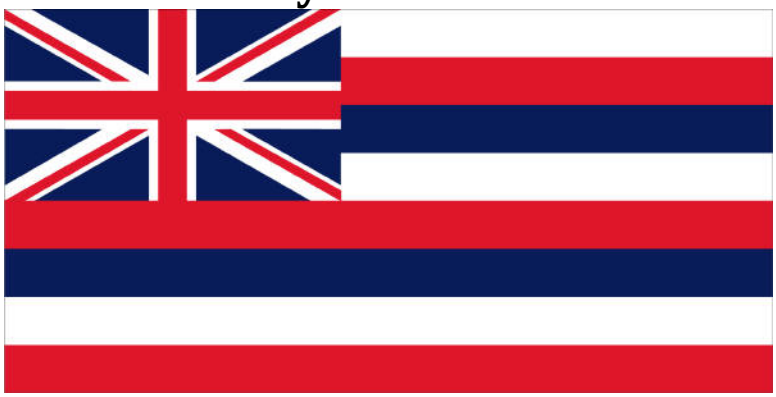
The Hawaii Law Enforcement and Prosecutors Manual on

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

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

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

The Editors,

National Law Center for Children and Families
June 2008

HAWAII
Topic Outline

I. OFFENSES DEFINED

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2. Promoting Child Abuse in the Second Degree: Distribution of Child Pornography

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Case List by Court

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

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

I. United States Supreme Court

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

II. Hawaii Supreme Court

- *State v. Kalani*, 118 P.3d 1222 (Haw. 2005)
- *State v. Rita,*[+] No. 25836, 2004 Haw. LEXIS 301 (Haw. Apr. 29, 2004)
- *State v. Chun*, 76 P.3d 935 (Haw. 2003)
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- *State v. Maielua*, No. 22895, 2001 Haw. LEXIS 310 (Haw. Aug. 22, 2001)
- *State v. Rossman*, No. 22992, 2001 Haw. LEXIS 131 (Haw. Mar. 28, 2001)
- *State v. West*, 24 P.3d 648 (Haw. 2001)
- *Barnett v. State*, 979 P.2d 1046 (Haw. 1999)
- *State v. Kapiko,*[++] 967 P.2d 228 (Haw. 1998)
- *State v. Anderson,*[++] 935 P.2d 1007 (Haw. 1997)
- *State v. Torres*, 945 P.2d 849 (Haw. 1997)
- *State v. Araki*, 923 P.2d 891 (Haw. 1996)
- *State v. Arceo*, 928 P.2d 843 (Haw. 1996)
- *State v. Buch*, 926 P.2d 599 (Haw. 1996)
- *State v. Apilando*, 900 P.2d 135 (Haw. 1995)
- *State v. Baron*, 905 P.2d 613 (Haw. 1995)
- *State v. Batangan*, 799 P.2d 48 (Haw. 1990)
- *State v. Shingaki*, 648 P.2d 190 (Haw. 1982)

III. Hawaii Intermediate Court of Appeals

- *State v. Offerman*, + No. 27923, 2008 Haw. App. LEXIS 390 (Haw. Ct. App. July 17, 2008)
- *Winterbourne v. State*, 88 P.3d 683 (Haw. Ct. App. 2004)

- *State v. Bolo*,[+] No. 24945, 2003 Haw. App. LEXIS 170 (Haw. Ct. App. May 30, 2003)
- *State v. Inoue*, No. 23903, 2002 Haw. App. LEXIS 104 (Haw. Ct. App. May 14, 2002)
- *State v. Montgomery*, 82 P.3d 818 (Haw. Ct. App. 2003)
- *State v. Rodriguez*,[+] No. 23425, 2003 Haw. App. LEXIS 69 (Haw. Ct. App. Mar. 6, 2003)
- *In re John Doe*,[+] No. 22884, 2002 Haw. App. LEXIS 83 (Haw. Ct. App. Apr. 30, 2002)
- *State v. Sapinoso*, No. 22893, 2001 Haw. App. LEXIS 66 (Haw. Ct. App. Mar. 21, 2001)
- *State v. Reyes*, 2 P.3d 725 (Haw. Ct. App. 2000)
- *State v. Naone*, 990 P.2d 1171 (Haw. Ct. App. 1997)
- *In re Jane Doe & John Doe*, 912 P.2d 588 (Haw. Ct. App. 1996)
- *State v. Whitney*, 912 P.2d 596 (Haw. Ct. App. 1996)
- *State v. Palabay*, 844 P.2d 1 (Haw. Ct. App. 1992)
- *State v. Rinehart*, 819 P.2d 1122 (Haw. Ct. App. 1991)
- *State v. Santiago*, 813 P.2d 335 (Haw. Ct. App. 1991)
- *State v. Paradis*, 711 P.2d 1307 (Haw. Ct. App. 1985)

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a. Elements

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b. Descriptions Versus Depictions

- *State v. Shingaki*, 648 P.2d 190 (Haw. 1982)

c. Obscenity Test

- *State v. Shingaki*, 648 P.2d 190 (Haw. 1982)

d. Definitions

i. "Disseminate"

- *State v. Shingaki*, 648 P.2d 190 (Haw. 1982)

ii. "Material"

- *State v. Shingaki*, 648 P.2d 190 (Haw. 1982)

iii. "Minor"

- *State v. Shingaki*, 648 P.2d 190 (Haw. 1982)

iv. "Sadomasochistic Abuse"

- *State v. Shingaki*, 648 P.2d 190 (Haw. 1982)

v. "Sexual Conduct"

- *State v. Shingaki*, 648 P.2d 190 (Haw. 1982)

3. Virtual/Simulated Child Pornography

No relevant state cases reported.

B. Criminal Attempt

1. Elements of the Offense

- *State v. Rossman*, No. 22992, 2001 Haw. LEXIS 131 (Haw. Mar. 28, 2001)
- *Barnett v. State*, 979 P.2d 1046 (Haw. 1999)
- *State v. Rodriguez*,[+] No. 23425, 2003 Haw. App. LEXIS 69 (Haw. Ct. App. Mar. 6, 2003)
- *State v. Sapinoso*, No. 22893, 2001 Haw. App. LEXIS 66 (Haw. Ct. App. Mar. 21, 2001)

2. Substantial Step

- *State v. Rossman*, No. 22992, 2001 Haw. LEXIS 131 (Haw. Mar. 28, 2001)
- *Barnett v. State*, 979 P.2d 1046 (Haw. 1999)
- *State v. Rodriguez*,[+] No. 23425, 2003 Haw. App. LEXIS 69 (Haw. Ct. App. Mar. 6, 2003)
- *State v. Sapinoso*, No. 22893, 2001 Haw. App. LEXIS 66 (Haw. Ct. App. Mar. 21, 2001)

C. Lewd or Lascivious Acts

1. Open Lewdness

- *State v. Whitney*, 912 P.2d 596 (Haw. Ct. App. 1996)
- *State v. Santiago*, 813 P.2d 335 (Haw. Ct. App. 1991)

2. Genital Exposure

- *State v. Santiago*, 813 P.2d 335 (Haw. Ct. App. 1991)

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

No relevant state cases reported.

E. Promoting Pornography for Minors

1. Elements of the Offense

- *Barnett v. State*, 979 P.2d 1046 (Haw. 1999)
- *State v. Araki*, 923 P.2d 891 (Haw. 1996)

2. "Pornographic for Minors" Defined

- *State v. Araki*, 923 P.2d 891 (Haw. 1996)

F. Prostitution of Minors

1. Promoting Prostitution in the First Degree

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- *State v. Paradis*, 711 P.2d 1307 (Haw. Ct. App. 1985)

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No relevant state cases reported.

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- *State v. Mueller*, 76 P.3d 943 (Haw. 2003)
- *State v. West*, 24 P.3d 648 (Haw. 2001)
- *State v. Kahakai*, No. 21562, 2001 Haw. LEXIS 457 (Haw. Nov. 26, 2001)
- *State v. Maielua*, No. 22895, 2001 Haw. LEXIS 310 (Haw. Aug. 22, 2001)
- *Barnett v. State*, 979 P.2d 1046 (Haw. 1999)
- *State v. Arceo*, 928 P.2d 843 (Haw. 1996)

- *State v. Montgomery*, 82 P.3d 818 (Haw. Ct. App 2003)
- *State v. Rodriguez*,[+] No. 23425, 2003 Haw. App. LEXIS 69 (Haw. Ct. App. Mar. 6, 2003)
- *State v. Sapinoso*, No. 22893 2001 Haw. App. LEXIS 66 (Haw. Ct. App. Mar. 21, 2001)
- *State v. Palabay*, 844 P.2d 1 (Haw. Ct. App. 1992)
- *State v. Rinehart*, 819 P.2d 1122 (Haw. Ct. App. 1991)

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- *State v. Mueller*, 76 P.3d 943 (Haw. 2003)

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- *State v. Mueller*, 76 P.3d 943 (Haw. 2003)

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- *State v. Baron*, 905 P.2d 613 (Haw. 1995)

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- *State v. Kalani*, 118 P.3d 1222 (Haw. 2005)
- *State v. Mueller*, 76 P.3d 943 (Haw. 2003)
- *State v. Peseti*, 65 P.3d 119 (Haw. 2003)
- *State v. Kahakai*, No. 21562, 2001 Haw. LEXIS 457 (Haw. Nov. 26, 2001)
- *State v. Rossman*, No. 22992, 2001 Haw. LEXIS 131 (Haw. Mar. 28, 2001)
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- *State v. Buch*, 926 P.2d 599 (Haw. 1996)
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- *State v. Inoue*, No. 23903, 2002 Haw. App. LEXIS 104 (Haw. Ct. App. May 14, 2002)
- *State v. Sapinoso*, No. 22893 2001 Haw. App. LEXIS 66 (Haw. Ct. App. Mar. 21, 2001)
- *State v. Naone*, 990 P.2d 1171 (Haw. Ct. App. 1997)
- *State v. Palabay*, 844 P.2d 1 (Haw. Ct. App. 1992)
- *State v. Rinehart*, 819 P.2d 1122 (Haw. Ct. App. 1991)

4. Fourth Degree

- *State v. Rita*,[+] No. 25836, 2004 Haw. LEXIS 301 (Haw. Apr. 29, 2004)
- *State v. Bani*, 36 P.3d 1255 (Haw. 2001)
- *State v. Baron*, 905 P.2d 613 (Haw. 1995)
- *In re John Doe*,[+] No. 22884, 2002 Haw. App. LEXIS 83 (Haw. Ct. App. Apr. 30, 2002)

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- *State v. Chun*, 76 P.3d 935 (Haw. 2003)
- *State v. Palabay*, 844 P.2d 1 (Haw. Ct. App. 1992)
- *State v. Santiago*, 813 P.2d 335 (Haw. Ct. App. 1991)

6. Definitions

a. "Sexual Contact"

- *State v. Kalani*, 118 P.3d 1222 (Haw. 2005)
- *State v. Rita*, [+] No. 25836, 2004 Haw. LEXIS 301 (Haw. Apr. 29, 2004)
- *State v. Mueller*, 76 P.3d 943 (Haw. 2003)
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- *State v. Sapinoso*, No. 22893, 2001 Haw. App. LEXIS 66 (Haw. Ct. App. Mar. 21, 2001)

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- *State v. Mueller*, 76 P.3d 943 (Haw. 2003)
- *State v. Rodriguez*,[+] No. 23425, 2003 Haw. App. LEXIS 69 (Haw. Ct. App. Mar. 6, 2003)
- *State v. Sapinoso*, No. 22893, 2001 Haw. App. LEXIS 66 (Haw. Ct. App. Mar. 21, 2001)

II. SEARCH AND SEIZURE OF ELECTRONIC EVIDENCE

A. Search Warrants

1. Probable Cause

- *State v. Anderson*,[++] 935 P.2d 1007 (Haw. 1997)

a. Oath or Affirmation

- *State v. Anderson*,[++] 935 P.2d 1007 (Haw. 1997)

b. False Information: The Defendant's Burden

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

2. Scope of the Search

a. Generally

- *State v. Anderson*,[++] 935 P.2d 1007 (Haw. 1997)

b. Places: Multiple-Occupancy Dwellings

i. Invalid

- *State v. Anderson*,[++] 935 P.2d 1007 (Haw. 1997)

ii. Valid

- *State v. Anderson*,[++] 935 P.2d 1007 (Haw. 1997)

3. Staleness

- *State v. Kapiko*,[++] 967 P.2d 228 (Haw. 1998)

a. Factors to Consider

- *State v. Kapiko*,[++] 967 P.2d 228 (Haw. 1998)

b. Appellate Review

- *State v. Kapiko*,[++] 967 P.2d 228 (Haw. 1998)

4. Return and Suppression of Evidence

a. Generally

- *State v. Araki*, 923 P.2d 891 (Haw. 1996)

b. Motion to Restore Property

- *State v. Araki*, 923 P.2d 891 (Haw. 1996)

c. Motion to Suppress: Burden

- *State v. Taua*,[++] 49 P.3d 1227 (Haw. 2002)
- *State v. Araki*, 923 P.2d 891 (Haw. 1996)
- *State v. Offerman*, + No. 27923, 2008 Haw. App. LEXIS 390 (Haw. Ct. App. July 17, 2008)

B. Expectation of Privacy: Exclusionary Rule

- *State v. Taua*,[++] 49 P.3d 1227 (Haw. 2002)
- *State v. Offerman*, + No. 27923, 2008 Haw. App. LEXIS 390 (Haw. Ct. App. July 17, 2008)

1. Place Searched

- *State v. Taua*,[++] 49 P.3d 1227 (Haw. 2002)

2. Property Seized

- *State v. Araki*, 923 P.2d 891 (Haw. 1996)

C. Anticipatory Warrants

No relevant state cases reported.

D. Methods of Searching

No relevant state cases reported.

E. Types of Searches

1. Consent Searches

No relevant state cases reported.

2. Employer Searches

No relevant state cases reported.

3. Private-Civilian Searches

- *State v. Araki*, 923 P.2d 891 (Haw. 1996)

4. University-Campus Searches

No relevant state cases reported.

E. Computer-Technician/Repairperson Discoveries

No relevant state cases reported.

F. Photo-Development Discoveries

No relevant state cases reported.

G. Criminal Forfeiture

No relevant state cases reported.

H. Disciplinary Hearings for Federal and State Officers

No relevant state cases reported.

III. JURISDICTION AND NEXUS

A. Jurisdictional Nexus

No relevant state cases reported.

B. Internet Nexus

No relevant state cases reported.

C. State Jurisdiction, Federal Jurisdiction, and Concurrent Jurisdiction

1. State Jurisdiction: Family Court

- *Winterbourne v. State*, 88 P.3d 683 (Haw. Ct. App. 2004)

a. Generally

- *In re Jane Doe & John Doe*, 912 P.2d 588 (Haw. Ct. App. 1996)

b. Child Protective Act

- *In re Jane Doe & John Doe*, 912 P.2d 588 (Haw. Ct. App. 1996)

c. Custody Determinations

- *In re Jane Doe & John Doe*, 912 P.2d 588 (Haw. Ct. App. 1996)

d. Appeals Process

- *In re Jane Doe & John Doe*, 912 P.2d 588 (Haw. Ct. App. 1996)

i. Question of Mootness

- *In re Jane Doe & John Doe*, 912 P.2d 588 (Haw. Ct. App. 1996)

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2. Federal Jurisdiction

No relevant state cases reported.

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D. Interstate Possession of Child Pornography

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IV. DISCOVERY AND EVIDENCE

A. Timely Review of Evidence

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B. Defense Requests for Copies of Child Pornography

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C. Introduction of E-mails into Evidence

1. Hearsay/Authentication Issues

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a. National Trap and Trace Authority

No relevant state cases reported.

b. State-Court-Judge Jurisdictional Limits

No relevant state cases reported.

F. Eyewitness-Identification Evidence

1. Reliability

- *State v. Araki*, 923 P.2d 891 (Haw. 1996)

2. Burden of Proof

- *State v. Araki*, 923 P.2d 891 (Haw. 1996)

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- *State v. Inoue*, No. 23903, 2002 Haw. App. LEXIS 104 (Haw. Ct. App. May 14, 2002)

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- *State v. Arceo*, 928 P.2d 843 (Haw. 1996)

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- *State v. Peseti*, 65 P.3d 119 (Haw. 2003)
- *State v. Baron*, 905 P.2d 613 (Haw. 1995)

1. "Relevant Evidence" Defined

- *State v. Baron*, 905 P.2d 613 (Haw. 1995)

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- *State v. Kahakai*, No. 21562, 2001 Haw. LEXIS 457 (Haw. Nov. 26, 2001)
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I. Prior Bad Acts

1. Inadmissible

- *State v. Torres*, 945 P.2d 849 (Haw. 1997)
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2. Admissible

a. Generally

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b. Probative of Truthfulness in Attacks on Credibility

- *State v. West*, 24 P.3d 648 (Haw. 2001)

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2. Prior False Reports of Sexual Assault

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a. Preliminary Determination by the Court

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b. Burden of Proof

- *State v. West*, 24 P.3d 648 (Haw. 2001)

K. Witness Testimony

- *State v. Montgomery*, 82 P.3d 818 (Haw. Ct. App. 2003)

1. Competency

- *State v. Rodriguez*,[+] No. 23425, 2003 Haw. App. LEXIS 69 (Haw. Ct. App. Mar. 6, 2003)

2. Children

- *State v. Apilando*, 900 P.2d 135 (Haw. 1995)
- *State v. Palabay*, 844 P.2d 1 (Haw. Ct. App. 1992)

a. Recording of Oral Statements

- *State v. Baron*, 905 P.2d 613 (Haw. 1995)

b. Presence of Inanimate Objects

- *State v. Palabay*, 844 P.2d 1 (Haw. Ct. App. 1992)

3. Experts

a. Qualifications

- *State v. Kahakai*, No. 21562, 2001 Haw. LEXIS 457 (Haw. Nov. 26, 2001)
- *State v. Batangan*, 799 P.2d 48 (Haw. 1990)

b. Testimony

i. Generally

- *State v. Batangan*, 799 P.2d 48 (Haw. 1990)
- *State v. Rinehart*, 819 P.2d 1122 (Haw. Ct. App. 1991)

ii. Cases of Child-Sexual Abuse

- *State v. Batangan*, 799 P.2d 48 (Haw. 1990)

iii. Witness Credibility

- *State v. Batangan*, 799 P.2d 48 (Haw. 1990)

iv. Opinions on the Ultimate Issues

- *State v. Rinehart*, 819 P.2d 1122 (Haw. Ct. App. 1991)

4. Opinion Testimony

- *State v. Kahakai*, No. 21562, 2001 Haw. LEXIS 457 (Haw. Nov. 26, 2001)

5. Ultimate-Issue Testimony

- *State v. Kahakai*, No. 21562, 2001 Haw. LEXIS 457 (Haw. Nov. 26, 2001)

6. Hearsay

a. "Hearsay" Defined

- *State v. Apilando*, 900 P.2d 135 (Haw. 1995)
- *State v. Palabay*, 844 P.2d 1 (Haw. Ct. App. 1992)

b. Admissibility

- *State v. Apilando*, 900 P.2d 135 (Haw. 1995)
- *State v. Palabay*, 844 P.2d 1 (Haw. Ct. App. 1992)

c. Exceptions

i. Excited Utterances

- *State v. Apilando*, 900 P.2d 135 (Haw. 1995)

ii. Past-Recollection Recorded

- *State v. Apilando*, 900 P.2d 135 (Haw. 1995)

iii. Prior Statements by Witnesses

(a) Generally

- *State v. Palabay*, 844 P.2d 1 (Haw. Ct. App. 1992)

(b) Consistent Statements

- *State v. Montgomery*, 82 P.3d 818 (Haw. Ct. App. 2003)
- *State v. Palabay*, 844 P.2d 1 (Haw. Ct. App. 1992)

iv. Statement by a Child

- *State v. Apilando*, 900 P.2d 135 (Haw. 1995)

d. Confrontation Clause

- *State v. Apilando*, 900 P.2d 135 (Haw. 1995)

i. Witness Unavailability

- *State v. Apilando*, 900 P.2d 135 (Haw. 1995)

ii. Video-Taped Interviews

- *State v. Apilando*, 900 P.2d 135 (Haw. 1995)

L. Privileges

- *State v. Peseti*, 65 P.3d 119 (Haw. 2003)

1. Psychologist-Client Privilege

- *State v. Peseti*, 65 P.3d 119 (Haw. 2003)

2. Victim-Counselor Privilege

- *State v. Peseti*, 65 P.3d 119 (Haw. 2003)

V. AGE OF CHILD VICTIM

A. Proving the Age of the Child Victim

No relevant state cases reported.

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

No relevant state cases reported.

VI. MULTIPLE COUNTS

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

No relevant state cases reported.

B. Consolidation of Indictments

1. Generally

- *State v. Kahakai*, No. 21562, 2001 Haw. LEXIS 457 (Haw. Nov. 26, 2001)

2. Multiple Sex Acts

- *State v. Arceo*, 928 P.2d 843 (Haw. 1996)

a. Uninterrupted, Continuing Course of Conduct

- *State v. Arceo*, 928 P.2d 843 (Haw. 1996)

b. *Modica* Rule

- *State v. Arceo*, 928 P.2d 843 (Haw. 1996)

C. Double-Jeopardy Issues

- *State v. Santiago*, 813 P.2d 335 (Haw. Ct. App. 1991)

VII. DEFENSES

A. Alibi

- *State v. Baron*, 905 P.2d 613 (Haw. 1995)

B. Consent

No relevant state cases reported.

C. Diminished Capacity

1. Insanity

No relevant state cases reported.

2. Internet Addiction

No relevant state cases reported.

D. First Amendment

No relevant state cases reported.

E. Impossibility

1. Factual

No relevant state cases reported.

2. Legal

No relevant state cases reported.

F. Manufacturing Jurisdiction

No relevant state cases reported.

G. Mistake

1. Of Fact: Age

- *State v. Buch*, 926 P.2d 599 (Haw. 1996)

2. Of Law

No relevant state cases reported.

H. Outrageous Conduct

No relevant state cases reported.

I. Researcher

No relevant state cases reported.

J. Sexual Orientation

No relevant state cases reported.

VIII. PLEAS

A. Manifest Injustice

- *Barnett v. State*, 979 P.2d 1046 (Haw. 1999)
- *State v. Bolo*,[+] No. 24945, 2003 Haw. App. LEXIS 170 (Haw. Ct. App. May 30, 2003)

B. *Nolo Contendere* Pleas

- *State v. Naone*, 990 P.2d 1171 (Haw. Ct. App. 1997)

IX. SENTENCING ISSUES

A. Admissibility of Evidence

- *Barnett v. State*, 979 P.2d 1046 (Haw. 1999)

B. Sentencing Imposition

- *Barnett v. State*, 979 P.2d 1046 (Haw. 1999)

1. Circuit-Court Jurisdiction

- *Barnett v. State*, 979 P.2d 1046 (Haw. 1999)

2. Enhancement

a. Age of Victim

No relevant state cases reported.

b. Distribution/Intent to Traffic

No relevant state cases reported.

c. Number of Images

No relevant state cases reported.

d. Pattern of Activity for Sexual Exploitation

No relevant state cases reported.

e. Sadistic, Masochistic, or Violent Material

No relevant state cases reported.

f. Use of Computers

No relevant state cases reported.

3. Concurrent Versus Consecutive Sentences

- *State v. Rossman*, No. 22992, 2001 Haw. LEXIS 131 (Haw. Mar. 28, 2001)
- *State v. Reyes*, 2 P.3d 725 (Haw. Ct. App. 2000)

a. Presumption: Concurrent Sentences

- *State v. Rossman*, No. 22992, 2001 Haw. LEXIS 131 (Haw. Mar. 28, 2001)
- *Barnett v. State*, 979 P.2d 1046 (Haw. 1999)

b. Consecutive Sentences

- *State v. Rossman*, No. 22992, 2001 Haw. LEXIS 131 (Haw. Mar. 28, 2001)

C. Megan's Law: Sex-Offender Registration and Notification

1. "Sex Offender" Defined

- *State v. Bani*, 36 P.3d 1255 (Haw. 2001)

2. Indecent Exposure as a Qualifying Offense

- *State v. Chun*, 76 P.3d 935 (Haw. 2003)

3. Constitutionality

- *State v. Bani*, 36 P.3d 1255 (Haw. 2001)

X. SUPERVISED RELEASE

A. Parole Revocation

- *State v. Naone*, 990 P.2d 1171 (Haw. Ct. App. 1997)

B. Probation Revocation

- *State v. Reyes*, 2 P.3d 725 (Haw. Ct. App. 2000)

HAWAII
Case Highlights

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

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

Barnett v. State, 979 P.2d 1046 (Haw. 1999)

The petitioner agreed to plea guilty to certain offenses in exchange for a life sentence; however, the sentencing court imposed multiple, concurrent life terms. The appellate court found that the sentencing court did not violate the defendant's plea agreement because the sentencing imposition was the only way to meet the statutory requirement that the defendant be sentenced for each count on which he was convicted. The imposition of multiple life terms set to run concurrently was equivalent to the petitioner's plea agreement to one life sentence.

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

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

In re Jane Doe & John Doe, 912 P.2d 588 (Haw. Ct. App. 1996)

Jane and John Doe were in temporary foster care due to allegations that their father had sexually abused them. The trial court denied the father's motion to reconsider, alter, or amend the order establishing family-court jurisdiction, and the father appealed. The Department of Human Services filed a motion to dismiss the father's appeal as moot. The appellate court held that an appeal is not moot if the case appealed has substantial, continuing, collateral consequences on the appellant. Since the result of the father's appeal would have a direct impact on his rights to visit his children, his appeal was not moot.

In re John Doe,[+] No. 22884, 2002 Haw. App. LEXIS 83 (Haw. Ct. App. Apr. 30, 2002)

The trial court should not have admitted evidence of prior contact between the defendant and the victim. A teacher testified that she had witnessed similar conduct between the defendant and the victim before; however, the State did not give pretrial notice of its

intent to use prior-bad-act evidence. The State's failure to provide notice prejudiced the defendant because the defense was not prepared to address prior bad acts.

State v. Anderson,[++] 935 P.2d 1007 (Haw. 1997)

Law-enforcement officers searched the defendant's rented bedroom with a search warrant for a multiple-occupancy dwelling. When the officers obtained the search warrant, the facts available to them reasonably suggested that the bedroom was not separate and distinct from the remainder of the dwelling; therefore, the search warrant was valid.

State v. Apilando, 900 P.2d 135 (Haw. 1995)

The presentation of videotape evidence in lieu of direct testimony violated the defendant's right of confrontation; therefore, the appellate court vacated the trial court's judgment and sentence, and remanded the case for a new trial.

State v. Araki, 923 P.2d 891 (Haw. 1996)

A mother discovered her minor son had received a pornographic videotape from a video store. She independently searched and secured the videotape and voluntarily gave it to law enforcement. The court held that when an object discovered in a private search is voluntarily turned over to the government, there is no seizure.

State v. Arceo, 928 P.2d 843 (Haw. 1996)

It is not necessary for the specific date of an offense to be given in a sexual-offense case involving a minor; however, the time of the offense should be given with as much particularity as possible under the circumstances based on the information available, provided that the time stated is within the statute of limitations.

State v. Bani, 36 P.3d 1255 (Haw. 2001)

A sex offender contended that the public-notification provisions of Hawaii's Megan's Law denied him notice and the opportunity to be heard prior to notifying the public of his status as a convicted sex offender; therefore, his constitutional rights to procedural due process, privacy, equal protection of the law, and the prohibition against cruel and unusual punishment were violated. The court held that the public notification provisions were void and unenforceable.

State v. Baron, 905 P.2d 613 (Haw. 1995)

The complainant's videotaped interview was presented to the jury pursuant to Hawaii Rule of Evidence 616(b), which permits the introduction of videotaped statement's of child-victims in sexual assault cases, provided, *inter alia*, that the child is present to testify on cross-examination. The defendant acknowledged that the videotape was admissible under Rule 616; however, he contended that the prejudicial impact of the videotape substantially outweighed its probative value. The appellate court disagreed, finding the videotaped interview to be relevant because it enabled the jury to view whether the complainant's behavior was consistent with a child of her age who had experienced a recent, upsetting event. The trial commenced December 28, 1992, more than two years after the date of the alleged offenses, whereas the videotaped interview took place on November 15, 1990. The appellate court held that the videotaped

interview's probative value was not substantially outweighed by its prejudicial effect. Consequently, the trial court did not commit plain error in permitting the jury to view the videotaped interview.

State v. Batangan, 799 P.2d 48 (Haw. 1990)

The defendant was accused of having sexual contact with his daughter. While testifying about the behavior of child-sexual-abuse victims was appropriate, the State's expert witness also testified that the complainant was believable in her accusations. The court determined that the expert's testimony was inadmissible, as the jury was left with the indication that the complainant's accusations were truthful and believable. The court vacated the trial court's judgment and remanded the case for a new trial.

State v. Bolo,[+] No. 24945, 2003 Haw. App. LEXIS 170 (Haw. Ct. App. May 30, 2003)

The defendant pled guilty to sexually assaulting a child less than 14 years old. During the plea hearing, an interpreter was used by the defendant. On appeal, the court found that the defendant entered his plea voluntarily. When the circuit court asked him if anyone was forcing, threatening, or making him plead guilty, he answered, "I am the only one who makes the decision, Your Honor." The circuit court was aware of the possible difficulty of a language barrier, and took the necessary steps to make sure there was no misunderstanding on the defendant's part. Further, in his opening brief, the defendant did not challenge the findings of fact and conclusions of law that stated he reviewed the guilty plea form with his attorney and his attorney explained the different terms and provisions to him; he had the assistance of an interpreter during the proceedings; he did not have any questions about his guilty plea; he executed his signature on the guilty plea form, assenting to the plea; the record, including the guilty plea form and the transcripts, demonstrates that he fully understood the plea and knowingly, intelligently, and voluntarily pled guilty; he provided a written factual basis for his guilty plea and, with the aid of an interpreter, confirmed it was a correct statement; he was fully and properly informed of possible deportation consequences; he acknowledged understanding that a consequence of his plea was possible deportation; and the guilty plea form and transcript clearly demonstrate that he was duly informed of the consequences of his plea regarding his alien status.

State v. Buch, 926 P.2d 599 (Haw. 1996)

Sexual assault in the third degree does not require proof that the defendant had knowledge of the attendant circumstances of the victim's age; therefore, the fact that the defendant may not have known the victim was 13 years old was not a rational basis for acquitting him of sexual assault in the third degree.

State v. Chun, 76 P.3d 935 (Haw. 2003)

Indecent exposure is not an offense subject to the sex-offender-registration and notification statute.

State v. Inoue, No. 23903, 2002 Haw. App. LEXIS 104 (Haw. Ct. App. May 14, 2002)

On appeal, the defendant contended there was insufficient evidence to convict him of sexual assault in the first and third degree; however, the record demonstrated otherwise.

The appellate court concluded that the 6-year-old victim's testimony that she was touched in her "private part" where "shishi" comes out and that the defendant touched her breast was credible evidence that the defendant subjected the child to sexual conduct.

State v. Kahakai, No. 21562, 2001 Haw. LEXIS 457 (Haw. Nov. 26, 2001)

A doctor testified that the complainant's injuries were consistent with sexual abuse but did not testify about the abuser, when the abuse occurred, or the complainant's credibility; therefore, the testimony was admissible. A child-protective-services (CPS) caseworker also testified that the CPS investigation confirmed the child was sexually abused by the defendant. The court held that this was improper testimony as to the ultimate issue, and a reasonable possibility existed that the testimony contributed to the defendant's conviction. Consequently, the error was not harmless beyond a reasonable doubt, the conviction was vacated, and the case was remanded for a new trial.

State v. Kalani, 118 P.3d 1222 (Haw. 2005)

The Defendant was convicted of two counts of third degree sexual assault after the Defendant inserted his tongue into the mouth of a nine-year-old child. The Defendant appealed his conviction claiming the mouth and tongue are not intimate parts. The court held the interior of the mouth is an intimate part under the definition of sexual contact under HRS § 707-700. The Defendant's conviction of third degree sexual assault was affirmed

State v. Kapiko,[++] 967 P.2d 228 (Haw. 1998)

The temporal proximity or remoteness of the events observed has a bearing on the validity of a warrant; however, no specific rule clarifies what constitutes excessive remoteness because each case must be judged in its circumstantial context. Factors like the nature of criminal activity under investigation and the nature of what is being sought bear on where the line between stale and fresh information should be drawn in a particular case.

State v. Maielua, No. 22895, 2001 Haw. LEXIS 310 (Haw. Aug. 22, 2001)

Sexual assault in the first degree with a minor less than 14 years old is a strict-liability offense with respect to the attendant circumstance of the minor's age.

State v. Montgomery, 82 P.3d 818 (Haw. Ct. App. 2003)

A 7-year-old child victim testified about an incident that had happened 3 years prior. The victim testified that the incident took place when he was 4 years old, during the day, in his family's bathroom while getting ready for a bath. He further testified that the defendant, his father, put his penis in the victim's "butt." The child demonstrated what had happened by circling the respective areas on drawings of a young boy and a grown man. The victim said he felt sad during the act because it hurt. The victim also confirmed that the defendant's penis was hard. Such evidence was sufficient to sustain the defendant's conviction of sexual assault in the first degree.

State v. Mueller, 76 P.3d 943 (Haw. 2003)

Physical penetration is required for sexual assault in the first degree. Without evidence of such penetration, the defendant could only be convicted of the lesser-included offense of sexual assault in the third degree. Cunnilingus, without evidence of physical penetration, is not sufficient to support a conviction of sexual assault in the first degree.

State v. Naone, 990 P.2d 1171 (Haw. Ct. App. 1997)

Under the statutory procedures governing deferred acceptance of *nolo contendere*, considerable discretion is vested in a sentencing court to impose reasonable terms and conditions on a defendant seeking to enter a deferred acceptance of a *nolo contendere* plea. The defendant entered a deferred acceptance of *nolo contendere* (DANC) plea to third-degree sexual assault. The plea required him to undergo sex-offender treatment, including polygraph testing. When the defendant objected, the court revoked his plea, entered a judgment of conviction, and sentenced him. The defendant appealed, claiming that polygraph testing could not be imposed pursuant to the DANC plea. The appellate court found that polygraph testing was reasonably related to testing and a reasonable condition placed on accepting a DANC plea.

State v. Offerman, + No. 27923, 2008 Haw. App. LEXIS 390 (Haw. Ct. App. July 17, 2008)

Child pornography was found on a shared computer file with a specific internet address. The internet service provider was subpoenaed to provide the identity of the internet provider address subscriber. Subsequently after obtaining a search warrant, law enforcement authorities seized the Defendant's computer, DVDs, and CDs that contained over 100 videos and images of child pornography. The Defendant was convicted of disseminating child pornography and possessing child pornography. The Defendant filed a motion to suppress the evidence obtained because of the subpoena. The court found the subpoena did not violate the Defendant's right to privacy and did not warrant the suppression of the evidence. The court held the Defendant had no expectation of privacy of his internet provider subscription information under the Electronic Communications Privacy Act.

State v. Palabay, 844 P.2d 1 (Haw. Ct. App. 1992)

The trial court erred in allowing the complainant's out-of-court-videotaped statements. The witness's credibility had not been attacked; therefore, the State did not have the right to use a prior consistent statement. In light of the overwhelming evidence of the defendant's guilt, however, this error did not prejudice the defendant so as to deny him a fair and impartial trial and the judgment was affirmed.

State v. Paradis, 711 P.2d 1307 (Haw. Ct. App. 1985)

The defendant was convicted of promoting prostitution in the second degree. He appealed the conviction, claiming he should not have been convicted of promoting prostitution solely upon the uncorroborated testimony of his prostitutes. The appellate court found the testimony of one of the defendant's prostitutes may not be corroborated by the testimony of another of the defendant's prostitutes.

State v. Peseti, 65 P.3d 119 (Haw. 2003)

The family court improperly prohibited defense counsel from cross-examining the victim about her recantation of her allegations of sexual abuse by the defendant. This inability to cross-examine violated the defendant's right to confrontation. Consequently, the judgment was vacated and remanded for a new trial.

State v. Reyes, 2 P.3d 725 (Haw. Ct. App. 2000)

The defendant, who was convicted of assaulting his girlfriend's daughter, was placed on probation and required to successfully participate in the Hawaii Sex Offender Treatment Program. The program involved admitting guilt, which the defendant continued to deny. He was terminated from the program, his probation was revoked, and he was resentenced. The court concluded that when the defendant refused to admit his guilt, he did not fail to comply with his probation. The defendant cannot be ordered to admit guilt for his crimes; therefore, his resentence was vacated.

State v. Rinehart, 819 P.2d 1122 (Haw. Ct. App. 1991)

A child-protective-services worker testified in a sexual-abuse case where the victim was exhibiting behaviors consistent with sexually abused children. Since this opinion facilitated the jury's understanding of the origin of the child's action and words and was not unduly prejudicial to the defendant, the testimony on the ultimate issue was admissible.

State v. Rita,[+] No. 25836, 2004 Haw. LEXIS 301 (Haw. Apr. 29, 2004)

The defendant's touching of the complainant's buttocks constituted "sexual contact."

State v. Rodriguez,[+] No. 23425, 2003 Haw. App. LEXIS 69 (Haw. Ct. App. Mar. 6, 2003)

On direct examination at trial, the child victim testified that "Grandpa Ray" touched her "punani" – "where you go shi-shi from" – with his hand, and did not stop when she told him to stop. The child victim remembered that "Grandpa Ray" put his "boto" inside her "punani," that it hurt, and that, "[t]he thing was bleeding and I started to go to doctors." Further, the child victim said that "Grandpa Ray" touched her "butt" with his hand. The child victim also recalled that "Grandpa Ray" touched her on the inside of her "okole" – "where you make doo-doo" – with his "boto," and that it hurt and made her feel sad and cry. The child victim testified that "Grandpa Ray" did these things to her at "Grandma Donna's house." The child victim made similar allegations against "Uncle Joey." When asked why she told "Grandma Donna" about these things, the child victim responded, "'Cause my private parts was hurting." On cross-examination, the child victim confirmed her testimony on direct that the sexual abuse by "Grandpa Ray" happened while she was staying at Donna's house. At that time, her brother and sister, her cousins, and her "Uncle Joey" were also living there. The child victim remembered that she told "Cathy" about the abuse before she told Donna. Taking the evidence in the light most favorable to the State, the testimony of the child victim was, in and of itself, substantial evidence sufficient to support the defendant's ("Grandpa Ray") convictions.

State v. Rossman, No. 22992, 2001 Haw. LEXIS 131 (Haw. Mar. 28, 2001)

The trial court ordered three sentences to be served concurrently because they involved convictions with respect to assaults and attempted assaults on one child. The remaining three sentences were ordered to be served consecutively because they involved, respectively, assaults and/or attempted assaults on three separate children. A sentence of consecutive sentences that leads to a life sentence without the possibility of parole does not constitute an abuse of the trial court's discretion.

State v. Santiago, 813 P.2d 335 (Haw. Ct. App. 1991)

The defendant was convicted of sexual assault in the fifth degree and open lewdness. On appeal, he contended that double jeopardy barred his double convictions on the sexual assault and lewdness charges. The court found that sexual assault in the fifth degree and open lewdness do not constitute the same offense and that the defendant's convictions did not violate the guarantee against double jeopardy.

State v. Sapinoso, No. 22893, 2001 Haw. App. LEXIS 66 (Haw. Ct. App. Mar. 21, 2001)

Although prosecutorial misconduct occurred at trial, the instances of misconduct were harmless beyond a reasonable doubt and did not require the appellate court to vacate the lower court's judgment. The evidence at trial that is without dispute established conclusively that the defendant committed the offense of attempted sexual assault in the third degree.

State v. Shingaki, 648 P.2d 190 (Haw. 1982)

Hawaii's "promoting-child-abuse-in-the-second-degree" statute is not overbroad and is constitutional.

State v. Taua,[++] 49 P.3d 1227 (Haw. 2002)

Courts use a two-part test to determine whether an individual's expectation of privacy brings the governmental activity into the scope of constitutional protection. To satisfy the first prong, the person must exhibit an actual, subjective expectation of privacy and to satisfy the second prong, the expectation must be one that society would recognize as objectively reasonable.

State v. Torres, 945 P.2d 849 (Haw. 1997)

The defendant claimed that the circuit court abused its discretion when it improperly admitted evidence regarding four prior bad acts that allegedly occurred between the defendant and the complainant. The defendant identified the following as improperly admitted bad acts: (1) evidence he had allegedly kissed the complainant and stuck his tongue in her mouth; (2) evidence that he had forced her to lie on the bed and that he laid down on her; (3) evidence that he threw kisses at her and tried to get her attention while in the house; and (4) evidence that he told her to find a place to make love. Considering the context in which the evidence was admitted, the admitted bad acts were certainly relevant and probative to show the defendant's motive and intent. The defendant was charged with digitally penetrating a person less than 14 years old. The charge originated from the complainant's assertion that one day while she was living at the defendant's home, he voluntarily bathed her and while washing her vagina with his bare hands,

penetrated her vagina with his finger. According to the defendant, he "had no bad intentions" when he agreed to bathe her and washed her vagina. He also vehemently denied ever digitally penetrating her vagina. There was a dispute regarding who prompted the bath and what occurred during the bath. Consequently, evidence of why the defendant bathed the complainant (*i.e.*, his motive, purpose, and intent for washing her vagina) were undoubtedly relevant to prove a fact of consequence, that the defendant knowingly subjected the complainant to sexual penetration.

State v. West, 24 P.3d 648 (Haw. 2001)

The defendant contested that allegedly false statements made by the complainant in a sexual-assault case regarding an unrelated sexual assault should have been admitted to impeach the complainant's credibility. When a defendant seeks to admit allegedly false statements made by a complainant regarding an unrelated sexual assault, the trial court must make a preliminary determination based on a preponderance of the evidence that the statements are false. Where the trial court is unable to determine by a preponderance of the evidence that the statement is false, the defendant has failed to meet his or her burden, and the evidence may be properly excluded. The judgment of conviction and sentence were affirmed.

State v. Whitney, 912 P.2d 596 (Haw. Ct. App. 1996)

The Defendant was convicted of open lewdness after a police officer observed the Defendant stroking his penis in a men's public restroom. The Defendant appealed his conviction claiming the men's public restroom is not a public place. Under the "public place" test, a lewd act occurs in a public place if the lewd act is likely to be seen by casual observers. The court applied the "public place" test and found the Defendant's lewd act could be likely seen by casual observers. The court affirmed the Defendant's conviction of open lewdness.

Winterbourne v. State, 88 P.3d 683 (Haw. Ct. App. 2004)

The petitioner appealed the dismissal of his petition for post-conviction relief, which alleged that the family court did not have jurisdiction to convict him. The family court is a division of the circuit court and the family-court judge who accepted the petitioner's plea was also serving as a circuit-court judge. It was within the judge's capacity as a circuit-court judge to convict the defendant on his plea, even if the family court did not have jurisdiction; therefore, the convictions were valid.

HAWAII
Offenses Defined

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

I. Child Pornography (a.k.a. "Unlawful Exploitation of Minor")

A. Promoting Child Abuse in the First Degree: Producing Child Pornography

- A person commits the offense of promoting child abuse in the first degree if, knowing or having reason to know its character and content, the person produces, directs, or participates in the preparation of pornographic material or engages in a pornographic performance that employs, uses, or otherwise contains a minor engaging in or assisting others to engage in sexual conduct. HAW. REV. STAT. § 707-750(1)
  – *Barnett v. State*, 979 P.2d 1046, 1048 n.2 (Haw. 1999)

B. Promoting Child Abuse in the Second Degree: Distribution of Child Pornography

1. Elements

- A person commits the offense of promoting child abuse in the second degree if, knowing or having reason to know its character and content, the person disseminates any material that employs, uses, or otherwise contains a minor engaging in or assisting others to engage in sexual conduct. HAW. REV. STAT. § 707-751(1)
  – *State v. Shingaki*, 648 P.2d 190, 191 (Haw. 1982)

- The fact that a person engaged in the specified conduct is *prima facie* evidence that the person engaged in that conduct with knowledge of the character and content of the material. HAW. REV. STAT. § 707-751(3).
  – *State v. Shingaki*, 648 P.2d 190, 191 (Haw. 1982)

- The fact that the person who was employed, used, or otherwise contained in the material was at that time a minor, is *prima facie* evidence that the defendant knew the person to be a minor. HAW. REV. STAT. § 707-751(3)
  – *State v. Shingaki*, 648 P.2d 190, 191 (Haw. 1982)

2. Descriptions Versus Depictions

- The statute applies to material depicting minors actually engaging or assisting others to engage in "sexual conduct." It does not apply to descriptions of minors engaging in "sexual conduct."
  – *State v. Shingaki*, 648 P.2d 190, 191 (Haw. 1982)

3. Obscenity Test

- The State's overriding interest in preventing child abuse makes the obscenity test inapplicable in cases involving the distribution of material depicting children engaging in sexual conduct.
  – *State v. Shingaki*, 648 P.2d 190, 191 (Haw. 1982)

4. Definitions

a. "Disseminate"

- "Disseminate" means to publish, sell, distribute, transmit, exhibit, or present material or to offer or agree to do the same. HAW. REV. STAT. § 707-751
  – *State v. Shingaki*, 648 P.2d 190, 191 (Haw. 1982)

b. "Material"

- "Material" means any printed matter, visual representation, or sound recording, including but not limited to books, magazines, motion-picture films, pamphlets, newspapers, pictures, photographs, and tape or wire recordings. HAW. REV. STAT. § 707-751
  – *State v. Shingaki*, 648 P.2d 190, 191 (Haw. 1982)

c. "Minor"

- "Minor" means any person less than 16 years old. HAW. REV. STAT. § 707-751
  – *State v. Shingaki*, 648 P.2d 190, 191 (Haw. 1982)

d. "Sadomasochistic Abuse"

- "Sadomasochistic abuse" means flagellation or torture by or upon a person as an act of sexual stimulation or gratification. HAW. REV. STAT. § 707-751
  – *State v. Shingaki*, 648 P.2d 190, 191 (Haw. 1982)

e. "Sexual Conduct"

- "Sexual conduct" means acts of masturbation, homosexuality, lesbianism, bestiality, sexual intercourse, deviate sexual intercourse, or sadomasochistic abuse. HAW. REV. STAT. § 707-751
  – *State v. Shingaki*, 648 P.2d 190, 191 (Haw. 1982)

- The statutory definition of sexual conduct does not mention "simulated conduct" or "lewd exhibition of the genitals."
  – *State v. Shingaki*, 648 P.2d 190, 191 (Haw. 1982)

C. Virtual/Simulated Child Pornography

No relevant state cases reported.

II. Criminal Attempt

A. Elements of the Offense

- A person is guilty of an attempt to commit a crime if he or she intentionally engages in conduct that:
  (1) would constitute the crime if the attendant circumstances were as he or she believes them to be, or
  (2) under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime.

  HAW. REV. STAT. § 705-500
  – *State v. Rossman*, No. 22992, 2001 Haw. LEXIS 131, *3 n.3 (Haw. Mar. 28, 2001)
  – *Barnett v. State*, 979 P.2d 1046, 1049 n.4 (Haw. 1999)
  – *State v. Rodriguez*,[+] No. 23425, 2003 Haw. App. LEXIS 69, *2 n.4 (Haw. Ct. App. Mar. 6, 2003)
  – *State v. Sapinoso*, No. 22893, 2001 Haw. App. LEXIS 66, *1 n.1 (Haw. Ct. App. Mar. 21, 2001)

- When causing a particular result is an element of the crime, a person is guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to attendant circumstances specified in the definition of the crime, he or she intentionally engages in conduct that is a substantial step in a course of conduct intended or known to cause such a result.

  HAW. REV. STAT. § 705-500
  – *State v. Rossman*, No. 22992, 2001 Haw. LEXIS 131, *3 n.3 (Haw. Mar. 28, 2001)
  – *Barnett v. State*, 979 P.2d 1046, 1049 n.4 (Haw. 1999)

B. Substantial Step

- Conduct shall not be considered a substantial step unless it is strongly corroborative of the defendant's criminal intent.
  HAW. REV. STAT. § 705-500
  – *State v. Rossman*, No. 22992, 2001 Haw. LEXIS 131, *3 n.3 (Haw. Mar. 28, 2001)
  – *Barnett v. State*, 979 P.2d 1046, 1049 n.4 (Haw. 1999)
  – *State v. Rodriguez*,+ No. 23425, 2003 Haw. App. LEXIS 69, *2 n.4 (Haw. Ct. App. Mar. 6, 2003)
  – *State v. Sapinoso*, No. 22893, 2001 Haw. App. LEXIS 66, *1 n.1 (Haw. Ct. App. Mar. 21, 2001)

III. Lewd or Lascivious Acts

A. Open Lewdness

- A person commits the offense of open lewdness if, in a public place, he or she commits any lewd act that is likely to be observed by others who would be affronted or alarmed. HAW. REV. STAT. § 712-1217 (1)
  – *State v. Whitney*, 912 P.2d 596, 600 (Haw. Ct. App. 1996)
  – *State v. Santiago*, 813 P.2d 335, 336 n.2 (Haw. Ct. App. 1991)

- Sexual assault in the fifth degree and open lewdness do not constitute the same offense.
  – *State v. Santiago*, 813 P.2d 335, 338 (Haw. Ct. App. 1991)

B. Genital Exposure

- The intentional exposure of one's genitals, where they are likely to be observed by others, is lewd.
  – *State v. Santiago*, 813 P.2d 335, 337 (Haw. Ct. App. 1991)

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

No relevant state cases reported.

V. Promoting Pornography for Minors

A. Elements of the Offense

- A person commits the offense of promoting pornography for minors if, knowing its character and content, the person disseminates to a minor material that is pornographic for minors. HAW. REV. STAT. § 712-1215 (1)
  – *Barnett v. State*, 979 P.2d 1046, 1048 n.7 (Haw. 1999)
  – *State v. Araki*, 923 P.2d 891, 893 n.2 (Haw. 1996)

B. "Pornographic for Minors" Defined

- Any material is "pornographic for minors" if it is:
  (1) primarily devoted to explicit and detailed narrative accounts of sexual excitement, sexual conduct, or sadomasochistic abuse;
  (2) presented in such a manner that the average person, applying contemporary community standards, would find that, taken as a whole, it appeals to a minor's prurient interest; and
  (3) taken as a whole, it lacks serious, literary, artistic, political, or scientific value. HAW. REV. STAT. § 712-1210
  – *State v. Araki*, 923 P.2d 891, 898 (Haw. 1996)

VI. Prostitution of Minors

A. Promoting Prostitution in the Second Degree

1. Elements of the Offense

- A person commits the offense of promoting prostitution in the first degree if he or she knowingly advances or profits from prostitution of a person less than 18 years of age. HAW. REV. STAT. § 712-1202(1)(b)
  – *State v. Paradis*, 711 P.2d 1307, 1308 n.1 (Haw. Ct. App. 1985)

B. Transporting a Minor for Purposes of Prostitution

No relevant state cases reported.

VII. Sexual Assault

A. First Degree

1. Elements of the Offense

- A person commits the offense of sexual assault in the first degree if he or she knowingly subjects to sexual penetration another person who is less than 14 years old. HAW. REV. STAT. § 707-730
  – *State v. Mueller*, 76 P.3d 943, 944 n.1 (Haw. 2003)
  – *State v. West*, 24 P.3d 648, 650 (Haw. 2001)
  – *State v. Kahakai*, No. 21562, 2001 Haw. LEXIS 457, *2 n.1 (Haw. Nov. 26, 2001)
  – *State v. Maielua*, No. 22895, 2001 Haw. LEXIS 310, *1 n.2 (Haw. Aug. 22, 2001)
  – *Barnett v. State*, 979 P.2d 1046, 1049 n.3 (Haw. 1999)
  – *State v. Arceo*, 928 P.2d 843, 844 n.2 (Haw. 1996)
  – *State v. Montgomery*, 82 P.3d 818, 819 n.2 (Haw. Ct. App 2003)
  – *State v. Rodriguez*,[+] No. 23425, 2003 Haw. App. LEXIS 69, *2 n.3 (Haw. Ct. App. Mar. 6, 2003)
  – *State v. Sapinoso*, No. 22893 2001 Haw. App. LEXIS 66, *1 n.3 (Haw. Ct. App. Mar. 21, 2001)
  – *State v. Palabay*, 844 P.2d 1, 5 (Haw. Ct. App. 1992)
  – *State v. Rinehart*, 819 P.2d 1122, 1123 n.1 (Haw. Ct. App. 1991)

2. Penetration

- The prosecution must prove some physical penetration, however slight, to sustain a conviction for sexual assault in the first degree.
  – *State v. Mueller*, 76 P.3d 943, 946, 949 (Haw. 2003)

3. Cunnilingus

- Proof of cunnilingus, without evidence of physical penetration, is not sufficient to support a conviction of sexual assault in the first degree.
  – *State v. Mueller*, 76 P.3d 943, 946, 948 (Haw. 2003)

B. Second Degree

- A person commits the offense of sexual assault in the second degree if he or she knowingly subjects another person to an act of sexual penetration by compulsion. HAW. REV. STAT. § 707-731(1)(a)
  – *State v. Baron*, 905 P.2d 613, 615 n.1 (Haw. 1995)

C. Third Degree

- A person commits the offense of sexual assault in the third degree if he or she knowingly subjects to sexual contact another person who is less than 14 years old or causes such a person to have sexual contact. HAW. REV. STAT. § 707-732 (1)(b)
  – *State v. Kalani*, 118 P.3d 1222, 1230 (Haw. 2005)
  – *State v. Mueller*, 76 P.3d 943, 947 n.5 (Haw. 2003)
  – *State v. Peseti*, 65 P.3d 119, 121 n.1 (Haw. 2003)
  – *State v. Kahakai*, No. 21562, 2001 Haw. LEXIS 457, *2 n.2 (Haw. Nov. 26, 2001)
  – *State v. Rossman*, No. 22992, 2001 Haw. LEXIS 131, *4 n.4 (Haw. Mar. 28, 2001)
  – *Barnett v. State*, 979 P.2d 1046, 1048 n.6 (Haw. 1999)
  – *State v. Arceo*, 928 P.2d 843, 845 n.1 (Haw. 1996)
  – *State v. Buch*, 926 P.2d 599, 600 n.1 (Haw. 1996)
  – *State v. Apilando*, 900 P.2d 135, 136 n.1 (Haw. 1995)
  – *Winterbourne v. State*, 88 P.3d 683, 684 n.2 (Haw. Ct. App. 2004)
  – *State v. Rodriguez*, [+] No. 23425, 2003 Haw. App. LEXIS 69, *3 n.5 (Haw. Ct. App. Mar. 6, 2003)
  – *State v. Inoue*, No. 23903, 2002 Haw. App. LEXIS 104, *1 n.2 (Haw. Ct. App. May, 14 2002)
  – *State v. Sapinoso*, No. 22893, 2001 Haw. App. LEXIS 66, *1 n.3 (Haw. Ct. App. Mar. 21, 2001)
  – *State v. Naone*, 990 P.2d 1171, 1173 n.1 (Haw. Ct. App. 1997)
  – *State v. Palabay*, 844 P.2d 1, 5 (Haw. Ct. App. 1992)
  – *State v. Rinehart*, 819 P.2d 1122, 1124 n.2 (Haw. Ct. App. 1991)

- The difference between first-degree and third-degree sexual assault is whether the defendant subjected the complainant to sexual penetration or sexual contact.
  – *State v. Mueller*, 76 P.3d 943, 949 (Haw. 2003)

D. Fourth Degree

- A person commits the offense of sexual assault in the fourth degree if he or she knowingly:
  (1) subjects another person to sexual contact by compulsion or causes another person to have sexual contact with the actor by compulsion;
  (2) exposes his or her genitals to another person under circumstances in which the actor's conduct is likely to alarm the other person or put the other person in fear of bodily injury; or
  (3) trespasses on property for the purpose of subjecting another person to surreptitious surveillance for the sexual gratification of the actor.

  HAW. REV. STAT. § 707-733
  – *State v. Rita*,[+] No. 25836, 2004 Haw. LEXIS 301 (Haw. Apr. 29, 2004)
  – *State v. Bani*, 36 P.3d 1255, 1256 n.1 (Haw. 2001)
  – *State v. Baron*, 905 P.2d 613, 615 n.2 (Haw. 1995)
  – *In re John Doe*,[+] No. 22884, 2002 Haw. App. LEXIS 83, *1 n.1 (Haw. Ct. App. Apr. 30, 2002)

- Sexual assault in the fourth degree is not a lesser-included offense of sexual assault in the third degree because sexual assault in the fourth degree requires proof of compulsion that may not be established by proof of the same or less than the facts required to establish sexual assault in the third degree.
  – *State v. Rita*,[+] No. 25836, 2004 Haw. LEXIS 301, *4-5 (Haw. Apr. 29, 2004)

E. Indecent Exposure

- A person commits the offense of indecent exposure if he or she intentionally exposes his or her genitals to a person to whom he or she is not married under circumstances in which the actor's conduct is likely to cause affront. HAW. REV. STAT. § 707-734
  – *State v. Chun*, 76 P.3d 935, 936 n.2 (Haw. 2003)
  – *State v. Palabay*, 844 P.2d 1, 5 (Haw. Ct. App. 1992)
  – *State v. Santiago*, 813 P.2d 335, 336 n.1 (Haw. Ct. App. 1991)

F. Definitions

1. "Sexual Contact"

- "Sexual contact" means any touching of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts. HAW. REV. STAT. § 707-700
  – *State v. Kalani*, 118 P.3d 1222, 1230 (Haw. 2005)
  – *State v. Mueller*, 76 P.3d 943, 949 (Haw. 2003)

– *State v. Rodriguez*,[+] No. 23425, 2003 Haw. App. LEXIS 69, *3 n.5 (Haw. Ct. App. Mar. 6, 2003)
– *State v. Sapinoso*, No. 22893, 2001 Haw. App. LEXIS 66, *2 (Haw. Ct. App. Mar. 21, 2001)

- Buttocks are intimate parts.
  – *State v. Rita*,[+] No. 25836, 2004 Haw. LEXIS 301, *4 (Haw. Apr. 29, 2004)

2. "Sexual Penetration"

- "Sexual penetration" means vaginal intercourse, anal intercourse, fellatio, cunnilingus, analingus, deviate sexual intercourse, or any intrusion of any part of a person's body or of any object into the genital or anal opening of another persons' body. HAW. REV. STAT. § 707-700
  – *State v. Mueller*, 76 P.3d 943, 949 (Haw. 2003)
  – *State v. Rodriguez*,[+] No. 23425, 2003 Haw. App. LEXIS 69, *2 n.3 (Haw. Ct. App. Mar. 6, 2003)
  – *State v. Sapinoso*, No. 22893, 2001 Haw. App. LEXIS 66, *1 (Haw. Ct. App. Mar. 21, 2001)

- Sexual penetration occurs upon any penetration, however slight, but emission is not required. HAW. REV. STAT. § 707-700
  – *State v. Mueller*, 76 P.3d 943, 949 (Haw. 2003)
  – *State v. Rodriguez*,[+] No. 23425, 2003 Haw. App. LEXIS 69, *2 n.3 (Haw. Ct. App. Mar. 6, 2003)
  – *State v. Sapinoso*, No. 22893, 2001 Haw. App. LEXIS 66, *1 (Haw. Ct. App. Mar. 21, 2001)

HAWAII

Search and Seizure of Electronic Evidence

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

I. Search Warrants

A. Probable Cause

- Search warrants shall be issued only on a finding of probable cause.
  – *State v. Anderson*,[++] 935 P.2d 1007, 1012 (Haw. 1997)

1. Oath or Affirmation

- The warrant must be supported by oath or affirmation that describes the place to be searched and the persons or things to be seized.
  – *State v. Anderson*,[++] 935 P.2d 1007, 1012 (Haw. 1997)

2. False Information: The Defendant's Burden

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

B. Scope of the Search

1. Generally

- The constitutional requirement that the warrant must describe, with particularity, the place to be searched, limits the scope of the search.
  – *State v. Anderson*,[++] 935 P.2d 1007, 1012 (Haw. 1997)

2. Places: Multiple-Occupancy Dwellings

a. Invalid

- A search warrant for an apartment, house, hotel, or other multiple-occupancy building will usually be held invalid if it fails to describe a particular subunit to be searched with

sufficient definiteness to preclude a search of one or more subunits indiscriminately; however, some courts recognize an exception if the building from the outward appearance looks like a single-occupancy structure and neither the affiant, the investigating officers, nor the executing officers knew or had reason to know that the structure was a multiple-occupancy dwelling until the execution of the warrant was underway.
– *State v. Anderson*,[++] 935 P.2d 1007, 1013 (Haw. 1997)

b. Valid

- In a multiple-occupancy dwelling where several persons or families share common living areas but have separate bedrooms, a single warrant authorizing the search of the entire premises is valid and reasonable.
  – *State v. Anderson*,[++] 935 P.2d 1007, 1014 (Haw. 1997)

- A locked bedroom door does not elevate a bedroom to the status of a separate residential unit; however, if information emerges after a search warrant has been issued, revealing that a bedroom is a separate residential unit secured against access by other occupants of the multiple occupancy dwelling, the search warrant is not invalidated retroactively.
  – *State v. Anderson*,[++] 935 P.2d 1007, 1014-15 (Haw. 1997)

C. Staleness

- The temporal proximity or remoteness of the events observed has a bearing on the validity of a warrant; however, no specific rule clarifies what constitutes excessive remoteness because each case must be judged in its circumstantial context.
  – *State v. Kapiko*,[++] 967 P.2d 228, 236 (Haw. 1998)

1. Factors to Consider

- Factors like the nature of criminal activity under investigation and the nature of what is being sought bear on where the line between stale and fresh information should be drawn in a particular case.
  – *State v. Kapiko*,[++] 967 P.2d 228, 236 (Haw. 1998)

2. Appellate Review

- In determining staleness, the reviewing court should treat the observations as occurring on the most remote date within the time period.
  – *State v. Kapiko*,[++] 967 P.2d 228, 236 (Haw. 1998)

D. Return and Suppression of Evidence

1. Generally

- A person aggrieved by an unlawful search and seizure may move the court having jurisdiction to try the offense for the return of the property, or to suppress for use as evidence anything so obtained, or both.
  – *State v. Araki*, 923 P.2d 891, 895 n.6 (Haw. 1996)

- The judge must receive evidence on any issue of fact necessary to the decision of the motion.
  – *State v. Araki*, 923 P.2d 891, 895 n.6 (Haw. 1996)

2. Motion to Restore Property

- If the motion to restore property is granted, the property must be restored unless otherwise subject to lawful detention and it must not be admissible in evidence at any hearing or trial. HAW. R. PENAL PROC. 41(e)
  – *State v. Araki*, 923 P.2d 891,895 n.6 (Haw. 1996)

3. Motion to Suppress: Burden

- The proponent of a motion to suppress has the burden of establishing that the evidence sought to be excluded was unlawfully secured and that his or her rights were violated.
  – *State v. Offerman*, + No. 27923, 2008 Haw. App. LEXIS 390, * 13-14 (Haw. Ct. App. July 17, 2008)
  – *State v. Taua*,[++] 49 P.3d 1227, 1236 (Haw. 2002)
  – *State v. Araki*, 923 P.2d 891, 900 (Haw. 1996)

- Whether a defendant may benefit from the exclusionary rule is a question of substantive search and seizure law (*i.e.*, whether his or her own reasonable expectations of privacy have been violated).
  – *State v. Taua*,[++] 49 P.3d 1227, 1236 (Haw. 2002)
  – *State v. Araki*, 923 P.2d 891, 900 (Haw. 1996)

II. Expectation of Privacy: Exclusionary Rule

- To invoke exclusionary-rule protections, the proponent of a motion to suppress must show that constitutional rights personal to him or her have been implicated by the search and seizure.
  – *State v. Taua*,[++] 49 P.3d 1227, 1239 (Haw. 2002)
  – *State v. Offerman*, + No. 27923, 2008 Haw. App. LEXIS 390, * 13-14 (Haw. Ct. App. July 17, 2008)

- Courts use a two-part test to determine whether an individual's expectation of privacy brings the governmental activity into the scope of constitutional protection. To satisfy the first prong, the person must exhibit an actual, subjective expectation of privacy

and to satisfy the second prong, the expectation must be one that society would recognize as objectively reasonable.
– *State v. Taua*,[++] 49 P.3d 1227, 1237 (Haw. 2002)

A. Place Searched

- A defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his or her expectation is reasonable (*i.e.*, one that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society).
  – *State v. Taua*,[++] 49 P.3d 1227, 1235 (Haw. 2002)

- A *passenger qua passenger* does not have a legitimate expectation of privacy in a vehicle in which he or she is a passenger.
  – *State v. Taua*,[++] 49 P.3d 1227, 1235 (Haw. 2002)

B. Property Seized

- A seizure occurs when there is a meaningful interference with an individual's possessory interest in the property seized.
  – *State v. Araki*, 923 P.2d 891, 897 (Haw. 1996)

III. Anticipatory Warrants

No relevant state cases reported.

IV. Methods of Searching

No relevant state cases reported.

V. Types of Searches

A. Consent Searches

No relevant state cases reported.

B. Employer Searches

No relevant state cases reported.

C. Private-Civilian Searches

- The state and federal constitutions protect against unreasonable intrusions by the government but not by private persons; therefore, evidence secured by private searches need not be excluded from a criminal trial even if the private

search is illegal.
– *State v. Araki*, 923 P.2d 891, 897 (Haw. 1996)

- When civilians act as agents of law enforcement in conducting a search and seizure, constitutional provisions and measures apply.
  – *State v. Araki*, 923 P.2d 891 (Haw. 1996)

- To implicate Fourth Amendment protections, the government, not a private party, must have occasioned the seizure.
  – *State v. Araki*, 923 P.2d 891 (Haw. 1996)

D. University-Campus Searches

No relevant state cases reported.

V. Computer-Technician/Repairperson Discoveries

No relevant state cases reported.

VI. Photo-Development Discoveries

No relevant state cases reported.

VII. Criminal Forfeiture

No relevant state cases reported.

VIII. Disciplinary Hearings for Federal and State Officers

No relevant state cases reported.

HAWAII
Jurisdiction and Nexus

I. Jurisdictional Nexus

No relevant state cases reported.

II. Internet Nexus

No relevant state cases reported.

III. State Jurisdiction, Federal Jurisdiction, and Concurrent Jurisdiction

A. State Jurisdiction: Family Court

- Family court is a division of the circuit court.
  – *Winterbourne v. State*, 88 P.3d 683, 687 (Haw. Ct. App. 2004)

1. Generally

- Family court has jurisdiction over a child who was or is found within the state of Hawaii and whose physical or psychological health or welfare is subject to imminent harm, is harmed, or is subject to threatened harm by acts or omissions of the child's family. HAW. REV. STAT. § 587-11
  – *In re Jane Doe & John Doe*, 912 P.2d 588, 593 (Haw. Ct. App. 1996)

- Harm occurs in any case where the child is a victim of sexual contact or conduct, including but not limited to:
  (1) rape;
  (2) sodomy;
  (3) molestation;
  (4) sexual fondling;
  (5) incest;
  (6) prostitution;
  (7) obscene or pornographic photographing, filming or depiction; or
  (8) similar forms of sexual exploitation.
  HAW. REV. STAT. § 587-2
  – *In re Jane Doe & John Doe*, 912 P.2d 588, 593 (Haw. Ct. App. 1996)

2. Child Protective Act

- Family court has exclusive original jurisdiction in proceedings under the Child Protective Act. HAW. REV. STAT. § 571-11(9)
  – *In re Jane Doe & John Doe*, 912 P.2d 588, 590 n.3 (Haw. Ct. App. 1996)

- The Child Protective Act enables the court to safeguard, treat, and provide permanent planning for children who are harmed or threatened with harm. HAW. REV. STAT. § 587-21
  – *In re Jane Doe & John Doe*, 912 P.2d 588, 590 n.4 (Haw. Ct. App. 1996)

3. Custody Determinations

- Family court has exclusive jurisdiction to determine the custody of any child for the protection of the child under the Child Protective Act. HAW. REV. STAT. § 587-11
  – *In re Jane Doe & John Doe*, 912 P.2d 588, 594 (Haw. Ct. App. 1996)

- Family court may exercise jurisdiction over a child or children in a divorce case while it or another family court exercises jurisdiction over the same child or children in a Child-Protective-Act case.
  – *In re Jane Doe & John Doe*, 912 P.2d 588, 595 (Haw. Ct. App. 1996)

4. Appeals Process

- Filing a valid notice of appeal transfers jurisdiction to the appellate court; however, except for some matters, all family courts of jurisdiction cannot proceed further in the case.
  – *In re Jane Doe & John Doe*, 912 P.2d 588, 595 (Haw. Ct. App. 1996)

- When an appellate court has jurisdiction over a family court Child-Protective-Act case, all family courts lack jurisdiction to terminate appeal jurisdiction in the case.
  – *In re Jane Doe & John Doe*, 912 P.2d 588, 595 (Haw. Ct. App. 1996)

a. Question of Mootness

- An appeal is not moot if the case appealed has substantial continuing collateral consequences on the appellant. When the result of a parent's appeal will have a direct impact on the rights to visit his or her children, the appeal is not moot.
  – *In re Jane Doe & John Doe*, 912 P.2d 588, 596 (Haw. Ct. App. 1996)

b. Concurrent Jurisdiction

- A family court may exercise jurisdiction over a child or children in a divorce case while a Child-Protective-Act case involving the same child or children is on appeal.
  – *In re Jane Doe & John Doe*, 912 P.2d 588, 593 (Haw. Ct. App. 1996)

B. Federal Jurisdiction

No relevant state cases reported.

C. Concurrent Jurisdiction

No relevant state cases reported.

IV. Interstate Possession of Child Pornography

No relevant state cases reported.

HAWAII

Discovery and Evidence

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

I. Timely Review of Evidence

No relevant state cases reported.

II. Defense Requests for Copies of Child Pornography

No relevant state cases reported.

III. Introduction of E-mails into Evidence

A. Hearsay/Authentication Issues

No relevant state cases reported.

B. Circumstantial Evidence

No relevant state cases reported.

C. Technical Aspects of Electronic Evidence Regarding Admissibility

No relevant state cases reported.

IV. Text-Only Evidence

A. Introduction into Evidence

No relevant state cases reported.

B. Relevance

No relevant state cases reported.

V. Evidence Obtained from Internet Service Providers

A. Electronic Communications Privacy Act

- *State v. Offerman*, + No. 27923, 2008 Haw. App. LEXIS 390, *9-14 (Haw. Ct. App. July 17, 2008)

B. Cable Act

No relevant state cases reported.

C. Patriot Act

1. National Trap and Trace Authority

No relevant state cases reported.

2. State-Court-Judge Jurisdictional Limits

No relevant state cases reported.

VI. Eyewitness-Identification Evidence

A. Reliability

- In determining the reliability of an identification, pertinent factors to consider include the:
  (1) opportunity of the witness to view the criminal at the time of the crime;
  (2) witness's degree of attention;
  (3) accuracy of the witness's prior description of the criminal;
  (4) level of certainty demonstrated by the witness at the confrontation; and
  (5) length of time between the crime and confrontation.
  – *State v. Araki*, 923 P.2d 891, 902 (Haw. 1996)

B. Burden of Proof

- When a defendant challenges the admissibility of an eyewitness identification on the grounds of impermissibly suggestive pre-trial identification procedure, the defendant has the burden of proof.
  – *State v. Araki*, 923 P.2d 891, 902 (Haw. 1996)

- The court must address whether the procedure was impermissibly suggestive and if so, considering factors such as the time and ability to view, if the identification is sufficiently reliable to be presented to the jury.
  – *State v. Araki*, 923 P.2d 891, 902 (Haw. 1996)

C. Appellate Review

- Appellate courts will not pass on issues dependent on the credibility of the witnesses and the weight of the evidence.
  – *State v. Inoue*, No. 23903, 2002 Haw. App. LEXIS 104, *3 (Haw. Ct. App. May 14, 2002)

VII. Specificity of Dates

- It is not necessary for the specific date of the offense to be given in a sexual-offense case involving a minor.
  – *State v. Arceo*, 928 P.2d 843, 848 (Haw. 1996)

- The time of the offense should be given with as much particularity as possible under the circumstances based on the information available, provided that the time stated is within the statute of limitations.
  – *State v. Arceo*, 928 P.2d 843, 848 (Haw. 1996)

VIII. Relevant Evidence

- All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States and the State of Hawaii, by statute, by the rules of evidence, or by other rules adopted by the Hawaii Supreme Court.
  – *State v. Peseti*, 65 P.3d 119, 128 n. 14 (Haw. 2003)
  – *State v. Baron*, 905 P.2d 613, 623 n. 9 (Haw. 1995)

- Evidence that is not relevant is not admissible. HAW. R. EVID. 402.
  – *State v. Peseti*, 65 P.3d 119, 128 n. 14 (Haw. 2003)
  – *State v. Baron*, 905 P.2d 613, 623 n. 9 (Haw. 1995)

A. "Relevant Evidence" Defined

- Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. HAW. R. EVID.403.
  – *State v. Baron*, 905 P.2d 613, 622 n. 7 (Haw. 1995)

B. Exclusion of Relevant Evidence

- Although relevant, the court may exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. HAW. R. EVID. 401.
  – *State v. Baron*, 905 P.2d 613, 622 n. 8 (Haw. 1995)

- The decision to exclude evidence, if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or

needless presentation of cumulative evidence, remains within the sole discretion of the court. HAW. R. EVID 403.
– *State v. Kahakai*, No. 21562, 2001 Haw. LEXIS 457, *31 n.12 (Haw. Nov. 26, 2001)

IX. Prior Bad Acts

A. Inadmissible

- Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. HAW. R. EVID. 404(b).
  – *State v. Torres*, 945 P.2d 849, 854 (Haw. 1997)

- The general rule of inadmissibility does not apply to evidence that is directly probative of an element of the charged offense or offenses.
  – *State v. Arceo*, 928 P.2d 843, 866 (Haw. 1996)

B. Admissible

1. Generally

- Evidence of other crimes, wrongs, or acts may be admissible where such evidence is probative of any other fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, *modus operandi*, absence of mistake, or absence of accident. HAW. R. EVID. 404(b).
  – *State v. Torres*, 945 P.2d 849, 854 (Haw. 1997)

2. Probative of Truthfulness in Attacks on Credibility

- Evidence of specific acts, if probative of truthfulness, may be introduced for the purposes of attacking the credibility of the witness. HAW. R. EVID. 608(b).
  – *State v. West*, 24 P.3d 648, 654 (Haw. 2001)

3. Testimony Regarding Multiple Acts Committed Against the Same Victim

- When the case involves child victims of repeated instances of sexual abuse, and the prosecutor seeks a single conviction by charging multiple acts, each of which constitutes a separate sexual assault within a single indictment or complaint, testimony regarding any or all of the acts is direct evidence of the charged offense and does not implicate other crimes, wrongs, or acts. Further, the testimony's probative value outweighs the danger of unfair prejudice to the defendant and survives a prejudicial-evidence challenge.
  – *State v. Arceo*, 928 P.2d 843,869 (Haw. 1996)

4. Balancing Test

- The probative value of the evidence must be weighed against the risk of prejudice, confusion, embarrassment, or undue delay. HAW. R. EVID. 403.
  – *State v. West*, 24 P.3d 648, 654 (Haw. 2001)

X. Rape-Shield Statute

A. Prior Sexual Conduct of the Victim

- Notwithstanding any other provision of law, in a criminal case in which a person is accused of sexual assault, evidence of an alleged victim's past sexual behavior other than reputation or opinion is usually not admissible to prove the character of the victim in order to show action in conformity therewith. HAW. R. EVID. 412.
  – *State v. West*, 24 P.3d 648, 648 n.6 (Haw. 2001)

- Sexual fantasizing, referred to as cognition evidence, is not sexual conduct for the purposes of the rape-shield statute; therefore, cognition evidence is not blocked by the shield, though admissibility should be argued under general rules of relevance.
  – *State v. West*, 24 P.3d 648, 653 n.8 (Haw. 2001)

B. Prior False Reports of Sexual Assault

- False allegations of unrelated sexual assaults are not excluded by the rape-shield statute.
  – *State v. West*, 24 P.3d 648, 654 (Haw. 2001)

1. Preliminary Determination by the Court

- When a defendant seeks to admit allegedly false statements made by a complainant regarding an unrelated sexual assault, the trial court must make a preliminary determination based on a preponderance of the evidence that the statements are false.
  – *State v. West*, 24 P.3d 648, 654, 656 (Haw. 2001)

- If the trial court cannot determine by a preponderance of the evidence that the statement is false, the defendant has failed to meet his or her burden, and the evidence may be properly excluded.
  – *State v. West*, 24 P.3d 648, 654, 656 (Haw. 2001)

- The failure to investigate or prosecute previous allegations of sexual assault does not establish the falsity of the statements.
  – *State v. West*, 24 P.3d 648, 657 (Haw. 2001)

2. Burden of Proof

- Where the facts necessary to admissibility are disputed, the offering party has the burden of proof by a preponderance of the evidence.
  – *State v. West*, 24 P.3d 648, 654 (Haw. 2001)

XI. Witness Testimony

- The testimony of a single witness, if found credible by the trier of fact, may constitute substantial evidence to support a conviction.
  – *State v. Montgomery*, 82 P.3d 818, 826 (Haw. Ct. App. 2003)

A. Competency

- Every person is competent to be a witness except as otherwise provided in the rules of evidence. HAW. R. EVID. 601.
  – *State v. Rodriguez*,[+] No. 23425, 2003 Haw. App. LEXIS 69, *21 (Haw. Ct. App. Mar. 6, 2003)

- A person is disqualified to be a witness if the person is incapable of:
  (1) expressing him- or herself so as to be understood, either directly or through interpretation by one who can understand the person, or
  (2) understanding the duty of a witness to tell the truth.
  HAW. R. EVID. 603.1.
  – *State v. Rodriguez*,[+] No. 23425, 2003 Haw. App. LEXIS 69, *21 (Haw. Ct. App. Mar. 6, 2003)

- Testimonial competency should be determined on a case-by-case basis.
  – *State v. Rodriguez*,[+] No. 23425, 2003 Haw. App. LEXIS 69, *21 (Haw. Ct. App. Mar. 6, 2003)

B. Children

- When a child must testify, the court must balance the defendant's right to fair trial and an environment where the child will not be intimidated into silence or tears.
  – *State v. Palabay*, 844 P.2d 1, 6 (Haw. Ct. App. 1992)

- The trial court has discretion to employ special measures to put children at ease on the witness stand but must establish the compelling necessity for the special measures.
  – *State v. Palabay*, 844 P.2d 1, 6 (Haw. Ct. App. 1992)

- Pursuant to the confrontation clause, the trial court must determine that testifying in the courtroom in the defendant's presence, the child would suffer serious emotional distress to the extent that the child could not reasonably

communicate.
– *State v. Apilando*, 900 P.2d 135, 137 n.4 (Haw. 1995)

1. Recording of Oral Statements

- The rule regarding recording of a child's oral statements applies only to a proceeding in the prosecution of an abuse offense alleged to have been committed against a child less than 16 years of age at the time of the offense and applies only to the statements or testimony of that child.
  – *State v. Baron*, 905 P.2d 613, 618 n.5 (Haw. 1995)

- The recording of an oral statement of the child made before the proceeding begins is admissible into evidence if:
  (1) no attorney of either party is present when the statement is made;
  (2) the recording is both visual and aural and recorded on film or videotape or by other electronic means;
  (3) the recording equipment is capable of making an accurate recording, the operator of the equipment is competent, and the recording is accurate and unaltered;
  (4) the statement is not made in response to questioning calculated to lead the child to make a particular statement;
  (5) every voice on the recording and every person present at the interview is identified;
  (6) the person conducting the interview of the child in the recording is present at the proceeding and available to testify for or be cross examined by either party and every other person present at the interview is available to testify;
  (7) the defendant is afforded discovery of the recording before it is offered into evidence; and
  (8) the child is present to testify.
  HAW. R. EVID. 616.
  – *State v. Baron*, 905 P.2d 613, 618 n.5 (Haw. 1995)

- If the electronic recording of the statement of a child is admitted into evidence, either party may call the child to testify, and the opposing party may cross-examine the child. HAW. R. EVID. 616.
  – *State v. Baron*, 905 P.2d 613, 618 n.5 (Haw. 1995)

2. Presence of Inanimate Objects

- A complainant cannot hold an inanimate object such as a teddy bear absent a finding of compelling necessity.
  – *State v. Palabay*, 844 P.2d 1, 7 (Haw. Ct. App. 1992)

C. Experts

1. Qualifications

- Expert testimony must meet the following criteria:
  (1) the trial court must be satisfied that the witness is indeed an expert;
  (2) the expert's testimony must be relevant; and
  (3) the testimony should facilitate the jury's understanding of the relevant issues.
  – *State v. Kahakai*, No. 21562, 2001 Haw. LEXIS 457, *27 (Haw. Nov. 26, 2001)
  – *State v. Batangan*, 799 P.2d 48, 53-54 (Haw. 1990)

2. Testimony

a. Generally

- If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise. HAW. R. EVID. 702.
  – *State v. Batangan*, 799 P.2d 48, 51 (Haw. 1990)
  – *State v. Rinehart*, 819 P.2d 1122, 1128 n.12 (Haw. Ct. App. 1991)

b. Cases of Child-Sexual Abuse

- Expert testimony in cases of child-sexual abuse turns on the issue of whether the expert testimony will assist the jury without unduly prejudicing the defendant.
  – *State v. Batangan*, 799 P.2d 48, 51 (Haw. 1990)

- Sexual abuse of children is a complex phenomenon and the jury's common experience may not have an adequate foundation to assess the credibility of a young child who complains of sexual abuse.
  – *State v. Batangan*, 799 P.2d 48, 51 (Haw. 1990)

- Expert testimony that explains the behavior of child-sexual-abuse victims helps the jury and should be admitted; however, opinions that abuse occurred and that the child's allegations are truthful and believable do not assist the jury and should not be admitted.
  – *State v. Batangan*, 799 P.2d 48, 51-52 (Haw. 1990)

- Once the jury has learned the victim's behavior from the evidence and has heard experts explain why sexual abuse may cause delayed reporting, inconsistent statements, or

recantation, the jury does not need an expert to explain that the victim's behavior is consistent or inconsistent with the crime having occurred. HAW. R. EVID. 702.
– *State v. Batangan*, 799 P.2d 48, 52 (Haw. 1990)

c. Witness Credibility

- The expert should not testify about a witness' credibility.
  – *State v. Batangan*, 799 P.2d 48, 51-52 (Haw. 1990)

d. Opinions on the Ultimate Issues

- Testimony of an expert in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. HAW. R. EVID. 704.
  – *State v. Rinehart*, 819 P.2d 1122, 1128 n.11 (Haw. Ct. App. 1991)

D. Opinion Testimony

- Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. HAW. R. EVID. 704.
  – *State v. Kahakai*, No. 21562, 2001 Haw. LEXIS 457, *20 (Haw. Nov. 26, 2001)

E. Ultimate-Issue Testimony

- Improper testimony about the ultimate issue is not reversible error if it is harmless beyond a reasonable doubt. The error is not harmless if there is a reasonable possibility that the error may have contributed to the conviction.
  – *State v. Kahakai*, No. 21562, 2001 Haw. LEXIS 457, *22 (Haw. Nov. 26, 2001)

F. Hearsay

1. "Hearsay" Defined

- "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. HAW. R. EVID. 801(3).
  – *State v. Apilando*, 900 P.2d 135, 138 (Haw. 1995)
  – *State v. Palabay*, 844 P.2d 1, 8 n.2 (Haw. Ct. App. 1992)

2. Admissibility

- Hearsay is not admissible at trial, unless it falls under an exception provided in the Hawaii Rules of Evidence, in rules prescribed by the

Hawaii Supreme Court, or by statute. HAW. R. EVID. 802.
– *State v. Apilando*, 900 P.2d 135, 138 (Haw. 1995)
– *State v. Palabay*, 844 P.2d 1, 8 n.3 (Haw. Ct. App. 1992)

3. Exceptions

a. Excited Utterances

- A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event of condition, referred to as an excited utterance, is not excluded by the hearsay rule, even though the declarant is available as a witness. HAW. R. EVID. 803 (b)(2).
  – *State v. Apilando*, 900 P.2d 135, 139 n.5 (Haw. 1995)

b. Past-Recollection Recorded

- "Past-recollection recorded" is a memorandum or record concerning a matter about which the witness once had knowledge but now has insufficient recollection to enable him or her to testify fully and accurately, and is shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. HAW. R. EVID. 802.1 (4).
  – *State v. Apilando*, 900 P.2d 135, 137 n.4 (Haw. 1995)

- If admitted, the memorandum or record may be read into evidence but may not be received as an exhibit unless offered by an adverse party. HAW. R. EVID. 802.1 (4).
  – *State v. Apilando*, 900 P.2d 135, 137 n.4 (Haw. 1995)

c. Prior Statements by Witnesses

i. Generally

- The following statements previously made by witnesses who testify at the trial or hearing are not excluded by the hearsay rule:
  (1) inconsistent statements, and
  (2) consistent statements.
  HAW. R. EVID. 802.1.
  – *State v. Palabay*, 844 P.2d 1, 9 (Haw. Ct. App. 1992)

ii. Consistent Statements

- When the credibility of the witness has been impeached, a prior consistent statement of the witness will be admissible for rehabilitation purposes.
  – *State v. Palabay*, 844 P.2d 1, 8 (Haw. Ct. App. 1992)

- Evidence of a statement previously made by a witness that is consistent with the witness' testimony at the trial is admissible to support the witness' credibility only if it is offered after:
  (1) evidence of the witness' prior inconsistent statement has been admitted for the purpose of attacking the witness' credibility, and the consistent statement was made before the inconsistent statement;
  (2) an express or implied charge has been made that the witness' testimony at the trial is recently fabricated or is influenced by bias or other improper motive, and the consistent statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen; or
  (3) the witness' credibility has been attacked at trial by imputation of inaccurate memory, and the consistent statement was made when the event was recent and the witness' memory fresh.
  HAW. R. EVID. 613(c).
  – *State v. Montgomery*, 82 P.3d 818, 822 n.3 (Haw. Ct. App. 2003)
  – *State v. Palabay*, 844 P.2d 1, 8 (Haw. Ct. App. 1992)

- In order for a prior consistent statement to be admissible:
  (1) the declarant must be subject to cross examination concerning the subject matter of the declarant's statement;
  (2) the statement must be consistent with the declarant's testimony; and
  (3) the statement must be offered in compliance with Hawaii Rule of Evidence 613(c).
  HAW. R. EVID. 802.1(2).
  – *State v. Palabay*, 844 P.2d 1, 9 (Haw. Ct. App. 1992)

- Contradiction of a witness version of the facts does not constitute an attack on the witness' character for truthfulness so as to allow evidence of the witness' character for truthfulness to be admitted into evidence.
  – *State v. Palabay*, 844 P.2d 1, 9 (Haw. Ct. App. 1992)

d. Statement by a Child

- The statement-by-a-child hearsay exception includes any prior recorded statement, by videotape or otherwise, of a child-complainant who is unavailable. HAW. R. EVID. 804(b)(6).
  – *State v. Apilando*, 900 P.2d 135, 147-48 (Haw. 1995)

4. Confrontation Clause

- Face-to-face confrontation is not an absolute constitutional requirement; however, an exception exists only where there is a case-specific finding of necessity.
  – *State v. Apilando*, 900 P.2d 135, 144 (Haw. 1995)

- The Confrontation Clause operates in two ways to restrict the range of admissible hearsay. Regarding the rule of necessity, the prosecution must demonstrate the unavailability of the declarant whose statement may be used against the defendant. When a witness is unavailable, the Clause countenances only hearsay marked with such trustworthiness that there is no material departure from the reason of the general rule.
  – *State v. Apilando*, 900 P.2d 135, 139 (Haw. 1995)

a. Witness Unavailability

- Unavailability as a witness includes situations in which the declarant:
  (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
  (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
  (3) testifies to a lack of memory of the subject matter of the declarant's statement;
  (4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity; or
  (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.
  HAW. R. EVID. 804(a).
  – *State v. Apilando*, 900 P.2d 135, 145 n.10 (Haw. 1995)

- The prosecution has the burden of proof regarding the declarant's unavailability. The prosecution may demonstrate the unavailability through lack of memory, insufficient

recollection, or inability to communicate. Simply asserting that the witness might not remember or might not be able to testify is insufficient.
– *State v. Apilando*, 900 P.2d 135, 148 (Haw. 1995)

b. Video-Taped Interviews

- The admission of videotape evidence in lieu of direct testimony violates the right of confrontation.
  – *State v. Apilando*, 900 P.2d 135, 136 (Haw. 1995)

XII. Privileges

- When a defendant sufficiently demonstrates that a statutory privilege interferes with a defendant's constitutional right to cross-examine, the witness' statutory privilege must, in the interest of the truth-seeking process, bow to the defendant's constitutional rights.
  – *State v. Peseti*, 65 P.3d 119,128 (Haw. 2003)

A. Psychologist-Client Privilege

- A client has a privilege to refuse to disclose and to prevent another person from disclosing confidential communications made for the purpose of counseling or psychotherapy with respect to behavioral problems, including substance addiction or abuse, among oneself, the client's psychologist, and persons who are participating in the counseling or psychotherapy under the direction of the psychologist, including members of the client's family. HAW. R. EVID. 504.1.
  – *State v. Peseti*, 65 P.3d 119,122 n.2 (Haw. 2003)

B. Victim-Counselor Privilege

- A victim has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to a victim counselor for the purpose of counseling or treatment of the victim for the emotional or psychological effects of sexual assault, domestic violence, or child abuse or neglect, and to refuse to provide evidence that would identify the name, location, or telephone number of a safe house, abuse shelter, or other facility that provided temporary emergency shelter to the victim. HAW. R. EVID. 505.5.
  – *State v. Peseti*, 65 P.3d 119,122 n.3 (Haw. 2003)

- The victim-counselor privilege accords privilege status to confidential communications made in the course of the counseling process.
  – *State v. Peseti*, 65 P.3d 119,127 (Haw. 2003)

HAWAII

Age of Child Victim

I. Proving the Age of the Child Victim

No relevant state cases reported.

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

No relevant state cases reported.

HAWAII
Multiple Counts

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

No relevant state cases reported.

II. Consolidation of Indictments

A. Generally

- The court may order consolidation of two or more charges for the trial if the offenses, and the defendants (if more than one), could have been joined in a single charge. HAW. R. PENAL. PROC. 13(a).
  – *State v. Kahakai*, No. 21562, 2001 Haw. LEXIS 457, *13 (Haw. Nov. 26, 2001)

B. Multiple Sex Acts

- Multiple sex acts do not merge into a single continuing offense because the defendant can be convicted and punished for each act.
  – *State v. Arceo*, 928 P.2d 843, 858 (Haw. 1996)

- Each act constituting a sexual assault is punishable as a separate and distinct offense.
  – *State v. Arceo*, 928 P.2d 843, 862 (Haw. 1996)

1. Uninterrupted, Continuing Course of Conduct

- When the defendant's actions constitute an uninterrupted, continuing course of conduct, multiple convictions are prohibited; however, this prohibition does not apply where these actions constitute separate offenses under the law. HAW. REV. STAT. § 701-709 (1)(e).
  – *State v. Arceo*, 928 P.2d 843, 862 (Haw. 1996)

2. *Modica* Rule

- According to the *Modica* rule, a violation of a misdemeanor, which constitutes a violation of a felony provision, consequently denies the right of due process and equal protection of the law.
  – *State v. Arceo*, 928 P.2d 843, 862 (Haw. 1996)

- Where the same act committed under the same circumstances can be punished as either a misdemeanor or a felony under either of two statutory provisions and the proof necessary for either conviction is the same, a conviction under the felony statute would violate the right of due process and equal protection of the laws; therefore, construing sexual assaults simultaneously as continuing and distinct offenses would violate the *Modica* rule.
  – *State v. Arceo*, 928 P.2d 843, 862 (Haw. 1996)

III. Double-Jeopardy Issues

- Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not and the law defining each of the offenses is intended to prevent a substantially different harm or evil.
  – *State v. Santiago*, 813 P.2d 335, 338 (Haw. Ct. App. 1991)

HAWAII
Defenses

I. Alibi

- An alibi defense challenges the perpetrator's identity. It does not challenge the evidence that crime was committed in the alleged manner.
  – *State v. Baron*, 905 P.2d 613, 624 (Haw. 1995)

- If a defendant intends to rely upon the defense of alibi, he or she must, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the prosecutor in writing of such intention and file a copy of such notice with the court. HAW. R. PENAL PROC. 12.1(a).
  – *State v. Baron*, 905 P.2d 613, 624 n.10 (Haw. 1995)

II. Consent

No relevant state cases reported.

III. Diminished Capacity

A. Insanity

No relevant state cases reported.

B. Internet Addiction

No relevant state cases reported.

IV. First Amendment

No relevant state cases reported.

V. Impossibility

A. Factual

No relevant state cases reported.

B. Legal

No relevant state cases reported.

VI. Manufacturing Jurisdiction

No relevant state cases reported.

VII. Mistake

A. Of Fact: Age

- The offense of knowingly subjecting to sexual contact another person who is less than 14 years old or causing such a person to have sexual contact does not require proof that the defendant had knowledge of the attendant circumstances of the victim's age.
  – *State v. Buch*, 926 P.2d 599, 604 (Haw. 1996)

B. Of Law

No relevant state cases reported.

VIII. Outrageous Conduct

No relevant state cases reported.

IX. Researcher

No relevant state cases reported.

X. Sexual Orientation

No relevant state cases reported.

HAWAII

Pleas

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

I. Manifest Injustice

- Manifest injustice occurs when a defendant makes a plea involuntarily or without knowledge of the direct consequences of the plea.
  – *Barnett v. State*, 979 P.2d 1046, 1054 (Haw. 1999)

- If the defendant can demonstrate manifest injustice, he or she may withdraw his or her guilty pleas after the imposition of a sentence.
  – *State v. Bolo*,[+] No. 24945, 2003 Haw. App. LEXIS 170, *2-3 (Haw. Ct. App. May 30, 2003)

II. *Nolo Contendere* Pleas

- Under the statutory procedures governing deferred acceptance of *nolo contendere*, considerable discretion is vested in a sentencing court to impose reasonable terms and conditions on a defendant seeking to enter a deferred acceptance of a *nolo contendere* plea.
  – *State v. Naone*, 990 P.2d 1171, 1183 (Haw. Ct. App. 1997)

HAWAII

Sentencing Issues

I. Admissibility of Evidence

- Victim and witness testimony at a sentencing hearing is allowable.
  – *Barnett v. State*, 979 P.2d 1046, 1058 (Haw. 1999)

II. Sentencing Imposition

- A defendant must be sentenced for each count on which he or she is convicted.
  – *Barnett v. State*, 979 P.2d 1046, 1053 (Haw. 1999)

A. Circuit-Court Jurisdiction

- A circuit court must sentence a person for each charge of which the person is convicted.
  – *Barnett v. State*, 979 P.2d 1046, 1053 (Haw. 1999)

B. Enhancement

1. Age of Victim

No relevant state cases reported.

2. Distribution/Intent to Traffic

No relevant state cases reported.

3. Number of Images

No relevant state cases reported.

4. Pattern of Activity for Sexual Exploitation

No relevant state cases reported.

5. Sadistic, Masochistic, or Violent Material

No relevant state cases reported.

6. Use of Computers

No relevant state cases reported.

C. Concurrent Versus Consecutive Sentences

- If multiple terms of imprisonment are imposed on a defendant at the same time, the terms may run concurrently or consecutively. HAW. REV. STAT. § 706-668.5.
  – *State v. Rossman*, No. 22992, 2001 Haw. LEXIS 131, *20 (Haw. Mar. 28, 2001)

- The court, in determining whether the terms imposed are to be ordered to run concurrently or consecutively shall consider the:
  (1) nature and circumstances of the offense;
  (2) history and characteristics of the defendant;
  (3) need for the sentence to be imposed to:
    (a) reflect the seriousness of the offense;
    (b) promote respect for law;
    (c) provide just punishment for the offense;
    (d) afford adequate deterrence to criminal conduct;
    (e) protect the public from further crimes of the defendant; and
    (f) provide the defendant with the needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
  (4) kinds of sentences available; and
  (5) need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

  HAW. REV. STAT. § 706-606; § 706-668.5.
  – *State v. Rossman*, No. 22992, 2001 Haw. LEXIS 131, *21 (Haw. Mar. 28, 2001)
  – *State v. Reyes*, 2 P.3d 725, 732 (Haw. Ct. App. 2000)

1. Presumption: Concurrent Sentences

- Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms run consecutively. HAW. REV. STAT. § 706-668.5.
  – *State v. Rossman*, No. 22992, 2001 Haw. LEXIS 131, *20 (Haw. Mar. 28, 2001)

- Concurrent life terms can be imposed in order for the sentence to meet statutory requirements that the individual be charged for each convicted count.
  – *Barnett v. State*, 979 P.2d 1046, 1056 (Haw. 1999)

2. Consecutive Sentences

- Consecutive prison sentences may properly be imposed only to achieve retributive, incapacitative, and deterrent objectives; therefore,

at the very least, the sentencing court must expressly intend that the defendant's period of incarceration be prolonged by virtue of the consecutive character of the prison terms (the retributive goal), and the sentence must embody the forward-looking aim of future crime reduction or prevention (the deterrent goal).
– *State v. Rossman*, No. 22992, 2001 Haw. LEXIS 131, *22 (Haw. Mar. 28, 2001)

- A sentence of consecutive sentences, which leads to a life sentence without the possibility of parole, does not constitute an abuse of the trial court's discretion.
– *State v. Rossman*, No. 22992, 2001 Haw. LEXIS 131, *20 (Haw. Mar. 28, 2001)

III. Megan's Law: Sex-Offender Registration and Notification

A. "Sex Offender" Defined

- A "sex offender" is any person convicted of a sexually violent offense or a criminal offense against a victim who is a minor.
– *State v. Bani*, 36 P.3d 1255, 1259 (Haw. 2001)

B. Indecent Exposure as a Qualifying Offense

- Indecent exposure does not constitute an offense subject to the registration and public-notification requirements.
– *State v. Chun*, 76 P.3d 935, 941 (Haw. 2003)

C. Constitutionality

- The statutory public-notification provisions are void and unenforceable.
– *State v. Bani*, 36 P.3d 1255, 1268 (Haw. 2001)

- Hawaii's Megan's Law violates the constitutional right to procedural due process, the constitutional right to privacy, the prohibition against cruel and unusual punishment, and the right to equal protection of the law.
– *State v. Bani*, 36 P.3d 1255, 1268 (Haw. 2001)

- A defendant is entitled to notice and an opportunity to be heard prior to public notification of his or her status as a sex offender and the Hawaii statutes provide a defendant neither notice nor an opportunity to be heard prior to notifying the public of his or her status as a convicted sex offender.
– *State v. Bani*, 36 P.3d 1255, 1268 (Haw. 2001)

HAWAII

Supervised Release: Probation Revocation

I. When Is Probation Revocable?

- A defendant's probation is revocable when the court is satisfied that the defendant has inexcusably failed to comply with a substantial requirement imposed as a condition of probation.
  – *State v. Naone*, 990 P.2d 1171, 1187 (Haw. Ct. App. 1997)

II. Deferred Acceptance of *Nolo Contendere* Pleas

- A "deferred acceptance of *nolo contendere*" plea can be revoked on a violation of a term or condition set by the court, distinct from failure to comply with standards of probation revocation.
  – *State v. Naone*, 990 P.2d 1171, 1187 (Haw. Ct. App. 1997)

III. Forced Admission of Guilt or Responsibility

- A defendant cannot be compelled to admit guilt for sex crimes in order to successfully complete a sex-offender-treatment program as part of his or her probation.
  – *State v. Reyes*, 2 P.3d 725, 733 (Haw. Ct. App. 2000)

- Court-ordered programs that require convicted sex offenders to admit responsibility for the offense for which they were convicted, under threat of probation revocation and imprisonment, violate the protections of the Fifth Amendment right against self incrimination.
  – *State v. Reyes*, 2 P.3d 725, 733 (Haw. Ct. App. 2000)