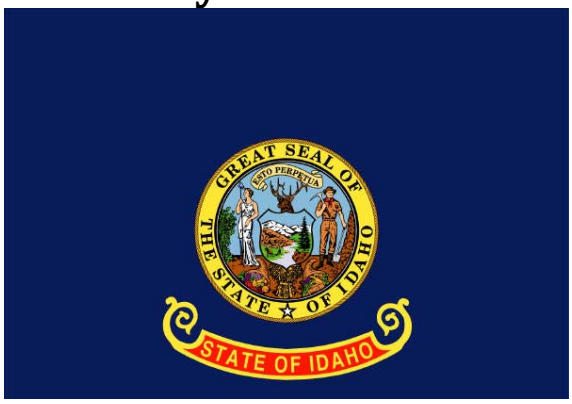
The Idaho Law Enforcement and Prosecutors Manual on

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 Idaho 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

IDAHO

Topic Outline with Cases

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

I. OFFENSES DEFINED

A. Attempt Crimes

1. Elements of the Offense

- *State v. Curtiss*, 65 P.3d 207 (Idaho Ct. App. 2002)
- *State v. Glass*, 87 P.3d 302 (Idaho Ct. App. 2003)

2. Preparatory Phase Versus Beyond Mere Preparation

- *State v. Glass*, 87 P.3d 302 (Idaho Ct. App. 2003)

3. Substantial Step

- *State v. Glass*, 87 P.3d 302 (Idaho Ct. App. 2003)

B. Battery

- *State v. Wardle*, 53 P.3d 1227 (Idaho Ct. App. 2002)

C. Disseminating Harmful Material to Minors

- *State v. Byington*, 977 P.2d 211 (Idaho Ct. App. 1998)

D. Injury to Children

- *State v. Snow*, 815 P.2d 475 (Idaho Ct. App. 1991)

E. Kidnapping

- *State v. Greensweig*, 644 P.2d 372 (Idaho Ct. App. 1982)

F. Lewd Conduct with a Minor Child Under 16

1. Elements of the Offense

- *State v. Bronson*, 732 P.2d 336 (Idaho Ct. App. 1987)
- *State v. Colwell*, 861 P.2d 1225 (Idaho Ct. App. 1993)
- *State v. Colwell*, 908 P.2d 156 (Idaho Ct. App. 1995)
- *State v. Curtiss*, 65 P. 3d 207 (Idaho Ct. App. 2002)
- *State v. Drennon*, 883 P. 2d 704 (Idaho Ct. App. 1994)
- *State v. Hester*, 760 P.2d 27 (Idaho 1988)
- *State v. Kavajecz*, 80 P.3d 1083 (Idaho 2003)

2. Touching Must Be Sexual

- *State v. Cannady*, 44 P.3d 1122 (Idaho 2002)

3. Burden of Proof

- *State v. Law*, 39 P.3d 661 (Idaho Ct. App. 2002)

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

- *State v. Glass*, 190 P.3d 896 (Idaho Ct. App. 2008)

H. Possession of Sexually Exploitative Material for Other than a Commercial Purpose

1. Elements of the Offense

- *State v. Claiborne*, 818 P.2d 285 (Idaho 1991)
- *State v. Morton*, 91 P.3d 1139 (Idaho 2004)
- *State v. Weimer*, 988 P.2d 216 (Idaho Ct. App. 1999)

2. Application of Obscenity Standards

- *State v. Claiborne*, 818 P.2d 285 (Idaho 1991)

3. Definitions

a. "Sexually Exploitative Material"

- *State v. Claiborne*, 818 P.2d 285 (Idaho 1991)
- *State v. Morton*, 91 P.3d 1139 (Idaho 2004)
- *State v. Weimer*, 988 P.2d 216 (Idaho Ct. App. 1999)

b. "Child"

- *State v. Morton*, 91 P.3d 1139 (Idaho 2004)
- *State v. Weimer*, 988 P.2d 216 (Idaho Ct. App. 1999)

c. "Explicit Sexual Conduct"

- *State v. Morton*, 91 P.3d 1139 (Idaho 2004)

d. "Erotic Nudity"

- *State v. Morton*, 91 P.3d 1139 (Idaho 2004)
- *State v. Weimer*, 988 P.2d 216 (Idaho Ct. App. 1999)

4. Virtual/Simulated Child Pornography

- *State v. Bonner*, 61 P.3d 611 (Idaho Ct. App. 2002)

I. Sexual Abuse of a Child Under 16 Years of Age

1. Elements of the Offense

- *State v. Colwell*, 908 P.2d 156 (Idaho Ct. App. 1995)
- *State v. Drennon*, 883 P.2d 704 (Idaho Ct. App. 1994)
- *State v. Espinoza*, 990 P.2d 1229 (Idaho Ct. App. 1999)
- *State v. O'Neill*, 796 P.2d 121 (Idaho 1990)
- *State v. Wardle*, 53 P. 3d 1227 (Idaho Ct. App. 2002)
- *State v. Weimer*, 988 P.2d 216 (Idaho Ct. App. 1999)
- *State v. Willard*, 933 P.2d 116 (Idaho Ct. App. 1997)

2. Definitions

a. "Solicit"

- *State v. Colwell*, 908 P.2d 156 (Idaho Ct. App. 1995)
- *State v. O'Neill*, 796 P.2d 121 (Idaho 1990)
- *State v. Willard*, 933 P.2d 116 (Idaho Ct. App. 1997)

b. "Sexual Contact"

- *State v. Colwell*, 908 P.2d 156 (Idaho Ct. App. 1995)
- *State v. Drennon*, 883 P.2d 704 (Idaho Ct. App. 1994)
- *State v. O'Neill*, 796 P.2d 121 (Idaho 1990)

3. Nature of Touching

- *State v. Cannady*, 44 P.3d 1122 (Idaho 2002)

J. Sexual Battery of Minor Child 16 or 17 Years of Age

1. Elements of the Offense

- *State v. Avila*, 49 P.3d 1260 (Idaho Ct. App. 2002)
- *State v. Oar*, 924 P.2d 599 (Idaho 1996)

2. Definitions

a. "Sexual Contact"

- *State v. Oar*, 924 P.2d 599 (Idaho 1996)

b. "Solicit"

- *State v. Oar*, 924 P.2d 599 (Idaho 1996)

K. Transporting a Minor for Purposes of Prostitution

No relevant state cases reported.

II. SEARCH AND SEIZURE OF ELECTRONIC EVIDENCE

A. Search Warrants

1. Probable Cause

a. Generally

- *State v. Weimer*, 988 P.2d 216 (Idaho Ct. App. 1999)

b. Appellate Review

- *State v. Lewis*, 848 P.2d 394 (Idaho 1993)
- *State v. Weimer*, 988 P.2d 216 (Idaho Ct. App. 1999)

2. Affidavits

a. Sufficient Nexus

- *State v. Weimer*, 988 P.2d 216 (Idaho Ct. App. 1999)

b. Conclusory Affidavits

i. Generally

- *State v. Weimer*, 988 P.2d 216 (Idaho Ct. App. 1999)

ii. Materials Depicting Sexually Explicit Conduct

- *State v. Weimer*, 988 P.2d 216 (Idaho Ct. App. 1999)

c. Obscenity Versus Child-Pornography Affidavits

- *State v. Claiborne*, 818 P.2d 285 (Idaho 1991)

i. Obscenity

- *State v. Claiborne*, 818 P.2d 285 (Idaho 1991)

ii. Child Pornography

- *State v. Claiborne*, 818 P.2d 285 (Idaho 1991)
- *State v. Weimer*, 988 P. 2d 216 (Idaho Ct. App. 1999)

d. False Information

i. Knowing and Intentional

- *State v. Byington*, 977 P.2d 211 (Idaho Ct. App. 1998)

ii. Negligent or Innocent Misrepresentations

- *State v. Byington*, 977 P.2d 211 (Idaho Ct. App. 1998)

3. Scope of the Search Warrant

a. Particularity Requirement

i. Generally

- *State v. Weimer*, 988 P. 2d 216 (Idaho Ct. App. 1999)

ii. Fourth Amendment

- *State v. Claiborne*, 818 P.2d 285 (Idaho 1991)
- *State v. Weimer*, 988 P. 2d 216 (1999 Idaho Ct. App. 1999)

b. Material Containing Sexually Explicit Conduct

- *State v. Weimer*, 988 P. 2d 216 (1999 Idaho Ct. App. 1999)

4. Staleness

- *State v. Patterson*,[++] 87 P.3d 967 (Idaho Ct. App. 2003)

B. Anticipatory Warrants

No relevant state cases reported.

C. Methods of Searching

No relevant state cases reported.

D. Types of Searches

1. Employer Searches

No relevant state cases reported.

2. Private Searches

No relevant state cases reported.

3. University-Campus Searches

No relevant state cases reported.

4. Warrantless Searches

a. Consent Searches

- *State v. Kilby*, 947 P.2d 420 (Idaho Ct. App. 1997)

i. Voluntariness

- *State v. Kilby*, 947 P.2d 420 (Idaho Ct. App. 1997)

(a) Totality of the Circumstances

- *State v. Kilby*, 947 P.2d 420 (Idaho Ct. App. 1997)

(b) Burden of Proof

- *State v. Kilby*, 947 P.2d 420 (Idaho Ct. App. 1997)

ii. Coercion

- *State v. Kilby*, 947 P.2d 420 (Idaho Ct. App. 1997)

b. Plain-View Searches

- *State v. Claiborne*, 818 P.2d 285 (Idaho 1991)

E. Computer-Technician/Repair Person 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.

I. Probation and Parolee Rights

No relevant state cases reported.

III. JURISDICTION AND NEXUS

A. Jurisdictional Nexus

No relevant state cases reported.

B. Internet Nexus

No relevant state cases reported.

C. State Jurisdiction, Federal Jurisdiction, Concurrent Jurisdiction

1. State: Juvenile Proceedings

- *State v. Kavajecz*, 80 P.3d 1083 (Idaho 2003)

a. Waiver of Jurisdiction from a Juvenile Court

- *State v. Kavajecz*, 80 P.3d 1083 (Idaho 2003)

b. Hearing

- *State v. Kavajecz*, 80 P.3d 1083 (Idaho 2003)

c. Enumerated Crimes

- *State v. Kavajecz*, 80 P.3d 1083 (Idaho 2003)

2. Federal

No state cases reported.

3. Concurrent

No state cases reported.

D. Interstate Possession of Child Pornography

No state cases reported.

IV. DISCOVERY AND EVIDENCE

A. Timely Review of Evidence

No relevant state cases reported.

B. Defense Requests for Copies of Child Pornography

No relevant state cases reported.

C. Psychiatric or Psychological Examination of the Defendant

- *State v. Longoria*, 992 P.2d 1219 (Idaho Ct. App. 1999)

D. Accusatory Instruments: Time of the Offense

- *State v. Taylor*, 797 P.2d 158 (Idaho Ct. App. 1990)

1. Lewd and Lascivious Conduct

- *State v. Tapia*, 899 P.2d 959 (Idaho 1995)

2. Course of Conduct

- *State v. Taylor*, 797 P.2d 158 (Idaho Ct. App. 1990)

E. Introduction of E-mails into Evidence

1. Hearsay/Authentication Issues

No relevant state cases reported.

2. Circumstantial Evidence

No relevant state cases reported.

3. Technical Aspects of Electronic Evidence Regarding Admissibility

No relevant state cases reported.

F. Text-Only Evidence

1. Introduction into Evidence

No relevant state cases reported.

2. Relevance

No relevant state cases reported.

G. Evidence Obtained from Internet Service Providers

1. Electronic Communications Privacy Act

No relevant state cases reported.

2. Cable Act

No relevant state cases reported.

3. Patriot Act

a. National Trap and Trace Authority

No relevant state cases reported.

b. State-Court-Judge Jurisdictional Limits

No relevant state cases reported.

H. Witness Testimony

1. Competency of Witnesses

- *State v. Ransom*, 864 P.2d 149 (Idaho 1993)

2. Expert Testimony

a. Admissible

- *State v. Aspeytia*, 936 P.2d 210 (Idaho Ct. App. 1997)
- *State v. Blackstead*, 878 P.2d 188 (Idaho Ct. App. 1994)
- *State v. Dutt*, 73 P.3d 112 (Idaho Ct. App. 2003)
- *State v. Eytchison*, 30 P.3d 988 (Idaho Ct. App. 2001)
- *State v. Glass*, 190 P.3d 896 (Idaho Ct. App. 2008)
- *State v. Hester*, 760 P.2d 27 (Idaho 1988)
- *State v. Lewis*, 848 P.2d 394 (Idaho 1993)

b. Expert Qualifications

i. Sources

- *State v. Dutt*, 73 P.3d 112 (Idaho Ct. App. 2003)
- *State v. Eytchison*, 30 P.3d 988 (Idaho Ct. App. 2001)

ii. Foundational Requirement

- *State v. Johnson*, 810 P.2d 1138 (Idaho Ct. App. 1991)

c. Bases of Opinion or Inference

- *State v. Scovell*, 38 P.3d 625 (Idaho Ct. App. 2001)

i. Admissibility of Facts or Data

- *State v. Scovell*, 38 P.3d 625 (Idaho Ct. App. 2001)

ii. Observations by Other Experts

- *State v. Scovell*, 38 P.3d 625 (Idaho Ct. App. 2001)

iii. Reliance on Hearsay

- *State v. Scovell*, 38 P.3d 625 (Idaho Ct. App. 2001)

d. Testimony Regarding Child-Sexual Abuse

i. Characteristics of Victims

- *State v. Blackstead*, 878 P.2d 188 (Idaho Ct. App. 1994)

ii. Delayed Reporting by Victims

- *State v. Blackstead*, 878 P.2d 188 (Idaho Ct. App. 1994)

iii. Progression and Phases of Child-Sexual Abuse

- *State v. Dutt*, 73 P.3d 112 (Idaho Ct. App. 2003)

iv. Occurrence of Sexual Abuse

- *State v. Hester*, 760 P.2d 27 (Idaho 1988)

(a) Foundational Requirement

- *State v. Eytchison*, 30 P.3d 988 (Idaho Ct. App. 2001)

(b) Factors that Suggest the Scope of Qualifications

- *State v. Eytchison*, 30 P.3d 988 (Idaho Ct. App. 2001)

v. Post-Traumatic-Stress Disorder

- *State v. Hester*, 760 P.2d 27 (Idaho 1988)

vi. Traits of Child Abusers

- *State v. Hester*, 760 P.2d 27 (Idaho 1988)

vii. Identity of the Abuser

- *State v. Hester*, 760 P.2d 27 (Idaho 1988)

e. Testimony Regarding the Credibility of Witnesses

- *State v. Blackstead*, 878 P.2d 188 (Idaho Ct. App. 1994)

f. Opinions Regarding an Ultimate Issue

i. Admissible

- *State v. Hester*, 760 P.2d 27 (Idaho 1988)

ii. Inadmissible

- *State v. Hester*, 760 P.2d 27 (Idaho 1988)

g. Scientific Evidence

i. Exclusion of Scientific Theories

- *State v. Parkinson*, 909 P.2d 647 (Idaho Ct. App. 1996)

ii. Limitation on Admissibility of Scientifically-Based Evidence

- *State v. Parkinson*, 909 P.2d 647 (Idaho Ct. App. 1996)

3. Lay-Witness Testimony

- *State v. Johnson*, 810 P.2d 1138 (Idaho Ct. App. 1991)

4. Exclusion of Witnesses from the Courtroom

- *State v. Cardell*, 970 P.2d 10 (Idaho 1998)

5. Hearsay Exceptions

a. Statements Made by a Child

- *State v. Hester*, 760 P.2d 27 (Idaho 1988)

i. Unavailable as a Witness

- *State v. Hester*, 760 P.2d 27 (Idaho 1988)

ii. Notice to the Adverse Party

- *State v. Hester*, 760 P.2d 27 (Idaho 1988)

b. Excited Utterance

- *State v. Field*, 165 P.3d 273 (Idaho 2007)
- *State v. Parkinson*, 909 P.2d 647 (Idaho Ct. App. 1996)

i. Requirements

- *State v. Field*, 165 P.3d 273 (Idaho 2007)
- *State v. Parkinson*, 909 P.2d 647 (Idaho Ct. App. 1996)

ii. Factors Considered by Court

- *State v. Poe*,[++] 88 P.3d 704 (Idaho 2004)

iii. Judicial Discretion

- *State v. Parkinson*, 909 P.2d 647 (Idaho Ct. App. 1996)

c. Residual Exception

- *State v. Field*, 165 P.3d 273 (Idaho 2007)
- *State v. Hester*, 760 P.2d 27 (Idaho 1988)
- *State v. Ransom*, 864 P.2d 149 (Idaho 1993)

I. Prior Acts, Crimes, and Wrongs

1. Inadmissible

a. Generally

- *State v. Avila*, 49 P.3d 1260 (Idaho Ct. App. 2002)
- *State v. Blackstead*, 878 P.2d 188 (Idaho Ct. App. 1994)
- *State v. Byington*, 977 P.2d 211 (Idaho Ct. App. 1998)
- *State v. Eytchison*, 30 P.3d 988 (Idaho Ct. App. 2001)
- *State v. Field*, 165 P.3d 273 (Idaho 2007)
- *State v. Hoots*, 961 P.2d 1195 (Idaho 1998)

b. Child-Sexual Abuse

- *State v. Cannady*, 44 P.3d 1122 (Idaho 2002)

c. Juvenile Adjudications

i. Generally Inadmissible

- *State v. Schwartzmiller*, 685 P.2d 830 (Idaho 1984)

ii. Exception

- *State v. Schwartzmiller*, 685 P.2d 830 (Idaho 1984)

2. Admissible

- *State v. Avila*, 49 P.3d 1260 (Idaho Ct. App. 2002)
- *State v. Blackstead*, 878 P.2d 188 (Idaho Ct. App. 1994)
- *State v. Boothe*, 646 P. 2d 429 (Idaho Ct. App. 1982)
- *State v. Byington*, 977 P.2d 211 (Idaho Ct. App. 1998)
- *State v. Eytchison*, 30 P.3d 988 (Idaho Ct. App. 2001)
- *State v. Hoots*, 961 P.2d 1195 (Idaho 1998)
- *State v. Kremer*, 160 P.3d 443 (Idaho Ct. App. 2007)
- *State v. Lippert*, 181 P.3d 512 (Idaho Ct. App. 2007)
- *State v. Marks*, 819 P.2d 581 (Idaho Ct. App. 1991)

a. Common Plan or Scheme

- *State v. Roach*, 712 P. 2d 674 (Idaho Ct. App. 1985)

b. *Res Gestae*: "Complete Story Principle"

- *State v. Avila*, 49 P.3d 1260 (Idaho Ct. App. 2002)
- *State v. Blackstead*, 878 P.2d 188 (Idaho Ct. App. 1994)

c. Corroboration of the Victim's Testimony

- *State v. Boothe*, 646 P. 2d 429 (Idaho Ct. App. 1982)
- *State v. Law*, 39 P.3d 661 (Idaho Ct. App. 2002)
- *State v. Moore*, 819 P.2d 1143 (Idaho 1991)
- *State v. Spor*, 1 P.3d 816 (Idaho Ct. App. 2000)

i. Lewd Conduct, Rape, or Sexual Abuse of Minor

- *State v. Spor*, 1 P.3d 816 (Idaho Ct. App. 2000)

ii. Credibility of a Young Child

- *State v. Moore*, 819 P.2d 1143 (Idaho 1991)

iii. Proof of Evidentiary Plan or Pattern

- *State v. Law*, 39 P.3d 661 (Idaho Ct. App. 2002)

d. General Plan to Exploit and Abuse

- *State v. Hoots*, 961 P.2d 1195 (Idaho 1998)
- *State v. Phillips*, 845 P.2d 1211 (Idaho 1993)

e. Prior Felony Conviction

- *State v. Thompson*, 977 P.2d 890 (Idaho 1999)

i. Two-Prong Test

- *State v. Muraco*, 968 P.2d 225 (Idaho 1998)
- *State v. Thompson*, 977 P.2d 890 (Idaho 1999)

ii. Weighing of Probative Value Versus Prejudicial Effect

- *State v. Thompson*, 977 P.2d 890 (Idaho 1999)

f. Sex Crimes Committed Against Minors

i. Generally

- *State v. Muraco*, 968 P.2d 225 (Idaho 1998)

ii. Remoteness

- *State v. Marks*, 819 P.2d 581 (Idaho Ct. App. 1991)
- *State v. Roach*, 712 P. 2d 674 (Idaho Ct. App. 1985)

g. Rape-Shield Statute

i. General Rule

- *State v. Self*, 85 P.3d 1117 (Idaho Ct. App. 2003)

ii. Rule 412(c)

(a) Generally

- *State v. Self*, 85 P.3d 1117 (Idaho Ct. App. 2003)

(b) Limitations on a Defendant's Right to Present a Defense

- *State v. Harvey*, 129 P.3d 1276 (Idaho Ct. App. 2006)
- *State v. Hensley*, 187 P.3d 1227 (Idaho 2008)
- *State v. Self*, 85 P.3d 1117 (Idaho Ct. App. 2003)

iii. Prior Allegations of Sexual Abuse

- *State v. Self*, 85 P.3d 1117 (Idaho Ct. App. 2003)

h. Credibility

- *State v. Moore*, 819 P.2d 1143 (Idaho 1991)
- *State v. Phillips*, 845 P.2d 1211 (Idaho 1993)

i. Accurate Assessment of Parties' Credibility

- *State v. Scovell*, 38 P.3d 625 (Idaho Ct. App. 2001)

ii. Evidence of Common Criminal Design

- *State v. Moore*, 819 P.2d 1143 (Idaho 1991)

iii. False Accusations of Sexual Misconduct

- *State v. Aspeytia*, 936 P.2d 210 (Idaho Ct. App. 1997)
- *State v. Schwartzmiller*, 685 P.2d 830 (Idaho 1984)

i. Impeachment

i. Admissible

- *State v. Eytchison*, 30 P.3d 988 (Idaho Ct. App. 2001)

ii. Relevance of Uncharged Misconduct

- *State v. Eytchison*, 30 P.3d 988 (Idaho Ct. App. 2001)

iii. Prior Juvenile Adjudication

- *State v. Schwartzmiller*, 685 P.2d 830 (Idaho 1984)

3. Relevance

- *State v. Avila*, 49 P.3d 1260 (Idaho Ct. App. 2002)

a. Two-Tiered Analysis

- *State v. Avila*, 49 P.3d 1260 (Idaho Ct. App. 2002)
- *State v. Blackstead*, 878 P.2d 188 (Idaho Ct. App. 1994)
- *State v. Byington*, 977 P.2d 211 (Idaho Ct. App. 1998)
- *State v. Cannady*, 44 P.3d 1122 (Idaho 2002)
- *State v. Cross*, 978 P.2d 227 (Idaho 1999)
- *State v. Hoots*, 961 P.2d 1195 (Idaho 1998)
- *State v. Law*, 39 P.3d 661 (Idaho Ct. App. 2002)
- *State v. Marks*, 819 P.2d 581 (Idaho Ct. App. 1991)

b. Sex Offenses and Similar Crimes

i. Substantiation of the Child Victim's Testimony/ Credibility

(a) Testimony

- *State v. Law*, 39 P.3d 661 (Idaho Ct. App. 2002)
- *State v. Scovell*, 38 P.3d 625 (Idaho Ct. App. 2001)

(b) Credibility

- *State v. Diggs*, 108 P.3d 1003 (Idaho Ct. App. 2005)
- *State v. Scovell*, 38 P.3d 625 (Idaho Ct. App. 2001)

4. Remoteness

- *State v. Law*, 39 P.3d 661 (Idaho Ct. App. 2002)

J. Character Evidence

1. Generally

- *State v. Hester*, 760 P.2d 27 (Idaho 1988)

2. Expert Testimony

- *State v. Hester*, 760 P.2d 27 (Idaho 1988)

K. Scienter Evidence: Specific Intent

1. Proof of Intent

- *State v. Bronson*, 732 P.2d 336 (Idaho Ct. App. 1987)
- *State v. Parkinson*, 909 P.2d 647 (Idaho Ct. App. 1996)

2. Inference of Intent

- *State v. Byington*, 977 P.2d 211 (Idaho Ct. App. 1998)

3. Question for the Jury

- *State v. Byington*, 977 P.2d 211 (Idaho Ct. App. 1998)

L. Circumstantial Evidence: Proving the Age of the Defendant

1. Jury Observations and Inferences

- *State v. Espinoza*, 990 P.2d 1229 (Idaho Ct. App. 1999)
- *State v. Willard*, 933 P.2d 116 (Idaho Ct. App. 1997)

2. Appellate Review

- *State v. Espinoza*, 990 P.2d 1229 (Idaho Ct. App. 1999)

M. Privileges

No relevant state cases reported.

V. AGE OF CHILD VICTIM

A. Proving the Age of a Child Victim

1. Circumstantial Evidence

- *State v. Espinoza*, 990 P.2d 1229 (Idaho Ct. App. 1999)

2. Jury Observations and Inferences

- *State v. Espinoza*, 990 P.2d 1229 (Idaho Ct. App. 1999)
- *State v. Willard*, 933 P.2d 116 (Idaho Ct. App. 1997)

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

No relevant state cases reported.

C. Sexual Battery of Minor Child: Mistake of Age

- *State v. Oar*, 924 P.2d 599 (Idaho 1996)

VI. MULTIPLE COUNTS

A. What Constitutes an Item of Child Pornography?

No relevant state cases reported.

B. Consolidation of Indictments: Joinder

- *State v. Field*, 165 P.3d 273 (Idaho 2007)
- *State v. Schwartzmiller*, 685 P.2d 830 (Idaho 1984)

C. Double Jeopardy

1. Generally

- *State v. Colwell*, 908 P.2d 156 (Idaho Ct. App. 1995)

2. Attachment

- *State v. Lewis*, 848 P.2d 394 (Idaho 1993)

3. Two-Step Analysis

- *State v. Lewis*, 848 P.2d 394 (Idaho 1993)

a. *Blockburger* Test

- *State v. Colwell*, 908 P.2d 156 (Idaho Ct. App. 1995)
- *State v. Hussain*, 139 P.3d 777 (Idaho Ct. App. 2006)

- *State v. Lewis*, 848 P.2d 394 (Idaho 1993)

b. *Grady* Test

- *State v. Lewis*, 848 P.2d 394 (Idaho 1993)

i. Subsequent Prosecutions

- *State v. Lewis*, 848 P.2d 394 (Idaho 1993)

ii. Overlap in Proof between Two Prosecutions

- *State v. Lewis*, 848 P.2d 394 (Idaho 1993)

4. Lesser-Included Offenses

a. Generally

- *State v. Colwell*, 861 P.2d 1225 (Idaho Ct. App. 1993)
- *State v. Gilman*, 673 P.2d 1085 (Idaho Ct. App. 1983)

b. "Included Offense" Defined

- *State v. Colwell*, 861 P.2d 1225 (Idaho Ct. App. 1993)
- *State v. Drennon*, 883 P. 2d 704 (Idaho Ct. App. 1994)

c. Attempt Crimes

- *State v. Gilman*, 673 P.2d 1085 (Idaho Ct. App. 1983)

5. Sexual Abuse and Lewd Conduct with a Child

- *State v. Drennon*, 883 P. 2d 704 (Idaho Ct. App. 1994)

6. Waiver of Double Jeopardy

a. Generally

- *State v. Hansen*, 904 P.2d 945 (Idaho Ct. App. 1995)

b. Exception

- *State v. Hansen*, 904 P.2d 945 (Idaho Ct. App. 1995)

VII. DEFENSES

A. Alibi

- *State v. Taylor*, 797 P.2d 158 (Idaho Ct. App. 1990)

B. Consent

1. Sexual Battery of a Minor Child

- *State v. Oar*, 924 P.2d 599 (Idaho 1996)

2. Lewd or Lascivious Conduct

- *State v. Schwartzmiller*, 685 P.2d 830 (Idaho 1984)

C. Diminished Capacity

1. Addiction to the Internet

No relevant state cases reported.

2. Insanity

No relevant state cases reported.

D. First Amendment

No relevant state cases reported.

E. Impossibility

1. Attempt Crimes

- *State v. Curtiss*, 65 P.3d 207 (Idaho Ct. App. 2002)
- *State v. Glass*, 87 P.3d 302 (Idaho Ct. App. 2003)

2. Factual Impossibility

- *State v. Curtiss*, 65 P.3d 207 (Idaho Ct. App. 2002)
- *State v. Glass*, 87 P.3d 302 (Idaho Ct. App. 2003)

3. Legal Impossibility

No relevant state cases reported.

F. Manufacturing Jurisdiction

No relevant state cases reported.

G. Mistake

1. Of Fact: The Victim's Age

a. Sexual Offenses Committed Against Minors

- *State v. Oar*, 924 P.2d 599 (Idaho 1996)

b. Sexual Battery of Minor Child 16 or 17 Years of Age

- *State v. Oar*, 924 P.2d 599 (Idaho 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.

K. Statute of Limitations

1. Commission of a Felony Against a Minor

- *State v. Claxton*, 918 P.2d 1227 (Idaho Ct. App. 1996)

2. Sexual Abuse of Child

- *State v. Claxton*, 918 P.2d 1227 (Idaho Ct. App. 1996)

3. Lewd Conduct with a Minor Child

- *State v. Claxton*, 918 P.2d 1227 (Idaho Ct. App. 1996)

VIII. SENTENCING ISSUES

A. Pre-Sentence Investigation and Reports

- *State v. Campbell*, 854 P.2d 265 (Idaho Ct. App. 1993)
- *State v. Carey*, 834 P.2d 899 (Idaho Ct. App. 1992)

1. Consideration of Evidence

- *State v. Campbell*, 854 P.2d 265 (Idaho Ct. App. 1993)

a. Dismissed Criminal Charges

- *State v. Atwood*, 832 P.2d 1134 (Idaho Ct. App. 1992)

b. Evidence Not Admissible at Trial

i. Generally

- *State v. Campbell*, 854 P.2d 265 (Idaho Ct. App. 1993)

ii. Inferences and Assumptions

- *State v. Campbell*, 854 P.2d 265 (Idaho Ct. App. 1993)

2. Analysis of the Defendant's Condition

- *State v. Sabin*, 820 P.2d 375 (Idaho Ct. App. 1991)

3. Psychological Evaluations

a. Judicial Discretion

- *State v. Carey*, 834 P.2d 899 (Idaho Ct. App. 1992)
- *State v. Puente-Gomez*, 827 P.2d 715 (Idaho Ct. App. 1992)
- *State v. Sabin*, 820 P.2d 375 (Idaho Ct. App. 1991)
- *State v. Wolfe*, 864 P.2d 170 (Idaho Ct. App. 1993)

b. Examination of a Defendant for Evidence of Mental Condition

- *State v. Jones*, 974 P.2d 85 (Idaho Ct. App. 1999)

c. The Defendant's Burden

- *State v. Jones*, 974 P.2d 85 (Idaho Ct. App. 1999)

d. Psychosexual Evaluations

- *State v. Jones*, 974 P.2d 85 (Idaho Ct. App. 1999)

4. Comments Regarding Potential Success in Rehabilitation

- *State v. Aspeytia*, 936 P.2d 210 (Idaho Ct. App. 1997)

5. Examination of Pre-Sentence Investigation Reports By the Defendant

- *State v. Campbell*, 854 P.2d 265 (Idaho Ct. App. 1993)

B. Sentencing Imposition

1. Court Discretion

a. Generally

- *State v. Arnold*, 769 P.2d 613 (Idaho Ct. App. 1989)

b. Punishment for Similar Offenses

- *State v. Byington*, 977 P.2d 211 (Idaho Ct. App. 1998)

2. Types of Sentencing

a. Consecutive Versus Concurrent

i. Court Discretion

- *State v. Alberts*, 824 P.2d 135 (Idaho Ct. App. 1991)

ii. Consecutive Sentences

- *State v. Bello*, 19 P.3d 66 (Idaho Ct. App. 2001)

b. Unified

i. Generally

- *State v. Snapp*, 743 P.2d 1003 (Idaho Ct. App. 1987)

ii. Effect of Good Behavior

- *State v. Alberts*, 824 P.2d 135 (Idaho Ct. App. 1991)

iii. Sentence Review

- *State v. Alberts*, 824 P.2d 135 (Idaho Ct. App. 1991)
- *State v. Jones*, 974 P.2d 85 (Idaho Ct. App. 1999)

c. Fixed Life

i. Reasonableness

- *State v. Bello*, 19 P.3d 66 (Idaho Ct. App. 2001)
- *State v. Eubank*, 759 P.2d 926 (Idaho Ct. App. 1988)

ii. Lewd and Lascivious Conduct

- *State v. Bello*, 19 P.3d 66 (Idaho Ct. App. 2001)
- *State v. Cross*, 978 P.2d 227 (Idaho 1999)

iii. Appellate Review

- *State v. Cannady*, 44 P.3d 1122 (Idaho 2002)

3. Severe Sentence After a New Trial

- *State v. Colwell*, 908 P.2d 156 (Idaho Ct. App. 1995)

4. Factors to Consider

a. Aggravating Factors

i. Age of Victim

No relevant state cases reported.

ii. Distribution/Intent to Traffic

No relevant state cases reported.

iii. Failure to Accept Responsibility

- *State v. Brown*, 951 P.2d 1288 (Idaho Ct. App. 1998)

iv. Number of Images

No relevant state cases reported.

v. Pattern of Activity for Sexual Exploitation: Habitual Offenders

(a) Persistent-Violator Statute

- *State v. Self*, 85 P.3d 1117 (Idaho Ct. App. 2003)

(b) Prohibition of Multiple Convictions

- *State v. Self*, 85 P.3d 1117 (Idaho Ct. App. 2003)

vi. Sadistic, Masochistic or Violent Material

No relevant state cases reported.

vii. Use of Computers

No relevant state cases reported.

b. Mitigating Factors

i. The Defendant's Mental Condition

(a) Factors to Consider

- *State v. Strand*, 50 P.3d 472 (Idaho 2002)

(b) Not a Controlling Factor

- *State v. Strand*, 50 P.3d 472 (Idaho 2002)

ii. Allocution

- *State v. Carey*, 834 P.2d 899 (Idaho Ct. App. 1992)

c. Victim Statements

- *State v. Campbell*, 854 P.2d 265 (Idaho Ct. App. 1993)

5. Appellate Review

- *State v. Aspeytia*, 936 P.2d 210 (Idaho Ct. App. 1997)
- *State v. Bello*, 19 P.3d 66 (Idaho Ct. App. 2001)

a. Independent Review of the Record

- *State v. Arnold*, 769 P.2d 613 (Idaho Ct. App. 1989)
- *State v. Aspeytia*, 936 P.2d 210 (Idaho Ct. App. 1997)

b. Reasonable Sentence

- *State v. Bello*, 19 P.3d 66 (Idaho Ct. App. 2001)
- *State v. Espinoza*, 990 P.2d 1229 (Idaho Ct. App. 1999)

i. Length of Confinement

- *State v. Campbell*, 854 P.2d 265 (Idaho Ct. App. 1993)

ii. Nature of the Offense and Character of the Offender

- *State v. Campbell*, 854 P.2d 265 (Idaho Ct. App. 1993)
- *State v. Harshbarger*, 77 P.3d 976 (Idaho Ct. App. 2003)

c. Excessive Sentence

- *State v. Arnold*, 769 P.2d 613 (Idaho Ct. App. 1989)
- *State v. Bello*, 19 P.3d 66 (Idaho Ct. App. 2001)
- *State v. Cross*, 978 P.2d 227 (Idaho 1999)

C. Reduction of Sentence: Rule 35

1. Rule 35 Plea for Leniency

- *State v. Atwood*, 832 P.2d 1134 (Idaho Ct. App. 1992)

a. Time Limit

- *State v. Joyner*, 825 P.2d 99 (Idaho Ct. App. 1992)

b. Approval

- *State v. Adams*, 859 P. 2d 970 (Idaho Ct. App. 1993)

c. Appellate Review of a Denial

- *State v. Adams*, 859 P. 2d 970 (Idaho Ct. App. 1993)

2. Impact of Good Conduct on a Reduction of Sentence

- *State v. Gain*, 90 P.3d 920 (Idaho Ct. App. 2004)

D. Rehabilitative Treatment for Sex Offenders

- *State v. Bartlett*, 800 P.2d 118 (Idaho Ct. App. 1990)

E. Sex-Offender Registration

- *Ray v. State*, 982 P.2d 931(Idaho 1999)

IX. SUPERVISED RELEASE

A. Probation

1. Goal

- *State v. Wardle*, 53 P.3d 1227 (Idaho Ct. App. 2002)

2. Court Discretion

- *State v. Alberts*, 824 P.2d 135 (Idaho Ct. App. 1991)

a. Retaining Jurisdiction

- *State v. Beebe*, 751 P.2d 673 (Idaho Ct. App. 1988)
- *State v. Wolfe*, 864 P.2d 170 (Idaho Ct. App. 1993)

b. Conditions of Probation

- *State v. Jones*, 926 P.2d 1318 (Idaho Ct. App. 1996)
- *State v. Wardle*, 53 P.3d 1227 (Idaho Ct. App. 2002)

3. Suspension of Sentence

- *State v. Brooke*, 10 P.3d 756 (Idaho Ct. App. 2000)

4. Revocation

a. Generally

- *State v. Crowe*, 952 P.2d 1245 (Idaho 1998)
- *State v. Jones*, 926 P.2d 1318 (Idaho Ct. App. 1996)

b. Appellate Review

- *State v. Jones*, 926 P.2d 1318 (Idaho Ct. App. 1996)

B. Parole

- *State v. Alberts*, 824 P.2d 135 (Idaho Ct. App. 1991)

IDAHO
Offenses Defined

I. Attempt Crimes

A. Elements of the Offense

- The Idaho legislature has specifically provided for the punishment of individuals who intend to commit a crime and act beyond mere preparation to commit the crime, but fail. IDAHO CODE § 18-306.
  – *State v. Curtiss*, 65 P.3d 207, 210 (Idaho Ct. App. 2002)

- Every person who attempts to commit any crime but fails, or is prevented or intercepted in the perpetration thereof, is nevertheless subject to punishment for the attempt to commit the underlying crime. IDAHO CODE § 18-306.
  – *State v. Curtiss*, 65 P.3d 207, 209 (Idaho Ct. App. 2002)
  – *State v. Glass*, 87 P.3d 302, 305 (Idaho Ct. App. 2003)

- An attempt to commit a crime occurs when a defendant attempts to commit the crime but fails or is prevented from committing the crime.
  – *State v. Curtiss*, 65 P.3d 207, 209 (Idaho Ct. App. 2002)
  – *State v. Glass*, 87 P.3d 302, 305 (Idaho Ct. App. 2003)

- Attempt consists of two elements:
  (1) an intent to do an actor bring about certain consequences which would in law amount to a crime; and
  (2) an act in furtherance of that intent that, as it is most commonly put, goes beyond mere preparation.
  – *State v. Curtiss*, 65 P.3d 207, 209 (Idaho Ct. App. 2002)
  – *State v. Glass*, 87 P.3d 302, 305 (Idaho Ct. App. 2003)

B. Preparatory Phase Versus Beyond Mere Preparation

- The preparatory phase of a crime consists of devising or arranging the means or measures necessary for the commission of the offense.
  – *State v. Glass*, 87 P.3d 302, 305 (Idaho Ct. App. 2003)

- To go beyond mere preparation, the actions of the defendant must reach far enough toward the accomplishment of the desired result to amount to the commencement of the consummation of the crime.
  – *State v. Glass*, 87 P.3d 302, 305 (Idaho Ct. App. 2003)

C. Substantial Step

- What conduct will constitute the requisite substantial step turns upon the facts and circumstances of each case.
  – *State v. Glass*, 87 P.3d 302, 306 (Idaho Ct. App. 2003)

- Of importance in this analysis is the proximity of the act, both spatially and temporally, to the completion of the criminal design. It has been said that for a criminal attempt to occur, there must be a dangerous proximity to success.
  – *State v. Glass*, 87 P.3d 302, 306 (Idaho Ct. App. 2003)

II. Battery

- Battery is the actual, intentional, and unlawful touching or striking of another person against the will of the other. IDAHO CODE § 18-903(b).
  – *State v. Wardle*, 53 P.3d 1227, 1229 (Idaho Ct. App. 2002)

III. Disseminating Harmful Material to Minors

- A person is guilty of disseminating material harmful to minors when he or she knowingly gives or makes available to a minor, promotes or possesses with the intent to promote to minors, or knowingly sells or loans to a minor for monetary consideration:
  (1) any picture, photograph, drawing, sculpture, motion-picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sadomasochistic abuse, that is harmful to minors; or
  (2) any other material that is harmful to minors.
  – *State v. Byington*, 977 P.2d 211, 216 (Idaho Ct. App. 1998)

- With reference to a motion picture, show, or other presentation that depicts nudity, sexual conduct, or sadomasochistic abuse, and that is harmful to minors, the perpetrator must knowingly exhibits the motion picture, show, or other presentation to a minor not for a monetary consideration.
  – *State v. Byington*, 977 P.2d 211, 216 (Idaho Ct. App. 1998)

IV. Injury to Children

- It is a crime for any person who, under circumstances or conditions likely to produce great bodily harm or death, while having the care or custody of any child, willfully causes or permits the person of such child to be injured. IDAHO CODE § 18-1501(1).
  – *State v. Snow*, 815 P.2d 475, 476 (Idaho Ct. App. 1991)

V. Kidnapping

- The offense of kidnapping includes leading, taking, enticing away, or detaining a child under the age of 16 years, with the intent to keep or conceal it from its parent. IDAHO CODE § 18-4501(2).
  – *State v. Greensweig*, 644 P.2d 372, 376 (Idaho Ct. App. 1982)

VI. Lewd Conduct with a Minor Child Under 16

A. Elements of the Offense

- Any person who willfully and lewdly commits any lewd or lascivious act(s) upon or with the body or any part or member thereof of a minor or child under the age of 16 years, including but not limited to, genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact, or manual-genital contact, whether between persons of the same or opposite sex, or who involves a minor or child in any act of bestiality, sado-masochistic abuse, or lewd exhibition, when any of such acts are done with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such minor or child, is guilty of a felony. IDAHO CODE § 18-1508.
  – *State v. Bronson*, 732 P.2d 336, 337 (Idaho Ct. App. 1987)
  – *State v. Colwell*, 861 P.2d 1225, 1230 (Idaho Ct. App. 1993)
  – *State v. Colwell*, 908 P.2d 156, 159 (Idaho Ct. App. 1995)
  – *State v. Curtiss*, 65 P. 3d 207, 209 (Idaho Ct. App. 2002)
  – *State v. Drennon*, 883 P. 2d 704, 710 (Idaho Ct. App. 1994)
  – *State v. Hester*, 760 P.2d 27, 30 (Idaho 1988)
  – *State v. Kavajecz*, 80 P.3d 1083, 1087 (Idaho 2003)

B. Touching Must Be Sexual

- The State must prove that the defendant's touching of the victim was sexual, not accidental or innocent.
  – *State v. Cannady*, 44 P.3d 1122, 1125 (Idaho 2002)

C. Burden of Proof

- The State bears the burden to prove that a defendant knowingly participated in the sexual molestation of a minor child with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the defendant, those of the child, or of a third person.
  – *State v. Law*, 39 P.3d 661, 666 (Idaho Ct. App. 2002)

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

- The State's evidence proved that the defendant was the person acting behind online chat room screen name that had engaged in online chat with an undercover detective posing as a 15-year-old girl by proving that the online interaction between defendant's screen name and detective's screen name was a private conversation to which only those two were a party, the detective's screen name provided defendant's screen name with the address of a vacant apartment located in an apartment complex, the defendant's screen name indicated to the detective's screen name that he would be arriving in a small, black two-door car and that he was leaving his residence immediately to come to apartment, and twenty-three minutes later, detectives witnessed a black two-door car driving into apartment complex parking lot.
  – *State v. Glass*, 190 P.3d 896, 903-904 (Idaho Ct. App. 2008)

- The State's evidence supported a conviction for enticing a child over the Internet by showing that the defendant proposed to the chat room screen name of undercover detective posing as a fifteen year-old girl that he would masturbate in front of her, and he sought to seduce or lure the girl to participate in sexual activity in addition to his proposal of masturbation, as was evidenced by his indication to the girl that masturbation was merely the starting point of their sexual experience.
  – *State v. Glass*, 190 P.3d 896, 903-904 (Idaho Ct. App. 2008)

VIII. Possession of Sexually Exploitative Material for Other than a Commercial Purpose

A. Elements of the Offense

- Every person who knowingly and willfully has in his or her possession any sexually exploitative material for other than a commercial purpose is guilty of a felony. IDAHO CODE § 18-1507A.
  – *State v. Claiborne*, 818 P.2d 285, 288 (Idaho 1991)
  – *State v. Morton*, 91 P.3d 1139, 1141 (Idaho 2004)
  – *State v. Weimer*, 988 P.2d 216, 221 (Idaho Ct. App. 1999)

- There is an element of scienter because to be guilty of such possession, the possessor must do so knowingly and willfully.
  – *State v. Morton*, 91 P.3d 1139, 1142 (Idaho 2004)

B. Application of Obscenity Standards

- The traditional standards applicable to obscenity do not apply to the offense of child pornography.
  – *State v. Claiborne*, 818 P.2d 285, 288 (Idaho 1991)

C. Definitions

1. "Sexually Exploitative Material"

- "Sexually exploitative material" is defined to include the following any photograph, motion picture, videotape, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material that depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct. IDAHO CODE § 18-1507(2)(j).
  – *State v. Claiborne*, 818 P.2d 285, 288 (Idaho 1991)
  – *State v. Morton*, 91 P.3d 1139, 1141 (Idaho 2004)
  – *State v. Weimer*, 988 P. 2d 216, 221 (Idaho Ct. App. 1999)

- "Sexually exploitative material" means, among other things, any videotape that depicts a child being used for explicit sexual conduct. IDAHO CODE § 18-1507(2)(k).
  – *State v. Morton*, 91 P.3d 1139, 1141 (Idaho 2004)

2. "Child"

- A "child" is defined as a person who is less than 18 years of age. IDAHO CODE § 18-1507(2)(b).
  – *State v. Morton*, 91 P.3d 1139, 1141 (Idaho 2004)
  – *State v. Weimer*, 988 P. 2d 216, 221 (Idaho Ct. App. 1999)

3. "Explicit Sexual Conduct"

- "Explicit sexual conduct" means, inter alia, erotic nudity. IDAHO CODE § 18-1507(2)(f).
  – *State v. Morton*, 91 P.3d 1139, 1141 (Idaho 2004)

4. "Erotic Nudity"

- Erotic nudity is defined, in relevant part, to mean the:
  (1) display of the human male or female genitals or pubic area;
  (2) undeveloped or developing genitals or pubic area of the human male or female child; The human female breasts; or
  (3) undeveloped or developing breast area of the human female child,
  for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.
  IDAHO CODE § 18-1507(2)(e).
  – *State v. Morton*, 91 P.3d 1139, 1141 (Idaho 2004)
  – *State v. Weimer*, 988 P. 2d 216, 221 (Idaho Ct. App. 1999)

D. Virtual/Simulated Child Pornography

- It is the government's concern in preventing physical and psychological damage and injury that occurs as a result of employing real children in child

pornography that triggers the exemption of child pornography from retaining First-Amendment protection; however, this lawful interest does not similarly validate the ban against sexually explicit descriptions and depictions that appear to be children, but do not, in fact, engage the use of minors in their creation.
– *State v. Bonner*, 61 P.3d 611, 615 (Idaho Ct. App. 2002)

IX. Sexual Abuse of a Child Under 16 Years of Age

A. Elements of the Offense

- It is a felony for any person 18 years of age or older, with the intent to gratify the lust, passions, or sexual desire of the actor, minor child, or third party, to:
  (1) cause or have sexual contact with such minor child, not amounting to lewd conduct;
  (2) solicit a minor child under the age of 16 years to participate in a sexual act; or
  (3) make any photographic or electronic recording of such minor child.

IDAHO CODE § 18-1506.
– *State v. Colwell*, 908 P.2d 156, 159 (Idaho Ct. App. 1995)
– *State v. Drennon*, 883 P.2d 704, 710 (Idaho Ct. App. 1994)
– *State v. Espinoza*, 990 P.2d 1229, 1231 (Idaho Ct. App. 1999)
– *State v. O'Neill*, 796 P.2d 121, 126 (Idaho 1990)
– *State v. Wardle*, 53 P. 3d 1227, 1229 (Idaho Ct. App. 2002)
– *State v. Weimer*, 988 P.2d 216, 220 (Idaho Ct. App. 1999)
– *State v. Willard*, 933 P.2d 116, 118 (Idaho Ct. App. 1997)

B. Definitions

1. "Solicit"

- "Solicit" means any offensive written, verbal, or physical act that is intended to communicate to the child the actor's desire to participate in a sexual act or participate in sexual foreplay, or the actor's desire to gratify lust by means of photographing or observing the child engaged in sexual contact. IDAHO CODE § 18-506(2).
  – *State v. Colwell*, 908 P.2d 156, 159 (Idaho Ct. App. 1995)
  – *State v. O'Neill*, 796 P.2d 121, 126 (Idaho 1990)
  – *State v. Willard*, 933 P.2d 116, 118 (Idaho Ct. App. 1997)

2. "Sexual Contact"

- "Sexual contact" means any physical contact between the child and the actor, or between children, that is caused by the actor, or the actor causing the child to have self-contact, any of which is intended to

gratify the lust or sexual desire of the actor or a third party. IDAHO CODE § 18-506(3).
– *State v. Colwell*, 908 P.2d 156, 159-60 (Idaho Ct. App. 1995)
– *State v. Drennon*, 883 P.2d 704, 710 (Idaho Ct. App. 1994)
– *State v. O'Neill*, 796 P.2d 121, 126 (Idaho 1990)

C. Nature of Touching

- The State must prove that the defendant's touching of the victim was sexual, not accidental or innocent.
  – *State v. Cannady*, 44 P.3d 1122, 1125 (Idaho 2002)

X. Sexual Battery of Minor Child 16 or 17 Years of Age

A. Elements of the Offense

- It is a felony for a person at least 5 years older than a 16- or 17-year old to cause or have sexual contact with the minor child if the person does so with the intent of arousing, appealing to or gratifying the lust, passion, or sexual desires of the person, the minor child, or a third party. IDAHO CODE § 18-1508A(1)(c).
  – *State v. Avila*, 49 P.3d 1260, 1264 (Idaho Ct. App. 2002)
  – *State v. Oar*, 924 P.2d 599, 603 (Idaho 1996)

B. Definitions

1. "Sexual Contact"

- "Sexual contact" means any physical contact between the minor child and any person or between the minor children that is caused by the actor, or the actor causing such minor child to have self-contact. IDAHO CODE § 18-1508A(3).
  – *State v. Oar*, 924 P.2d 599, 603 (Idaho 1996)

2. "Solicit"

- "Solicit" means as any written, verbal, or physical act that is intended to communicate to a minor child the desire of the actor or third party to participate in a sexual act or participate in sexual foreplay, by means of sexual contact, photographing, or observing such minor child engaged in sexual contact. IDAHO CODE § 18-1508A(2).
  – *State v. Oar*, 924 P.2d 599, 604 (Idaho 1996)

XII. Transporting a Minor for Purposes of Prostitution

No relevant state cases reported.

IDAHO

Search and Seizure of Electronic Evidence

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

I. Search Warrants

A. Probable Cause

1. Generally

- Whether probable cause exists to support the issuance of a search warrant is determined by the magistrate from the facts set forth in affidavits and from recorded testimony in support of the application for the warrant.
  – *State v. Weimer*, 988 P.2d 216, 220 (Idaho Ct. App. 1999)

- When determining whether probable cause exists, the task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him or her, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
  – *State v. Weimer*, 988 P.2d 216, 220 (Idaho Ct. App. 1999)

2. Appellate Review

- When the Supreme Court of Idaho reviews the issuance of a search warrant by a magistrate, the Court's review is limited to ensuring that the magistrate had a substantial basis for concluding that probable cause existed, and the Court gives great deference to the magistrate's determination.
  – *State v. Lewis*, 848 P.2d 394, 407 (Idaho 1993)
  – *State v. Weimer*, 988 P.2d 216, 219-20 (Idaho Ct. App. 1999)

- The test for reviewing the magistrate's action is whether he or she abused his or her discretion in finding that probable cause existed.
  – *State v. Weimer*, 988 P.2d 216, 220 (Idaho Ct. App. 1999)

- Search warrants are not subject to technical drafting requirements. They should be interpreted in a commonsense and realistic fashion.
  – *State v. Weimer*, 988 P.2d 216, 222 (Idaho Ct. App. 1999)

B. Affidavits

1. Sufficient Nexus

- Assertions in the affidavit must establish a sufficient nexus between criminal activity, the things to be seized, and the place to be searched to lead to the issuance of a warrant.
  – *State v. Weimer*, 988 P.2d 216, 220 (Idaho Ct. App. 1999)

2. Conclusory Affidavits

a. Generally

- An affidavit must provide the magistrate with a substantial basis for determining the existence of probable cause.
  – *State v. Weimer*, 988 P.2d 216, 220-21 (Idaho Ct. App. 1999)

- A magistrate's finding of probable cause cannot be a mere ratification of the bare conclusions of others; therefore, probable cause cannot be found in a purely conclusory affidavit that does not detail any of the underlying circumstances.
  – *State v. Weimer*, 988 P.2d 216, 220-21 (Idaho Ct. App. 1999)

b. Materials Depicting Sexually Explicit Conduct

- An affidavit's conclusory statement that photographs depict sexually explicit conduct is not fatal to the search warrant.
  – *State v. Weimer*, 988 P.2d 216, 221 (Idaho Ct. App. 1999)

- While a statement in an affidavit that material depicts sexually explicit conduct is conclusory to a certain extent, it is a conclusion based on observation and not, as in the case of obscenity, one based on evaluation.
  – *State v. Weimer*, 988 P.2d 216, 222 (Idaho Ct. App. 1999)

3. Obscenity Versus Child-Pornography Affidavits

- The distinction in constitutional requirements regarding legislation for child pornography and obscenity results in different criteria for affidavits that support a search warrant.
  – *State v. Claiborne*, 818 P.2d 285, 288 (Idaho 1991)

a. Obscenity

- To constitute unprotected obscenity, a work must appeal to the interest in sex when taken as a whole, must portray sexual

conduct in a patently offensive way, and must not, when taken as a whole, have serious literary, artistic, political, or scientific value. Even though the existence of these requirements constitute a question of fact for the jury, such a determination entails difficult information that exceeds that which is apparent from simply looking at the face of a photograph.
– *State v. Claiborne*, 818 P.2d 285, 288 (Idaho 1991)

b. Child Pornography

- In comparison, the constitutional criterion for legislation involving child pornography are much simpler and more receptive to credible assertion in an affidavit for a search warrant.
  – *State v. Claiborne*, 818 P.2d 285, 288 (Idaho 1991)

- Allegations that a particular picture portrays sexually explicit conduct proscribed by statute does not require the affiant to have extensive information regarding the prurient interest of the average person, of what depictions of sexual conduct are patently offensive, or of literary, artistic, political, or scientific criteria for serious value. Rather, the affiant is only required to recognize the specific, noticeably defined acts set forth in the applicable statute.
  – *State v. Claiborne*, 818 P.2d 285, 288 (Idaho 1991)

- The problem of law enforcement making a subjective judgment at the time of a seizure is not present in the case of seizing sexually exploitative materials because the definition of sexually exploitative material is detailed and narrowly defined by statute.
  – *State v. Claiborne*, 818 P.2d 285, 288 (Idaho 1991)
  – *State v. Weimer*, 988 P. 2d 216, 224 (Idaho Ct. App. 1999)

4. False Information

a. Knowing and Intentional

- If a defendant disputes a search warrant claiming that the warrant was obtained with the use of false information, the defendant must establish by a preponderance of the evidence that the false information was incorporated in the warrant affidavit knowingly, deliberately, or with reckless disregard for the truth. This rule also pertains to relevant information that is allegedly incorrectly omitted with the intention to deceive and mislead the magistrate.
  – *State v. Byington*, 977 P.2d 211, 214-15 (Idaho Ct. App. 1998)

- If false information was presented intentionally to the magistrate or with reckless disregard for the truth, the information cannot be used and must be set aside, and the court's determination of probable cause must be evaluated based on the remaining evidence.
  – *State v. Byington*, 977 P.2d 211, 215 (Idaho Ct. App. 1998)

b. Negligent or Innocent Misrepresentations

- Negligent or innocent falsifications, even if they are essential to show the existence of probable cause, will not invalidate a search warrant.
  – *State v. Byington*, 977 P.2d 211, 215 (Idaho Ct. App. 1998)

- If information is given to the magistrate in a negligent or innocent fashion, the information must be included in the court's deliberation of the totality of the circumstances in deciding if the magistrate had a substantial basis to determine the existence of probable cause.
  – *State v. Byington*, 977 P.2d 211, 215 (Idaho Ct. App. 1998)

C. Scope of the Search Warrant

1. Particularity Requirement

a. Generally

- A search warrant must be particular enough so that as to what is to be taken, nothing is left to the discretion of the officer executing the warrant; however, this statement is not to be read literally. Instead, the warrant must enable the searcher to reasonably ascertain and identify the things that are authorized to be seized.
  – *State v. Weimer*, 988 P. 2d 216, 222-23 (Idaho Ct. App. 1999)

b. Fourth Amendment

- The Fourth Amendment to the United States Constitution protects society against unreasonable searches and seizures by requiring that probable cause exists to support the search warrant, and the warrant is described with particularity the place to be searched and the items to be seized.
  – *State v. Claiborne*, 818 P.2d 285, 290 (Idaho 1991)

- The Fourth Amendment requires particularity sufficient to prevent the seizure of one thing under a warrant describing

another and to prevent the exercise of discretion by the officer executing the warrant.
– *State v. Weimer*, 988 P. 2d 216, 222 (1999 Idaho Ct. App. 1999)

2. Material Containing Sexually Explicit Conduct

- When a book is suspected to contain sexually exploitative material, the book is judged to be evidence of a crime; therefore, it can be seized with a valid warrant, just as any other piece of evidence of a crime would be. This reasoning applies equally to photographs.
  – *State v. Weimer*, 988 P. 2d 216, 222 (1999 Idaho Ct. App. 1999)

D. Staleness

- The staleness of information regarding the presence of items in a certain place depends upon the nature of the factual scenario involved.
  – *State v. Patterson,*[++] 87 P.3d 967, 974 (Idaho Ct. App. 2003)

- In a determination of whether information contained within a search-warrant affidavit is stale, there exits no magical number of days within which information is fresh and after which the information becomes stale.
  – *State v. Patterson,*[++] 87 P.3d 967, 974 (Idaho Ct. App. 2003)

- The question must be resolved in light of the circumstances of each case.
  – *State v. Patterson,*[++] 87 P.3d 967, 974 (Idaho Ct. App. 2003)

- Information in a search-warrant affidavit is only stale if it fails to demonstrate a fair probability that the contraband or evidence to be seized would presently be found at the location to be searched.
  – *State v. Patterson,*[++] 87 P.3d 967, 974 (Idaho Ct. App. 2003)

- An important factor in a staleness analysis is the nature of the criminal conduct. If the affidavit recounts criminal activities of a protracted or continuous nature, a time delay in the sequence of events is of less significance.
  – *State v. Patterson,*[++] 87 P.3d 967, 974 (Idaho Ct. App. 2003)

- Certain nefarious activities are continuing in nature and, as a result, are less likely to become stale even over an extended period of time.
  – *State v. Patterson,*[++] 87 P.3d 967, 974 (Idaho Ct. App. 2003)

II. Anticipatory Warrants

No relevant state cases reported.

III. Methods of Searching

No relevant state cases reported.

IV. Types of Searches

A. Employer Searches

No relevant state cases reported.

B. Private Searches

No relevant state cases reported.

C. University-Campus Searches

No relevant state cases reported.

D. Warrantless Searches

1. Consent Searches

- A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid.
  – *State v. Kilby*, 947 P.2d 420, 422 (Idaho Ct. App. 1997)

a. Voluntariness

- A warrantless search may be conducted where there has been a voluntary consent to search.
  – *State v. Kilby*, 947 P.2d 420, 422 (Idaho Ct. App. 1997)

i. Totality of the Circumstances

- The voluntariness of consent to search must be determined from the totality of the circumstances.
  – *State v. Kilby*, 947 P.2d 420, 422 (Idaho Ct. App. 1997)

ii. Burden of Proof

- The burden is upon the State to show, by a preponderance of the evidence, that a defendant's consent to search was given freely and voluntarily.
  – *State v. Kilby*, 947 P.2d 420, 422 (Idaho Ct. App. 1997)

b. Coercion

- When a law-enforcement officer claims authority to search a home under a warrant, he or she announces in effect that the occupant has no right to resist the search.
  – *State v. Kilby*, 947 P.2d 420, 422 (Idaho Ct. App. 1997)

- Where there is coercion, there cannot be consent.
  – *State v. Kilby*, 947 P.2d 420, 422 (Idaho Ct. App. 1997)

- The fact that the defendant is in custody has never been enough in itself to demonstrate a coerced consent to search.
  – *State v. Kilby*, 947 P.2d 420, 422 (Idaho Ct. App. 1997)

2. Plain-View Searches

- The plain-view exception is just one of many of the recognized exception to the warrant requirement.
  – *State v. Claiborne*, 818 P.2d 285, 290 (Idaho 1991)

- Items are allowed to be seized even though they are not specified in the search warrant if they satisfy the following requirements:
  (1) The law-enforcement official must legally conduct an initial intrusion, or appropriately be in a position from which the officer is able to view a specific area;
  (2) The officer must come across incriminating evidence unintentionally. The officer cannot know ahead of time the location of particular evidence and plan to seize it, thereby relying on the plain-view exception only as a ploy or as an excuse; and
  (3) It must be immediately obvious to the officer that the objects or items viewed may constitute evidence of a crime, contraband, or are subject to seizure. This prong is satisfied when an officer has probable cause to believe that the object or item at issue is linked to criminal activity. When making such a determination, it may be based on looking at the surrounding facts and circumstances of the case. Law enforcement is allowed to make reasonable inferences on the basis of training and experience in deciding if such an association exists. Further, it is also permissible to look at the collective information and facts of law-enforcement officials carrying out the searches.
  – *State v. Claiborne*, 818 P.2d 285, 290 (Idaho 1991)

V. Computer-Technician/Repair Person 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.

IX. Probation and Parolee Rights

No relevant state cases reported.

IDAHO
Jurisdiction and Nexus

I. Jurisdictional Nexus

No relevant state cases reported.

II. Internet Nexus

No relevant state cases reported.

III. State Jurisdiction, Federal Jurisdiction, Concurrent Jurisdiction

A. State: Juvenile Proceedings

- A person may not be tried for or convicted of a criminal offense if, at the time of the conduct charged to constitute the offense, he or she was less than 14 years of age. IDAHO CODE § 18-216(1).
  – *State v. Kavajecz*, 80 P.3d 1083, 1085 (Idaho 2003)

1. Waiver of Jurisdiction from a Juvenile Court

- Jurisdiction may only be waived from a juvenile court to a district court if the accused is between the ages of 14 and 17 years old. IDAHO CODE § 18-216(1).
  – *State v. Kavajecz*, 80 P.3d 1083, 1085 (Idaho 2003)

2. Hearing

- An actual hearing is required, with the magistrate making a determination of whether certain listed factors have been met before jurisdiction can be waived. A stipulation by the juvenile to waive the hearing does not satisfy this requirement. Any objection to a lack of a hearing or to such a stipulation by the juvenile must be raised before the district court or is waived. IDAHO CODE § 20-508.
  – *State v. Kavajecz*, 80 P.3d 1083, 1087 (Idaho 2003)

3. Enumerated Crimes

- There are certain crimes for which any juvenile, age 14 years to age 18 years, or any juvenile under age 14 years who has been ordered by the court to be held for adult criminal proceedings, may be criminally tried as an adult. The crimes include, but are not limited to:
  (1) murder of any degree or attempted murder;

(2) robbery;
(3) rape, but excluding statutory rape;
(4) forcible sexual penetration by the use of a foreign object;
(5) infamous crimes against nature, committed by force or violence;
(6) mayhem; and
(7) assault or battery with the intent to commit any of the above serious felonies.

IDAHO CODE § 20-509.

– *State v. Kavajecz*, 80 P.3d 1083, 1086 (Idaho 2003)

B. Federal

No state cases reported.

C. Concurrent

No state cases reported.

IV. Interstate Possession of Child Pornography

No state cases reported.

IDAHO

Discovery and Evidence

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

I. Timely Review of Evidence

No relevant state cases reported.

II. Defense Requests for Copies of Child Pornography

No relevant state cases reported.

III. Psychiatric or Psychological Examination of the Defendant

- The decision whether reasonable grounds exist to order a psychological or psychiatric evaluation to determine a defendant's competence to stand trial is left to the discretion of the trial court.
  – *State v. Longoria*, 992 P.2d 1219, 1222 (Idaho Ct. App. 1999)

- The trial court has broad discretion on determining if reasonable grounds exist to question a defendant's competency, and unless there has been a manifest abuse in this discretion, the trial court will be upheld.
  – *State v. Longoria*, 992 P.2d 1219, 1222 (Idaho Ct. App. 1999)

IV. Accusatory Instruments: Time of the Offense

- The precise time at which the offense was committed need not be stated in the indictment, but it may be alleged to have been committed at any time before the finding thereof, except where the time is a material ingredient in the offense. IDAHO CODE § 19-1414.
  – *State v. Taylor*, 797 P.2d 158, 159 (Idaho Ct. App. 1990)

A. Lewd and Lascivious Conduct

- Time is not a material ingredient in the offense of lewd and lascivious conduct with a minor.
  – *State v. Tapia*, 899 P.2d 959, 963 (Idaho 1995)

- The information need only be specific enough to enable the defendant to prepare his or her defense and to protect him or her from being subsequently

prosecuted for the same offense.
– *State v. Tapia*, 899 P.2d 959, 963 (Idaho 1995)

B. Course of Conduct

- A course of conduct over a period of time may be charged generally because that is the best that can be done.
  – *State v. Taylor*, 797 P.2d 158, 159 (Idaho Ct. App. 1990)

V. Introduction of E-mails into Evidence

A. Hearsay/Authentication Issues

No relevant state cases reported.

B. Circumstantial Evidence

No relevant state cases reported.

C. Technical Aspects of Electronic Evidence Regarding Admissibility

No relevant state cases reported.

VI. Text-Only Evidence

A. Introduction into Evidence

No relevant state cases reported.

B. Relevance

No relevant state cases reported.

VII. Evidence Obtained from Internet Service Providers

A. Electronic Communications Privacy Act

No relevant state cases reported.

B. Cable Act

No relevant state cases reported.

C. Patriot Act

1. National Trap and Trace Authority

No relevant state cases reported.

2. State-Court-Judge Jurisdictional Limits

No relevant state cases reported.

VIII. Witness Testimony

A. Competency of Witnesses

- Every person is competent to be a witness except persons whom the court finds to be incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly. IDAHO R. EVID. 601.
  – *State v. Ransom*, 864 P.2d 149, 156 (Idaho 1993)

- The trial court has the discretion to determine witness competency.
  – *State v. Ransom*, 864 P.2d 149, 156 (Idaho 1993)

B. Expert Testimony

1. Admissible

- 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. IDAHO R. EVID. 702.
  – *State v. Aspeytia*, 936 P.2d 210, 213-14 (Idaho Ct. App. 1997)
  – *State v. Blackstead*, 878 P.2d 188, 195 (Idaho Ct. App. 1994)
  – *State v. Dutt*, 73 P.3d 112, 117 (Idaho Ct. App. 2003)
  – *State v. Eytchison*, 30 P.3d 988, 990 (Idaho Ct. App. 2001)
  – *State v. Glass*, 190 P.3d 896, 901 (Idaho Ct. App. 2008)
  – *State v. Hester*, 760 P.2d 27, 32 (Idaho 1988)
  – *State v. Lewis*, 848 P.2d 394, 403 (Idaho 1993)

- Expert testimony is admissible where it will assist the jury in areas of inquiry that would be outside the common experience and knowledge of a lay juror and would assist the jury in deciding a material issue.
  – *State v. Blackstead*, 878 P.2d 188, 195 (Idaho Ct. App. 1994)

2. Expert Qualifications

a. Sources

- The five sources of expert qualifications are:
  (1) knowledge;
  (2) skill;
  (3) experience;
  (4) training; or
  (5) education.
  – *State v. Dutt*, 73 P.3d 112, 117 (Idaho Ct. App. 2003)
  – *State v. Eytchison*, 30 P.3d 988, 991 (Idaho Ct. App. 2001)

- The sources are disjunctive; therefore, academic training is not always a prerequisite to be qualified as an expert. Practical experience or specialized knowledge may be sufficient; however, there must be some demonstration that the witness has acquired, through some type of training, education, or experience, the necessary expertise and knowledge to render the proffered opinion.
  – *State v. Dutt*, 73 P.3d 112, 117 (Idaho Ct. App. 2003)
  – *State v. Eytchison*, 30 P.3d 988, 991 (Idaho Ct. App. 2001)

b. Foundational Requirement

- The foundation for establishing a witness' qualifications as an expert must be offered before his or her testimony is received in evidence.
  – *State v. Johnson*, 810 P.2d 1138, 1141 (Idaho Ct. App. 1991)

3. Bases of Opinion or Inference

- The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.
  – *State v. Scovell*, 38 P.3d 625, 630 (Idaho Ct. App. 2001)

a. Admissibility of Facts or Data

- If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
  – *State v. Scovell*, 38 P.3d 625, 630 (Idaho Ct. App. 2001)

b. Observations by Other Experts

- Experts are allowed to testify concerning observations made by other experts, but this does not specify that the other expert's

notes or photographs are to be directly in evidence or that such is allowed.
– *State v. Scovell*, 38 P.3d 625, 630 (Idaho Ct. App. 2001)

c. Reliance on Hearsay

- Otherwise inadmissible hearsay, upon which an expert relies in formulating an opinion, is not made automatically admissible by the Idaho Rules of Evidence.
  – *State v. Scovell*, 38 P.3d 625, 630 (Idaho Ct. App. 2001)

- Although the Idaho Rules of Evidence authorize the admission of expert opinions that are based upon hearsay or other inadmissible information (if the information is of a type reasonably relied upon by experts in the field), the rule does not provide that the hearsay information itself is automatically independently admissible in evidence. IDAHO R. EVID. 703.
  – *State v. Scovell*, 38 P.3d 625, 631 (Idaho Ct. App. 2001)

4. Testimony Regarding Child-Sexual Abuse

a. Characteristics of Victims

- Expert testimony regarding characteristics of child-sexual-abuse victims is admissible where it will aid the jury's understanding of the complaining witness' conduct.
  – *State v. Blackstead*, 878 P.2d 188, 195 (Idaho Ct. App. 1994)

b. Delayed Reporting by Victims

- Expert testimony regarding late reporting by child-abuse victims is admissible because this is a matter about which a jury may have difficulty understanding and because children may have difficulty articulating the reasons for their behavior.
  – *State v. Blackstead*, 878 P.2d 188, 195 (Idaho Ct. App. 1994)

c. Progression and Phases of Child-Sexual Abuse

- The progression and various phases of child-sexual abuse, including delayed disclosure, are subjects that are beyond the common sense, experience, and education of the average juror.
  – *State v. Dutt*, 73 P.3d 112, 118 (Idaho Ct. App. 2003)

d. Occurrence of Sexual Abuse

- An expert can render an opinion that a child has been sexually abused if he or she is qualified by knowledge, skill, experience, training, or education.
  – *State v. Hester*, 760 P.2d 27, 31 (Idaho 1988)

i. Foundational Requirement

- A foundational showing of expertise to render an opinion that a victim was sexually abused requires more than general education and expertise in mental health counseling.
  – *State v. Eytchison*, 30 P.3d 988, 991 (Idaho Ct. App. 2001)

- Whenever an alleged victim's treating therapist or counselor is called to express such an opinion, the trial court must be careful to scrutinize whether a foundation has been offered to show that the witness' expertise is not merely in treatment but in the determination of whether the child was actually sexually abused.
  – *State v. Eytchison*, 30 P.3d 988, 991 (Idaho Ct. App. 2001)

ii. Factors that Suggest the Scope of Qualifications

- The following factors suggest the scope of the qualifications trial courts should look for when a litigant offers an expert opinion as a diagnostician of sexual abuse:
  (1) whether the expert possessed specialized knowledge of child development, individual and family dynamics related to sexual abuse, patterns of child-sexual abuse, the effects of sexual abuse on a child, the disclosure process, the use and limits of psychological tests, and the significance of developmentally inappropriate sexual knowledge;
  (2) whether the expert is trained in the interpretation of medical reports or laboratory tests, in the art of interviewing children, and in the diagnostic evaluation of both children and adults;
  (3) whether the expert is familiar with the literature on child abuse and on coached and fabricated allegations of abuse; and
  (4) whether the expert has clinical experience with sexually abused children.
  – *State v. Eytchison*, 30 P.3d 988, 991 (Idaho Ct. App. 2001)

e. Post-Traumatic-Stress Disorder

- Expert testimony concerning post-traumatic-stress disorder patterns in sexually abused children satisfies the requirement of the evidence code in providing jury enlightenment on a critical and relevant subject of an esoteric nature.
  – *State v. Hester*, 760 P.2d 27, 32 (Idaho 1988)

f. Traits of Child Abusers

- If relevant, it is generally permissible for experts to testify regarding traits typically exhibited by child abusers.
  – *State v. Hester*, 760 P.2d 27, 33 (Idaho 1988)

- Evidence that a defendant exhibits characteristics commonly found in child abusers would generally be admissible, if relevant.
  – *State v. Hester*, 760 P.2d 27, 33 (Idaho 1988)

- Both types of evidence are beyond the common experience of most jurors, and jurors would be assisted by such expert testimony.
  – *State v. Hester*, 760 P.2d 27, 33 (Idaho 1988)

g. Identity of the Abuser

- Although the field of child abuse may be beyond common experience, having an expert render an opinion as to the identity of the abuser is more of an invasion of the jury's function rather than an assist to the trier of fact.
  – *State v. Hester*, 760 P.2d 27, 34 (Idaho 1988)

5. Testimony Regarding the Credibility of Witnesses

- An expert witness may not give an opinion as to the credibility of a particular witness.
  – *State v. Blackstead*, 878 P.2d 188, 195 (Idaho Ct. App. 1994)

6. Opinions Regarding an Ultimate Issue

a. Admissible

- The opinion testimony of experts on the ultimate issue(s) is admissible only insofar as the opinion will aid the jury in the interpretation of technical facts or when it will assist the jury in understanding the material in evidence.
  – *State v. Hester*, 760 P.2d 27, 35 (Idaho 1988)

b. Inadmissible

- Where the normal experience and qualifications of lay jurors permit them to draw proper conclusions from given facts and circumstances, expert conclusions or opinions are inadmissible.
  – *State v. Hester*, 760 P.2d 27, 35 (Idaho 1988)

7. Scientific Evidence

a. Exclusion of Scientific Theories

- It is not error for a trial court to exclude from evidence testimony dealing with a scientific theory for which an adequate foundation has not been laid.
  – *State v. Parkinson*, 909 P.2d 647, 651 (Idaho Ct. App. 1996)

b. Limitation on Admissibility of Scientifically-Based Evidence

- Federal Rule of Evidence 702 places appropriate limits on the admissibility of evidence that is purportedly scientifically based by assigning to the trial judge the task of ensuring that an expert's testimony rests on a reliable scientific foundation and is relevant to the task at hand.
  – *State v. Parkinson*, 909 P.2d 647, 652 (Idaho Ct. App. 1996)

- This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. The inquiry is a flexible one.
  – *State v. Parkinson*, 909 P.2d 647, 652 (Idaho Ct. App. 1996)

- There exist a number of factors to be considered when evaluating whether the underlying reasoning or methodology is scientifically valid, including:
  (1) whether the theory or technique in question can be tested;
  (2) whether it has been subjected to peer review and publication;
  (3) its known or potential error rate;
  (4) the existence and maintenance of standards governing its use; and
  (5) whether it has attracted widespread acceptance within a relevant scientific community.
  – *State v. Parkinson*, 909 P.2d 647, 652 (Idaho Ct. App. 1996)

C. Lay-Witness Testimony

- The court is allowed to admit opinion testimony of a non-expert or lay witness when that opinion is rationally based on the witness' perception and is helpful to a clear understanding of his or her testimony or the determination of a fact in issue.
  – *State v. Johnson*, 810 P.2d 1138, 1141 (Idaho Ct. App. 1991)

- Idaho appellate courts have held that a trial court may, in its discretion, permit a lay witness to state an impression or conclusion about a matter of fact within his or her knowledge. It is the underlying factual basis of the witness' testimony that is at issue, not the fact that it is offered as an opinion.
  – *State v. Johnson*, 810 P.2d 1138, 1141 (Idaho Ct. App. 1991)

D. Exclusion of Witnesses from the Courtroom

- Allowing exceptions to or deviations from an exclusion order is within the trial court's discretion.
  – *State v. Cardell*, 970 P.2d 10, 14 (Idaho 1998)

- Unless there exists proof indicating that the presence of the witness has prejudiced the defendant, the trial court's authorization to permit a witness to testify after violating an exclusion order will not be regarded as an abuse of discretion.
  – *State v. Cardell*, 970 P.2d 10, 14 (Idaho 1998)

- The defendant has the burden of proof to show how the testimony might have been tainted as a result of the witness having exposure to additional testimony in the courtroom.
  – *State v. Cardell*, 970 P.2d 10, 14 (Idaho 1998)

E. Hearsay Exceptions

1. Statements Made by a Child

- Statements made by a child under the age of 10 years describing any act of sexual abuse, physical abuse, or other criminal conduct committed with or upon the child, although not otherwise admissible by statute or court rule, are admissible in evidence after a proper foundation has been laid in accordance with the Idaho rules of evidence in any proceedings under the Child Protective Act, or in any criminal proceedings in the courts of the state of Idaho if the:
  (1) court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statements provide sufficient indicia of reliability; and
  (2) child either:
    (a) testifies at the proceedings; or

(b) is unavailable as a witness.

IDAHO CODE § 19-3024.

– *State v. Hester*, 760 P.2d 27, 31 (Idaho 1988)

a. Unavailable as a Witness

- A child is unavailable as a witness when the child is unable to be present or to testify at the hearing because of death or a then existing physical or mental illness or infirmity, provided that when the child is unavailable as a witness, such statements may be admitted only if there is corroborative evidence of the act.
  – *State v. Hester*, 760 P.2d 27, 31 (Idaho 1988)

b. Notice to the Adverse Party

- Statements may not be admitted unless the proponent of the statements notifies the adverse party of his or her intention to offer the statements and the particulars of the statements sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statements.
  – *State v. Hester*, 760 P.2d 27, 31 (Idaho 1988)

2. Excited Utterance

- Hearsay will be admissible if the out-of-court declaration is a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. IDAHO R. EVID. 803(2).
  – *State v. Parkinson*, 909 P.2d 647, 654 (Idaho Ct. App. 1996)

a. Requirements

- There are two requirements for the excited-utterance hearsay exception:
  (1) there must be an occurrence or event sufficiently startling to render inoperative the normal reflective thought processes of an observer; and
  (2) the statement must have been the declarant's spontaneous reaction to the occurrence or event and not the result of reflective thought.
  – *State v. Field*, 165 P.3d 273, 281-282 (Idaho 2007)
  – *State v. Parkinson*, 909 P.2d 647, 654 (Idaho Ct. App. 1996)

b. Factors Considered by Court

- Factors that the trial court can consider include:
  (1) the time lapse between the startling event and the statement;
  (2) the nature of the condition or event;
  (3) the age and condition of the declarant;
  (4) the presence or absence of self-interest; and
  (5) whether the statement was volunteered or made in response to a question.
  – *State v. Poe*,[++] 88 P.3d 704, 723 (Idaho 2004)

c. Judicial Discretion

- Whether a statement falls within the excited-utterance exception is a question that is committed to the sound discretion of the trial court.
  – *State v. Parkinson*, 909 P.2d 647, 654 (Idaho Ct. App. 1996)

3. Residual Exception

- The admissibility of hearsay pursuant to the residual exception provided in Idaho Rule of Evidence 803(24) depends upon the trustworthiness of the evidence and the necessity for its use.
  – *State v. Hester*, 760 P.2d 27, 35 (Idaho 1988)

- A statement not specifically covered by any of the enumerated hearsay exceptions, but having equivalent circumstantial guarantees of trustworthiness, may be admitted into evidence if the court determines the following;
  (1) the statement has circumstantial guarantees of trustworthiness equivalent to those provided for in the other hearsay exceptions;
  (2) the statement is offered as evidence of a material fact;
  (3) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
  (4) the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.
  – *State v. Hester*, 760 P.2d 27, 36 (Idaho 1988)
  – *State v. Ransom*, 864 P.2d 149, 154 (Idaho 1993)

- A statement may not be admitted under the residual exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the

statement and the particulars of it, including the name and address of the declarant.
– *State v. Hester*, 760 P.2d 27, 36 (Idaho 1988)
– *State v. Ransom*, 864 P.2d 149, 154 (Idaho 1993).

- A statement will not be upheld as admissible under the residual exception on appeal if the trial court did not make findings of fact that the statement meets all the requirements of the residual exception.
  – *State v. Field*, 165 P.3d 273, 281 (Idaho 2007)

IX. Prior Acts, Crimes, and Wrongs

A. Inadmissible

1. Generally

- Proof of other crimes, wrongs, or acts is inadmissible if introduced to prove the character of a person to show conduct is in conformity with the character of that person. IDAHO R. EVID. 404(b).
  – *State v. Avila*, 49 P.3d 1260, 1262 (Idaho Ct. App. 2002)
  – *State v. Byington*, 977 P.2d 211, 219 (Idaho Ct. App. 1998)
  – *State v. Eytchison*, 30 P.3d 988, 993 (Idaho Ct. App. 2001)
  – *State v. Field*, 165 P.3d 273, 284 (Idaho 2007)
  – *State v. Hoots*, 961 P.2d 1195, 1196 (Idaho 1998)

- Evidence of prior crimes or wrongs is inadmissible to prove the defendant's character or propensity to commit such acts.
  – *State v. Blackstead*, 878 P.2d 188, 191 (Idaho Ct. App. 1994)

2. Child-Sexual Abuse

- Proof that an accused was formerly investigated, charged, and found guilty of child-sexual abuse would constitute evidence of another crime and would normally not be admissible into evidence.
  – *State v. Cannady*, 44 P.3d 1122, 1127 (Idaho 2002)

3. Juvenile Adjudications

a. Generally Inadmissible

- The right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. Federal Rule of Evidence 609(d) indicates that one of those legitimate interests is the confidentiality of juvenile adjudications.
  – *State v. Schwartzmiller*, 685 P.2d 830, 833 (Idaho 1984)

b. Exception

- Juvenile adjudications are generally inadmissible but may be allowed if the:
  (1) adjudication would be admissible against an adult; and
  (2) court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.
  FED. R. EVID. 609(d).
  – *State v. Schwartzmiller*, 685 P.2d 830, 833 (Idaho 1984)

B. Admissible

- Evidence of other crimes, wrongs, or acts may be admitted into evidence if such acts are probative for other reasons, and relevant to prove motive, intent, absence of mistake, absence of accident, a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, the identity of the person charged with the commission of the crime on trial, and other similar issues. IDAHO R. EVID. 404(b).
  – *State v. Avila*, 49 P.3d 1260, 1262 (Idaho Ct. App. 2002)
  – *State v. Blackstead*, 878 P.2d 188, 191 (Idaho Ct. App. 1994)
  – *State v. Boothe*, 646 P. 2d 429, 431-32 (Idaho Ct. App. 1982)
  – *State v. Byington*, 977 P.2d 211, 219 (Idaho Ct. App. 1998)
  – *State v. Eytchison*, 30 P.3d 988, 993 (Idaho Ct. App. 2001)
  – *State v. Hoots*, 961 P.2d 1195, 1196 (Idaho 1998)
  – *State v. Kremer*, 160 P.3d 443, 449 (Idaho Ct. App. 2007)
  – *State v. Lippert*, 181 P.3d 512, 517 (Idaho Ct. App. 2007)
  – *State v. Marks*, 819 P.2d 581, 585 (Idaho Ct. App. 1991)

1. Common Plan or Scheme

- The scope of the "common plan or scheme" exception is not well defined and it tends to overlap the intent and identity exceptions
  – *State v. Roach*, 712 P. 2d 674, 676 (Idaho Ct. App. 1985)

- Idaho cases formulate the exception as allowing other-crimes evidence to prove a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to prove the other.
  – *State v. Roach*, 712 P. 2d 674, 676 (Idaho Ct. App. 1985)

2. *Res Gestae*: "Complete Story Principle"

- *Res gestae* refers to other acts that occur during the commission of or in close temporal proximity to the charged offense, which must be described to complete the story of the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings.
  – *State v. Blackstead*, 878 P.2d 188, 192 (Idaho Ct. App. 1994)

- *Res gestae* or the "Complete Story Principle" is an exception to the prohibition of other misconduct evidence only where the charged act and the uncharged act are so inseparably connected that the jury cannot be given a rational and complete presentation of the alleged crime without reference to the uncharged misconduct.
  – *State v. Blackstead*, 878 P.2d 188, 193 (Idaho Ct. App. 1994)

- Facts inseparably linked and related to the chain of events of which the act charged in the information is a part are allowed to be admitted into evidence despite the fact that the full story proves the commission of other offenses.
  – *State v. Avila*, 49 P.3d 1260, 1263 (Idaho Ct. App. 2002)

3. Corroboration of the Victim's Testimony

- An exception to the rule against admitting evidence of prior criminal activity involves allowing the admission of similar acts of sexual misconduct between a defendant and the victim or between the defendant and another witness, for corroboration of the victim's testimony in sex-crime cases.
  – *State v. Boothe*, 646 P. 2d 429, 432 (Idaho Ct. App. 1982)
  – *State v. Law*, 39 P.3d 661, 666 (Idaho Ct. App. 2002)
  – *State v. Moore*, 819 P.2d 1143, 1146 (Idaho 1991)

- Although corroboration is no longer required in all sex-crime cases, due to the particular proof problems in sex-crime cases involving minor victims, corroborating evidence may still be relevant.
  – *State v. Moore*, 819 P.2d 1143, 1145 (Idaho 1991)
  – *State v. Spor*, 1 P.3d 816, 820 (Idaho Ct. App. 2000)

a. Lewd Conduct, Rape, or Sexual Abuse of Minor

- When a defendant is charged with lewd conduct, rape, or sexual abuse of a minor, evidence of similar acts of sexual misconduct between a defendant and the victim is admissible for corroboration purposes.
  – *State v. Spor*, 1 P.3d 816, 820 (Idaho Ct. App. 2000)

b. Credibility of a Young Child

- Corroborative evidence in sex-crime cases involving youthful victims is often times necessary to establish the credibility of a young child.
  – *State v. Moore*, 819 P.2d 1143, 1146 (Idaho 1991)

c. Proof of Evidentiary Plan or Pattern

- Evidence of all the incidents of abuse, taken together, may provide an evidentiary plan or pattern that tends to make the alleged incidents more plausible and probable.
  – *State v. Law*, 39 P.3d 661, 667 (Idaho Ct. App. 2002)

4. General Plan to Exploit and Abuse

- When a defendant is charged with lewd conduct with or sexual abuse of a minor, testimony of the defendant's prior sexual misconduct may be admissible if it shows a general plan to exploit and sexually abuse an identifiable group of young female victims. Such testimony is relevant as to the credibility of the victim.
  – *State v. Hoots*, 961 P.2d 1195, 1197 (Idaho 1998)

- Not all testimony of prior sexual misconduct will fall under the protective cloak of establishing a defendant's general strategy to exploit and abuse a particular group of persons. Instead, the proffered testimony must pass muster under Idaho Rule Evidence 403.
  – *State v. Phillips*, 845 P.2d 1211, 1212 (Idaho 1993)

5. Prior Felony Conviction

- For the purposes of attacking the credibility of a witness, evidence of the fact that the witness has been convicted of a felony and the nature of the felony shall be admitted if elicited from the witness or established by public record, but only if the court determines in a hearing outside the presence of the jury that the fact of the prior conviction or the nature of the prior conviction, or both, are relevant to the credibility of the witness and that the probative value of admitting this evidence outweighs its prejudicial effect to the party offering the witness. IDAHO R. EVID. 609(a).
  – *State v. Thompson*, 977 P.2d 890, 892 (Idaho 1999)

a. Two-Prong Test

- The test to determine whether a prior felony conviction is admissible is as follows:
  (1) whether the evidence is relevant to the credibility of the witness; and
  (2) whether the probative value of the evidence outweighs the unfair prejudicial effect to the party offering the witness.
  – *State v. Muraco*, 968 P.2d 225, 227 (Idaho 1998)
  – *State v. Thompson*, 977 P.2d 890, 892 (Idaho 1999)

b. Weighing of Probative Value Versus Prejudicial Effect

- When weighing the probative value of the defendant's prior conviction against its prejudicial impact, courts ought to take into account the:
  (1) impeachment value of the prior crime;
  (2) remoteness of the prior conviction;
  (3) witness' criminal history;
  (4) similarity between the past crime and the crime charged;
  (5) importance of the witness' testimony;
  (6) centrality of the credibility issue; and
  (7) nature and extent of the witness' criminal record as a whole.
  – *State v. Thompson*, 977 P.2d 890, 895 (Idaho 1999)

6. Sex Crimes Committed Against Minors

a. Generally

- In establishing whether a previous conviction can be admitted for purposes of impeachment, a sexual crime committed against a minor child falls within the group of crimes that, while not directly showing a propensity to falsify, does disclose a disregard for the rights of others, which one might reasonably expect to express itself in giving false testimony if such would be advantageous to the witness.
  – *State v. Muraco*, 968 P.2d 225, 227 (Idaho 1998)

b. Remoteness

- To be admissible, the evidence must not be too remote in time, and there must be some logical connection between the fact sought to be proved and the evidence of prior sexual misconduct.
  – *State v. Marks*, 819 P.2d 581, 585 (Idaho Ct. App. 1991)
  – *State v. Roach*, 712 P. 2d 674, 676 (Idaho Ct. App. 1985)

7. Rape-Shield Statute

a. General Rule

- In a criminal case in which a person is accused of a sex crime, evidence of a victim's past sexual behavior other than reputation or opinion evidence is not admissible unless such evidence other than reputation or opinion evidence is admitted in accordance with Idaho Rule of Evidence 412(c) and is evidence of past sexual behavior with persons other than the

accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury. IDAHO R. EVID. 412(b)(2).
– *State v. Self*, 85 P.3d 1117, 1121 (Idaho Ct. App. 2003)

b. Rule 412(c)

i. Generally

- Idaho Rule of Evidence 412(c) sets forth certain notice requirements that must be met by a party requesting to admit evidence of an alleged victim's past sexual behavior.
  – *State v. Self*, 85 P.3d 1117, 1121 (Idaho Ct. App. 2003)

- The Rule also provides that if the evidence is relevant and the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible at trial. IDAHO R. EVID. 412(c)(3).
  – *State v. Self*, 85 P.3d 1117, 1121 (Idaho Ct. App. 2003)

ii. Limitations on a Defendant's Right to Present a Defense

- A defendant's Sixth Amendment right to present a defense may be limited by Rule 412.
  – *State v. Self*, 85 P.3d 1117, 1121 (Idaho Ct. App. 2003)

- A defendant has no right to present irrelevant evidence and even if evidence is relevant, it may be excluded in certain cases.
  – *State v. Harvey*, 129 P.3d 1276, 1279 (Idaho Ct. App. 2006)
  – *State v. Hensley*, 187 P.3d 1227, 1233 (Idaho 2008)
  – *State v. Self*, 85 P.3d 1117, 1121 (Idaho Ct. App. 2003)

- The State has a legitimate interest in protecting rape victims against unwarranted invasions of privacy and harassment regarding their sexual conduct.
  – *State v. Self*, 85 P.3d 1117, 1121 (Idaho Ct. App. 2003)

- Trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally

relevant.
– *State v. Harvey*, 129 P.3d 1276 (Idaho Ct. App. 2006)
– *State v. Self*, 85 P.3d 1117, 1121 (Idaho Ct. App. 2003)

c. Prior Allegations of Sexual Abuse

- Evidence of a prior allegation of sexual abuse may be admissible if it is relevant, if it falls within the scope of Rule 412, and if the probative value of the evidence outweighs the danger of unfair prejudice.
  – *State v. Self*, 85 P.3d 1117, 1121 (Idaho Ct. App. 2003)

8. Credibility

- Evidence of prior sexual misconduct is admissible where relevant to the parties' credibility.
  – *State v. Moore*, 819 P.2d 1143, 1146 (Idaho 1991)
  – *State v. Phillips*, 845 P.2d 1211, 1212 (Idaho 1993)

a. Accurate Assessment of Parties' Credibility

- Hearing detailed testimony about prior uncharged incidents may render the jury better able to compare patterns and methods, details and generalities, consistencies and discrepancies, and thereby make a more meaningful and accurate assessment of the parties' credibility.
  – *State v. Scovell*, 38 P.3d 625, 628 (Idaho Ct. App. 2001)

b. Evidence of Common Criminal Design

- Where relevant to the credibility of the parties, evidence of a common criminal design is admissible.
  – *State v. Moore*, 819 P.2d 1143, 1146 (Idaho 1991)

c. False Accusations of Sexual Misconduct

- Evidence of false accusations of similar sexual misconduct is admissible on the issue of the victim's credibility; however, the allegations must be demonstrably false.
  – *State v. Schwartzmiller*, 685 P.2d 830, 833 (Idaho 1984)

- Evidence concerning the occurrence of false sexual-abuse allegations must be based upon more than anecdotal and subjective information.
  – *State v. Aspeytia*, 936 P.2d 210, 216 (Idaho Ct. App. 1997)

9. Impeachment

a. Admissible

- Evidence offered for the purpose of impeachment may be admissible, although not specifically listed in the Idaho Rules of Evidence.
  – *State v. Eytchison*, 30 P.3d 988, 993 (Idaho Ct. App. 2001)

b. Relevance of Uncharged Misconduct

- Although evidence of uncharged misconduct may be admitted for impeachment purposes, the evidence must be relevant to the impeachment.
  – *State v. Eytchison*, 30 P.3d 988, 994 (Idaho Ct. App. 2001)

c. Prior Juvenile Adjudication

- While the juvenile's adjudication cannot be used as a general impeachment of his or her character as a truthful person, it can be used as a more particular attack on his or her credibility, by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of him or her as they may relate directly to issues or personalities in the case at hand.
  – *State v. Schwartzmiller*, 685 P.2d 830, 832-33 (Idaho 1984)

C. Relevance

- The first question to be answered in determining the admissibility of "other-crimes" evidence is whether the evidence is relevant for a purpose other than to show character and conduct in conformity with that character.
  – *State v. Avila*, 49 P.3d 1260, 1262 (Idaho Ct. App. 2002)

1. Two-Tiered Analysis

- When the evidence of a defendant's other crimes, wrongs, or acts is offered, a two-part standard must be met. First, the evidence must be relevant to a material and disputed issue in the case. Second, the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice.
  – *State v. Avila*, 49 P.3d 1260, 1262 (Idaho Ct. App. 2002)
  – *State v. Blackstead*, 878 P.2d 188, 191 (Idaho Ct. App. 1994)
  – *State v. Byington*, 977 P.2d 211, 219 (Idaho Ct. App. 1998)
  – *State v. Cannady*, 44 P.3d 1122, 1127 (Idaho 2002)
  – *State v. Cross*, 978 P.2d 227, 230 (Idaho 1999)

– *State v. Hoots*, 961 P.2d 1195, 1196-97 (Idaho 1998)
– *State v. Law*, 39 P.3d 661, 666 (Idaho Ct. App. 2002)
– *State v. Marks*, 819 P.2d 581, 585 (Idaho Ct. App. 1991)

2. Sex Offenses and Similar Crimes

a. Substantiation of the Child Victim's Testimony/Credibility

i. Testimony

- In view of the particular proof problems often presented in cases of sexual offenses committed against children, evidence of the defendant's other sex offenses against minor victims may be relevant to substantiate the child victim's testimony.
  – *State v. Diggs*, 108 P.3d 1003, 1006 (Idaho Ct. App. 2005)
  – *State v. Law*, 39 P.3d 661, 666 (Idaho Ct. App. 2002)

- Evidence of similar acts of sexual misconduct between a defendant and the victim or between the defendant and another witness is admissible for corroboration of the victim's testimony in sex crime cases.
  – *State v. Scovell*, 38 P.3d 625, 628 (Idaho Ct. App. 2001)

ii. Credibility

- The Idaho Supreme Court has held that in prosecutions for sexual molestation of a child, evidence of uncharged incidents of the defendant's sexual misconduct with the same victim or with other children is relevant to demonstrate the young victim's credibility.
  – *State v. Scovell*, 38 P.3d 625, 628 (Idaho Ct. App. 2001)

D. Remoteness

- The issue of remoteness generally goes to the weight of the evidence, not to its admissibility.
  – *State v. Law*, 39 P.3d 661, 667 (Idaho Ct. App. 2002)

- Remoteness and similarity must be considered together because the two concepts are so closely related. A prior bad act, despite its remoteness, may still be relevant if it is strikingly similar to the charged offense. Conversely, less similarity may be required where the prior act is closer in time to the charged incident.
  – *State v. Law*, 39 P.3d 661, 667 (Idaho Ct. App. 2002)

X. Character Evidence

A. Generally

- Evidence of a person's character or a trait of his or her character is not admissible for the purpose of proving that he or she acted in conformity therewith on a particular occasion, except evidence of:
  (1) a pertinent trait of his or her character offered by an accused, or by the prosecution to rebut the same;
  (2) a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; or
  (3) evidence of the character of a witness, as provided in Idaho Rules of Evidence 607, 608, and 609.
  – *State v. Hester*, 760 P.2d 27, 33 (Idaho 1988)

B. Expert Testimony

- Evidence of a person's character, even if in the form of an expert opinion, is prohibited. IDAHO R. EVID. 404.
  – *State v. Hester*, 760 P.2d 27, 33 (Idaho 1988)

XI. Scienter Evidence: Specific Intent

A. Proof of Intent

- Where specific intent is an essential element of a crime, it is sufficient to show that intent by circumstantial evidence. Direct evidence is not required.
  – *State v. Bronson*, 732 P.2d 336, 338 (Idaho Ct. App. 1987)
  – *State v. Parkinson*, 909 P.2d 647, 656 (Idaho Ct. App. 1996)

- One's intent may be proved by his or her acts and conduct.
  – *State v. Bronson*, 732 P.2d 336, 338 (Idaho Ct. App. 1987)
  – *State v. Parkinson*, 909 P.2d 647, 656 (Idaho Ct. App. 1996)

B. Inference of Intent

- The intent element may be inferred by the jury based on the actions and the surrounding circumstances.
  – *State v. Byington*, 977 P.2d 211, 222 (Idaho Ct. App. 1998)

C. Question for the Jury

- The intent of the defendant is an issue of fact for the jury to decide.
  – *State v. Byington*, 977 P.2d 211, 222 (Idaho Ct. App. 1998)

XII. Circumstantial Evidence: Proving the Age of the Defendant

A. Jury Observations and Inferences

- Jurors are entitled to make observations and draw inferences as to the age of an accused or of a witness from that individual's physical appearance; however, some jurisdictions hold that some additional evidence of age is required beyond the jury's observation of the individual, at least in those cases where the record does not show that the individual's physical appearance indicates an age markedly above that required to be proven.
  – *State v. Espinoza*, 990 P.2d 1229, 1232 (Idaho Ct. App. 1999)
  – *State v. Willard*, 933 P.2d 116, 118 (Idaho Ct. App. 1997)

B. Appellate Review

- A proper analysis of whether there was sufficient circumstantial evidence of the defendant's age entails a two-step process. First, the reviewing court must determine whether the record reveals that the defendant's physical appearance was such that a rational juror could find that the age element was satisfied solely from the juror's observation of the defendant. If not, the court must then determine whether there was other circumstantial evidence adequate to support the jury's finding that the defendant was of the requisite age.
  – *State v. Espinoza*, 990 P.2d 1229, 1232 (Idaho Ct. App. 1999)

XIII. Privileges

No relevant state cases reported.

IDAHO
Age of Child Victim

I. Proving the Age of a Child Victim

A. Circumstantial Evidence

- The prosecution may rely upon circumstantial evidence to prove the age element of a crime.
  – *State v. Espinoza*, 990 P.2d 1229, 1232 (Idaho Ct. App. 1999)

B. Jury Observations and Inferences

- Jurors are entitled to make observations and draw inferences as to the age of an accused or of a witness from that individual's physical appearance; however, some jurisdictions hold that some additional evidence of age is required beyond the jury's observation of the individual, at least in those cases where the record does not show that the individual's physical appearance indicates an age markedly above that required to be proven.
  – *State v. Espinoza*, 990 P.2d 1229, 1232 (Idaho Ct. App. 1999)
  – *State v. Willard*, 933 P.2d 116, 118 (Idaho Ct. App. 1997)

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

No relevant state cases reported.

III. Sexual Battery of Minor Child: Mistake of Age

- Mistake of age is not a defense to sexual battery of a minor child who is 16 or 17 years of age.
  – *State v. Oar*, 924 P.2d 599, 601 (Idaho 1996)

IDAHO
Multiple Counts

I. What Constitutes an Item of Child Pornography?

No relevant state cases reported.

II. Consolidation of Indictments: Joinder

- Two or more offenses may be charged on the same complaint if the offenses are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan. IDAHO CRIM. R. 8(a).
  – *State v.Field*, 165 P.3d 273, 278 (Idaho 2007)
  – *State v. Schwartzmiller*, 685 P.2d 830, 833-34 (Idaho 1984)

III. Double Jeopardy

A. Generally

- The constitutional prohibition against double jeopardy safeguards a defendant from conviction for both a greater- and a lesser-included offense.
  – *State v. Colwell*, 908 P.2d 156, 159 (Idaho Ct. App. 1995)

- Double jeopardy also protects against a subsequent prosecution for the same offense after acquittal, protects against another prosecution for the same offense after conviction, and protects against multiple punishments for the same offense.
  – *State v. Colwell*, 908 P.2d 156, 159 (Idaho Ct. App. 1995)

B. Attachment

- Jeopardy attaches when a jury is sworn.
  – *State v. Lewis*, 848 P.2d 394, 403 (Idaho 1993)

C. Two-Step Analysis

- The U.S. Supreme Court fashioned a two-step-double-jeopardy analysis: apply the *Blockburger* test and if the prosecution is not barred under *Blockburger*, then apply the *Grady* test.
  – *State v. Lewis*, 848 P.2d 394, 402 (Idaho 1993)

1. *Blockburger* Test

- For the *Blockburger* test, the inquiry is whether the two or more offenses have identical statutory elements or whether one is a lesser-included offense of the other.
  – *State v. Colwell*, 908 P.2d 156, 159 (Idaho Ct. App. 1995)
  – *State v. Lewis*, 848 P.2d 394, 402 (Idaho 1993)

- 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 an additional fact which the other does not.
  – *State v. Colwell*, 908 P.2d 156, 159 (Idaho Ct. App. 1995)
  – *State v. Hussain*, 139 P.3d 777, 779 (Idaho Ct. App. 2006)

- A single act may be an offense against two statues, and if each statute requires proof of an additional fact that the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.
  – *State v. Colwell*, 908 P.2d 156, 159 (Idaho Ct. App. 1995)

2. *Grady* Test

- For the *Grady* test, the critical inquiry is what conduct the State will prove.
  – *State v. Lewis*, 848 P.2d 394, 402 (Idaho 1993)

a. Subsequent Prosecutions

- In addition to the traditional *Blockburger* test, the double-jeopardy clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the State will prove conduct that constitutes an offense for which the defendant has already been prosecuted.
  – *State v. Lewis*, 848 P.2d 394, 401 (Idaho 1993)

b. Overlap in Proof between Two Prosecutions

- A mere overlap in proof between two prosecutions does not establish a double-jeopardy violation.
  – *State v. Lewis*, 848 P.2d 394, 403 (Idaho 1993)

D. Lesser-Included Offenses

1. Generally

- A jury may properly find a defendant guilty of an offense different from that charged in the information if the offense is an offense included in the crime charged.
  – *State v. Colwell*, 861 P.2d 1225, 1229 (Idaho Ct. App. 1993)
  – *State v. Gilman*, 673 P.2d 1085, 1087 (Idaho Ct. App. 1983)

2. "Included Offense" Defined

- An included offense is one that is necessarily committed while committing the crime charged, or the essential elements of which are alleged as the manner or means by which the charged offense has been committed.
  – *State v. Colwell*, 861 P.2d 1225, 1229 (Idaho Ct. App. 1993)
  – *State v. Drennon*, 883 P. 2d 704, 710 (Idaho Ct. App. 1994)

- An offense may also be deemed an included offense if the evidence adduced at trial shows that such an offense necessarily was committed during the commission of the charged offense.
  – *State v. Colwell*, 861 P.2d 1225, 1229 (Idaho Ct. App. 1993)

3. Attempt Crimes

- The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.
  – *State v. Gilman*, 673 P.2d 1085, 1087 (Idaho Ct. App. 1983)

E. Sexual Abuse and Lewd Conduct with a Child

- The offense of sexual abuse of a child is included in a charge of lewd conduct with a child; however, this may not necessarily be so in every case. It is the facts alleged rather than the designation of the offense that control.
  – *State v. Drennon*, 883 P. 2d 704, 711 (Idaho Ct. App. 1994)

F. Waiver of Double Jeopardy

1. Generally

- A defendant's motion for mistrial removes any bar by the double-jeopardy clause of the Fifth and Fourteenth Amendments to retrial.
  – *State v. Hansen*, 904 P.2d 945, 949 (Idaho Ct. App. 1995)

2. Exception

- An exception to the general bar exists when the defendant's motion is based on prosecutorial misconduct that was intended to provoke the defendant into moving for a mistrial.
  – *State v. Hansen*, 904 P.2d 945, 949 (Idaho Ct. App. 1995)

IDAHO
Defenses

I. Alibi

- The courts generally recognize that a defendant who has had a close association with a minor over a protracted period of time and who is charged with a continuous conduct of abuse will have no practical defense of alibi.
  – *State v. Taylor*, 797 P.2d 158, 160 (Idaho Ct. App. 1990)

II. Consent

A. Sexual Battery of a Minor Child

- Consent is not a defense to sexual battery of a minor child who is 16 or 17 years of age.
  – *State v. Oar*, 924 P.2d 599, 602 (Idaho 1996)

B. Lewd or Lascivious Conduct

- Consent is not a defense to the offense of lewd or lascivious conduct.
  – *State v. Schwartzmiller*, 685 P.2d 830, 835 (Idaho 1984)

III. Diminished Capacity

A. Addiction to the Internet

No relevant state cases reported.

B. Insanity

No relevant state cases reported.

IV. First Amendment

No relevant state cases reported.

V. Impossibility

A. Attempt Crimes

- Impossibility is not a recognized defense to attempt crimes.
  – *State v. Curtiss*, 65 P.3d 207, 211 (Idaho Ct. App. 2002)
  – *State v. Glass*, 87 P.3d 302, 305 (Idaho Ct. App. 2003)

B. Factual Impossibility

- The attempt statute provides no exception for those who intend to commit a crime but fail because they were unaware of some fact that would have prevented them from completing the intended crime.
  – *State v. Curtiss*, 65 P.3d 207, 210 (Idaho Ct. App. 2002)
  – *State v. Glass*, 87 P.3d 302, 305 (Idaho Ct. App. 2003)

C. Legal Impossibility

No relevant state cases reported.

VI. Manufacturing Jurisdiction

No relevant state cases reported.

VII. Mistake

A. Of Fact: The Victim's Age

1. Sexual Offenses Committed Against Minors

- Sexual offenses against minors have long been a recognized judicial exception to the general rule that a mistake of fact is a defense to a criminal charge.
  – *State v. Oar*, 924 P.2d 599, 602 (Idaho 1996)\

2. Sexual Battery of Minor Child 16 or 17 Years of Age

- Mistake of age is not a defense to sexual battery of a minor child who is 16 or 17 years of age.
  – *State v. Oar*, 924 P.2d 599, 601 (Idaho 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.

XI. Statute of Limitations

A. Commission of a Felony Against a Minor

- Prosecutions for any felony committed upon or against a minor child must be commenced within five years after the commission of the offense by either the filing of the complaint or a finding of an indictment. IDAHO CODE § 19-402.
  – *State v. Claxton*, 918 P.2d 1227, 1230 (Idaho Ct. App. 1996)

B. Sexual Abuse of Child

- A prosecution under the statute regarding sexual abuse of a child under the age of 16 years must be commenced within 5 years after the date the child reaches 18 years of age. IDAHO CODE § 19-402(2).
  – *State v. Claxton*, 918 P.2d 1227, 1230 (Idaho Ct. App. 1996)

C. Lewd Conduct with a Minor Child

- A prosecution under the statute regarding lewd conduct with a minor child under the age of 16 years must be commenced within 5 years after the date the child reaches 18 years of age. IDAHO CODE § 19-402(2).
  – *State v. Claxton*, 918 P.2d 1227, 1230 (Idaho Ct. App. 1996)

IDAHO

Sentencing Issues

I. Pre-Sentence Investigation and Reports

- Despite the fact that a defendant may waive his or her right to have a pre-sentence investigation report conducted before sentencing, the trial court's discretion to do without a pre-sentence report is not absolute.
  – *State v. Carey*, 834 P.2d 899, 903 (Idaho Ct. App. 1992)

- The evidence must positively establish a legitimate and convincing reason to dispense with the report, and there must exist enough information from independent sources to allow the court to fashion a suitable sentence.
  – *State v. Carey*, 834 P.2d 899, 903 (Idaho Ct. App. 1992)

- Sentencing courts are permitted to take into consideration pre-sentence investigation results if the reliability of the material included in the report is insured by the defendant's opportunity to offer favorable evidence, to inspect all the information contained in the pre-sentence investigation report, and to clarify or refute adverse evidence.
  – *State v. Campbell*, 854 P.2d 265, 269 (Idaho Ct. App. 1993)

A. Consideration of Evidence

- The following information may be considered by the court:
  (1) hearsay evidence;
  (2) evidence of previously dismissed charges against the accused; and
  (3) evidence of charges which have not been established,
  if the defendant has been given the opportunity to raise objections, or to refute the evidence of his alleged wrongdoing; however, the court may not take into consideration such material if there exists no reasonable basis to regard the information as reliable, such as when the information is merely conjecture or speculation.
  – *State v. Campbell*, 854 P.2d 265, 269 (Idaho Ct. App. 1993)

1. Dismissed Criminal Charges

- Dismissed criminal charges may be included within the pre-sentence report.
  – *State v. Atwood*, 832 P.2d 1134, 1136 (Idaho Ct. App. 1992)

2. Evidence Not Admissible at Trial

a. Generally

- The trial judge has discretion in considering material included in the pre-sentence report that would not have been admissible according to the rules of evidence applicable at trial. IDAHO CRIM. R. 32(e).
  – *State v. Campbell*, 854 P.2d 265, 269 (Idaho Ct. App. 1993)

b. Inferences and Assumptions

- While not all material in a pre-sentence report must be in the form of sworn testimony and be admissible evidence in trial, inferences and assumptions are not allowed to be included in the pre-sentence report.
  – *State v. Campbell*, 854 P.2d 265, 269 (Idaho Ct. App. 1993)

B. Analysis of the Defendant's Condition

- Whenever a full pre-sentence report is ordered, it must contain the pre-sentence investigator's analysis of the defendant's condition.
  – *State v. Sabin*, 820 P.2d 375, 379 (Idaho Ct. App. 1991)

- The analysis of the defendant's condition contained in the pre-sentence report should include a complete summary of the pre-sentence investigator's view of the psychological factors surrounding either the commission of the crime or the defendant.
  – *State v. Sabin*, 820 P.2d 375, 379 (Idaho Ct. App. 1991)

- When appropriate, the analysis should also include a specific recommendation regarding a psychological examination and a plan of rehabilitation.
  – *State v. Sabin*, 820 P.2d 375, 379 (Idaho Ct. App. 1991)

C. Psychological Evaluations

1. Judicial Discretion

- A trial judge has discretion with regards to the requesting and the adequacy of a psychological evaluation.
  – *State v. Carey*, 834 P.2d 899, 903 (Idaho Ct. App. 1992)

- The pre-sentence investigator may recommend a psychological evaluation, but the decision as to whether to order a psychological evaluation is to be made by the sentencing judge; therefore, whether to order a psychological evaluation is a question left to the court's

discretion. IDAHO CRIM. R. 32.
– *State v. Puente-Gomez*, 827 P.2d 715, 718 (Idaho Ct. App. 1992)
– *State v. Sabin*, 820 P.2d 375, 378 (Idaho Ct. App. 1991)
– *State v. Wolfe*, 864 P.2d 170, 172 (Idaho Ct. App. 1993)

2. Examination of a Defendant for Evidence of Mental Condition

- If there is reason to believe the mental condition of the defendant will be a significant factor at sentencing and for good cause shown, the court shall appoint at least one psychiatrist or licensed psychologist to examine and report upon the mental condition of the defendant. IDAHO CODE § 19-2522.
  – *State v. Jones*, 974 P.2d 85, 88 (Idaho Ct. App. 1999)

3. The Defendant's Burden

- When a defendant fails to request a psychological evaluation or object to the pre-sentence investigation report on the ground that an evaluation has not been performed, he or she must demonstrate that by failing to order a psychological evaluation the court manifestly disregarded the provisions of Idaho Criminal Rule 32.
  – *State v. Jones*, 974 P.2d 85, 88 (Idaho Ct. App. 1999)

4. Psychosexual Evaluations

- Idaho's Sexual Offender Registration Act requires a psychosexual evaluation by a professional in all sexual-offense cases prior to sentencing. IDAHO CODE § 18-8316.
  – *State v. Jones*, 974 P.2d 85, 89 (Idaho Ct. App. 1999)

D. Comments Regarding Potential Success in Rehabilitation

- The pre-sentence report may make mention generally on the likelihood of the defendant's successfully finishing the term of probation; however, this rule does not mandate or require that such a comment be included within the report. IDAHO CRIM. R. 32(c).
  – *State v. Aspeytia*, 936 P.2d 210, 217 (Idaho Ct. App. 1997)

E. Examination of Pre-Sentence Investigation Reports By the Defendant

- A defendant and his or her counsel must be granted a full opportunity to inspect the pre-sentence investigation report so that, if the defendant wishes, he or she may clarify and defend against adverse matters. IDAHO CRIM. R. 32(g).
  – *State v. Campbell*, 854 P.2d 265, 269 (Idaho Ct. App. 1993)

- The accused will also be given a full opportunity to offer favorable evidence on his or her behalf throughout the proceeding concerning the determination of sentencing. IDAHO CRIM. R. 32(g).
  – *State v. Campbell*, 854 P.2d 265, 269 (Idaho Ct. App. 1993)

II. Sentencing Imposition

A. Court Discretion

1. Generally

- The ultimate decision on the length of a sentence is within the district court's discretion.
  – *State v. Arnold*, 769 P.2d 613, 614-15 (Idaho Ct. App. 1989)

- The district court is not bound by the State's sentencing recommendation.
  – *State v. Arnold*, 769 P.2d 613, 614-15 (Idaho Ct. App. 1989)

2. Punishment for Similar Offenses

- Not all crimes in like category require the same punishment.
  – *State v. Byington*, 977 P.2d 211, 224 (Idaho Ct. App. 1998)

- There may appropriately be differences in the sentences imposed between various offenders, depending upon the circumstances and nature of the offense and the character of the accused in his or her individual case.
  – *State v. Byington*, 977 P.2d 211, 224 (Idaho Ct. App. 1998)

B. Types of Sentencing

1. Consecutive Versus Concurrent

a. Court Discretion

- Decisions to determine if sentences should run either concurrently or consecutively is discretionary.
  – *State v. Alberts*, 824 P.2d 135, 138 (Idaho Ct. App. 1991)

- Trial courts are authorized by law to use discretion in ordering consecutive service of multiple sentences.
  – *State v. Alberts*, 824 P.2d 135, 138 (Idaho Ct. App. 1991)

b. Consecutive Sentences

- When an individual has been found guilty of two or more offenses, the imprisonment to which the defendant is sentenced

upon the second or other subsequent conviction, in the discretion of the court, may begin when the first term of imprisonment has terminated. Idaho Code § 18-308.
– *State v. Bello*, 19 P.3d 66, 69 (Idaho Ct. App. 2001)

- A sentence of incarceration can be made to run consecutive only to a previous term of imprisonment.
  – *State v. Bello*, 19 P.3d 66, 69 (Idaho Ct. App. 2001)

- The statute does not authorize a sentencing court to order a term of imprisonment to run consecutive to a term of probation.
  – *State v. Bello*, 19 P.3d 66, 69 (Idaho Ct. App. 2001)

2. Unified

a. Generally

- The Unified Sentencing Act applies to crimes committed on or after February 1, 1987.
  – *State v. Snapp*, 743 P.2d 1003, 1006 (Idaho Ct. App. 1987)

- The Act contains explicit statutory authority to combine the minimum periods of confinement prescribed in consecutive sentences, and then to place the inmate on parole during the ensuing indeterminate period(s).
  – *State v. Snapp*, 743 P.2d 1003, 1006 (Idaho Ct. App. 1987)

b. Effect of Good Behavior

- The Unified Sentencing Act states in part that throughout the minimum period of incarceration, the offender is not entitled or eligible for parole, release, credit, or a reduction of his or her sentence for good behavior, except for commendable service; however, the offender may be considered for parole eligibility or discharge at any point throughout the indeterminate period of his or her sentence.
  – *State v. Alberts*, 824 P. 2d 135, 137 (Idaho Ct. App. 1991)

c. Sentence Review

- With respect to sentences imposed under the Uniform Sentencing Act, the minimum period of confinement generally will be treated as the probable measure of confinement for the purpose of sentence review.
  – *State v. Alberts*, 824 P.2d 135, 138 (Idaho Ct. App. 1991)
  – *State v. Jones*, 974 P.2d 85, 87 (Idaho Ct. App. 1999)

- By focusing on this period, the court does not wholly disregard the aggregate length of the sentence, nor does it suggest that a prisoner will be entitled to parole when the minimum period has elapsed. The court does recognize that he or she will be eligible for parole at that time.
  – *State v. Alberts*, 824 P.2d 135, 138 (Idaho Ct. App. 1991)
  – *State v. Jones*, 974 P.2d 85, 87 (Idaho Ct. App. 1999)

3. Fixed Life

a. Reasonableness

- A fixed-life sentence may be regarded as a reasonable sentence if the crime is deemed so egregious that it calls for an unusually harsh measure of retribution and deterrence, or if the offender completely lacks any rehabilitative potential where incarceration until death is the only practicable solution or way of protecting society.
  – *State v. Bello*, 19 P.3d 66, 68 (Idaho Ct. App. 2001)

- In making a determination, a judge has complete information only in regard to retribution and deterrence, which are based on the nature of the offense.
  – *State v. Eubank*, 759 P.2d 926, 929 (Idaho Ct. App. 1988)

- The character of the offender is not completely known because it may evolve over time.
  – *State v. Eubank*, 759 P.2d 926, 929 (Idaho Ct. App. 1988)

- The judge must attempt to predict the defendant's future response to rehabilitative programs and the degree of risk he or she might pose to society if eventually released.
  – *State v. Eubank*, 759 P.2d 926, 929 (Idaho Ct. App. 1988)

b. Lewd and Lascivious Conduct

- Even though the offense of lewd and lascivious conduct with a minor child under 16 years of age is a severe offense, a fixed-life sentence is a harsh penalty and it must not be imposed gently.
  – *State v. Cross*, 978 P.2d 227, 232 (Idaho 1999)

- A fixed-life sentence for lewd and lascivious behavior necessitates a high level of sureness that the offender could never be safely returned back into society, or that the character

of the crime requires that the person spend the rest of his or her life imprisoned.
– *State v. Bello*, 19 P.3d 66, 68 (Idaho Ct. App. 2001)
– *State v. Cross*, 978 P.2d 227, 232 (Idaho 1999)

- Life sentences for lewd and lascivious behavior have been supported in instances where the perpetrator's conduct was considered violent, recurring, extremely cruel, or life threatening.
  – *State v. Bello*, 19 P.3d 66, 68 (Idaho Ct. App. 2001)
  – *State v. Cross*, 978 P.2d 227, 232 (Idaho 1999)

c. Appellate Review

- When the court reviews a fixed life sentence, the most important factors the court considers include the seriousness of the crime and/or the need to protect citizens or society from the accused.
  – *State v. Cannady*, 44 P.3d 1122, 1128 (Idaho 2002)

C. Severe Sentence After a New Trial

- Whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for doing so must affirmatively appear.
  – *State v. Colwell*, 908 P.2d 156, 161 (Idaho Ct. App. 1995)

- This rule implies a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence; however, when the sentence is pronounced by a different judge, the presumption does not apply and the defendant must show actual vindictiveness.
  – *State v. Colwell*, 908 P.2d 156, 161 (Idaho Ct. App. 1995)

D. Factors to Consider

1. Aggravating Factors

a. Age of Victim

No relevant state cases reported.

b. Distribution/Intent to Traffic

No relevant state cases reported.

c. Failure to Accept Responsibility

- It is not impermissible for a trial court to take into consideration a defendant's failure to admit responsibility in deciding whether rehabilitation efforts would be successful.
  – *State v. Brown*, 951 P.2d 1288, 1300 (Idaho Ct. App. 1998)

d. Number of Images

No relevant state cases reported.

e. Pattern of Activity for Sexual Exploitation: Habitual Offenders

i. Persistent-Violator Statute

- Any person convicted for the third time of the commission of a felony, whether the previous conditions were had within the state of Idaho or were had outside the state of Idaho, shall be considered a persistent violator of law, and on such third conviction shall be sentenced to a term in the custody of the State Board of Correction, which term shall be for not less than five years and such term may extend to life. IDAHO CODE § 19-2514.
  – *State v. Self*, 85 P.3d 1117, 1123 (Idaho Ct. App. 2003)

ii. Prohibition of Multiple Convictions

- Idaho appellate courts have adopted a general rule that prohibits multiple convictions entered on the same day or charged in the same information to be used to establish a defendant's status as a habitual offender.
  – *State v. Self*, 85 P.3d 1117, 1123 (Idaho Ct. App. 2003)

- The court has qualified the rule holding that the nature of the convictions in any situation must be examined to make certain that the general rule is appropriate.
  – *State v. Self*, 85 P.3d 1117, 1123 (Idaho Ct. App. 2003)

f. Sadistic, Masochistic or Violent Material

No relevant state cases reported.

g. Use of Computers

No relevant state cases reported.

2. Mitigating Factors

a. The Defendant's Mental Condition

i. Factors to Consider

- If a defendant's mental condition is a significant factor, the court is required to consider factors such as:
  (1) the extent to which the defendant is mentally ill;
  (2) the degree of illness or defect and level of functional impairment;
  (3) the prognosis for improvement or rehabilitation;
  (4) any risk of danger which the defendant may create for the public if not incarcerated, or the lack of such risk; and
  (5) the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law at the time of the offense charged.
  – *State v. Strand*, 50 P.3d 472, 476 (Idaho 2002)

- The sentencing court is not required to recite each of the factors listed. The record need only show that the court adequately considered the substance of the factors in arriving at its sentencing decision.
  – *State v. Strand*, 50 P.3d 472, 476 (Idaho 2002)

ii. Not a Controlling Factor

- Idaho law does not require that a defendant's mental condition be the controlling factor at sentencing.
  – *State v. Strand*, 50 P.3d 472, 476 (Idaho 2002)

- The defendant's mental condition is simply one of the factors that must be considered and weighed by the court at sentencing.
  – *State v. Strand*, 50 P.3d 472, 476 (Idaho 2002)

b. Allocution

- Before imposing a punishment, the court must give the defendant's attorney the chance to speak on the defendant's behalf and the court must speak to the defendant personally to see if he or she would like to make a statement on his own behalf and to offer any information for purposes of mitigating

the sentence. IDAHO CRIM. R. 33.
– *State v. Carey*, 834 P.2d 899, 902 (Idaho Ct. App. 1992)

- If the trial judge fails to give the right of allocution, it does not constitute grounds for overturning the judgment of conviction; however, it is required that the case be remanded to allow re-sentencing after the defendant is given the ability to speak.
  – *State v. Carey*, 834 P.2d 899, 903 (Idaho Ct. App. 1992)

- Giving the defense attorney the right to address the court on behalf of the defendant does not conform to Idaho Criminal Rule 33.
  – *State v. Carey*, 834 P.2d 899, 903 (Idaho Ct. App. 1992)

3. Victim Statements

- Sentencing courts are authorized, in non-capital cases, to take into consideration victim-impact statements and statements from victims who are asking for specific sentences to be imposed, provided that the court does not give too much weight to the victim statement by changing its emphasis from the offense and the perpetrator to the worth of the victim.
  – *State v. Campbell*, 854 P.2d 265, 271 (Idaho Ct. App. 1993)

E. Appellate Review

- The main consideration in evaluating a sentence is, and presumably always will be, the good order and protecting members of society. All other issues are, and shall be, subservient to that end.
  – *State v. Bello*, 19 P.3d 66, 69 (Idaho Ct. App. 2001)

- In reviewing a sentence, the question before the court is not whether the sentence imposed is one that the court would have chosen. Rather, if reasonable minds might differ as to the appropriateness of the sentence, the discretion vested in the district court will be respected.
  – *State v. Aspeytia*, 936 P.2d 210, 218-19 (Idaho Ct. App. 1997)

1. Independent Review of the Record

- When evaluating an exercise of sentencing discretion, the court conducts an independent review of the record, focusing upon the nature of the offense and the character of the offender.
  – *State v. Arnold*, 769 P.2d 613, 614 (Idaho Ct. App. 1989)

- No abuse of discretion occurs when a sentence is reasonable in light of the facts of the case.
  – *State v. Arnold*, 769 P.2d 613, 614 (Idaho Ct. App. 1989)

- A legal sentence will not be disturbed on appeal unless it is unreasonably harsh in view of the sentencing objectives of protecting society, deterrence, rehabilitation, and retribution.
  – *State v. Aspeytia*, 936 P.2d 210, 218 (Idaho Ct. App. 1997)

2. Reasonable Sentence

- A sentence of imprisonment will be deemed reasonable if it appears at the time of sentencing that imprisonment is essential to achieve the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution applicable to a given case.
  – *State v. Bello*, 19 P.3d 66, 68 (Idaho Ct. App. 2001)
  – *State v. Espinoza*, 990 P.2d 1229, 1233 (Idaho Ct. App. 1999)

a. Length of Confinement

- In establishing the reasonableness of the sentence imposed, the court of appeals looks to the probable or potential length of imprisonment or incarceration.
  – *State v. Campbell*, 854 P.2d 265, 271 (Idaho Ct. App. 1993)

b. Nature of the Offense and Character of the Offender

- When the court of appeals reviews whether a sentence is reasonable, the court conducts an independent review of the record, where it focuses on the nature of the offense and the character of the offender.
  – *State v. Campbell*, 854 P.2d 265, 271-72 (Idaho Ct. App. 1993)
  – *State v. Harshbarger*, 77 P.3d 976, 983 (Idaho Ct. App. 2003)

3. Excessive Sentence

- A sentence within the statutory maximum will not be deemed excessive unless the appellant shows that, under any reasonable view of the facts, the term of confinement is longer than appears necessary to accomplish the primary objective of protecting society, and achieving the related goals of deterrence of the individual and the public generally, the possibility of rehabilitation, and punishment or retribution for wrongdoing.
  – *State v. Arnold*, 769 P.2d 613, 614 (Idaho Ct. App. 1989)
  – *State v. Cross*, 978 P.2d 227, 231 (Idaho 1999)

- When the appellant asserts that the sentencing court imposed a very severe sentence, the reviewing court makes an independent review of

the evidence, taking into consideration the type of offense, character of the offender, and protecting the public interest.
– *State v. Bello*, 19 P.3d 66, 68 (Idaho Ct. App. 2001)

III. Reduction of Sentence: Rule 35

A. Rule 35 Plea for Leniency

- No defendant may file more than one motion seeking a reduction of sentence under Idaho Criminal Rule 35.
  – *State v. Atwood*, 832 P.2d 1134, 1135 (Idaho Ct. App. 1992)

1. Time Limit

- Idaho Criminal Rule 35 allows the court to reduce an otherwise lawful sentence if the motion to reduce the sentence is filed within 120 days after sentence is imposed or the court releases jurisdiction.
  – *State v. Joyner*, 825 P.2d 99, 101-02 (Idaho Ct. App. 1992)

- The court may also reduce a sentence upon revocation of probation.
  – *State v. Joyner*, 825 P.2d 99, 101-02 (Idaho Ct. App. 1992)

- The 120-day period starts to run at the time the sentence is originally imposed, even though execution of the sentence may be suspended. A sentence is considered imposed when it is pronounced.
  – *State v. Joyner*, 825 P.2d 99, 101-02 (Idaho Ct. App. 1992)

2. Approval

- A sentencing court has the sound discretion in determining motions regarding the reduction of otherwise legal sentences.
  – *State v. Adams*, 859 P. 2d 970, 971 (Idaho Ct. App. 1993)

- Such motions are basically considered a plea for leniency that may be approved if the sentence initially imposed was unduly or excessively severe.
  – *State v. Adams*, 859 P. 2d 970, 971 (Idaho Ct. App. 1993)

3. Appellate Review of a Denial

- The scope of review of a denial of a Rule 35 plea for leniency entails the application of the same criteria used to determine the reasonableness of the original sentence, focusing on the nature of the offense and the character of the offender.
  – *State v. Adams*, 859 P. 2d 970, 971 (Idaho Ct. App. 1993)

B. Impact of Good Conduct on a Reduction of Sentence

- Although good conduct while in prison is worthy of consideration, it may not necessarily result in a reduction of a prisoner's sentence.
  – *State v. Gain*, 90 P.3d 920, 926 (Idaho Ct. App. 2004)

- The evidence concerning a defendant's good conduct while incarcerated must be viewed in light of the entire record and may not be an accurate indicator of future conduct in a non-custodial setting.
  – *State v. Gain*, 90 P.3d 920, 926 (Idaho Ct. App. 2004)

IV. Rehabilitative Treatment for Sex Offenders

- Idaho law does not constitutionally require the Board of Correction to provide adequate rehabilitation treatment to sex offenders.
  – *State v. Bartlett*, 800 P.2d 118, 121 (Idaho Ct. App. 1990)

- The failure of the Board to provide rehabilitative treatment, if required, will not affect the validity of the sentence imposed.
  – *State v. Bartlett*, 800 P.2d 118, 121 (Idaho Ct. App. 1990)

V. Sex-Offender Registration

- Sex offender registration is a collateral, not direct, consequence of pleading guilty.
  – *Ray v. State*, 982 P.2d 931, 936 (Idaho 1999)

IDAHO

Supervised Release

I. Probation

A. Goal

- The goal of probation is to foster the defendant's rehabilitation while protecting public safety.
  – *State v. Wardle*, 53 P.3d 1227, 1229 (Idaho Ct. App. 2002)

B. Court Discretion

- The trial court has the sound discretion in determining whether to grant a defendant probation or instead to release jurisdiction over him or her.
  – *State v. Alberts*, 824 P.2d 135, 137 (Idaho Ct. App. 1991)

1. Retaining Jurisdiction

- Retaining jurisdiction allows the court to extend the time in which it can evaluate a defendant's suitability for probation.
  – *State v. Wolfe*, 864 P.2d 170, 173 (Idaho Ct. App. 1993)

- Whether to retain jurisdiction is a question left to the court's discretion.
  – *State v. Wolfe*, 864 P.2d 170, 173 (Idaho Ct. App. 1993)

- When a judge has sufficient information at the time of sentencing to deny probation, his or her refusal to retain jurisdiction for further evaluation is not an abuse of discretion.
  – *State v. Beebe*, 751 P.2d 673, 675 (Idaho Ct. App. 1988)
  – *State v. Wolfe*, 864 P.2d 170, 173 (Idaho Ct. App. 1993)

2. Conditions of Probation

- The district court has broad, though not unbounded, discretion in deciding upon the terms of probation.
  – *State v. Jones*, 926 P.2d 1318, 1321 (Idaho Ct. App. 1996)

- A trial court is authorized to make probation subject to such terms and conditions as it deems necessary and expedient.
  – *State v. Wardle*, 53 P.3d 1227, 1229 (Idaho Ct. App. 2002)

- Although trial courts have broad discretion in the imposition of restrictive terms, the conditions of probation must be reasonably related to the rehabilitative and public safety goals of probation.
  – *State v. Jones*, 926 P.2d 1318, 1321 (Idaho Ct. App. 1996)
  – *State v. Wardle*, 53 P.3d 1227, 1229 (Idaho Ct. App. 2002)

C. Suspension of Sentence

- Recommendations made for the suspension of a sentence impliedly contemplates probation because suspended sentences are always presented with an order of probation.
  – *State v. Brooke*, 10 P.3d 756, 758 (Idaho Ct. App. 2000)

- Agreements for the purpose of proposing a term of probation include the recognition that the sentence will also be suspended.
  – *State v. Brooke*, 10 P.3d 756, 759 (Idaho Ct. App. 2000)

- Agreements to propose the suspension of a sentence include the recognition that probation will result.
  – *State v. Brooke*, 10 P.3d 756, 759 (Idaho Ct. App. 2000)

D. Revocation

1. Generally

- A court may revoke probation only upon evidence that the probationer has in fact violated the terms or conditions of probation.
  – *State v. Jones*, 926 P.2d 1318, 1322 (Idaho Ct. App. 1996)

- A proceeding for the revocation of probation does not constitute a separate criminal proceeding.
  –*State v. Crowe*, 952 P.2d 1245 1248 (Idaho 1998)

2. Appellate Review

- In reviewing a revocation of probation, the Idaho appellate courts examine whether the district court abused its discretion in finding that probation could not be an effective means of rehabilitation.
  – *State v. Jones*, 926 P.2d 1318, 1322 (Idaho Ct. App. 1996)

- Idaho appellate courts review the district court's order revoking probation to determine whether the district court erred in finding that the defendant had failed to comply with the conditions of his or her probation.
  – *State v. Jones*, 926 P.2d 1318, 1322 (Idaho Ct. App. 1996)

- A court's finding that an alleged violation has been proved will be upheld on appeal if there is substantial evidence in the record to support the finding.
  – *State v. Jones*, 926 P.2d 1318, 1322 (Idaho Ct. App. 1996)

II. Parole

- The Parole Commission's ultimate determination regarding the decision of whether, or when, to discharge an inmate on parole constitutes an administrative determination exempt from judicial assessment under Idaho's Administrative Procedure Act.
  – *State v. Alberts*, 824 P.2d 135, 138 (Idaho Ct. App. 1991)