime will be found in a particular place.

State v. Farnham, 752 So. 2d 12 (Fla. Dist. Ct. App. 2000)

The defendant's possession of an entire "zip" file, made up of 18 separate disks, as well as his possession of each individual computer image contained in the "zip" file constitutes a separate offense under the Florida statute for possession of child pornography.

State v. Fuksman, 468 So. 2d 1067 (Fla. Dist. Ct. App. 1985)

A consent search is valid when the consent is freely and voluntarily given and when it is conducted within the scope of the consent.

State v. Griffen, 694 So. 2d 122 (Fla. Dist. Ct. App. 1997)

Evidence of prior sexual abuse of a child within a familial context is admissible as long as there is some additional showing of similarity.

State v. Guertin, 650 So. 2d 1041 (Fla. Dist. Ct. App. 1995)

An affidavit in support of an application for a second search warrant that makes specific reference to the earlier warrants, search, and arrests may be sufficient for the issuing judge to find probable cause.

State v. Olsen, 745 So. 2d 454 (Fla. Dist. Ct. App. 1999)

A government search that is prompted by a preceding private search, and does not exceed the scope of the private search, does not violate the Fourth Amendment because at that point the party's expectation of privacy has already been frustrated.

State v. Osborn, 717 So. 2d 1110 (Fla. Dist. Ct. App. 1998)

While a downward departure in sentencing is allowed for defendants requiring treatment for specialized mental disorders, it is within the trial court's discretion, based on a preponderance of the evidence, to determine whether any of the statutory elements for departure exist.

State v. Parrella, 736 So. 2d 94 (Fla. Dist. Ct. App. 1999)

As a means of discerning legislative intent as to the unit of prosecution, where the offender possessed multiple articles of the same type of contraband, the courts have focused on whether the legislature used the word "any" or the word "a" in describing the contraband.

State v. Pasko, 815 So. 2d 680 (Fla. Dist. Ct. App. 2002)

Nudity alone does not constitute sexual conduct under Florida child-pornography legislation.

State v. Patterson, 694 So. 2d 55 (Fla. Dist. Ct. App. 1997)

The amended Florida statute regarding psychotherapist-patient privilege does not abrogate the privilege extending to communications between a victim and his or her psychotherapist.

State v. Raleigh, 686 So. 2d 621 (Fla. Dist. Ct. App. 1996)

There is no constitutionally protected right to the defense of consent when any person, even a minor, commits a lewd act on a[nother] minor.

State v. Ridgway, 718 So. 2d 318 (Fla. Dist. Ct. App. 1998)

Pictures of child pornography found during a lawful search for drugs and drug paraphernalia were properly admitted as evidence.

State v. Rife, 733 So. 2d 541 (Fla. Dist. Ct. App. 1999)

Even though consent is not a defense to sexual intercourse with a minor, it may be considered by the court in determining an appropriate sentence.

State v. Rife, 789 So. 2d 288 (Fla. 2001)

Trial judges are not prohibited as a matter of law from imposing a downward departure based on a finding that the victim was an initiator, willing participant, aggressor, or provoker of the incident. When the minor is a victim, however, the trial court must consider the victim's age and maturity and the totality of the facts and circumstances of the relationship between the defendant and the victim.

State v. Ross, 792 So. 2d 699 (Fla. Dist. Ct. App. 2001)

The State was not required to turn over copies of the child pornography to the defendant when the State made the photographs otherwise available for inspection.

State v. Smith, 668 So. 2d 639 (Fla. Dist. Ct. App. 1996)

A child's consent to sex is not a basis for departure.

State v. Tirohn, 556 So. 2d 447 (Fla. Dist. Ct. App. 1990)

Florida Statute 827.071(1)(g) (actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast) is overbroad but excisable.

State v. Walborn, 729 So. 2d 504 (Fla. Dist. Ct. App. 1999)

An age limitation set in a Florida statute that prohibits a person 24 years of age or older from engaging in sexual activity with a person of 16 or 17 is not arbitrary, and therefore constitutional, when balanced against the goals of protecting minors from sexual exploitation.

Thibeault v. State, 732 So. 2d 28 (Fla. Dist. Ct. App. 1999)

Images of child pornography sent in only one computer transmission constitute only one offense under Florida law.

Wade v. State, 751 So. 2d 669 (Fla. Dist. Ct. App. 2000)

Prosecutors have the discretion to determine under which statute a defendant will be charged.

Weatherford v. State, 561 So. 2d 629 (Fla. Dist. Ct. App. 1990)

A witness's testimony offered to vouch for the credibility of another is inadmissible.

Whitfield v. State, 706 So. 2d 1 (Fla. 1997)

Evidence of prior bad acts or crimes is admissible if it is relevant to establish a material issue so long as the prejudicial nature of the evidence does not outweigh its relevance.

Witt v. State, 780 So. 2d 946 (Fla. Dist. Ct. App. 2001)

The language of the Florida child-abuse statute requires that the abuse be committed knowingly or willfully, not that the defendant knew the victim's age.

Young v. State, 791 So. 2d 1121 (Fla. Dist. Ct. App. 2000)

To open the door to evidence of prior bad acts, the defense must first offer misleading testimony or make a specific factual assertion that the state has the right to correct so that the jury will not be misled.

FLORIDA
Offenses Defined

An asterisk (*) *next to a case name indicates that the decision is not final until time expires to file rehearing motion and, if filed, determined.*

I. Aggravated Child Abuse

A. Elements

- Aggravated child abuse occurs when a person:
  (1) commits aggravated battery on a child;
  (2) willfully tortures, maliciously punishes, or willfully and unlawfully cages a child; or
  (3) knowingly or willfully abuses a child and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the child.
  FLA. STAT. § 827.03(2).
  – *Witt v. State*, 780 So. 2d 946, 946-47 (Fla. Dist. Ct. App. 2001).

B. "Knowingly" or "Willfully"

- The plain language of the statute only requires that the abuse be committed knowingly or willfully, not that the defendant knew the victim's age.
  – *Witt v. State*, 780 So. 2d 946, 947 (Fla. Dist. Ct. App. 2001).

C. Malice

- The statute requires actual--not legal--malice. Legal malice may be inferred from one's acts and does not require proof of intent or motive. Actual malice, or malice in fact, requires actual proof of evil intent or motive.
  -*Gryphon v. State*, 847 So. 2d 589 (Fla. Dist. Ct. App. 2003).

II. Child Abuse or Neglect

- Child abuse means intentional infliction of physical or mental injury upon a child, an intentional act that could reasonably be expected to result in physical or mental injury to a child, or active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or mental injury to a child. FLA. STAT. § 827.03 and FLA. STAT. § 827.03(3)(a) ("neglect of a child").
  – *S.J.C. v. State*, 906 So. 2d 1115 (Fla. Dist. Ct. App. 2005).

III. Child Enticement

- Whoever, without lawful authority, knowingly or recklessly takes or entices, or aids, abets, hires, or otherwise procures another to take or entice, any child 17 years of age or under or any incompetent person from the custody of his or her parent shall be guilty of a felony of the third degree. FLA. STAT. § 787.03(1).
  – *Leding v. State*, 725 So. 2d 1221, 1222 (Fla. Dist. Ct. App. 1999).

IV. Child Pornography (a.k.a. "Sexual Performance by a Child")

A. Possession

- It is unlawful for any person to knowingly possess any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, he or she knows to include any sexual conduct by a child. FLA. STAT. § 827.071(5).
  – *Beattie v. State*, 636 So. 2d 744, 745 (Fla. Dist. Ct. App. 1993).
  – *Crosby v. State*, 757 So. 2d 584, 585 (Fla. Dist. Ct. App. 2000).
  – *Ladd v. State*, 715 So. 2d 1012, 1014 (Fla. Dist. Ct. App. 1998).
  – *Nicholson v. State*, 748 So. 2d 1092, 1093 (Fla. Dist. Ct. App. 2000).
  – *Schmitt v. State*, 563 So. 2d 1095, 1101 (Fla. Dist. Ct. App. 1990).
  – *Schmitt v. State*, 590 So. 2d 404, 408, 414 (Fla. 1991).
  – *Schneider v. State*, 700 So. 2d 1239, 1239 (Fla. Dist. Ct. App. 1997).
  – *State v. Beckman*, 547 So. 2d 210, 210 (Fla. Dist. Ct. App. 1989).
  – *State v. Cohen*, 696 So. 2d 435, 436 n.1 (Fla. Dist. Ct. App. 1997).
  – *State v. Farnham*, 752 So. 2d 12, 14 (Fla. Dist. Ct. App. 2000).
  – *State v. Tirohn*, 556 So. 2d 447, 448 (Fla. Dist. Ct. App. 1990).
  – *Strouse v. State*, 932 So. 2d 326 (Fla. Dist. Ct. App. 2006).

B. Possession With Intent to Promote

1. Elements

- It is unlawful for any person to possess with the intent to promote any photograph, motion picture, exhibition, show, representation, or other presentation that, in whole or in part, includes any sexual conduct by a child. FLA. STAT. § 827.071(4).
  – *Crosby v. State*, 757 So. 2d 584, 585 (Fla. Dist. Ct. App. 2000).
  – *Wade v. State*, 751 So. 2d 669, 671 (Fla. Dist. Ct. App. 2000).

2. Number of "Images"

- The possession of three or more copies of such photograph, motion picture, representation, or presentation is *prima facie* evidence of an intent to promote. FLA. STAT. § 827.071(4).
  – *Crosby v. State*, 757 So. 2d 584, 585 (Fla. Dist. Ct. App. 2000).

C. Promoting a Sexual Performance

- A person is guilty of the use of a child in a sexual performance if, knowing the character and content thereof, he or she employs, authorizes, or induces a child less than 18 years of age to engage in a sexual performance or, being a parent, legal guardian, or custodian of such child, consents to the participation by such child in a sexual performance. FLA. STAT. § 827.071(2).

- A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a child less than 18 years of age. FLA. STAT. § 827.071(3).

1. Minor

- Minor means any person under the age of 18 years. FLA. STAT. §§ 827.041(1) - 827.041(3).

2. Sexual Conduct

- Sexual conduct means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. FLA. STAT. § 827.071(g).
  – *Fletcher v. State*, 787 So. 2d 232, 235 (Fla. Dist. Ct. App. 2001).
  – *Schmitt v. State*, 563 So. 2d 1095, 1099 (Fla. Dist. Ct. App. 1990).
  – *Schmitt v. State*, 590 So. 2d 404, 408 (Fla. 1991).
  – *State v. Tirohn*, 556 So. 2d 447, 448 (Fla. Dist. Ct. App. 1990) (finding "actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast" to be overbroad, but easily excisable from the statute).

- Videos showing innocent, normal everyday occurrences of a female child undressing, showering, performing acts of female hygiene, and donning her clothes, do not depict conduct that satisfies the statutory definition of sexual conduct.
  – *Fletcher v. State*, 787 So. 2d 232, 234 (Fla. Dist. Ct. App. 2001).

a. Nudity

i. Generally

- Nudity alone does not constitute sexual conduct.
  –*State v. Pasko*, 815 So. 2d 680 (Fla. Dist. Ct. App. 2002).

- Nudity alone may be purely innocent; however, conduct that might be purely innocent can be found to be lewd and lascivious if accompanied by the requisite improper intent.
  – *Schmitt v. State*, 563 So. 2d 1095, 1099 (Fla. Dist. Ct. App. 1990).

ii. As Sexual Abuse

- Nudity is a form of sexual abuse only if such exposure is for the purpose of sexual arousal or gratification, aggression, degradation, or other similar purpose.
  – *Schmitt v. State*, 590 So. 2d 404, 410 (Fla. 1991).

b. Lewd and Lascivious

- The term "lewd and lascivious" has been referred to as generally and usually involving an unlawful indulgence in lust, eager for sexual indulgence.
  – *Schmitt v. State*, 563 So. 2d 1095, 1100 (Fla. Dist. Ct. App. 1990).

- "Lewd and lascivious" has also been said to connote wicked, lustful, unchaste, licentious, or sensual design on the part of the perpetrator.
  – *Schmitt v. State*, 563 So. 2d 1095, 1100 (Fla. Dist. Ct. App. 1990).

- The term "lewd and lascivious" imports more than a negligent disregard of the decent proprieties and consideration due to others.
  – *Schmitt v. State*, 563 So. 2d 1095, 1100 (Fla. Dist. Ct. App. 1990).
  – *Schmitt v. State*, 590 So. 2d 404, 409 (Fla. 1991).

- Under Florida criminal law the terms "lewd" and "lascivious" are synonymous: both require an intentional act of sexual indulgence or public indecency, when such act causes offense to one or more persons viewing it or otherwise intrudes upon the rights of others. Acts are neither lewd nor lascivious unless they substantially intrude upon the rights of others.
  – *Schmitt v. State*, 590 So. 2d 404, 410 (Fla. 1991).

3. Sadomasochistic Abuse

- Sadomasochistic abuse means the flagellation or torture by or upon a person, or the condition of being fettered, bound, or otherwise physically restrained, for the purpose of deriving sexual satisfaction from inflicting harm on another or receiving such harm oneself. FLA. STAT. § 827.071(d).
  – *Griffin v. State*, 396 So. 2d 152, 154 (Fla. 1981).

D. Computer Images

- A pornographic computer image of an actual child constitutes a photograph, representation, or other presentation, the possession of which is punishable as a third-degree felony.
  – *Schneider v. State*, 700 So. 2d 1239, 1240 (Fla. Dist. Ct. App. 1997).
  – *State v. Cohen*, 696 So. 2d 435, 436 (Fla. Dist. Ct. App. 1997).
  – *State v. Farnham*, 752 So. 2d 12, 15 (Fla. Dist. Ct. App. 2000).

E. Virtual/Simulated Child Pornography

No state cases reported.

V. Computer Pornography

- A person is guilty of a violation of this section if he or she knowingly complies, enters into, or transmits by means of computer, or makes, prints, publishes, or reproduces by other computerized means, or knowingly causes or allows to be entered into or transmitted by means of computer, or buys, sells, receives, exchanges, or disseminates any notice, statement, or advertisement, or any minor's name, telephone number, place of residence, physical characteristics, or other descriptive or identifying information, for purposes of facilitating, encouraging, offering, or soliciting sexual conduct of or with any minor, or the visual depiction of such conduct. FLA. STAT. § 847.0135.
  – *State v. Cohen*, 696 So. 2d 435, 441 n.2 (Fla. Dist. Ct. App. 1997).

VI. Lewd or Lascivious Conduct

A. Committing a Lewd or Lascivious Act in the Presence of a Child

- A person who knowingly commits any lewd or lascivious act in the presence of any child under the age of 16 years, without committing the crime of sexual battery, commits a felony of the second degree.
  – *J.A.S. v. State*, 705 So. 2d 1381, 1382 n.2 (Fla. 1998).
  – *Schmitt v. State*, 590 So. 2d 404, 408 (Fla. 1991).

B. Committing a Lewd or Lascivious Assault on a Child Under 16

- A person who:
  (1) handles, fondles, or assaults any child under the age of 16 in a lewd, lascivious, or indecent manner;
  (2) commits actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, actual lewd exhibition of the genitals, or any act or conduct which simulates that sexual battery is being or will be committed upon any child under the age of 16 years or forces or entices the child to commit any such act;

(3) commits an act defined as sexual battery upon any child under the age of 16 years; or
(4) knowingly commits any lewd or lascivious act in the presence of any child under the age of 16 years,

without committing the crime of sexual battery, commits a felony of the second degree. FLA. STAT. § 800.04.
– *Conyers v. State*, 638 So. 2d 1055, 1056 (Fla. Dist. Ct. App. 1994).
– *Jones v. State*, 640 So. 2d 1084, 1085 (Fla. 1994).
– *State v. A.R.S.*, 684 So. 2d 1383, 1386 n.2 (Fla. Dist. Ct. App. 1996).
– *State v. Raleigh*, 686 So. 2d 621, 622 n.2 (Fla. Dist. Ct. App. 1996).

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

No state cases reported.

VIII. Prostitution

A. Procuring a Person Under the Age of 18 for Prostitution

- A person who procures for prostitution, or causes to be prostituted, any person who is under the age of 18 commits a felony of the second degree. FLA. STAT. § 796.03.
  – *Kobel v. State*, 745 So. 2d 979, 980 (Fla. Dist. Ct. App. 1999).
  – *Petty v. State*, 761 So. 2d 474, 474 (Fla. Dist. Ct. App. 2000).
  – *Register v. State*, 715 So. 2d 274, 275 (Fla. Dist. Ct. App. 1998).

1. Procure

- While it is true that "procure" may mean to act as a "pimp" and not necessarily procure the person for oneself, it is also clear that "procure" may mean persuading, inducing, or prevailing upon the person to do something sexual for oneself.
  – *Kobel v. State*, 745 So. 2d 979, 980, 981 (Fla. Dist. Ct. App. 1999).

- The term "procurement" connotes a pecuniary gain from the exploitation of another. In the context of prostitution, the word "procure" must be given its specialized meaning, which is to "obtain as a prostitute for another," connoting a commercial motive.
  – *Petty v. State*, 761 So. 2d 474, 474 (Fla. Dist. Ct. App. 2000).

- The mere offer of money to a person under 18 to have sex with the offeror is solicitation, rather than procurement for prostitution.
  – *Register v. State*, 715 So. 2d 274, 275 (Fla. Dist. Ct. App. 1998).

2. Prostitution

- Prostitution means the giving or receiving of the body for sexual activity for hire but excludes sexual activity between spouses. FLA. STAT. § 796.07(1)(a).
  – *Register v. State*, 715 So. 2d 274, 275 (Fla. Dist. Ct. App. 1998).

- The act of prostitution involves a financial element.
  – *Register v. State*, 715 So. 2d 274, 275 (Fla. Dist. Ct. App. 1998).

B. Solicitation of Another to Commit Prostitution

1. Elements

- It is unlawful to solicit, induce, entice, or procure another to commit prostitution, lewdness, or assignation. FLA. STAT. § 796.07(2).
  – *Register v. State*, 715 So. 2d 274, 275 (Fla. Dist. Ct. App. 1998) (FLA. STAT. § 796.07(2)(f) outlaws soliciting or procuring "another" (without express regard to the age of the victim) for prostitution).

2. "Solicit" Defined

- Solicitation is the attempt to induce one to have sex, whereas procurement contemplates the attaining, bringing about, or effecting of the result sought by the initial solicitation, such as obtaining someone as a prostitute for a third party.
  – *Register v. State*, 715 So. 2d 274, 276 (Fla. Dist. Ct. App. 1998).

- To show solicitation in the context of sexual activity, it is only necessary that the actor, with the intent that another person commit a crime, have enticed, advised, incited, ordered, or otherwise encouraged that person to commit a crime. The crime solicited need not be committed.
  – *Register v. State*, 715 So. 2d 274, 276 (Fla. Dist. Ct. App. 1998).

IX. Sexual Exploitation of a Child

- Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.
  – *Burk v. State*, 705 So. 2d 1003, 1005 n.1 (Fla. Dist. Ct. App. 1998).

X. Sexual Performance by a Child

A. Promoting a Sexual Performance by a Child

- A person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a child less than 18 years of age. FLA. STAT. § 827.071(3).
  – *Burk v. State*, 705 So. 2d 1003, 1004 (Fla. Dist. Ct. App. 1998).
  – *Ladd v. State*, 715 So. 2d 1012, 1014 (Fla. Dist. Ct. App. 1998).
  – *Nicholson v. State*, 748 So. 2d 1092, 1093 (Fla. Dist. Ct. App. 2000).
  – *State v. A.R.S.*, 684 So. 2d 1383, 1385, 1387 (Fla. Dist. Ct. App. 1996).

B. Use of a Child in a Sexual Performance

- A person is guilty of the use of a child in a sexual performance if, knowing the character and content thereof, he or she employs, authorizes, or induces a child less than 18 years of age to engage in a sexual performance, or being a parent, legal guardian, or custodian of such child, consents to the participation by such child in a sexual performance. FLA. STAT. § 827.071(2).
  – *Ladd v. State*, 715 So. 2d 1012, 1014 (Fla. Dist. Ct. App. 1998).
  – *State v. A.R.S.*, 684 So. 2d 1383, 1387 (Fla. Dist. Ct. App. 1996).

C. Definitions

1. Sexual Performance

- Sexual performance means any performance or part thereof that includes sexual conduct by a child of less than 18 years of age. FLA. STAT. § 827.071(1)(h).
  – *Ladd v. State*, 715 So. 2d 1012, 1014, 1016 (Fla. Dist. Ct. App. 1998).

- Sexual performance, pursuant to the statute, has two requirements. First, it must be a performance. Second, the performance must include the criteria enounced for sexual conduct.
  – *Schmitt v. State*, 563 So. 2d 1095, 1100-01 (Fla. Dist. Ct. App. 1990).
  – *Schmitt v. State*, 590 So. 2d 404, 410 (Fla. 1991).

2. Promote

- Promote means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer or agree to do the same. FLA. STAT. § 827.071(1)(c).
  – *Burk v. State*, 705 So. 2d 1003, 1004 (Fla. Dist. Ct. App. 1998).
  – *Ladd v. State*, 715 So. 2d 1012, 1013 (Fla. Dist. Ct. App. 1998).
  – *State v. A.R.S.*, 684 So. 2d 1383, 1385 (Fla. Dist. Ct. App. 1996).

3. Performance

- Performance means any play, motion picture, photograph, or dance or any other visual representation exhibited before an audience. FLA. STAT. § 827.071(1)(b).
  – *Burk v. State*, 705 So. 2d 1003, 1004 (Fla. Dist. Ct. App. 1998).
  – *Ladd v. State*, 715 So. 2d 1012, 1013 (Fla. Dist. Ct. App. 1998).
  – *Schmitt v. State*, 563 So. 2d 1095, 1101 (Fla. Dist. Ct. App. 1990).

4. Sexual Conduct

- Sexual conduct means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed. FLA. STAT. § 827.071(1)(g).
  – *Ladd v. State*, 715 So. 2d 1012, 1014, 1016 (Fla. Dist. Ct. App. 1998).

a. Deviate Sexual Intercourse

- Deviate sexual intercourse means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and the penis, or the mouth and the vulva. FLA. STAT. § 827.071(1)(a).
  – *Ladd v. State*, 715 So. 2d 1012, 1013 (Fla. Dist. Ct. App. 1998).

b. Sexual Bestiality

- Sexual bestiality means any sexual act between a person and an animal involving the sex organ of the one and the mouth, anus, or vagina of the other. FLA. STAT. § 827.071(1)(f).
  – *Ladd v. State*, 715 So. 2d 1012, 1013-14 (Fla. Dist. Ct. App. 1998).

c. Sadomasochistic Abuse

- Sadomasochistic abuse means flagellation or torture by or upon a person, or the condition of being fettered, bound, or otherwise physically restrained, for the purpose of deriving sexual satisfaction from inflicting harm on another or receiving such harm oneself. FLA. STAT. § 827.071(1)(d).
  – *Ladd v. State*, 715 So. 2d 1012, 1013 (Fla. Dist. Ct. App. 1998).

d. Sexual Battery

- Sexual battery means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose. FLA. STAT. § 827.071(1)(e).
  – *Ladd v. State*, 715 So. 2d 1012, 1013 (Fla. Dist. Ct. App. 1998).

e. Simulated

- Simulated means the explicit depiction of sexual conduct that creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals, or buttocks. FLA. STAT. § 827.071(1)(i).
  – *Ladd v. State*, 715 So. 2d 1012, 1014 (Fla. Dist. Ct. App. 1998).

XI. Transporting Minor for the Purposes of Prostitution

No state cases reported.

XII. Unlawful Sexual Activity With Certain Minors

A. Elements

- A person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits a felony of the second degree. FLA. STAT. § 794.05(1).
  – *State v. Cunningham*, 712 So. 2d 1221, 1221 (Fla. Dist. Ct. App. 1998).
  – *State v. Walborn*, 729 So. 2d 504, 505 (Fla. Dist. Ct. App. 1999).

B. Sexual Activity

- Sexual activity means oral, anal, or vaginal penetration by, or union with, the sexual organ of another; however, sexual activity does not include an act done for a bona fide medical purpose. FLA. STAT. § 794.05(1).
  – *State v. Cunningham*, 712 So. 2d 1221, 1221-22 (Fla. Dist. Ct. App. 1998).
  – *State v. Walborn*, 729 So. 2d 504, 505 (Fla. Dist. Ct. App. 1999).

C. Victim's Prior Sexual Conduct

- The victim's prior sexual conduct is not a relevant issue in a prosecution under this section. FLA. STAT. § 794.05(3).
  – *State v. Cunningham*, 712 So. 2d 1221, 1222 (Fla. Dist. Ct. App. 1998).

FLORIDA

Mandatory Reporting

I. Who Must Report?

- Any person including, but not limited to, any:
  (1) physician, osteopath, medical examiner, chiropractor, nurse, or hospital personnel engaged in the admission, examination, care, or treatment of persons;
  (2) health or mental-health professional other than one listed above;
  (3) practitioner who relies solely on spiritual means for healing;
  (4) Nursing home staff; assisted living facility staff; adult day care center staff; adult family-care home staff; social worker; or other professional adult care, residential, or institutional staff;
  (5) State, county, or municipal criminal justice employee or law enforcement officer;
  (6) An employee of the Department of Business and Professional Regulation conducting inspections of public lodging establishments
  (7) Florida advocacy council member or long-term care ombudsman council member
  (8) Bank, savings and loan, or credit union officer, trustee, or employer.
  FLA. STAT. § 415.1034(1)(a).
  – *Fischer v. Metcalf*, 543 So. 2d 785, 787-88 (Fla. Dist. Ct. App. 1989).

II. Failure to Report

- A person who knowingly and willfully fails to report a case of known or suspected abuse, neglect, or exploitation of a vulnerable adult, or who knowingly and willfully prevents another person from doing so, commits a misdemeanor of the second degree. FL. STAT. § 415.111(1).
  – *Fischer v. Metcalf*, 543 So. 2d 785, 788 (Fla. Dist. Ct. App. 1989).

FLORIDA
Search and Seizure of Electronic Evidence

I. Search Warrants

A. Probable Cause

1. "Probable Cause" Defined

- Probable cause is a reasonable ground of suspicion supported by circumstances sufficiently strong to warrant a cautious person in the belief that the person is guilty of the offense charged.
  – *Schmitt v. State*, 590 So. 2d 404, 409 (Fla. 1991).

2. Determination of Probable Cause by a Magistrate

- The determination by the issuing judge that there is probable cause is entitled to a presumption of correctness.
  – *State v. Guertin*, 650 So. 2d 1041, 1043 (Fla. Dist. Ct. App. 1995).

- A magistrate's determination of probable cause should be paid great deference by reviewing courts.
  – *Schmitt v. State*, 563 So. 2d 1095, 1099 (Fla. Dist. Ct. App. 1990).
  – *Chavez v. State*, 832 So. 2d 730 (Fla. 2002).

- The standard to be applied by the trial court in evaluating the search warrant is whether there was a substantial basis for the issuing magistrate to conclude that probable cause existed.
  – *Schmitt v. State*, 563 So. 2d 1095, 1099 (Fla. Dist. Ct. App. 1990).
  – *State v. Enstice*, 573 So. 2d 340, 341 (Fla. Dist. Ct. App. 1990).

- The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him or her, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
  – *Schmitt v. State*, 563 So. 2d 1095, 1098-99 (Fla. Dist. Ct. App. 1990).
  – *State v. Enstice*, 573 So. 2d 340, 341 (Fla. Dist. Ct. App. 1990).
  – *Brachlow v. State*, 907 So. 2d 626 (Fla. Dist. Ct. App. 2005).

- As long as the neutral magistrate has a substantial basis for concluding that a search would uncover evidence of wrongdoing, the requirement of probable cause is satisfied.
  – *Schmitt v. State*, 590 So. 2d 404, 409 (Fla. 1991).

3. Offer of Proof

- To establish probable cause for the search warrant, a reason to believe that a crime had been committed and that evidence would be found at the premises to be searched must be shown.
  – *Schmitt v. State*, 590 So. 2d 404, 409 (Fla. 1991).

- Probable cause exists if a reasonable man, having the specialized training of a law-enforcement officer, in reviewing the facts known to him or her, would consider that a felony is being or has been committed by the person under suspicion.
  – *Schmitt v. State*, 563 So. 2d 1095, 1098 (Fla. Dist. Ct. App. 1990).

- The facts constituting cause need not meet the standard of conclusiveness and probability required of circumstantial facts upon which a conviction must be based.
  – *Schmitt v. State*, 563 So. 2d 1095, 1098 (Fla. Dist. Ct. App. 1990).

- The presence of secreted video cameras positioned to capture a child performing typical acts of feminine hygiene does not give rise to probable cause for a warrant issued on the suspicion of possession of child pornography.
  – *Fletcher v. State*, 787 So. 2d 232, 236 (Fla. Dist. Ct. App. 2001).

4. Affidavits for Search Warrants

- Affidavits for search warrants must be tested and interpreted by magistrates and courts in a common-sense fashion.
  – *Schmitt v. State*, 563 So. 2d 1095, 1098 (Fla. Dist. Ct. App. 1990).

- An affidavit in support of an application for a second search warrant that makes specific reference to the earlier warrants, search, and arrests, may be sufficient for the issuing judge to find probable cause.
  – *State v. Guertin*, 650 So. 2d 1041, 1043 (Fla. Dist. Ct. App. 1995).

5. Confidential Informants

- In order to find probable cause in cases involving confidential informants a magistrate must be informed of:
  (1) some of the underlying circumstances necessary to enable him or her to independently judge the informant's "basis of knowledge," and

(2) some of the underlying circumstances from which the officer concluded that the informant was credible or his or her information reliable.
– *State v. Enstice*, 573 So. 2d 340, 342 (Fla. Dist. Ct. App. 1990).

6. Undated Information

- Where undated information is factually interrelated with other dated information in an affidavit, it is permissible to infer that the events took place in close proximity to the dates that are given.
  – *State v. Enstice*, 573 So. 2d 340, 342 (Fla. Dist. Ct. App. 1990).

7. The Defendant's Burden

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

8. "Good-Faith" Exception

- In situations where analysis yields a conclusion that it lacks probable cause, the court must then determine whether an affidavit is so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.
  – *State v. Enstice*, 573 So. 2d 340, 343 (Fla. Dist. Ct. App. 1990).

B. Scope of Search: Contraband Not Listed in Search Warrant

- Contraband not listed in a search warrant may be seized if found in accordance with the "plain-view" doctrine during the course of the search.
  – *State v. Ridgway*, 718 So. 2d 318, 319-20 (Fla. Dist. Ct. App. 1998).

- The discovery of the unlisted evidence need not be inadvertent.
  – *State v. Ridgway*, 718 So. 2d 318, 320 (Fla. Dist. Ct. App. 1998).

C. Staleness

- The staleness doctrine relates to the age of information and events that form the factual basis for issuing a warrant.
  – *Fletcher v. State*, 787 So. 2d 232, 234 (Fla. Dist. Ct. App. 2001).

- Generally, as the incriminating information ages, it becomes less likely that evidence of a crime will be found on the premises sought to be searched.
  – *Fletcher v. State*, 787 So. 2d 232, 234 (Fla. Dist. Ct. App. 2001).

- The length of time between events relied upon to obtain a warrant and the date of issuance determines whether the events and information are stale.
  – *Haworth v. State*, 637 So. 2d 267, 267 (Fla. Dist. Ct. App. 1994).
  – *State v. Jenkins*, 910 So. 2d 934 (Fla. Dist. Ct. App. 2005).

- Florida courts have held that the rule of thumb on staleness determinations is 30 days.
  – *Fletcher v. State*, 787 So. 2d 232, 234 (Fla. Dist. Ct. App. 2001).
  – *State v. Felix*, 942 So. 2d 5 (Fla. Dist. Ct. App. 2006).

- If an alleged offense occurs in a place no more than 30 days prior to issuance of a search warrant, a finding of probable cause will usually be upheld.
  – *State v. Enstice*, 573 So. 2d 340, 342 (Fla. Dist. Ct. App. 1990).

- The substantial lapse of time does not render a search warrant stale in child pornography cases.
  – *Brachlow v. State*, 907 So. 2d 934 (Fla. Dist. Ct. App. 2005).

II. Anticipatory Warrants

No state cases reported.

III. Methods of Searching

No state cases reported.

IV. Types of Searches

A. Consent Searches

- The general rule in search-and-seizure law is that warrantless searches are *per se* unreasonable.
  – *State v. Fuksman*, 468 So. 2d 1067, 1068 (Fla. Dist. Ct. App. 1985).

- One exception to the general rule is that a warrantless search conducted with consent is permissible.
  – *State v. Fuksman*, 468 So. 2d 1067, 1068 (Fla. Dist. Ct. App. 1985).

- A consent search is valid when the consent is freely and voluntarily given and when it is conducted within the scope of the consent.
  – *State v. Fuksman*, 468 So. 2d 1067, 1068 (Fla. Dist. Ct. App. 1985).

1. Scope of Search

- The scope of a consent search is determined by the totality of the circumstances by making one circumstance, the general consent to search an area, preeminent.
  – *State v. Fuksman*, 468 So. 2d 1067, 1070 (Fla. Dist. Ct. App. 1985).

- It is not merely the consenting party's words and actions, but the words and actions of all involved, as well as the surrounding circumstances, which define the scope of a consent search.
  – *State v. Fuksman*, 468 So. 2d 1067, 1070 (Fla. Dist. Ct. App. 1985).

2. Evidentiary Standard

- A preponderance of the evidence standard is applied to show a consent search was valid.
  – *State v. Fuksman*, 468 So. 2d 1067, 1068 (Fla. Dist. Ct. App. 1985).

B. Employer Searches

One case that does not focus on, but rather mentions "employer searches" in passing is *Pendarvis v. State*, 752 So. 2d 75 (Fla. Dist. Ct. App. 2000).

C. Private Searches

- No constitutional provision affords any protection against purely private searches and seizures no matter how unreasonable.
  – *Pomerantz v. State*, 372 So. 2d 104, 108 (Fla. Dist. Ct. App. 1979).

- A search will not be considered private if it was instigated by law enforcement or conducted by a private citizen acting as an agent of law enforcement.
  – *State v. Olsen*, 745 So. 2d 454, 456 (Fla. Dist. Ct. App. 1999).

- When a government agent participates in a lawless private search or where the individual perpetrates a lawless search at the suggestion, order, or request of law enforcement such as to make him or her their agent, the evidence produced may be excluded as in derogation of the constitutional mandate against unreasonable searches and seizures by governmental action.
  – *Pomerantz v. State*, 372 So. 2d 104, 109 (Fla. Dist. Ct. App. 1979).

1. Successive Government Search

- A government search that is prompted by a preceding private search, and does not exceed the scope of the private search, does not violate the Fourth Amendment because at that point the party's expectation of privacy has already been frustrated.
  – *State v. Olsen*, 745 So. 2d 454, 455-56 (Fla. Dist. Ct. App. 1999).

- Evidence seized as a result of a successive government search is admissible against a defendant in a criminal proceeding.
  – *State v. Olsen*, 745 So. 2d 454, 456 (Fla. Dist. Ct. App. 1999).

2. Application of Exclusionary Rule to Private Searches

- The exclusionary rule does not apply to a private search not conducted for or stimulated by law-enforcement officers.
  – *Roberts v. State*, 443 So. 2d 1082, 1082 (Fla. Dist. Ct. App. 1984).

- Even if persons conducting a search are government employees purportedly acting in furtherance of their employment duties, to the extent that their actions are unconnected with law-enforcement purposes the exclusionary rule, intended to deter over-zealous law enforcement, should not apply.
  – *Roberts v. State*, 443 So. 2d 1082, 1082 (Fla. Dist. Ct. App. 1984).

D. Civilian Searches

No state cases reported.

E. University-Campus Searches

No state cases reported.

V. Computer Technician/Repairperson Discoveries

One case that does not focus on, but rather mentions in passing computer technician/repairperson discoveries is *State v. Cohen*, 696 So. 2d 435 (Fla. Dist. Ct. App. 1997).

VI. Photo-Development Discoveries

One case that does not focus on, but rather mentions in passing photo-development discoveries is *Burk v. State*, 705 So. 2d 1003 (Fla. Dist. Ct. App. 1998).

VII. Criminal Forfeiture

No state cases reported.

VIII. Disciplinary Hearings for Federal and State Officers

No state cases reported.

IX. Probation and Parolee Rights

No state cases reported.

FLORIDA

Jurisdiction and Nexus

I. Jurisdictional Nexus

No state cases reported.

II. Internet Nexus

No state cases reported.

III. State Jurisdiction, Federal Jurisdiction, Concurrent Jurisdiction

A. State

No state cases reported.

B. Federal

No state cases reported.

C. Concurrent

No state cases reported.

IV. Interstate Possession of Child Pornography

No state cases reported.

FLORIDA

Discovery and Evidence

I. Timely Review of Evidence

No state cases reported.

II. Defense Requests for Copies of Child Pornography

- The State is under no obligation to turn over contraband child pornography.
  – *State v. Ross*, 792 So. 2d 699, 702 (Fla. Dist. Ct. App. 2001).

- The State's offer to make contraband materials available for inspection but not to allow them to be copied is reasonable.
  – *State v. Ross*, 792 So. 2d 699, 702 (Fla. Dist. Ct. App. 2001).

III. Introduction of E-mails into Evidence

A. Hearsay/Authentication Issues

No state cases reported.

B. Circumstantial Evidence

No state cases reported.

C. Technical Aspects of Electronic Evidence Regarding Admissibility

No state cases reported.

IV. Text-Only Evidence

A. Introduction into Evidence

No state cases reported.

B. Relevance

No state cases reported.

V. Evidence Obtained from Internet Service Providers

A. Electronic Communications Privacy Act

No state cases reported.

B. Cable Act

No state cases reported.

C. Patriot Act

1. National Trap and Trace Authority

No state cases reported.

2. State-Court-Judge Jurisdictional Limits

No state cases reported.

VI. Fair Presentation of the Evidence

- For a prosecutor to underhandedly characterize a defendant to the jury as a pervert is not only improper in that it is obviously intended to inflame the jury, but also is a clear violation of a prosecutor's duty to fairly present the evidence and permit the jury to come to a fair and impartial verdict.
  – *Pendarvis v. State*, 752 So. 2d 75, 77 (Fla. Dist. Ct. App. 2000).

VII. Witnesses and Testimony

A. Hearsay Exception for Child Victims of Sexual Abuse

- The hearsay exception for child victims of sexual abuse requires the court to make specific findings of fact on the record, setting forth the reasons the court determined the out-of-court statements to be reliable, and the reason it discounted any indications of a lack of reliability. *Fla. Stat. ch. 90.803(23)*.
  – *Leding v. State*, 725 So. 2d 1221, 1222 (Fla. Dist. Ct. App. 1999).
  – *Weatherford v. State*, 561 So. 2d 629, 633 (Fla. Dist. Ct. App. 1990).

- When the hearsay exception for child victims of sexual abuse is used, the court shall make specific findings of fact setting forth the reasons the court determined the out-of-court statements to be reliable.
  – *Beber v. State*, 887 So. 2d 1248 (Fla. 2004).

B. Credibility Testimony

- The law is well-settled that a witness's testimony offered to vouch for the credibility of another is inadmissible.
  – *Weatherford v. State*, 561 So. 2d 629, 634 (Fla. Dist. Ct. App. 1990).
  – *Essex v. State*, 917 So. 2d 953 (Fla. Dist. Ct. App. 2005).

C. Expert Testimony

- Some expert testimony may be helpful, but putting an impressively qualified expert's stamp of truthfulness on a witness' story goes too far.
  – *Weatherford v. State*, 561 So. 2d 629, 633 (Fla. Dist. Ct. App. 1990).

VIII. Prior Bad Acts

A. Evidence of Prior Sexual Abuse of a Child in a Familial Context

- When the collateral sex crime and the charged offense both occur in the familial context, this constitutes a significant similarity, but that these facts, standing alone, are insufficient to authorize admission of the collateral sex-crime offense. There must be some additional showing of similarity in order for the collateral sex-crime evidence to be admissible.
  – *State v. Griffen*, 694 So. 2d 122, 123 (Fla. Dist. Ct. App. 1997).

- The strict similarity in the nature of the offenses and the circumstances surrounding their commission that would be required in cases occurring outside the familial context is relaxed by virtue of the evidence proving that both crimes were committed in the familial context.
  – *State v. Griffen*, 694 So. 2d 122, 123-24 (Fla. Dist. Ct. App. 1997).

B. "Familial Relationship" Defined

- There is no single definition or description of what constitutes a "familial relationship" in the context of child sexual battery.
  – *State v. Griffen*, 694 So. 2d 122, 124 (Fla. Dist. Ct. App. 1997).

- Consanguinity and affinity are strong indicia of a familial relationship but are not necessary.
  – *State v. Griffen*, 694 So. 2d 122, 124 (Fla. Dist. Ct. App. 1997).

- The victim need not reside in the same home.
  – *State v. Griffen*, 694 So. 2d 122, 124 (Fla. Dist. Ct. App. 1997).

- The relationship must be one in which there is a recognizable bond of trust with the defendant, similar to the bond that develops between a child and his or her grandfather, uncle, or guardian.
  – *State v. Griffen*, 694 So. 2d 122, 124 (Fla. Dist. Ct. App. 1997).

- Where an individual legitimately exercises parental-type authority over a child or maintains custody of a child on a regular basis, a familial relationship may exist for purposes of the admissibility of collateral crime evidence.
  – *State v. Griffen*, 694 So. 2d 122, 124-25 (Fla. Dist. Ct. App. 1997).

C. Admissibility

1. Evidence of a Defendant's Other Crimes, Wrongs, or Acts (William's Rule Evidence)

- Evidence of other crimes, wrongs, or acts by a defendant may be admitted if such evidence is relevant to prove material facts in issue such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or absence of accident. *Fla. Stat. ch. 90.404(2)*.
  – *Mayberry v. State*, 430 So. 2d 908, 908 (Fla. Dist. Ct. App. 1982).
  – *Randall v. State*, 760 So. 2d 892, 896 n.5 (Fla. 2000).

- William's rule evidence is evidence of other crimes, wrongs, or acts by a defendant which may be admitted if such evidence is relevant to prove material facts in issue such as motive, opportunity, intent, preparation, plan, knowledge, etc.
  – *Conde v. State*, 860 So. 2d 930 (Fla. 2003).

2. To Impeach a Witness

- Normally, testimony that concerns the moral character and prior bad acts of a witness is not admissible to impeach a witness; however, such testimony may be admissible to show a possible bias or motive on the part of the witness.
  – *Brown v. State*, 424 So. 2d 950, 955 (Fla. Dist. Ct. App. 1983).

3. To Establish a Material Issue

- Evidence of prior bad acts or crimes is admissible if it is relevant to establish a material issue so long as the prejudicial nature of the evidence does not outweigh its relevance.
  – *Whitfield v. State*, 706 So. 2d 1, 4 (Fla. 1997).

4. When a Defendant Opens the Door

- As an evidentiary principal, the concept of "opening the door" allows the admission of otherwise inadmissible testimony to qualify, explain, or limit testimony or evidence previously admitted.
  – *Young v. State*, 791 So. 2d 1121, 1122 (Fla. Dist. Ct. App. 2000).

- To open the door to evidence of prior bad acts, the defense must first offer misleading testimony or make a specific factual assertion that the state has the right to correct so the jury will not be misled.
  – *Young v. State*, 791 So. 2d 1121, 1122 (Fla. Dist. Ct. App. 2000).

IX. Privileges

A. Waiver of Patient-Psychotherapist Privilege in Child Abuse and Neglect Proceedings

- The privileged quality of communication between any professional person and his or her client or patient shall not apply to any communications involving the perpetrator or alleged perpetrator in any situation involving unknown or suspected child abuse or neglect and shall not constitute grounds for failure to report regardless of the source of the information requiring the report, failure to cooperate with the department in its activities, or failure to give evidence in any judicial proceeding relating to child abuse or neglect. FLA. STAT. § 39.204.
  – *Jett v. State*, 605 So. 2d 926, 928 (Fla. Dist. Ct. App. 1992).
  – *State v. Patterson*, 694 So. 2d 55, 57 (Fla. Dist. Ct. App. 1997).

- Construing the abrogation of the psychological privilege as limited to the statements of the perpetrator best serves the intent of the statute – to protect children.
  – *State v. Patterson*, 694 So. 2d 55, 58 (Fla. Dist. Ct. App. 1997).

- The statute does not abrogate the privilege to communications between a victim and his or her psychotherapist.
  – *State v. Patterson*, 694 So. 2d 55, 58 (Fla. Dist. Ct. App. 1997).

- It is not essential that the defendant be charged with child abuse or neglect in order for the privilege to arise; it is sufficient that the actual charges constitute child abuse.
  – *Jett v. State*, 605 So. 2d 926, 928 (Fla. Dist. Ct. App. 1992).

- The prosecutor cannot avoid the application of the waiver merely by not alleging in the information the relationship between the abuser and the child. The statutory definition makes the relationship itself, and not the allegation, sufficient to waive the privilege when the abuser is in fact responsible for the child's welfare.
  – *Jett v. State*, 605 So. 2d 926, 928 (Fla. Dist. Ct. App. 1992).

B. Waiver of Marital Privilege in Child Abuse and Neglect Proceedings

- The privileged quality of communication between husband and wife shall not apply to any communications involving the perpetrator or alleged perpetrator in any situation involving unknown or suspected child abuse or neglect and shall not constitute grounds for failure to report regardless of the source of the information requiring the report, failure to cooperate with the department in its activities, or failure to give evidence in any judicial proceeding relating to child abuse or neglect. FLA. STAT. § 39.204.
  – *State v. Patterson*, 694 So. 2d 55, 57 (Fla. Dist. Ct. App. 1997).

FLORIDA
Age of Child Victim

I. Proving the Age of the Child Victim

No state cases reported.

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

A. Possession of Child Pornography/Sexual Performance by a Child

- The defendant's ignorance of the victim's age is not a viable defense to the charge of possessing child pornography/a sexual performance by a child.
  – *Nicholson v. State*, 748 So. 2d 1092, 1094 (Fla. Dist. Ct. App. 2000).

B. Procuring a Person Under the Age of 18 for Prostitution

- Knowledge of the age of the victim in a prosecution for procuring a person under the age of 18 for prostitution is not an element of the crime.
  – *Witt v. State*, 780 So. 2d 946, 947 (Fla. Dist. Ct. App. 2001).

C. Promoting a Sexual Performance by a Child

- The defendant's ignorance of the victim's age is not a viable defense to the charge of promoting a sexual performance by a child.
  – *Nicholson v. State*, 748 So. 2d 1092, 1094 (Fla. Dist. Ct. App. 2000).

D. Use of Child in a Sexual Performance

- The defendant's ignorance of the victim's age is not a viable defense to the charge of use of a child in a sexual performance.
  – *Nicholson v. State*, 748 So. 2d 1092, 1093 (Fla. Dist. Ct. App. 2000).

E. Unlawful Sexual Activity with a Minor

- The defendant's ignorance of the victim's age is not a viable defense to the charge of unlawful sexual activity with a minor.
  – *Hodge v. State*, 866 So. 2d 1270 (Fla. Dist. Ct. App. 2004).

FLORIDA
Multiple Counts

I. What Constitutes an "Item" of Child Pornography?

- If the word "a" is used, the courts have discerned a legislative intent that each item of contraband be the basis for a separate unit of prosecution; if the word "any" is used, the courts have discerned a legislative intent that all of the contraband be viewed in the episodic sense with only a single unit of prosecution intended.
  – *State v. Farnham*, 752 So. 2d 12, 14 (Fla. Dist. Ct. App. 2000).
  – *State v. Parrella*, 736 So. 2d 94, 95 (Fla. Dist. Ct. App. 1999).
  – *Thibeault v. State*, 732 So. 2d 28, 29-30 (Fla. Dist. Ct. App. 1999).

A. Possession

- Possession of each article of child pornography shall constitute a separate offense.
  – *Crosby v. State*, 757 So. 2d 584, 585 (Fla. Dist. Ct. App. 2000).
  – *State v. Farnham*, 752 So. 2d 12, 15 (Fla. Dist. Ct. App. 2000).

- A defendant found in possession of several copies of the same article of child pornography may be tried and convicted upon each article.
  – *Crosby v. State*, 757 So. 2d 584, 585 (Fla. Dist. Ct. App. 2000).

- By use of the word "any," the legislature intended that possession of several articles should be treated as a single offense with multiple convictions and punishments precluded.
  – *Schmitt v. State*, 563 So. 2d 1095, 1100-01 (Fla. Dist. Ct. App. 1990).

B. Possession With Intent to Promote

- A defendant found in possession of three or more copies of the same article of child pornography during a single episode may only be prosecuted for a single count of possession with intent to promote.
  – *Crosby v. State*, 757 So. 2d 584, 585 (Fla. Dist. Ct. App. 2000).
  – *Wade v. State*, 751 So. 2d 669, 671 (Fla. Dist. Ct. App. 2000).

C. Promoting a Sexual Performance by a Child

- Since the word "photograph" is used in the singular, this indicates the legislature's intent to make the production or promotion of each individual photograph a crime. *Fla. Stat. ch. 827.071(3).*
  – *Burk v. State*, 705 So. 2d 1003, 1004-05 (Fla. Dist. Ct. App. 1998).

II. Issues of Double Jeopardy: Zip Files and Images Contained Therein

- The defendant's possession of the entire zip file, as well as his possession of each individual computer image contained in that zip file constitute separate offenses of possession of child pornography/sexual performance by a child.
  – *State v. Farnham*, 752 So. 2d 12, 14 (Fla. Dist. Ct. App. 2000).

FLORIDA
Defenses

I. Specific Offenses

A. Lewd or Lascivious Act in the Presence of a Child

- Neither the victim's lack of chastity nor the victim's consent is a defense to committing a lewd or lascivious act in the presence of a child. FLA. STAT. § 800.04.
  – *J.A.S. v. State*, 705 So. 2d 1381, 1382 n.2 (Fla. 1998).

B. Lewd, Lascivious, or Indecent Assault Upon a Child

- The victim's consent and lack of chastity are not defenses to the crime.
  – *State v. A.R.S.*, 684 So. 2d 1383, 1386 n.2 (Fla. Dist. Ct. App. 1996).
  – *State v. Brooks*, 739 So. 2d 1223, 1224 (Fla. Dist. Ct. App. 1999).
  – *State v. Raleigh*, 686 So. 2d 621, 622 n.2 (Fla. Dist. Ct. App. 1996).
  – *State v. Rife*, 733 So. 2d 541, 544 (Fla. Dist. Ct. App. 1999).

- There is no constitutionally protected right to the defense of consent when any person, whether an adult or minor, commits a lewd act on a minor.
  – *State v. Raleigh*, 686 So. 2d 621, 623 (Fla. Dist. Ct. App. 1996).

C. Procuring a Person Under the Age of 18 for Prostitution

- The defendant's ignorance of the victim's age is not a defense.
  – *Grady v. State*, 701 So. 2d 1181, 1182 (Fla. Dist. Ct. App. 1997).

D. Promoting a Sexual Performance by a Child

- The defendant's ignorance of the victim's age is not a viable defense to the charge of promoting a sexual performance by a child.
  – *Nicholson v. State*, 748 So. 2d 1092, 1094 (Fla. Dist. Ct. App. 2000).

E. Possession of Child Pornography/Sexual Performance by a Child

- The defendant's ignorance of the victim's age is not a viable defense to the charge of possessing child pornography/a sexual performance by a child.
  – *Nicholson v. State*, 748 So. 2d 1092, 1094 (Fla. Dist. Ct. App. 2000).

F. Sexual Battery of a Minor

- Willingness or consent of the minor is not a defense to sexual battery of a minor.
  –*State v. Rife*, 789 So. 2d 288, 290 (Fla. 2001).

G. Use of Child in a Sexual Performance

- The defendant's ignorance of the victim's age is not a viable defense to the charge of use of a child in a sexual performance.
  – *Nicholson v. State*, 748 So. 2d 1092, 1093 (Fla. Dist. Ct. App. 2000).

II. General

- Neither the level of intimacy nor the degree of harm are relevant when an adult and a child under the age of 16 engage in sexual intercourse.
  – *J.A.S. v. State*, 705 So. 2d 1381, 1383 (Fla. 1998).

A. Age

1. Of Offender

- The court declines to find that a minor has an open-ended privacy right in carnal intercourse with another minor, or any age, that shields the minor from adjudication as a delinquent.
  – *J.A.S. v. State*, 705 So. 2d 1381, 1386 (Fla. 1998) (holding that whatever privacy interest a 15-year-old minor has in carnal intercourse is clearly outweighed by the State's interest in protecting 12-year-old children from harmful sexual conduct, irrespective of whether the 12-year-old consented to the sexual activity).

2. Of Victim

See infra "Specific Offenses," Part I.

B. Consent

- Minor children are legally incapable of consenting to a sexual act in most circumstances. One exception is for a minor who is lawfully married.
  – *Schmitt v. State*, 590 So. 2d 404, 410 (Fla. 1991).

C. Diminished Capacity

1. Addiction to the Internet

No state cases reported.

2. Insanity

No state cases reported.

D. Entrapment

- There is a three-part test to determine if entrapment has occurred:
  (1) the first question is whether an agent of the government induced the accused to commit the offense charged. On this issue, the accused has the burden of proof and must establish this factor by a preponderance of the evidence.
  (2) the second question is whether the accused was awaiting a propitious opportunity or was ready and willing, without persuasion, to commit the offense. On the second question, the defendant initially has the burden to establish lack of predisposition. As soon as the defendant produces evidence of no predisposition, the burden shifts to the prosecution to rebut this evidence beyond a reasonable doubt. In rebutting the defendant's evidence of lack of predisposition, the prosecution may make an appropriate and searching inquiry into conduct of the accused and present evidence of the accused's prior criminal history, even though such evidence normally is inadmissible.
  (3) the third question is whether the entrapment evaluation should be submitted to a jury.

  – *Beattie v. State*, 636 So. 2d 744, 746 (Fla. Dist. Ct. App. 1993).

E. First Amendment

No state cases reported.

F. Impossibility

1. Factual

No state cases reported.

2. Legal

No state cases reported.

G. Manufacturing Jurisdiction

No state cases reported.

H. Outrageous Conduct

No state cases reported.

I. Researcher

No state cases reported.

J. Sexual Orientation

No state cases reported.

FLORIDA
Sentencing Issues

I. Mitigating Factors and Downward Departure

- Departures from the sentencing guidelines should be avoided unless there are clear and convincing reasons to warrant aggravating or mitigating a sentence.
  – *State v. Smith*, 668 So. 2d 639, 644 (Fla. Dist. Ct. App. 1996).

A. Trial Judge's Discretion

- Even if a trial judge finds that a mitigating factor exists, it is still within the trial judge's discretion whether the guideline sentence should be reduced.
  – *State v. Rife*, 733 So. 2d 541, 544 (Fla. Dist. Ct. App. 1999).
  – *State v. Rife*, 789 So. 2d 288, 295 (Fla. 2001).

B. Appellate Review

- When the appellate court reviews a downward-departure sentence there are two inquiries. First, is there a record to support that the mitigating factor is actually present? Second, even if the mitigating factor is present, did the judge abuse his or her discretion in departing downward?
  – *State v. Brooks*, 739 So. 2d 1223, 1224 (Fla. Dist. Ct. App. 1999).
  – *State v. Rife*, 789 So. 2d 288, 295 (Fla. 2001).

C. Mitigating Factors

1. Specialized Treatment

- That the defendant requires specialized treatment for addiction, mental disorder, or physical disability and that the defendant is amendable to treatment is a mitigating circumstance under which a departure sentence is reasonably justified.
  – *State v. Osborn*, 717 So. 2d 1110, 1110-11 (Fla. Dist. Ct. App. 1998).

- Although the departure statute provides no definition of "mental disorder," it is within the discretion of the court, based on a preponderance of the evidence, to determine whether any of the statutory elements for departure exist.
  – *State v. Osborn*, 717 So. 2d 1110, 1111 (Fla. Dist. Ct. App. 1998).

2. Victim as Initiator, Willing Participant, Aggressor, or Provoker of Incident

- Trial judges are not prohibited from imposing a downward departure based on a finding that the victim was an initiator, willing participant, aggressor, or provoker of the incident.
  – *State v. Rife*, 789 So. 2d 288, 296 (Fla. 2001).

- While consent of the victim is not a defense to the crime of lewd, lascivious, or indecent assault upon a child, the fact that the child was the initiator, willing participant, aggressor, or provoker of the incident is a mitigating factor which may be considered by the trial judge.
  – *State v. Brooks*, 739 So. 2d 1223, 1224 (Fla. Dist. Ct. App. 1999).

- The younger and less mature the victim, the less likelihood of a finding that even willing participation is sufficient for mitigating.
  – *State v. Brooks*, 739 So. 2d 1223, 1225 (Fla. Dist. Ct. App. 1999).
  – *State v. Rife*, 733 So. 2d 541, 544 (Fla. Dist. Ct. App. 1999).

3. Minor Victim

- In determining whether the mitigator applies when the victim is a minor, the trial court must consider the victim's age and maturity and the totality of the facts and circumstances of the relationship between the defendant and the victim.
  – *State v. Rife*, 789 So. 2d 288, 296 (Fla. 2001).

4. Consent

- A minor victim's consent can be considered by a trial judge in imposing a downward departure.
  – *State v. Rife*, 789 So. 2d 288, 290 (Fla. 2001).

II. Enhancement

A. Acts of Sexual Battery Committed by More than One Person

- Florida Statute 794.023 mandates an enhanced penalty for acts of sexual battery committed by more than one person based upon a public policy that such acts are a danger to the public and offensive to civilized society.
  – *State v. Smith*, 668 So. 2d 639, 643 (Fla. Dist. Ct. App. 1996).

B. Age of Victim

No state cases reported.

C. Distribution/Intent to Traffic

No state cases reported.

D. Sadistic, Masochistic, or Violent Material

No state cases reported.

E. Pattern of Activity for Sexual Exploitation

No state cases reported.

F. Use of Computers

No state cases reported.

G. Number of Images

No state cases reported.

H. Victim Injury Points for Purposes of Sentencing Guidelines Scoresheet

1. "Victim Injury" Defined

- Victim injury means the physical injury or death suffered by a person as a direct result of the primary offense, or any offense other than the primary offense, for which an offender is convicted and which is pending before the court for sentencing at the time of the primary offense.
  – *Ladd v. State*, 715 So. 2d 1012, 1015-16 (Fla. Dist. Ct. App. 1998).

2. Sexual Contact

- If the conviction is for an offense involving sexual contact that includes sexual penetration, the sexual penetration must be scored as a severe injury regardless of whether there is evidence of any physical injury.
  – *Ladd v. State*, 715 So. 2d 1012, 1015-16 (Fla. Dist. Ct. App. 1998).

- If the conviction is for an offense involving sexual contact that does not include sexual penetration, the sexual contact must be scored as a moderate injury regardless of whether there is evidence of any physical injury.
  – *Ladd v. State*, 715 So. 2d 1012, 1016 (Fla. Dist. Ct. App. 1998).

- If the victim of an offense involving sexual contact suffers any physical injury as a direct result of the primary offense or any other

offense committed by the offender resulting in conviction, such physical injury must be scored separately and in addition to the points scored for the sexual contact or the sexual penetration.
– *Ladd v. State*, 715 So. 2d 1012, 1016 (Fla. Dist. Ct. App. 1998).

FLORIDA

Supervised Release

No state cases reported.