The New Hampshire 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 New Hampshire 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

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- *State v. Decoteau*, 623 A.2d 1338 (N.H. 1993)
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- *State v. Fortier*, 780 A.2d 1243 (N.H. 2001)
- *State v. Kirsch*, 662 A.2d 937 (N.H. 1995)
- *State v. Krueger*, 776 A.2d 720 (N.H. 2001)
- *State v. Lucius*, 663 A.2d 605 (N.H. 1995)
- *State v. Moreau*, 306 A.2d 764 (N.H. 1973)
- *State v. Paulsen*, 726 A.2d 902 (N.H. 1999)
- *State v. Ravell*, 922 A.2d 685 (N.H. 2007)
- *State v. Steer*, 517 A.2d 797 (N.H. 1986)
- *State v. Tucker*, 575 A.2d 810 (N.H. 1990)
- *State v. Zidel*, 940 A.2d 255 (N.H. 2008)

NEW HAMPSHIRE

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A. Aggravated Felonious Sexual Assault

- *State v. Krueger*, 776 A.2d 720 (N.H. 2001)

1. Pattern Statute

- *State v. Fortier*, 780 A.2d 1243 (N.H. 2001)

2. "Pattern of Sexual Assault" Defined

- *State v. Fortier*, 780 A.2d 1243 (N.H. 2001)

3. "Sexual Penetration" Defined

- *State v. Krueger*, 776 A.2d 720 (N.H. 2001)

B. Child Enticement/ Solicitation

1. Solicitation

- *State v. Paulsen*, 726 A.2d 902 (N.H. 1999)
- *State v. Steer*, 517 A.2d 797 (N.H. 1986)

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

No state cases reported.

C. Child Pornography

- *State v. Clark*, 959 A.2d 229 (N.H. 2008)
- *State v. Zidel*, 940 A.2d 255 (N.H. 2008)
- *State v. Cobb*, 732 A.2d 425 (N.H. 1999)

1. "Visual Representation" Defined

- *State v. Cobb*, 732 A.2d 425 (N.H. 1999)

2. "Sexual Activity" Defined

- *State v. Cobb*, 732 A.2d 425 (N.H. 1999)

3. Virtual/Simulated Child Pornography

- *State v. Zidel*, 940 A.2d 255 (N.H. 2008)
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D. Endangering the Welfare of a Child

- *State v. Paulsen*, 726 A.2d 902 (N.H. 1999)

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- *State v. Collins*, 529 A.2d 945 (N.H. 1987)

2. "Authority" Defined

- *State v. Fortier*, 780 A.2d 1243 (N.H. 2001)

F. Transporting a Minor for Purposes of Prostitution

No state cases reported.

II. SEARCH AND SEIZURE OF ELECTRONIC EVIDENCE

A. Search Warrants

1. Probable Cause

- *State v. Dowman*, 855 A.2d 524 (N.H. 2004)
- *State v. Cobb*, 732 A.2d 425 (N.H. 1999)

a. Standard of Proof in Affidavit

- *State v. Dowman*, 855 A.2d 524 (N.H. 2004)
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- *State v. Kirsch*, 662 A.2d 937 (N.H. 1995)

b. Degree of Specificity

- *State v. Kirsch*, 662 A.2d 937 (N.H. 1995)
- *State v. Tucker*, 575 A.2d 810 (N.H. 1990)
- *State v. Moreau*, 306 A.2d 764 (N.H. 1973)

c. The Defendant's Burden

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

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- *State v. Decoteau*, 623 A.2d, 1338 (N.H. 1993)

3. Staleness

- *State v. Kirsch*, 662 A.2d 937 (N.H. 1995)

B. Anticipatory Warrants

No state cases reported.

C. Methods of Searching

No state cases reported.

D. Types of Searches

1. Employer Searches

No state cases reported.

2. Private Searches

No state cases reported.

3. Civilian Searches

No state cases reported.

4. University-Campus Searches

No state cases reported.

E. Computer Technician/Repairperson Discoveries

No state cases reported.

F. Photo-Development Discoveries

No state cases reported.

G. Criminal Forfeiture

No state cases reported.

H. Disciplinary Hearings for Federal and State Officers

No state cases reported.

I. Probation and Parolee Rights

No state cases reported.

III. JURISDICTION AND NEXUS

A. Jurisdictional Nexus

No state cases reported.

B. Internet Nexus

No state cases reported.

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No state cases reported.

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No state cases reported.

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1. Electronic Communications Privacy Act

No state cases reported.

2. Cable Act

No state cases reported.

3. Patriot Act

a. National Trap and Trace Authority

No state cases reported.

b. State-Court-Judge Jurisdictional Limits

No state cases reported.

F. Prior Bad Acts

1. Inadmissible

- *State v. Kirsch*, 662 A.2d 937 (N.H. 1995)

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- *State v. Kirsch*, 662 A.2d 937 (N.H. 1995)

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b. Burden of Proof

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c. "Motive" Defined

- *State v. Kirsch*, 662 A.2d 937 (N.H. 1995)

d. "Intent" Defined

- *State v. Kirsch*, 662 A.2d 937 (N.H. 1995)

e. "Common Plan or Scheme" Defined

- *State v. Kirsch*, 662 A.2d 937 (N.H. 1995)

3. Appellate Review

- *State v. Kirsch*, 662 A.2d 937 (N.H. 1995)

G. Privileges

No state cases reported.

V. AGE OF CHILD VICTIM

A. Proving the Age of the Child Depicted

- *State v. Cobb*, 732 A.2d 425 (N.H. 1999)

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

No state cases reported.

VI. MULTIPLE COUNTS

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

No state cases reported.

B. Issues of Double Jeopardy

- *State v. Ravell*, 922 A.2d 685 (N.H. 2007)
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- *State v. Krueger*, 776 A.2d 720 (N.H. 2001)
- *State v. Lucius*, 663 A.2d 605 (N.H. 1995)

1. Duplicitous Indictments

- *State v. Paulsen*, 726 A.2d 902 (N.H. 1999)

2. Course of Conduct

- *State v. Paulsen*, 726 A.2d 902 (N.H. 1999)

3. "Difference-in-Evidence" Test

- *State v. Krueger*, 776 A.2d 720 (N.H. 2001)
- *State v. Cobb*, 732 A.2d 425 (N.H. 1999)
- *State v. Lucius*, 663 A.2d 605 (N.H. 1995)

4. Prosecution

- *State v. Lucius*, 663 A.2d 605 (N.H. 1995)

5. Punishment

- *State v. Lucius*, 663 A.2d 605 (N.H. 1995)

6. Soliciting a Minor to Engage in a Single Act of Sexual Penetration

- *State v. Paulsen*, 726 A.2d 902 (N.H. 1999)

VII. DEFENSES

A. Age

No state cases reported.

B. Consent

No state cases reported.

C. Diminished Capacity

1. Addiction to the Internet

No state cases reported.

2. Insanity

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D. First Amendment

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H. Researcher

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VIII. SENTENCING ISSUES

A. Unproven Misconduct Evidence

- *State v. Cobb*, 732 A.2d 425 (N.H. 1999)

1. What to Consider

- *State v. Cobb*, 732 A.2d 425 (N.H. 1999)

2. What Not to Consider

- *State v. Cobb*, 732 A.2d 425 (N.H. 1999)

B. Enhancement

1. Age of Victim

No state cases reported.

2. Distribution/Intent to Traffic

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3. Number of Images

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4. Pattern of Activity for Sexual Exploitation

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IX. SUPERVISED RELEASE

No state cases reported.

NEW HAMPSHIRE

Case Highlights

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

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

State v. Clark, 959 A.2d 229 (N.H. 2008)

The prosecution is not required to present evidence besides the images themselves to prove that the images of child pornography found on defendant's computer were of real children. Images may be proven to be in defendant's possession on or around the time alleged in the indictment, but the date of possession must be before the indictment date and before the statute of limitations.

State v. Cobb, 732 A.2d 425 (N.H. 1999)

There is no statutory requirement that the visual representation of a child engaging in sexual activity involve the use of an actual child.

State v. Collins, 529 A.2d 945 (N.H. 1987)

A person in a position of authority who uses such authority in any way to coerce the child's submission to sexual activity is subject to prosecution, whether the coercion involves undue influence, physical force, threats, or any combination thereof.

State v. Decoteau, 623 A.2d 1338 (N.H. 1993)

A search made under authority of a search warrant may extend to the entire area covered by the warrant's description.

State v. Dowman, 855 A.2d 524 (N.H. 2004).

Defendant's admission of possessing child pornographic material on his computer constitutes probable cause for the issuance of a search warrant.

State v. Fortier, 780 A.2d 1243 (N.H. 2001)

The focus of the aggravated, felonious, sexual-assault pattern statute is to criminalize a continuing course of sexual assaults, not isolate instances. The essential culpable act, the *actus reus*, is the pattern itself, that is the occurrence of more than one sexual assault over a period of time, and not the specific assaults comprising the pattern.

State v. Kirsch, 662 A.2d 937 (N.H. 1995)

In an affidavit recounting sexual abuse of children over a period of six years, recitation of the types of material collected by child molesters and their proclivity for retaining those materials, was not required to establish probable cause. A "common-sense inference" about the longevity of child pornography for the sexual abuser of children may reasonably be drawn from the nature of the items themselves, such as the photographs taken of the children.

State v. Krueger, 776 A.2d 720 (N.H. 2001)

Two offenses will not be considered the same unless each requires proof of an element that the other does not. Thus multiple indictments are permissible only if proof of the elements of the crime as charged will in actuality require a difference in evidence.

State v. Lucius, 663 A.2d 605 (N.H. 1995)

The defendant's convictions for both solicitation of aggravated felonious sexual assault and solicitation of kidnapping violated double jeopardy because the elements charged in the indictment for aggravated felonious sexual assault, if true, would also support a conviction under the indictment for solicitation of kidnapping.

State v. Moreau, 306 A.2d 764 (N.H. 1973)

Search warrants must describe with particularity the area to be searched and the things to be seized; it is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended.

State v. Paulsen, 726 A.2d 902 (N.H. 1999)

Each act of soliciting a minor to engage in a single act of sexual penetration is a separate offense of endangering the welfare of the child.

State v. Ravell, 922 A.2d 685 (N.H. 2007)

Defendant was found to have CD-ROM with child pornographic material that was identical to material found on defendant's home computer. Defendant may be charged for possession of same material twice even if the material is an identical copy.

State v. Steer, 517 A.2d 797 (N.H. 1986)

While automatic standing is afforded to defendants being charged with crimes in which possession of any article or thing is an element, because possession was not an element of the child-pornography offenses brought against the defendant, the trial court did not err in finding a lack of standing.

State v. Tucker, 575 A.2d 810 (N.H. 1990)

Generic descriptions, for purposes of a search-warrant affidavit, are inadequate whenever it is reasonably possible for a warrant's applicant or issuing magistrate to narrow its scope by using descriptive criteria for distinguishing objects with evidentiary significance from similar items having no such value.

State v. Zidel, 940 A.2d 255 (N.H. 2008)
Defendant's possession of morphed images with children's heads and necks placed over adult, naked, female bodies was not in violation of *N.H. Rev. Stat. Ann. § 649-A:3* and that possession of such images does not demonstrate harm to the children depicted.

NEW HAMPSHIRE

Offenses Defined

I. Aggravated Felonious Sexual Assault

- Aggravated felonious sexual assault is when a person engages in sexual penetration with another person when the victim is less than 13 years of age. *N.H. Rev. Stat. Ann. § 632-A:2, I(l).*
  – *State v. Krueger*, 776 A.2d 720, 721 (N.H. 2001).

A. Pattern Statute

- A person is guilty of aggravated felonious sexual assault when such person engages in a pattern of sexual assault against another person, not the actor's legal spouse, who is less than 16 years of age. The mental state applicable to the underlying acts of sexual assault need not be shown with respect to the elements of engaging in a pattern of sexual assault. *N.H. Rev. Stat. Ann. § 632-A:2, II.*
  – *State v. Fortier*, 780 A.2d 1243, 1250 (N.H. 2001).

B. "Pattern of Sexual Assault" Defined

- "Pattern of sexual assault" means committing more than one act upon the same victim over a period of 2 months or more and within a period of 5 years. *N.H. Rev. Stat. Ann. § 632-A:1, I-c.*
  – *State v. Fortier*, 780 A.2d 1243, 1250 (N.H. 2001).

- The focus of the pattern statute is to criminalize a continuing course of sexual assaults, not isolated instances. The essential culpable act, the *actus reus*, is the pattern itself, that is, the occurrence of more than one sexual assault over a period of time, and not the specific assaults comprising the pattern.
  – *State v. Fortier*, 780 A.2d 1243, 1250 (N.H. 2001).

C. "Sexual Penetration" Defined

- The term "sexual penetration" specifically includes fellatio and any intrusion, however slight, of any part of the victim's body into genital or anal openings of the actor's body. *N.H. Rev. Stat. Ann. §§ 632-A:1, V(c), V(f).*
  – *State v. Krueger*, 776 A.2d 720, 721 (N.H. 2001).

II. Child Enticement/ Solicitation

A. Solicitation

- A person is guilty of criminal solicitation if, with a purpose that another engage in conduct constituting a crime, he or she commands, solicits, or requests such other person to engage in such conduct. *N.H. Rev. Stat. Ann. § 629:2, I.*
  – *State v. Paulsen*, 726 A.2d 902, 905 (N.H. 1999).
  – *State v. Steer*, 517 A.2d 797, 799 (N.H. 1986).

- A single act of solicitation is sufficient to convict a person of the crime of solicitation.
  – *State v. Paulsen*, 726 A.2d 902, 905 (N.H. 1999).

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

No state cases reported.

III. Child Pornography

- A person is guilty of a felony if he or she publishes, exhibits, or otherwise makes available any visual representation of a child engaging in sexual activity. *N.H. Rev. Stat. Ann. § 649-A:3*.
  – *State v. Clark*, 959 A.2d 229 (N.H. 2008)
  – *State v. Zidel*, 940 A.2d 255 (N.H. 2008)
  – *State v. Cobb*, 732 A.2d 425, 430 (N.H. 1999).

A. "Visual Representation" Defined

- "Visual representation" is defined as any pose, play, dance, or other performance exhibited before an audience or reproduced in or designed to be reproduced in any book, magazine, pamphlet, motion-picture film, photograph, or picture. *N.H. Rev. Stat. Ann. § 649-A:2, IV*.
  – *State v. Cobb*, 732 A.2d 425, 430 (N.H. 1999).

B. "Sexual Activity" Defined

- "Sexual activity" means human masturbation, the touching of the actor's or other person's sexual organs in the context of a sexual relationship, sexual intercourse actual or simulated, normal or perverted, whether alone or between members of the same or opposite sex or between humans and animals, and lewd exhibition of the genitals, flagellation, or torture. *N.H. Rev. Stat. Ann. § 649-A:2, III*.
  – *State v. Cobb*, 732 A.2d 425, 430-31 (N.H. 1999).

C. Virtual/Simulated Child Pornography

- In New Hampshire there is no statutory requirement that the visual representation involve use of an actual child.
  – *State v. Zidel*, 940 A.2d 255 (N.H. 2008)
  – *State v. Cobb*, 732 A.2d 425, 431 (N.H. 1999).

IV. Endangering the Welfare of a Child

- The solicitation by any person of a child under the age of 16 to engage in sexual activity, as defined in *N.H. Rev. Stat. Ann. § 649-A:2, III*, for the purpose of creating a visual representation, as defined in *N.H. Rev. Stat. Ann. § 649-A:2, IV*, or to engage in sexual penetration, as defined in *N.H. Rev. Stat. Ann. § 632-A:1, V,* constitutes endangering the welfare of such child. *N.H. Rev. Stat. Ann. § 639:3, III*.
  – *State v. Paulsen*, 726 A.2d 902, 905 (N.H. 1999).

V. Sexual Contact With a Minor by a Person in a Position of Authority

- A person is guilty of the felony of aggravated felonious sexual assault if he or she engages in sexual penetration with another person when, except as between legally married spouses, the victim is 13 years of age or older and under 18 years of age and the actor is in a position of authority over the victim and uses this authority to coerce the victim to submit. *N.H. Rev. Stat. Ann. § 632-A:2, I(k)*.
  – *State v. Fortier*, 780 A.2d 1243, 1253 (N.H. 2001).

A. "Coercion" Defined

- Coercion, while not defined in the Criminal Code, has been ascribed a broad meaning, relying on the dictionary definition which defines the term to mean: to restrain, control, or dominate nullifying individual will or desire; to compel an act or choice by force, threat, or other pressure; to effect, bring about, establish, or enforce by force, threat, or other pressure.
  – *State v. Fortier*, 780 A.2d 1243, 1254 (N.H. 2001).
  – *State v. Collins*, 529 A.2d 945, 946 (N.H. 1987).

- An authority figure may use a broad range of coercive tactics, including use of physical force, to coerce a child's submission to, and subsequent silence about, sexual activity, all of which would fall within the statutory meaning of coercion.
  – *State v. Collins*, 529 A.2d 945, 946 (N.H. 1987).

- A person in a position of authority who uses such authority in any way to coerce the child's submission to sexual activity is subject to prosecution under New Hampshire Revised Statute Annotated § 632-A:2, X, whether the coercion involves undue influence, physical force, threats, or any combination thereof.
  – *State v. Fortier*, 780 A.2d 1243, 1254 (N.H. 2001).
  – *State v. Collins*, 529 A.2d 945, 947 (N.H. 1987).

- Coercion need not be overt, but may consist of the subtle persuasion arising from the position of authority.
  – *State v. Fortier*, 780 A.2d 1243, 1254 (N.H. 2001).

B. "Authority" Defined

- The term "authority" has been construed to mean "power to require and receive submission: the right to expect obedience: superiority derived from a status that carries with it the right to command and give final decisions."
  – *State v. Fortier*, 780 A.2d 1243, 1253 (N.H. 2001).

VI. Transporting a Minor for Purposes of Prostitution

No state cases reported.

NEW HAMPSHIRE

Search and Seizure of Electronic Evidence

I. Search Warrants

A. Probable Cause

- Probable cause exists if the person of ordinary caution would be justified in believing that what is sought will be found in the place to be searched and that what is sought, if not contraband or fruits of implements of a crime, will aid in a particular apprehension or conviction.
  – *State v. Dowman*, 855 A.2d 524 (N.H. 2004)
  – *State v. Cobb*, 732 A.2d 425, 436 (N.H. 1999).

- A determination of probable cause must be viewed in the light of factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.
  – *State v. Cobb*, 732 A.2d 425, 437 (N.H. 1999).

1. Standard of Proof in Affidavit

- The standard for reviewing whether probable cause has been demonstrated in a search-warrant affidavit is whether, given all the facts and circumstances presented to the magistrate, law enforcement has shown that there is a substantial likelihood that contraband or evidence of a crime will be found in the place to be searched.
  – *State v. Dowman*, 855 A.2d 524 (N.H. 2004)
  – *State v. Kirsch*, 662 A.2d 937, 940 (N.H. 1995).

- To obtain a search warrant, law enforcement must show that at the time of the application for the warrant there is a substantial likelihood of finding the items sought; they need not establish with certainty, or even beyond a reasonable doubt, that the search will lead to the desired result.
  – *State v. Cobb*, 732 A.2d 425, 436-37 (N.H. 1999).

2. Degree of Specificity

- The degree of specificity required in a search warrant depends upon the nature of the items to be seized.
  – *State v. Kirsch*, 662 A.2d 937, 941 (N.H. 1995).

- It is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended.
  – *State v. Moreau*, 306 A.2d 764, 767 (N.H. 1973).

- A description that identifies with reasonable certainty the place or places to be searched is sufficient.
  – *State v. Moreau*, 306 A.2d 764, 767 (N.H. 1973).

- Generic descriptions are inadequate whenever it is reasonably possible for a warrant's applicant or issuing magistrate to narrow its scope by using descriptive criteria for distinguishing objects with evidentiary significance from similar items having no such value.
  – *State v. Tucker*, 575 A.2d 810, 812 (N.H. 1990).

3. The Defendant's Burden

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

B. Scope of Search

See infra "Degree of Specificity," Part I.A.2.

- A search made under authority of a search warrant may extend to the entire area covered by the warrant's description.
  – *State v. Decoteau*, 623 A.2d 1338, 1341 (N.H. 1993).

C. Staleness

- Where the passage of time between the suspected criminal activity and the application for the warrant is at issue, other circumstances, such as the nature of the activity and the items sought, must also be considered in determining whether probable cause exists.
  – *State v. Kirsch*, 662 A.2d 937, 940 (N.H. 1995).

- An appreciable lapse of time may not be a bar to a finding of probable cause to issue a search warrant, in light of the nature of the offense and of the items sought.
  – *State v. Kirsch*, 662 A.2d 937, 940 (N.H. 1995).

II. Anticipatory Warrants

No state cases reported.

III. Methods of Searching

No state cases reported.

IV. Types of Searches

A. Employer Searches

No state cases reported.

B. Private Searches

No state cases reported.

C. Civilian Searches

No state cases reported.

D. University-Campus Searches

No state cases reported.

V. Computer Technician/Repairperson Discoveries

No state cases reported.

VI. Photo-Development Discoveries

No state cases reported.

VII. Criminal Forfeiture

No state cases reported.

VIII. Disciplinary Hearings for Federal and State Officers

No state cases reported.

IX. Probation and Parolee Rights

No state cases reported.

NEW HAMPSHIRE

Jurisdiction and Nexus

I. Jurisdictional Nexus

No state cases reported.

II. Internet Nexus

No state cases reported.

III. State Jurisdiction, Federal Jurisdiction, Concurrent Jurisdiction

A. State

No state cases reported.

B. Federal

No state cases reported.

C. Concurrent

No state cases reported.

IV. Interstate Possession of Child Pornography

No state cases reported.

NEW HAMPSHIRE

Discovery and Evidence

I. Timely Review of Evidence

No state cases reported.

II. Defense Requests for Copies of Child Pornography

No state cases reported.

III. Introduction of E-mails into Evidence

A. Hearsay/Authentication Issues

No state cases reported.

B. Circumstantial Evidence

No state cases reported.

C. Technical Aspects of Electronic Evidence Regarding Admissibility

No state cases reported.

IV. Text-Only Evidence

A. Introduction into Evidence

No state cases reported.

B. Relevance

No state cases reported.

V. Evidence Obtained from Internet Service Providers

A. Electronic Communications Privacy Act

No state cases reported.

B. Cable Act

No state cases reported.

C. Patriot Act

1. National Trap and Trace Authority

No state cases reported.

2. State-Court-Judge Jurisdictional Limits

No state cases reported.

VI. Prior Bad Acts

A. Inadmissible

- Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. *N.H. R. Evid. 404(b).*
  – *State v. Kirsch*, 662 A.2d 937, 942 (N.H. 1995).

B. Admissible

- Evidence of other crimes, wrongs, or acts may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *N.H. R. Evid. 404(b).*
  – *State v. Kirsch*, 662 A.2d 937, 942 (N.H. 1995).

- Evidence of other bad acts is only admissible if relevant for a purpose other than to prove the defendant's character or disposition, if there is clear proof the defendant committed the other acts, and if the prejudice to the defendant does not substantially outweigh the probative value of the evidence.
  – *State v. Kirsch*, 662 A.2d 937, 942 (N.H. 1995).

1. Relevance

- To meet the relevancy requirement, the other bad-acts evidence must have some direct bearing on an issue actually in dispute, and there must be a clear connection between the particular evidentiary purpose, as articulated to the trial court, and the other bad acts.
  – *State v. Kirsch*, 662 A.2d 937, 942 (N.H. 1995).

2. Burden of Proof

- The burden is on the State to articulate to the trial judge the precise evidentiary purpose for which it seeks to introduce the "other crime" evidence and the purported connection between the evidence and the stated purpose.
  – *State v. Kirsch*, 662 A.2d 937, 942 (N.H. 1995).

3. "Motive" Defined

- Motive is generally understood to refer to the reason that nudges the will and prods the mind to indulge in criminal intent or what prompts a defendant to engage in a particular criminal activity.
  – *State v. Kirsch*, 662 A.2d 937, 942 (N.H. 1995).

- Motive, to the extent it is an issue at all, concerns the defendant's reason for committing the charged crime, not his or her motivation for engaging in ancillary activities that may have been precursors to criminal conduct.
  – *State v. Kirsch*, 662 A.2d 937, 942 (N.H. 1995).

- A defendant's desire for sexual activity with a certain type of victim is proof of propensity, not motive.
  – *State v. Kirsch*, 662 A.2d 937, 942 (N.H. 1995).

4. "Intent" Defined

- To be relevant to intent, evidence of other bad acts must be able to support a reliable inference, not dependent on the defendant's character or propensity, that the defendant had the same intent on the occasions of the charged and uncharged acts.
  – *State v. Kirsch*, 662 A.2d 937, 942 (N.H. 1995).

5. "Common Plan or Scheme" Defined

- To be admissible as evidence showing the defendant's plan, other bad acts must be constituent parts of some overall scheme.
  – *State v. Kirsch*, 662 A.2d 937, 943 (N.H. 1995).

- A pattern or systematic course of conduct is insufficient to establish a plan.
  – *State v. Kirsch*, 662 A.2d 937, 943 (N.H. 1995).

- It is not enough to show that each crime was "planned" in some way; rather, there must be some overall scheme of which each of the crimes is but a part.
  – *State v. Kirsch*, 662 A.2d 937, 943 (N.H. 1995).

C. Appellate Review

- The trial court's decision to admit other bad-acts evidence is reviewable for abuse of discretion, which is found only where a defendant can show that the decision was "clearly untenable or unreasonable to the prejudice of his [or her] case."
  – *State v. Kirsch*, 662 A.2d 937, 942 (N.H. 1995).

VII. Privileges

No state cases reported.

NEW HAMPSHIRE

Age of Child Victim

I. Proving the Age of the Child Depicted

- The State is required to prove that the photographs depicted persons under the age of 16, and not the actual age of the child depicted. *N.H. Rev. Stat. Ann. § 649-A:2, I.*
  – *State v. Cobb*, 732 A.2d 425, 432 (N.H. 1999).

- The determination of the age of the subjects in each photograph is for the trier of fact, relying on everyday observations and common experience.
  – *State v. Cobb*, 732 A.2d 425, 433 (N.H. 1999).

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

No state cases reported.

NEW HAMPSHIRE

Multiple Counts

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

No state cases reported.

II. Issues of Double Jeopardy

- The double-jeopardy clause of the New Hampshire Constitution protects against multiple prosecutions and multiple convictions.
  – *State v. Ravell*, 922 A.2d 685 (N.H. 2007)
  – *State v. Fortier*, 780 A.2d 1243, 1252 (N.H. 2001).
  – *State v. Krueger*, 776 A.2d 720, 721 (N.H. 2001).
  – *State v. Lucius*, 663 A.2d 605, 609 (N.H. 1995).

- Double jeopardy precludes the State from pursuing multiple charges in a single prosecution when the charges comprise the same offense and the State seeks multiple convictions and thus multiple punishments.
  – *State v. Fortier*, 780 A.2d 1243, 1252 (N.H. 2001).

- Two offenses will not be considered the same unless each requires proof of an element that the other does not.
  – *State v. Krueger*, 776 A.2d 720, 721 (N.H. 2001).

- The State may not insulate itself against attack on double-jeopardy grounds merely by charging the triggering elements of the crime in the alternative.
  – *State v. Lucius*, 663 A.2d 605, 609 (N.H. 1995).

A. Duplicitous Indictments

- Duplicitous indictments are unconstitutional because they fail to ensure notice to the defendant, protect against double jeopardy, and assure the reliability of a unanimous jury verdict.
  – *State v. Paulsen*, 726 A.2d 902, 904 (N.H. 1999).

- An indictment is duplicitous when it charges two or more offenses in one count.
  – *State v. Paulsen*, 726 A.2d 902, 904 (N.H. 1999).

B. Course of Conduct

- An indictment alleging a course of conduct is not duplicitous if continuous acts or omissions may constitute the offense.
  – *State v. Paulsen*, 726 A.2d 902, 904 (N.H. 1999).

C. "Difference-in-Evidence" Test

- The "difference-in-evidence" test has been adopted by the New Hampshire Supreme Court as the benchmark for evaluating double-jeopardy claims under the New Hampshire Constitution.
  – *State v. Cobb*, 732 A.2d 425, 433 (N.H. 1999).

- Multiple indictments are permissible only if proof of the elements of the crime as charged will in actuality require a difference in evidence.
  – *State v. Krueger*, 776 A.2d 720, 721 (N.H. 2001).
  – *State v. Cobb*, 732 A.2d 425, 433 (N.H. 1999).
  – *State v. Lucius*, 663 A.2d 605, 609 (N.H. 1995).

D. Prosecution

- Double jeopardy bars a subsequent prosecution for the same offense, but it does not bar simultaneous prosecution for separate charges that constitute the same offense.
  – *State v. Lucius*, 663 A.2d 605, 609 (N.H. 1995).

E. Punishment

- Double jeopardy prevents multiple punishments for convictions on separate charges that constitute the same offense.
  – *State v. Lucius*, 663 A.2d 605, 609 (N.H. 1995).

- When cumulative punishments are sought for offenses arising out of a single transaction, the focus of the inquiry is whether proof of the elements of the crimes as charged will in actuality require a difference in evidence.
  – *State v. Lucius*, 663 A.2d 605, 609 (N.H. 1995).

F. Soliciting a Minor to Engage in a Single Act of Sexual Penetration

- Each act of soliciting a minor to engage in a single act of sexual penetration is a separate offense of endangering the welfare of the child.
  – *State v. Paulsen*, 726 A.2d 902, 905 (N.H. 1999).

NEW HAMPSHIRE

Defenses

I. Age

No state cases reported.

II. Consent

No state cases reported.

III. Diminished Capacity

A. Addiction to the Internet

No state cases reported.

B. Insanity

No state cases reported.

IV. First Amendment

No state cases reported.

V. Impossibility

A. Factual

No state cases reported.

B. Legal

No state cases reported.

VI. Manufacturing Jurisdiction

No state cases reported.

VII. Outrageous Conduct

No state cases reported.

VIII. Researcher

No state cases reported.

IX. Sexual Orientation

No state cases reported.

NEW HAMPSHIRE

Sentencing Issues

I. Unproven Misconduct Evidence

- A judge exercises wide discretion in choosing the sources and types of evidence on which to rely in imposing sentence.
  – *State v. Cobb*, 732 A.2d 425, 442 (N.H. 1999).

A. What to Consider

- A trial court may consider evidence of pending charges in determining a sentence.
  – *State v. Cobb*, 732 A.2d 425, 442 (N.H. 1999).

B. What Not to Consider

- It is an abuse of discretion to consider offenses for which the defendant has been acquitted or prior convictions that have been found constitutionally infirm.
  – *State v. Cobb*, 732 A.2d 425, 442 (N.H. 1999).

- Sentencing courts should not consider conclusory statements of criminal conduct lacking a factual basis.
  – *State v. Cobb*, 732 A.2d 425, 442 (N.H. 1999).

II. Enhancement

A. Age of Victim

No state cases reported.

B. Distribution/Intent to Traffic

No state cases reported.

C. Number of Images

No state cases reported.

D. Pattern of Activity for Sexual Exploitation

No state cases reported.

E. Sadistic, Masochistic, or Violent Material

No state cases reported.

F. Use of Computers

No state cases reported.

NEW HAMPSHIRE

Supervised Release

No state cases reported.