

The Indiana Law Enforcement and Prosecutors Manual on Child Exploitation Crimes

Statutory and Case Law



**NATIONAL LAW CENTER
FOR CHILDREN AND FAMILIES**



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 Indiana 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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INDIANA

Topic Outline With Cases

A case with + indicates a decision not designated for publication.

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

I. OFFENSES DEFINED

A. Child Exploitation (a.k.a. Child Pornography)

1. Offenses

a. Distribution

i. Generally

- *Beach v. State*, 411 N.E.2d 363 (Ind. Ct. App. 1980)

ii. Using a Computer

- *Pope v. State*, 740 N.E.2d 1247 (Ind. Ct. App. 2000)

b. Possession

- *Bone v. State*, 771 N.E.2d 710 (Ind. Ct. App. 2002)
- *Evans v. Evans*, 766 N.E.2d 1240 (Ind. Ct. App. 2002)
- *Pope v. State*, 740 N.E.2d 1247 (Ind. Ct. App. 2000)

c. Production

- *Babin v. State*, 609 N.E.2d 3 (Ind. App. Ct. 1993)

d. Virtual/Simulated Child Pornography

- *Bone v. State*, 771 N.E.2d 710 (Ind. Ct. App. 2002)

2. Definitions

a. “Child Pornography”

- *Evans v. Evans*, 766 N.E.2d 1240 (Ind. Ct. App. 2002)

b. Exhibit

- *Beach v. State*, 411 N.E.2d 363 (Ind. Ct. App. 1980)

B. Child Molesting

1. Offenses

a. Attempted Child Molesting

- *State v. Kemp*, 753 N.E.2d 47 (Ind. Ct. App. 2001)

b. Fondling or Touching

- *Louallen v. State*, 778 N.E.2d 794 (Ind. 2002)

c. Sexual Intercourse and Deviate Sexual Conduct

i. Elements

- *Carpenter v. State*, 786 N.E.2d 696 (Ind. 2003)
- *Cowart v. State*, 756 N.E.2d 581 (Ind. Ct. App. 2001)
- *Benson v. State*, 574 N.E.2d 934 (Ind. Ct. App. 1991)

ii. Proof of Penetration

- *Smith v. State*, 779 N.E.2d 111 (Ind. Ct. App. 2002)

d. Vicarious Sexual Gratification

- *Louallen v. State*, 778 N.E.2d 794 (Ind. 2002)
- *Sipe v. State*, 797 N.E.2d 336 (Ind. Ct. App. 2003)

2. Definitions

a. “Sexual Conduct”

- *Bone v. State*, 771 N.E.2d 710 (Ind. Ct. App. 2002)
- *Babin v. State*, 609 N.E.2d 3 (Ind. Ct. App. 1993)

b. “Sexual Intercourse”

- *Smith v. State*, 779 N.E.2d 111 (Ind. Ct. App. 2002)

C. Child Seduction

- *Asher v. State*, 790 N.E.2d 567 (Ind. Ct. App. 2003)

D. Criminal Attempt

1. Elements

- *Ward v. State*, 528 N.E.2d 52 (Ind. 1988)
- *Laughner v. State*, 769 N.E.2d 1147 (Ind. Ct. App. 2002)
- *State v. Kemp*, 753 N.E.2d 47 (Ind. Ct. App. 2001)
- *Mettler v. State*, 697 N.E.2d 502 (Ind. Ct. App. 1998)
- *Benson v. State*, 574 N.E.2d 934 (Ind. Ct. App. 1991)

2. Substantial Step

- *Ward v. State*, 528 N.E.2d 52 (Ind. 1988)
- *Laughner v. State*, 769 N.E.2d 1147 (Ind. Ct. App. 2002)
- *State v. Kemp*, 753 N.E.2d 47 (Ind. Ct. App. 2001)
- *Shahan v. State*, 669 N.E.2d 1012 (Ind. Ct. App. 1996)

E. Enticement and Solicitation

1. Enticement

- *Wise v. State*, 635 N.E.2d 221 (Ind. Ct. App. 1994)

2. Solicitation

a. Generally

- *Louallen v. State*, 778 N.E.2d 794 (Ind. 2002)
- *Ward v. State*, 528 N.E.2d 52 (Ind. 1988)
- *Laughner v. State*, 769 N.E.2d 1147 (Ind. Ct. App. 2002)
- *State v. Kemp*, 753 N.E.2d 47 (Ind. Ct. App. 2001)

b. Using the Internet

- *Laughner v. State*, 769 N.E.2d 1147 (Ind. Ct. App. 2002)

c. Attempt Crimes

- *Ward v. State*, 528 N.E.2d 52 (Ind. 1988)
- *Laughner v. State*, 769 N.E.2d 1147 (Ind. Ct. App. 2002)

i. Substantial Step

(a) Three-Part Test

- *Ward v. State*, 528 N.E.2d 52 (Ind. 1988)
- *State v. Kemp*, 753 N.E.2d 47 (Ind. Ct. App. 2001)
- *Benson v. State*, 574 N.E.2d 934 (Ind. Ct. App. 1991)

(b) Verbal Solicitation

- *Laughner v. State*, 769 N.E.2d 1147 (Ind. Ct. App. 2002)
- *Shahan v. State*, 669 N.E.2d 1012 (Ind. Ct. App. 1996)

ii. Solicitation as Attempted Child Molesting

- *Ward v. State*, 528 N.E.2d 52 (Ind. 1988)
- *Shahan v. State*, 669 N.E.2d 1012 (Ind. Ct. App. 1996)
- *Benson v. State*, 574 N.E.2d 934 (Ind. Ct. App. 1991)

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

- *Laughner v. State*, 769 N.E.2d 1147 (Ind. Ct. App. 2002).

F. Transporting a Minor for the Purpose of Prostitution

No relevant state cases reported.

II. SEARCH AND SEIZURE OF ELECTRONIC EVIDENCE

A. Search Warrants

1. Issuing Magistrate

- *Mehring v. State*, 884 N.E.2d 371 (Ind. Ct. App. 2008)
- *Green v. State*, 676 N.E.2d 755 (Ind. Ct. App. 1997)

2. Probable Cause

- *Clifford v. State*, 474 N.E.2d 963 (Ind. 1985)
- *Mehring v. State*, 884 N.E.2d 371 (Ind. Ct. App. 2008)
- *Bone v. State*, 771 N.E.2d 710 (Ind. Ct. App. 2002)

- *State v. Sotos*, 558 N.E.2d 909 (Ind. Ct. App. 1990)

a. Informants

i. Anonymous Tips

- *State v. Mason*, 829 N.E.2d 1010, 1016 (Ind. Ct. App. 2005)
- *Frasier v. State*, 794 N.E.2d 449 (Ind. Ct. App. 2003)

ii. Cooperative Citizens

- *Clifford v. State*, 474 N.E.2d 963 (Ind. 1985)
- *Frasier v. State*, 794 N.E.2d 449 (Ind. Ct. App. 2003)

b. False Information: The Defendant's Burden

- *Franks v. Delaware*,⁺⁺ 438 U.S. 154 (1978)
- *Jones v. State*, 783 N.E.2d 1132, 1136 (Ind. 2003)

3. Scope of the Search: Place to Be Searched

- *Green v. State*, 676 N.E.2d 755 (Ind. Ct. App. 1997)

4. Staleness

- *Mehring v. State*, 884 N.E.2d 371 (Ind. Ct. App. 2008)
- *Frasier v. State*, 794 N.E.2d 449 (Ind. Ct. App. 2003)

B. Exclusionary Rule: Good-Faith Doctrine

- *Frasier v. State*, 794 N.E.2d 449 (Ind. Ct. App. 2003)

C. Anticipatory Warrants

No relevant state cases reported.

D. Methods of Searching

No relevant state cases reported.

E. Types of Searches

1. Employer Searches

No relevant state cases reported.

2. Private-Civilian Searches

- *Bone v. State*, 771 N.E.2d 710 (Ind. Ct. App. 2002)

3. Warrantless Searches

- *Bone v. State*, 771 N.E.2d 710 (Ind. Ct. App. 2002)

a. Consent Searches

No relevant state cases reported.

b. Plain-View Searches

- *Frasier v. State*, 794 N.E.2d 449 (Ind. Ct. App. 2003)

4. University-Campus Searches

No relevant state cases reported.

F. Computer-Technician/Repairperson Discoveries

See generally Bone v. State, 771 N.E.2d 710 (Ind. Ct. App. 2002)

G. Photo-Development Discoveries

No relevant state cases reported.

H. Seizure of Evidence

- *Clifford v. State*, 474 N.E.2d 963 (Ind. 1985)

I. Criminal Forfeiture

No relevant cases reported.

J. Disciplinary Hearings for Federal and State Officers

No relevant state cases reported.

III. JURISDICTION AND NEXUS

A. Jurisdictional Nexus

No relevant state cases reported.

Deleted:

B. Internet Nexus

No relevant state cases reported.

C. State Jurisdiction, Federal Jurisdiction, and Concurrent Jurisdiction

1. State Jurisdiction

- *Laughner v. State*, 769 N.E.2d 1147 (Ind. Ct. App. 2002)

2. Federal Jurisdiction

No relevant state cases reported.

3. Concurrent Jurisdiction

No relevant state cases reported.

4. Interstate Possession of Child Pornography

No relevant state cases reported.

IV. DISCOVERY AND EVIDENCE

A. Timely Review of Evidence

No relevant state cases reported.

B. Amending the Charge

- *Clifford v. State*, 474 N.E.2d 963 (Ind. 1985)
- *Laughner v. State*, 769 N.E.2d 1147 (Ind. Ct. App. 2002)

C. Discovery by the Defendant

1. Defense Requests for Copies of Child Pornography

No relevant state cases reported.

2. Psychiatric Examinations

- *Clifford v. State*, 474 N.E.2d 963 (Ind. 1985)
- *Neaveill v. State*, 474 N.E. 2d 1045 (Ind. Ct. App. 1985)

D. 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.

E. Text-Only Evidence

1. Introduction into Evidence

No relevant state cases reported.

2. Relevance

No relevant state cases reported.

F. Evidence Obtained from Internet Service Providers

1. Electronic Communications Privacy Act

No relevant state cases reported.

2. Cable Act

No relevant state cases reported.

3. Patriot Act

No relevant state cases reported.

a. National Trap and Trace Authority

No relevant state cases reported.

b. State-Court-Judge Jurisdictional Limits

No relevant state cases reported.

G. Electronic Evidence and the Best-Evidence Rule

- *Laughner v. State*, 769 N.E.2d 1147 (Ind. Ct. App. 2002)

H. Confessions

1. Voluntariness

- *Garmon v. State*, 775 N.E.2d 1217 (Ind. Ct. App. 2002)

a. Trial-Court Determination

- *Smith v. State*, 543 N.E.2d 634 (Ind. 1989)
- *Garmon v. State*, 775 N.E.2d 1217 (Ind. Ct. App. 2002)

b. Threats by Law Enforcement

- *Garmon v. State*, 775 N.E.2d 1217 (Ind. Ct. App. 2002)

c. Inadmissibility of Confessions

- *Smith v. State*, 543 N.E.2d 634 (Ind. 1989)

2. Sufficiency

- *Garmon v. State*, 775 N.E.2d 1217 (Ind. Ct. App. 2002)

3. Appellate Review

- *Smith v. State*, 543 N.E.2d 634 (Ind. 1989)

I. Relevant Evidence

1. “Relevant Evidence” Defined

- *Candler v. State*, 837 N.E.2d 1100 (Ind. Ct. App. 2005)
- *Asher v. State*, 790 N.E.2d 567 (Ind. Ct. App. 2003)
- *Pope v. State*, 740 N.E.2d 1247 (Ind. Ct. App. 2000)

2. Exclusion of Relevant Evidence

- *Marshall v. State*,+ No. 35A02-0712-CR-1135, 2008 Ind. App. LEXIS 2121 (Ind. Ct. App. Sept. 30, 2008)
- *Tinkham v. State*, 787 N.E.2d 440, 444 (Ind. Ct. App. 2003)
- *Pope v. State*, 740 N.E.2d 1247 (Ind. Ct. App. 2000)

J. Authentication of Evidence

- *Bone v. State*, 771 N.E.2d 710 (Ind. Ct. App. 2002)

K. Sufficiency of Evidence

1. Double Jeopardy

- *Carpenter v. State*, 786 N.E.2d 696 (Ind. 2003)
- *Serrano v. State*, 808 N.E.2d 724, 728 (Ind. Ct. App. 2004)

2. Appellate Review of Evidence

- *Smith v. State*, 543 N.E.2d 634 (Ind. 1989)
- *Ware v. State*, 816 N.E.2d 1167, 1173 (Ind. Ct. App. 2004)
- *Sipe v. State*, 797 N.E.2d 336 (Ind. Ct. App. 2003)
- *Bone v. State*, 771 N.E.2d 710 (Ind. Ct. App. 2002)
- *Smith v. State*, 779 N.E.2d 111 (Ind. Ct. App. 2002)
- *Pope v. State*, 740 N.E.2d 1247 (Ind. Ct. App. 2000)
- *Babin v. State*, 609 N.E.2d 3 (Ind. Ct. App. 1993)
- *Benson v. State*, 574 N.E.2d 934 (Ind. Ct. App. 1991)
- *State v. Sotos*, 558 N.E.2d 909 (Ind. Ct. App. 1990)
- *Neaveill v. State*, 474 N.E.2d 1045 (Ind. Ct. App. 1985)
- *Beach v. State*, 411 N.E.2d 363 (Ind. Ct. App. 1980)

L. Prior Bad Acts

1. Inadmissible

- *Marshall v. State*,+ No. 35A02-0712-CR-1135, 2008 Ind. App. LEXIS 2121 (Ind. Ct. App. Sept. 30, 2008)
- *Pope v. State*, 740 N.E.2d 1247 (Ind. Ct. App. 2000)

2. Admissible

- *Southern v. State*, 878 N.E.2d 315, 322 (Ind. Ct. App. 2007)
- *Pope v. State*, 740 N.E.2d 1247 (Ind. Ct. App. 2000)

3. Depraved Sexual Instinct

- *Lannan v. State*, 600 N.E.2d 1334, 1339 (Ind. 1992)

M. Witness Testimony

1. **Child Witnesses**
 - a. **Anatomical Descriptions**
 - *Smith v. State*, 779 N.E.2d 111 (Ind. Ct. App. 2002)
 - b. **Uncorroborated Testimony**
 - *Sipe v. State*, 797 N.E.2d 336 (Ind. Ct. App. 2003)
 - *Smith v. State*, 779 N.E.2d 111 (Ind. Ct. App. 2002)
 - *Wise v. State*, 635 N.E.2d 221 (Ind. Ct. App. 1994)
 - c. **Videotaped Interviews**
 - *Carpenter v. State*, 786 N.E.2d 696 (Ind. 2003)
2. **Expert Witnesses**
 - *Steward v. State*, 636 N.E.2d 143 (Ind. Ct. App. 1994)
 - *Goodwin v. State*, 573 N.E.2d 895 (Ind. Ct. App. 1991)
3. **Protected Person**
 - *Carpenter v. State*, 786 N.E.2d 696 (Ind. 2003)
 - *Taylor v. State*, 841 N.E.2d 631 (Ind. Ct. App. 2006)
4. **Demonstrative Evidence**
 - *Johnston v. State*, 541 N.E.2d 514 (Ind. 1989)
 - *Clifford v. State*, 474 N.E.2d 963 (Ind. 1985)
 - *Wormbly v. State*, 550 N.E.2d 95 (Ind. App. 1990)
5. **Witness Credibility: The “Incredible-Dubiosity” Rule**
 - *Prickett v. State*, 856 N.E.2d 1203 (Ind. 2006)
 - *Carpenter v. State*, 786 N.E.2d 696 (Ind. 2003)
 - *Hardley v. State*,+ No. 49A05-0801-CR-29, 2008 Ind. App. LEXIS 2106 (Ind. Ct. App. Sept. 26, 2008)
 - *Smith v. State*, 779 N.E.2d 111 (Ind. Ct. App. 2002)
6. **Hearsay**
 - a. **“Hearsay” Defined**
 - *Carpenter v. State*, 786 N.E.2d 696 (Ind. 2003)

- *Arndt v. State*, 642 N.E.2d 224 (Ind. 1994)

b. Admissibility

- *Johnston v. State*, 541 N.E.2d 514 (Ind. 1989)
- *Jeffers v. State*, 605 N.E.2d 196 (Ind. Ct. App. 1992)

c. Exceptions

- *Carpenter v. State*, 786 N.E.2d 696 (Ind. 2003)
- *Arndt v. State*, 642 N.E.2d 224 (Ind. 1994)

i. Confrontation Clause

- *Garner v. State*, 777 N.E.2d 721 (Ind. 2002)
- *Arndt v. State*, 642 N.E.2d 224 (Ind. 1994)

ii. Past-Recollection Recorded

- *Carpenter v. State*, 786 N.E.2d 696 (Ind. 2003)
- *Taylor v. State*, 841 N.E.2d 631 (Ind. Ct. App. 2006)

7. Appellate Review: Failure to Object to Testimony

- *Surber v. State*, 884 N.E.2d 856 (Ind. Ct. App. 2008)
- *Goodwin v. State*, 573 N.E.2d 895 (Ind. Ct. App. 1991)

N. Privileges

1. Physician-Patient Privilege

- *Williams v. State*, 819 N.E.2d 381 (Ind. Ct. App. 2004)
- *Goodwin v. State*, 573 N.E.2d 895 (Ind. Ct. App. 1991)

2. Psychologist-Patient Privilege

- *Goodwin v. State*, 573 N.E.2d 895 (Ind. Ct. App. 1991)

V. AGE OF CHILD VICTIM

A. Proving the Age of the Child Victim

1. Methods

- *Johnston v. State*, 541 N.E.2d 514 (Ind. 1989)

2. Specific Offenses

a. Child Molesting

- *Minton v. State*, 802 N.E.2d 929 (Ind. Ct. App. 2004)

b. Sexual Conduct with a Minor

- *Minton v. State*, 802 N.E.2d 929 (Ind. Ct. App. 2004)

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

No relevant state cases reported.

VI. MULTIPLE COUNTS

A. What Constitutes an "Item" of Child Pornography

No relevant state cases reported.

B. Issues of Double Jeopardy

- *Thomas v. State*, 840 N.E.2d 893 (Ind. Ct. App. 2006)
- *Minton v. State*, 802 N.E.2d 929 (Ind. Ct. App. 2004)

VII. DEFENSES

A. Abandonment

- *Smith v. State*, 636 N.E.2d 124 (Ind. 1994)
- *Babin v. State*, 609 N.E.2d 3 (Ind. App. Ct. 1993)

B. Alibi

- *Stewart v. State*, 521 N.E.2d 675 (Ind. 1988)
- *Clifford v. State*, 474 N.E.2d 963 (Ind. 1985)
- *McNeely v. State*, 529 N.E.2d 1317 (Ind. Ct. App. 1988)

C. Diminished Capacity

- *Neaveill v. State*, 474 N.E.2d 1045 (Ind. Ct. App. 1985)

1. Insanity

No relevant state cases reported, but see generally IND. CODE § 35-41-3-6.

2. Internet Addiction

No relevant state cases reported.

D. Entrapment

- *Beach v. State*, 411 N.E.2d 363 (Ind. Ct. App. 1980)

E. First Amendment

No relevant state cases reported.

F. Impossibility

1. Factual

No relevant state cases reported.

2. Legal: Attempt Crimes

- *Noble v. State*, 725 N.E. 2d 842 (Ind. 2000)
- *Aplin v. State*, 889 N.E.2d 882 (Ind. Ct. App. 2008)
- *Laughner v. State*, 769 N.E.2d 1147 (Ind. Ct. App. 2002)

G. Manufacturing Jurisdiction

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

- *Sipe v. State*, 797 N.E.2d 336 (Ind. Ct. App. 2003)

1. Specific Offenses

- a. **Child Molesting, Vicarious Sexual Gratification, and Child Solicitation**
 - *Sipe v. State*, 797 N.E.2d 336 (Ind. Ct. App. 2003)
 - b. **Fondling or Touching**
 - *Sipe v. State*, 797 N.E.2d 336 (Ind. Ct. App. 2003)
2. **Tolling: Concealment of Evidence**
 - *Sipe v. State*, 797 N.E.2d 336 (Ind. Ct. App. 2003)

VIII. SENTENCING

A. Pretrial Home Detention

- *Molden v. State*, 750 N.E.2d 448 (Ind. Ct. App. 2001)

B. Sentence Imposition

- *Bluck v. State*, 716 N.E.2d 507 (Ind. Ct. App. 1999)

1. Evidence at Sentencing Hearing

- *Bluck v. State*, 716 N.E.2d 507 (Ind. Ct. App. 1999)

a. Habitual Offenders

- *Smith v. State*, 543 N.E.2d 634 (Ind. 1989)

b. Sex Offenders

- *Bluck v. State*, 716 N.E.2d 507 (Ind. Ct. App. 1999)

c. Statements by the Victim's Family

- *Serino v. State*, 798 N.E.2d 852 (Ind. 2003)

2. First-Time Offenders Versus Repeat Offenders

- *Bluck v. State*, 716 N.E.2d 507 (Ind. Ct. App. 1999)

3. Presumptive Sentences and Enhancement

- *Serino v. State*, 798 N.E.2d 852 (Ind. 2003)
- *Fitzgerald v. State*, 805 N.E.2d 857 (Ind. Ct. App. 2004)
- *Asher v. State*, 790 N.E.2d 567 (Ind. Ct. App. 2003)
- *Pope v. State*, 740 N.E.2d 1247 (Ind. Ct. App. 2000)
- *Bluck v. State*, 716 N.E.2d 507 (Ind. Ct. App. 1999)
- *Everroad v. State*, 701 N.E.2d 1284 (Ind. Ct. App. 1998)
- *Singer v. State*, 674 N.E.2d 11 (Ind. Ct. App. 1996)
- *Reynolds v. State*, 575 N.E.2d 28 (Ind. Ct. App. 1991)

a. Mitigating Factors

- *Fitzgerald v. State*, 805 N.E.2d 857 (Ind. Ct. App. 2004)
- *Bluck v. State*, 716 N.E.2d 507 (Ind. Ct. App. 1999)
- *Everroad v. State*, 701 N.E.2d 1284 (Ind. Ct. App. 1998)
- *Singer v. State*, 674 N.E.2d 11 (Ind. Ct. App. 1996)
- *Bresson v. State*, 498 N.E.2d 91 (Ind. Ct. App. 1986)

i. No Prior Criminal Record

- *Fitzgerald v. State*, 805 N.E.2d 857 (Ind. Ct. App. 2004)
- *Bluck v. State*, 716 N.E.2d 507 (Ind. Ct. App. 1999)

ii. Guilty Pleas

- *Singer v. State*, 674 N.E.2d 11 (Ind. Ct. App. 1996)

b. Aggravating Factors

- *Bluck v. State*, 716 N.E.2d 507 (Ind. Ct. App. 1999)
- *Bresson v. State*, 498 N.E.2d 91 (Ind. Ct. App. 1986)

i. Age of the Victim

- *Bluck v. State*, 716 N.E.2d 507 (Ind. Ct. App. 1999)
- *Reynolds v. State*, 575 N.E.2d 28 (Ind. Ct. App. 1991)
- *Bresson v. State*, 498 N.E.2d 91 (Ind. Ct. App. 1986)

ii. Criminal Record

- *Asher v. State*, 790 N.E.2d 567 (Ind. Ct. App. 2003)
- *Davies v. State*, 730 N.E.2d 726, 742 (Ind. Ct. App. 2000)

- *Bluck v. State*, 716 N.E.2d 507 (Ind. Ct. App. 1999)

iii. Distribution/Intent to Traffic

No relevant state cases reported.

iv. Lack of Remorse

- *Bluck v. State*, 716 N.E.2d 507 (Ind. Ct. App. 1999)
- *Singer v. State*, 674 N.E.2d 11 (Ind. Ct. App. 1996)

v. Maintaining Innocence

- *Bluck v. State*, 716 N.E.2d 507 (Ind. Ct. App. 1999)

vi. Need for Treatment

- *Bluck v. State*, 716 N.E.2d 507 (Ind. Ct. App. 1999)

vii. Number of Images

No relevant state cases reported.

viii. Pattern of Activity for Sexual Exploitation

- *Smith v. State*, 543 N.E.2d 634 (Ind. 1989)
- *Bluck v. State*, 716 N.E.2d 507 (Ind. Ct. App. 1999)
- *Singer v. State*, 674 N.E.2d 11 (Ind. Ct. App. 1996)

ix. Physical Injury

- *Bluck v. State*, 716 N.E.2d 507 (Ind. Ct. App. 1999)

x. Position of Trust

- *Bluck v. State*, 716 N.E.2d 507 (Ind. Ct. App. 1999)
- *Singer v. State*, 674 N.E.2d 11 (Ind. Ct. App. 1996)

xi. Sadistic, Masochistic, or Violent Material

No relevant state cases reported.

xii. Uncharged Misconduct

- *Singer v. State*, 674 N.E.2d 11 (Ind. Ct. App. 1996)

xiii. Use of Computers

No relevant state cases reported.

C. Concurrent Versus Consecutive Sentences

- *Serino v. State*, 798 N.E.2d 852 (Ind. 2003)

D. Appellate Review of Sentencing Decisions

1. Generally

- *Fitzgerald v. State*, 805 N.E.2d 857 (Ind. Ct. App. 2004)
- *Asher v. State*, 790 N.E.2d 567 (Ind. Ct. App. 2003)
- *Pope v. State*, 740 N.E.2d 1247 (Ind. Ct. App. 2000)
- *Everroad v. State*, 701 N.E.2d 1284 (Ind. Ct. App. 1998)
- *Reynolds v. State*, 575 N.E.2d 28 (Ind. Ct. App. 1991)
- *Bresson v. State*, 498 N.E.2d 91 (Ind. Ct. App. 1986)

2. Aggravating Factors

Deleted:

- *Bresson v. State*, 498 N.E.2d 91 (Ind. Ct. App. 1986)

3. Post Conviction Relief

- *Douglas v. State*, 490 N.E.2d 270 (Ind. 1986)

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

1. Dangerousness Hearing

- *Doe v. O'Connor*, 790 N.E.2d 985 (Ind. 2003)

2. Juvenile Offenders: Evidentiary Hearing

Deleted:

- *M.L.H. v. State*, 799 N.E.2d 1 (Ind. Ct. App. 2003)
- *R.G. v. State*, 793 N.E.2d 238 (Ind. Ct. App. 2003)
- *In re G.B.*, 709 N.E.2d 352 (Ind. Ct. App. 1999)

IX. SUPERVISED RELEASE: PROBATION

A. Conditions of Probation

- *Fitzgerald v. State*, 805 N.E.2d 857 (Ind. Ct. App. 2004)
- *Smith v. State*, 779 N.E.2d 111 (Ind. Ct. App. 2002)

1. Constitutional Rights

- *Fitzgerald v. State*, 805 N.E.2d 857 (Ind. Ct. App. 2004)
- *Smith v. State*, 779 N.E.2d 111 (Ind. Ct. App. 2002)

2. Prohibitions and Restricted Access

a. Types of Offenders

i. Child Molesters

- *Smith v. State*, 779 N.E.2d 111 (Ind. Ct. App. 2002)

ii. Sexual Predators

- *Fitzgerald v. State*, 805 N.E.2d 857 (Ind. Ct. App. 2004)

b. Types of Restrictions

i. Computer Access

- *Smith v. State*, 779 N.E.2d 111 (Ind. Ct. App. 2002)

ii. Pornography

- *Smith v. State*, 779 N.E.2d 111 (Ind. Ct. App. 2002)

c. “Area Where Children Congregate”

- *Fitzgerald v. State*, 805 N.E.2d 857 (Ind. Ct. App. 2004)

3. Probationary Searches

- *Fitzgerald v. State*, 805 N.E.2d 857 (Ind. Ct. App. 2004)

B. Probation Revocation

- *Gleason v. State*, 634 N.E.2d 67 (Ind. Ct. App. 1994)

Deleted:

INDIANA

Case List By Court

A case with + indicates a decision not designated for publication.

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

I. U.S. Supreme Court

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

II. Supreme Court of Arkansas

- *Arndt v. State*, 642 N.E.2d 224 (Ind. 1994)
- *Carpenter v. State*, 786 N.E.2d 696 (Ind. 2003)
- *Clifford v. State*, 474 N.E.2d 963 (Ind. 1985)
- *Doe v. O'Connor*, 790 N.E.2d 985 (Ind. 2003)
- *Douglas v. State*, 490 N.E.2d 270 (Ind. 1986)
- *Garner v. State*, 777 N.E.2d 721 (Ind. 2002)
- *Johnston v. State*, 541 N.E.2d 514 (Ind. 1989)
- *Jones v. State*, 783 N.E.2d 1132, 1136 (Ind. 2003)
- *Lannan v. State*, 600 N.E.2d 1334, 1339 (Ind. 1992)
- *Louallen v. State*, 778 N.E.2d 794 (Ind. 2002)
- *Noble v. State*, 725 N.E. 2d 842 (Ind. 2000)
- *Prickett v. State*, 856 N.E.2d 1203 (Ind. 2006)
- *Serino v. State*, 798 N.E.2d 852 (Ind. 2003)
- *Smith v. State*, 636 N.E.2d 124 (Ind. 1994)
- *Smith v. State*, 543 N.E.2d 634 (Ind. 1989)
- *Stewart v. State*, 521 N.E.2d 675 (Ind. 1988)
- *Ward v. State*, 528 N.E.2d 52 (Ind. 1988)

III. Court of Appeals of Arkansas

- *Aplin v. State*, 889 N.E.2d 882 (Ind. Ct. App. 2008)
- *Asher v. State*, 790 N.E.2d 567 (Ind. Ct. App. 2003)
- *Babin v. State*, 609 N.E.2d 3 (Ind. App. Ct. 1993)
- *Beach v. State*, 411 N.E.2d 363 (Ind. Ct. App. 1980)
- *Benson v. State*, 574 N.E.2d 934 (Ind. Ct. App. 1991)
- *Bluck v. State*, 716 N.E.2d 507 (Ind. Ct. App. 1999)
- *Bone v. State*, 771 N.E.2d 710 (Ind. Ct. App. 2002)
- *Bresson v. State*, 498 N.E.2d 91 (Ind. Ct. App. 1986)

- *Candler v. State*, 837 N.E.2d 1100 (Ind. Ct. App. 2005)
- *Cowart v. State*, 756 N.E.2d 581 (Ind. Ct. App. 2001)
- *Davies v. State*, 730 N.E.2d 726, 742 (Ind. Ct. App. 2000)
- *Evans v. Evans*, 766 N.E.2d 1240 (Ind. Ct. App. 2002)
- *Everroad v. State*, 701 N.E.2d 1284 (Ind. Ct. App. 1998)
- *Fitzgerald v. State*, 805 N.E.2d 857 (Ind. Ct. App. 2004)
- *Frasier v. State*, 794 N.E.2d 449 (Ind. Ct. App. 2003)
- *Garmon v. State*, 775 N.E.2d 1217 (Ind. Ct. App. 2002)
- *Gleason v. State*, 634 N.E.2d 67 (Ind. Ct. App. 1994)
- *Goodwin v. State*, 573 N.E.2d 895 (Ind. Ct. App. 1991)
- *Green v. State*, 676 N.E.2d 755 (Ind. Ct. App. 1997)
- *Hardley v. State*,+ No. 49A05-0801-CR-29, 2008 Ind. App. LEXIS 2106 (Ind. Ct. App. Sept. 26, 2008)
- *In re G.B.*, 709 N.E.2d 352 (Ind. Ct. App. 1999)
- *Jeffers v. State*, 605 N.E.2d 196 (Ind. Ct. App. 1992)
- *Laughner v. State*, 769 N.E.2d 1147 (Ind. Ct. App. 2002)
- *Marshall v. State*,+ No. 35A02-0712-CR-1135, 2008 Ind. App. LEXIS 2121 (Ind. Ct. App. Sept. 30, 2008)
- *McNeely v. State*, 529 N.E.2d 1317 (Ind. Ct. App. 1988)
- *Mehring v. State*, 884 N.E.2d 371 (Ind. Ct. App. 2008)
- *Mettler v. State*, 697 N.E.2d 502 (Ind. Ct. App. 1998)
- *Minton v. State*, 802 N.E.2d 929 (Ind. Ct. App. 2004)
- *M.L.H. v. State*, 799 N.E.2d 1 (Ind. Ct. App. 2003)
- *Molden v. State*, 750 N.E.2d 448 (Ind. Ct. App. 2001)
- *Neaveill v. State*, 474 N.E. 2d 1045 (Ind. Ct. App. 1985)
- *Pope v. State*, 740 N.E.2d 1247 (Ind. Ct. App. 2000)
- *Reynolds v. State*, 575 N.E.2d 28 (Ind. Ct. App. 1991)
- *R.G. v. State*, 793 N.E.2d 238 (Ind. Ct. App. 2003)
- *Serrano v. State*, 808 N.E.2d 724, 728 (Ind. Ct. App. 2004)
- *Shahan v. State*, 669 N.E.2d 1012 (Ind. Ct. App. 1996)
- *Singer v. State*, 674 N.E.2d 11 (Ind. Ct. App. 1996)
- *Sipe v. State*, 797 N.E.2d 336 (Ind. Ct. App. 2003)
- *Smith v. State*, 779 N.E.2d 111 (Ind. Ct. App. 2002)
- *Southern v. State*, 878 N.E.2d 315, 322 (Ind. Ct. App. 2007)
- *State v. Kemp*, 753 N.E.2d 47 (Ind. Ct. App. 2001)
- *State v. Mason*, 829 N.E.2d 1010, 1016 (Ind. Ct. App. 2005)
- *State v. Sotos*, 558 N.E.2d 909 (Ind. Ct. App. 1990)
- *Steward v. State*, 636 N.E.2d 143 (Ind. Ct. App. 1994)
- *Surber v. State*, 884 N.E.2d 856 (Ind. Ct. App. 2008)
- *Taylor v. State*, 841 N.E.2d 631 (Ind. Ct. App. 2006)
- *Thomas v. State*, 840 N.E.2d 893 (Ind. Ct. App. 2006)
- *Tinkham v. State*, 787 N.E.2d 440, 444 (Ind. Ct. App. 2003)
- *Ware v. State*, 816 N.E.2d 1167, 1173 (Ind. Ct. App. 2004)
- *Williams v. State*,++ 819 N.E.2d 381 (Ind. Ct. App. 2004)

- *Wise v. State*, 635 N.E.2d 221 (Ind. Ct. App. 1994)
- *Wormbly v. State*, 550 N.E.2d 95 (Ind. App. 1990)

INDIANA

Offenses Defined

A case with + indicates a decision not designated for publication.

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

I. Child Exploitation (a.k.a. Child Pornography)

A. Offenses

1. Distribution

a. Generally

- It is a crime to knowingly or intentionally send or bring into Indiana obscene matter for sale or distribution or offer to distribute or exhibit to another person obscene matter depicting or describing sexual conduct involving any person who is or appears to be under 16 years of age. IND. CODE § 35-30-10.1-2.
– *Beach v. State*, 411 N.E.2d 363, 364 n.1 (Ind. Ct. App. 1980).

b. Using a Computer

- To convict an accused of felony child exploitation, the State is required to prove beyond a reasonable doubt that he or she knowingly or intentionally disseminated or exhibited to another person photographs of sexual conduct by a child under 18 years of age by using a computer network. IND. CODE § 35-42-4-4(b)(2).
– *Pope v. State*, 740 N.E.2d 1247, 1252 (Ind. Ct. App. 2000).

2. Possession

- A person who knowingly or intentionally possesses a picture, drawing, photograph, negative, motion picture, videotape, pictorial representation, or undeveloped film that depicts or describes sexual conduct by a child who is less than 16 years of age, or appears to be less than 16 years of age, and that lacks serious literary, artistic, political, or scientific value commits possession of child pornography. IND. CODE § 35-42-4-4(c).
– *Bone v. State*, 771 N.E.2d 710, 717 (Ind. Ct. App. 2002).
– *Evans v. Evans*, 766 N.E.2d 1240, 1244 n.3 (Ind. Ct. App. 2002).

– *Pope v. State*, 740 N.E.2d 1247,1252 (Ind. Ct. App. 2000).

3. Production

- A person who knowingly or intentionally manages, produces, sponsors, presents, exhibits, photographs, films, or videotapes any performance or incident that includes sexual conduct by a child under 16 years of age commits child exploitation. IND. CODE § 35-42-4-4(b).
– *Babin v. State*, 609 N.E.2d 3, 5 (Ind. App. Ct. 1993).

4. Virtual/Simulated Child Pornography

- The State is not required to bring in an actual victim of child pornography and display him or her in the court proceeding to establish that he or she is the one depicted in the pictorial image.
– *Bone v. State*, 771 N.E.2d 710, 716 (Ind. Ct. App. 2002).

B. Definitions

1. “Child Pornography”

- Photographs depicting exposed genitalia of children under the age of 18 constitute child pornography. IND. CODE § 35-42-4-4.
– *Evans v. Evans*, 766 N.E.2d 1240, 1242 n.1 (Ind. Ct. App. 2002).

2. Exhibit

- “Exhibit” is defined as to show, to display, or to present to view.
– *Beach v. State*, 411 N.E.2d 363, 364 (Ind. Ct. App. 1980).

II. Child Molesting

A. Offenses

1. Attempted Child Molesting

- The offense of attempted child molesting requires a child victim.
– *State v. Kemp*, 753 N.E.2d 47, 49 (Ind. Ct. App. 2001).

2. Fondling or Touching

- A person who, with a child under 14 years of age, performs or submits to fondling or touching, of either the child or the older person, with the intent to arouse or to satisfy the sexual desires of either the child or the older person, commits child molesting. IND. CODE § 35-42-4-3(b).
– *Louallen v. State*, 778 N.E.2d 794, 795 (Ind. 2002).

3. Sexual Intercourse and Deviate Sexual Conduct

a. Elements

- A person who, with a child under 14 years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting. IND. CODE § 35-42-4-3(a).
– *Carpenter v. State*, 786 N.E.2d 696, 704 (Ind. 2003).
– *Cowart v. State*, 756 N.E.2d 581, 583 (Ind. Ct. App. 2001).
- A person 16 years of age or older who, with a child of 12 years of age or older but under 16 years of age, performs or submits to sexual intercourse or deviate sexual conduct commits child molesting. IND. CODE § 35-42-4-3(c).
– *Benson v. State*, 574 N.E.2d 934, 935 (Ind. Ct. App. 1991).

b. Proof of Penetration

- The State is required to prove penetration in order to obtain a conviction for child molesting as a Class A felony.
– *Smith v. State*, 779 N.E.2d 111, 114 (Ind. Ct. App. 2002).
- Proof of the slightest penetration is sufficient to sustain convictions for child molesting.
– *Smith v. State*, 779 N.E.2d 111, 115 (Ind. Ct. App. 2002).
- The statute requires that the female sex organ, including external genitalia, be penetrated, not that the vagina be penetrated.
– *Smith v. State*, 779 N.E.2d 111, 115 (Ind. Ct. App. 2002).

4. Vicarious Sexual Gratification

- A person 18 years of age or older, who knowingly or intentionally directs, aids, induces, or causes a child under the age of 16 to touch or fondle him- or herself self or another child under the age of 16 with the intent to arouse or satisfy the sexual desires of the child or the older person commits vicarious sexual gratification. IND. CODE § 35-42-4-5.
– *Louallen v. State*, 778 N.E.2d 794, 797 (Ind. 2002).
– *Sipe v. State*, 797 N.E.2d 336, 341 (Ind. Ct. App. 2003).
- Merely directing a child to fondle him- or herself constitutes an offense under the vicarious-gratification statute.
– *Sipe v. State*, 797 N.E.2d 336, 338 (Ind. Ct. App. 2003).

B. Definitions

1. “Sexual Conduct”

- “Sexual conduct” includes sexual intercourse, deviate sexual conduct, exhibition of the uncovered genitals with the intent to satisfy or arouse the sexual desires of any person, sadomasochistic abuse, sexual intercourse, deviate sexual conduct with an animal, or any fondling or touching of a child by another person or of another person by a child intended to arouse or satisfy the sexual desires of either the child or the other person. IND. CODE § 35-42-4-4(a).
– *Bone v. State*, 771 N.E.2d 710, 717 (Ind. Ct. App. 2002).
– *Babin v. State*, 609 N.E.2d 3, 5 (Ind. App. Ct. 1993).

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2. “Sexual Intercourse”

- “Sexual intercourse” is an act that includes any penetration of the female sex organ by the male sex organ. IND. CODE § 35-41-1-26.
– *Smith v. State*, 779 N.E.2d 111, 114 (Ind. Ct. App. 2002).

III. Child Seduction

- To be convicted of child seduction, the defendant must be the guardian, adoptive parent, adoptive grandparent, custodian, or stepparent of the victim. IND. CODE § 35-42-4-7.
– *Asher v. State*, 790 N.E.2d 567, 571 (Ind. Ct. App. 2003).
- The statute indicates that this offense only occurs between persons in a position of trust by virtue of a particular relationship with the victim. IND. CODE § 35-42-4-7.
– *Asher v. State*, 790 N.E.2d 567, 571 (Ind. Ct. App. 2003).

IV. Criminal Attempt

A. Elements

- A person attempts to commit a crime when, acting with the culpability required for commission of the crime, he or she engages in conduct that constitutes a substantial step toward commission of the crime. IND. CODE § 35-41-5-1.
– *Laughner v. State*, 769 N.E.2d 1147, 1153 (Ind. Ct. App. 2002).
– *State v. Kemp*, 753 N.E.2d 47, 50 (Ind. Ct. App. 2001).
– *Mettler v. State*, 697 N.E.2d 502, 503 (Ind. Ct. App. 1998).
– *Benson v. State*, 574 N.E.2d 934, 935 (Ind. Ct. App. 1991).
- Determining whether an attempt has taken place involves assessing the particular circumstances of each case, the seriousness of the crime attempted, and the danger to be apprehended from a defendant’s conduct.
– *Ward v. State*, 528 N.E.2d 52, 53-54 (Ind. 1988).

B. Substantial Step

- To commit criminal attempt, an individual must act with specific intent to commit the substantive crime.
 - *Ward v. State*, 528 N.E.2d 52, 54 (Ind. 1988).
 - *Laughner v. State*, 769 N.E.2d 1147, 1154 (Ind. Ct. App. 2002).
 - *Shahan v. State*, 669 N.E.2d 1012, 1013 (Ind. Ct. App. 1996).
- The defendant must make an overt act that indicates a substantial step towards the commission of the crime.
 - *Ward v. State*, 528 N.E.2d 52, 54 (Ind. 1988).
 - *Laughner v. State*, 769 N.E.2d 1147, 1154 (Ind. Ct. App. 2002).
 - *Shahan v. State*, 669 N.E.2d 1012, 1013 (Ind. Ct. App. 1996).
- The overt act must go beyond preparation and planning to a point close enough to accomplishing the attempted crime that it amounts to the commencement of consummation of the crime.
 - *State v. Kemp*, 753 N.E.2d 47, 50 (Ind. Ct. App. 2001).
- When a defendant has done what he or she believes is necessary to effect a result, he or she has committed an attempt.
 - *Ward v. State*, 528 N.E.2d 52, 54 (Ind. 1988).
 - *Laughner v. State*, 769 N.E.2d 1147, 1154 (Ind. Ct. App. 2002).
 - *Shahan v. State*, 669 N.E.2d 1012, 1013 (Ind. Ct. App. 1996).

V. Enticement and Solicitation

A. Enticement

- Enticement includes inviting, persuading, or attempting to persuade a child to enter any vehicle, building, room, or secluded place with the intent to commit an unlawful sexual act on or with the person of the child.
 - *Wise v. State*, 635 N.E.2d 221, 223 (Ind. Ct. App. 1994).

B. Solicitation

1. Generally

- A person 18 years of age or older who knowingly or intentionally solicits a child under 14 years of age to engage in:
 - (1) sexual intercourse;
 - (2) deviate sexual conduct; or
 - (3) any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person, commits child solicitation. IND. CODE § 35-42-4-6.
 - *Louallen v. State*, 778 N.E.2d 794, 797 (Ind. 2002).
 - *Ward v. State*, 528 N.E.2d 52, 53 (Ind. 1988).

- *Laughner v. State*, 769 N.E.2d 1147, 1153 (Ind. Ct. App. 2002).
- *State v. Kemp*, 753 N.E.2d 47, 51 (Ind. Ct. App. 2001).

2. Using the Internet

- Indiana’s solicitation statute criminalizes only specific Internet communications: communications that solicit a child under 14 for sexual activities with the intent to arouse the sexual desire of either the child or solicitor. Consequently, the statute is not overbroad.
– *Laughner v. State*, 769 N.E.2d 1147, 1156 (Ind. Ct. App. 2002).

3. Attempt Crimes

- Statutory language does not prohibit an attempt offense in the crime of solicitation.
– *Laughner v. State*, 769 N.E.2d 1147, 1154 (Ind. Ct. App. 2002).
- Acts that rise above mere invitation may equate to an attempt.
– *Ward v. State*, 528 N.E.2d 52, 53 (Ind. 1988).
- Indiana statutory and common law support the existence of the crime of attempted child solicitation wherein the defendant commits an overt act that constitutes a substantial step towards soliciting a child under 14 for sexual activity, even if the solicited person is actually an adult.
– *Laughner v. State*, 769 N.E.2d 1147, 1154-55 (Ind. Ct. App. 2002).

a. Substantial Step

i. Three-Part Test

- A three-part test determines when a solicitation constitutes a substantial step:
 - (1) the solicitation takes the form of urging;
 - (2) the solicitation urges the commission of the crime at some immediate time and not in the future; and
 - (3) the cooperation or submission of the person being solicited is an essential feature of the substantive crime.

If these factors exist, the court considers the specific crime and the wrongful human conduct that the legislature has tried to sanction.

- *Ward v. State*, 528 N.E.2d 52, 54 (Ind. 1988).
- *State v. Kemp*, 753 N.E.2d 47, 51 (Ind. Ct. App. 2001).
- *Benson v. State*, 574 N.E.2d 934, 935 (Ind. Ct. App. 1991).

ii. Verbal Solicitation

- Verbal solicitation is a substantial step when the solicitation urges the immediate commission of the crime and the cooperation of the solicited person is essential to the crime.

– *Laughner v. State*, 769 N.E.2d 1147, 1154 (Ind. Ct. App. 2002).

– *Shahan v. State*, 669 N.E.2d 1012, 1013 (Ind. Ct. App. 1996).

b. Solicitation as Attempted Child Molesting

- Certain acts of child solicitation may constitute attempted child molesting.

– *Ward v. State*, 528 N.E.2d 52, 55 (Ind. 1988).

– *Benson v. State*, 574 N.E.2d 934, 935 (Ind. Ct. App. 1991).

- If the court finds that the action is a solicitation, the court should consider the specific crime and the wrongful human conduct the legislature has sought to sanction. Child molesting is a serious enough crime that the line may be drawn early in a series of acts that lead up to the consummated crime, to identify and sanction behavior as attempt.

– *Ward v. State*, 528 N.E. 2d 52, 54 (Ind. 1988).

– *Shahan v. State*, 669 N.E. 2d 1012, 1013 (Ind. Ct. App. 1996).

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

See generally Laughner v. State, 769 N.E.2d 1147 (Ind. Ct. App. 2002).

VI. Transporting a Minor for the Purpose of Prostitution

No relevant state cases reported.

INDIANA

Search and Seizure of Electronic Evidence

A case with + indicates a decision not designated for publication.

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

I. Search Warrants

A. Issuing Magistrate

- The issuing magistrate should use their common sense about the relevant information provided to them, and if they think it likely evidence of a crime can be obtained at a location, they may issue a search warrant.
– *Mehring v. State*, 884 N.E.2d 371, 376 (Ind. Ct. App. 2008).
- Determinations by magistrates about the existence of probable cause are given deference.
– *Mehring v. State*, 884 N.E.2d 371, 377 (Ind. Ct. App. 2008).
- The issuing magistrate must be neutral and detached to determine whether probable cause exists for the requested search or arrest.
– *Green v. State*, 676 N.E.2d 755, 760 (Ind. Ct. App. 1997).

B. Probable Cause

- A court may issue warrants upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. IND. CODE § 35-33-5-1.
– *Clifford v. State*, 474 N.E.2d 963, 968 (Ind. 1985).
- To establish probable cause for a search warrant, law enforcement must demonstrate that crime-connected items exist and can be discovered in a specific place. IND. CODE § 35-33-5-2(a)(1)(A).
– *Bone v. State*, 771 N.E.2d 710, 715 (Ind. Ct. App. 2002).
- Probable cause exists when facts based on reasonably trustworthy information would lead an individual of reasonable caution and prudence to conclude the accused committed the criminal offense.
– *State v. Sotos*, 558 N.E.2d 909, 912 (Ind. Ct. App. 1990).
- Whether probable cause exists is a determination to be made on a case-by-case basis.

1. Informants

a. Anonymous Tips

- Uncorroborated hearsay from an individual whose credibility is unknown is insufficient to support a finding of probable cause.
– *Frasier v. State*, 794 N.E.2d 449, 456 (Ind. Ct. App. 2003).
– *State v. Mason*, 829 N.E.2d 1010, 1016 (Ind. Ct. App. 2005).
- The hearsay must demonstrate reliability and anonymous tips do not demonstrate reliability because of the potential for poor intentions; therefore, in the event of receipt of anonymous information, corroboration of the accusations is vital.
– *Frasier v. State*, 794 N.E.2d 449, 456 (Ind. Ct. App. 2003).

b. Cooperative Citizens

- Cooperative citizens include victims of crime or persons who witness a crime.
– *Clifford v. State*, 474 N.E.2d 963, 969 (Ind. 1985).
- The motivation of a cooperative citizen in coming forward is rooted in good citizenship and a desire for law enforcement to solve the crime.
– *Clifford v. State*, 474 N.E.2d 963, 969 (Ind. 1985).
- Cooperative citizens are typically one-time reporters and are considered reliable for probable cause unless an incriminating circumstance suggests otherwise.
– *Clifford v. State*, 474 N.E.2d 963, 969 (Ind. 1985).
- When information comes from cooperative citizens who are either eyewitnesses or victims of a crime, the information can be relied on providing that no other factors call into question the informant's motives.
– *Frasier v. State*, 794 N.E.2d 449, 457 (Ind. Ct. App. 2003).

2. False Information: The Defendant's Burden

- If a defendant establishes by a preponderance of the evidence that a false statement made knowingly, intentionally, or with reckless disregard for the truth was included in a probable-cause affidavit, and if it was material to establish probable cause, the false information must be excised from the affidavit.
– *Franks v. Delaware*,⁺⁺ 438 U.S. 154, 164-65 (1978).
– *Jones v. State*, 783 N.E.2d 1132, 1136 (Ind. 2003).

C. Scope of the Search: Place to Be Searched

- A lawful search of a fixed premise includes the entire area where the object of the search may be found and includes additional acts of entry or opening that might be necessary to perform the search.
– *Green v. State*, 676 N.E.2d 755, 758 (Ind. Ct. App. 1997).
- The search of containers on the premise that might contain the item in the warrant is accessible to the search.
– *Green v. State*, 676 N.E.2d 755, 758 (Ind. Ct. App. 1997).

D. Staleness

- The information in a search warrant application must be timely.
– *Mehring v. State*, 884 N.E.2d 371, 377 (Ind. Ct. App. 2008).
– *Frasier v. State*, 794 N.E.2d 449, 457 (Ind. Ct. App. 2003).
- Stale information establishes suspicion, not reasonable belief.
– *Mehring v. State*, 884 N.E.2d 371, 377 (Ind. Ct. App. 2008).
– *Frasier v. State*, 794 N.E.2d 449, 457 (Ind. Ct. App. 2003).
- When determining staleness, courts may look at the crime’s nature, the evidence’s nature or type, or the specialized opinion testimony of law enforcement officers
– *Mehring v. State*, 884 N.E.2d 371, 378 (Ind. Ct. App. 2008).
- Indiana has not established a bright-line rule regarding the time between ascertaining the facts for a warrant and the warrant’s issuance; however, the courts determine staleness based on the individual facts and circumstances.
– *Mehring v. State*, 884 N.E.2d 371, 377 (Ind. Ct. App. 2008).
– *Frasier v. State*, 794 N.E.2d 449, 457 (Ind. Ct. App. 2003).

II. Exclusionary Rule: Good-Faith Doctrine

- Evidence obtained in violation of the Fourth Amendment is not admissible at trial; however, certain exceptions exist including the “good-faith exception.”
– *Frasier v. State*, 794 N.E.2d 449, 457 (Ind. Ct. App. 2003).
- If law enforcement relies on a defective search warrant, in good faith, the exclusionary rule does not require the suppression of evidence.
– *Frasier v. State*, 794 N.E.2d 449, 457 (Ind. Ct. App. 2003).
- The good-faith exception does not apply where the affiant knew the information in the affidavit was false or should have known it was false and misled the magistrate, where the issuing magistrate abandoned his or her judicial role, where the affidavit significantly lacked probable cause, or where the warrant is facially deficient.
– *Frasier v. State*, 794 N.E.2d 449, 458 (Ind. Ct. App. 2003).

III. Anticipatory Warrants

No relevant state cases reported.

IV. Methods of Searching

No relevant state cases reported.

V. Types of Searches

A. Employer Searches

No relevant state cases reported.

Deleted:

B. Private-Civilian Searches

- A search or seizure by a private party does not implicate the Fourth Amendment; however, it does apply to a party who acts as a government instrument or agent.
– *Bone v. State*, 771 N.E.2d 710, 714 (Ind. Ct. App. 2002).
- Determining whether one is a government agent entails analyzing whether the government knew of and acquiesced in the conduct and whether the private party's purpose in conducting the search was to assist law-enforcement agents or further their own ends.
– *Bone v. State*, 771 N.E.2d 710, 714 (Ind. Ct. App. 2002).

C. Warrantless Searches

- If law enforcement reasonably suspects that criminal activity may be taking place, law enforcement may undertake a limited investigation.
– *Bone v. State*, 771 N.E.2d 710, 716 (Ind. Ct. App. 2002).

1. Consent Searches

No relevant state cases reported.

2. Plain-View Searches

- When law-enforcement officers inadvertently discover items that suggest criminality, they may seize the item even if it is not in the search warrant.
– *Frasier v. State*, 794 N.E.2d 449, 460 (Ind. Ct. App. 2003).

- The plain-view doctrine applies where the initial search was authorized, the items were in plain view, and the criminality of the items was evident.
– *Frasier v. State*, 794 N.E.2d 449, 460 (Ind. Ct. App. 2003).

D. University-Campus Searches

No relevant state cases reported.

VI. Computer-Technician/Repairperson Discoveries

- If repairman finds child pornography on an individual's computer and contacts law enforcement, the repairman's discovery may not be an illegal search if the repairman is not a government agent.
– See generally *Bone v. State*, 771 N.E.2d 710, 714 (Ind. Ct. App. 2002).

VII. Photo-Development Discoveries

No relevant state cases reported.

VIII. Seizure of Evidence

- Under Indiana law, the following may be seized:
 - (1) property that is obtained lawfully;
 - (2) property, the possession of which is unlawful;
 - (3) property used or possessed with the intent to be used as the means of committing an offense or concealed to prevent an offense from being discovered;
 - (4) property constituting evidence of an offense or tending to show that a particular person committed an offense;
 - (5) any child that has been abandoned or neglected;
 - (6) evidence necessary to enforce statutes enacted to prevent cruelty to or neglect of children.

IND. CODE § 35-1-6-1.
– *Clifford v. State*, 474 N.E.2d 963, 968-69 (Ind. 1985).

IX. Criminal Forfeiture

No relevant cases reported.

X. Disciplinary Hearings for Federal and State Officers

No relevant state cases reported.

INDIANA

Jurisdiction and Nexus

A case with + indicates a decision not designated for publication.

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

I. Jurisdictional Nexus

Deleted:

No relevant state cases reported.

II. Internet Nexus

No relevant state cases reported.

III. State Jurisdiction, Federal Jurisdiction, and Concurrent Jurisdiction

A. State Jurisdiction

- In determining venue between two counties, the critical issue is whether the defendant operating in the first county took “any action directed” at the second county.
– *Laughner v. State*, 769 N.E.2d 1147, 1157 (Ind. Ct. App. 2002).

B. Federal Jurisdiction

No relevant state cases reported.

C. Concurrent Jurisdiction

No relevant state cases reported.

IV. Interstate Possession of Child Pornography

No relevant state cases reported.

INDIANA

Discovery and Evidence

A case with + indicates a decision not designated for publication.

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

I. Timely Review of Evidence

No relevant state cases reported.

II. Amending the Charge

- Information can be amended any time before, during, or after the trial provided the defendant's substantial rights are not prejudiced. A defendant's rights will not be prejudiced as long as he or she has notice of the amended charge, an opportunity to be heard regarding the charge, and adequate time to prepare the defense.
– *Laughner v. State*, 769 N.E.2d 1147, 1158 (Ind. Ct. App. 2002).
- An indictment or information cannot be amended in any respect that changes the theory or theories of the prosecution as originally stated, or that changes the identity of the offense charged, nor may an indictment or information be amended after arraignment for the purpose of curing a failure to charge or state an offense or legal insufficiency of the factual allegations.
– *Clifford v. State*, 474 N.E.2d 963, 965 (Ind. 1985).

III. Discovery by the Defendant

A. Defense Requests for Copies of Child Pornography

No relevant state cases reported.

B. Psychiatric Examinations

- In a sex-offense case, the defendant has no right to subject the victim to a psychiatric examination.
– *Clifford v. State*, 474 N.E.2d 963, 968, 971 (Ind. 1985).
- Where the witness's competency is not in question, the defendant is not entitled to a psychiatric examination of a witness.
– *Neaveill v. State*, 474 N.E. 2d 1045, 1049 (Ind. Ct. App. 1985).

IV. 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.

V. Text-Only Evidence

A. Introduction into Evidence

No relevant state cases reported.

B. Relevance

No relevant state cases reported.

VI. Evidence Obtained from Internet Service Providers

A. Electronic Communications Privacy Act

No relevant state cases reported.

B. Cable Act

No relevant state cases reported.

C. Patriot Act

No relevant state cases reported.

1. National Trap and Trace Authority

No relevant state cases reported.

2. State-Court-Judge Jurisdictional Limits

No relevant state cases reported.

VII. Electronic Evidence and the Best-Evidence Rule

- The best-evidence rule requires an original to prove the content of a writing or recording. IND. R. EVID. § 1002.
– *Laughner v. State*, 769 N.E.2d 1147, 1159 (Ind. Ct. App. 2002).
- When data is stored on a computer or similar device, a printout or visually readable output that reflects the data accurately is considered an original. IND. R. EVID. § 1001(3).
– *Laughner v. State*, 769 N.E.2d 1147, 1159 (Ind. Ct. App. 2002).

VIII. Confessions

A. Voluntariness

- Pursuant to the Fifth Amendment right against self incrimination, a suspect's confession must be voluntarily given to be admitted.
– *Garmon v. State*, 775 N.E.2d 1217, 1219-20 (Ind. Ct. App. 2002).

1. Trial-Court Determination

- The trial court should determine whether the confession was made voluntarily or improperly induced through threats or violence.
– *Garmon v. State*, 775 N.E.2d 1217, 1220 (Ind. Ct. App. 2002).
- In determining the voluntariness of a confession, the trial court should focus on the behavior of law-enforcement officials, ignore the probable truth or falsity of the confession, and determine whether the behavior overwhelmed the defendant's will to resist and to bring about a confession not freely self determined.
– *Smith v. State*, 543 N.E.2d 634, 637 (Ind. 1989).

2. Threats by Law Enforcement

- When law-enforcement officers make statements during arrests or interviews that explain crimes and possible penalties, the statements do not equate to promises or threats.
– *Garmon v. State*, 775 N.E.2d 1217, 1220 (Ind. Ct. App. 2002).

3. Inadmissibility of Confessions

- A confession is not admissible if it is the product of threats, physical abuse, or direct or implied promises.
– *Smith v. State*, 543 N.E.2d 634, 637 (Ind. 1989).

B. Sufficiency

- A confession alone is not sufficient evidence of a crime.

– *Garmon v. State*, 775 N.E.2d 1217, 1221 (Ind. Ct. App. 2002).

- Additional independent evidence that will permit an inference that the crime was committed is sufficient.
– *Garmon v. State*, 775 N.E.2d 1217, 1221 (Ind. Ct. App. 2002).

C. Appellate Review

- On appeal, the court should determine whether the State met its burden of proving voluntariness beyond a reasonable doubt.
– *Smith v. State*, 543 N.E.2d 634, 637 (Ind. 1989).
- The appellate court will consider the appellant’s uncontroverted evidence and in the case of conflicting evidence, the evidence that supports the trial court’s decision.
– *Smith v. State*, 543 N.E.2d 634, 637 (Ind. 1989).

IX. Relevant Evidence

A. “Relevant Evidence” Defined

- Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without evidence. IND. R. EVID. 401.
– *Candler v. State*, 837 N.E.2d 1100, 1105 (Ind. App. 2005).
– *Asher v. State*, 790 N.E.2d 567, 569 (Ind. Ct. App. 2003).
– *Pope v. State*, 740 N.E.2d 1247, 1251 (Ind. Ct. App. 2000).

B. Exclusion of Relevant Evidence

- Only where probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or needless presentation of cumulative evidence will that evidence be excluded. IND. R. EVID. 403.
– *Marshall v. State*, + No. 35A02-0712-CR-1135, 2008 Ind. App. LEXIS 2121 (Ind. Ct. App. Sept. 30, 2008).
– *Tinkham v. State*, 787 N.E.2d 440, 444 (Ind. Ct. App. 2003).
– *Pope v. State*, 740 N.E.2d 1247, 1251 (Ind. Ct. App. 2000).

X. Authentication of Evidence

- The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponents claim. IND. R. EVID. 901 (a).
– *Bone v. State*, 771 N.E.2d 710, 716 (Ind. Ct. App. 2002).

XI. Sufficiency of Evidence

A. Double Jeopardy

- If evidence is sufficient to support the jury verdict, double jeopardy does not bar a retrial on the same charge.
 - *Carpenter v. State*, 786 N.E.2d 696, 705 (Ind. 2003).
 - *Serrano v. State*, 808 N.E.2d 724, 728 (Ind. Ct. App. 2004).

B. Appellate Review of Evidence

- In reviewing sufficiency claims, the appellate court neither weighs the evidence nor judges the credibility of witnesses.
 - *Smith v. State*, 543 N.E.2d 634, 636 (Ind. 1989).
 - *Ware v. State*, 816 N.E.2d 1167, 1173 (Ind. Ct. App. 2004).
 - *Sipe v. State*, 797 N.E.2d 336, 339 (Ind. Ct. App. 2003).
 - *Smith v. State*, 779 N.E.2d 111, 114 (Ind. Ct. App. 2002).
 - *Pope v. State*, 740 N.E.2d 1247, 1251 (Ind. Ct. App. 2000).
 - *State v. Sotos*, 558 N.E.2d 909, 912 (Ind. Ct. App. 1990).
 - *Neaveill v. State*, 474 N.E.2d 1045, 1051 (Ind. Ct. App. 1985).
- The appellate court will consider evidence most favorable to the judgment and the reasonable inferences drawn there from.
 - *Smith v. State*, 543 N.E.2d 634, 636 (Ind. 1989).
 - *Ware v. State*, 816 N.E.2d 1167, 1173 (Ind. Ct. App. 2004).
 - *Sipe v. State*, 797 N.E.2d 336, 339 (Ind. Ct. App. 2003).
 - *Bone v. State*, 771 N.E.2d 710, 717 (Ind. Ct. App. 2002).
 - *Smith v. State*, 779 N.E.2d 111, 114 (Ind. Ct. App. 2002).
 - *Pope v. State*, 740 N.E.2d 1247, 1251 (Ind. Ct. App. 2000).
 - *Babin v. State*, 609 N.E.2d 3, 4 (Ind. Ct. App. 1993).
 - *Benson v. State*, 574 N.E.2d 934, 935 (Ind. Ct. App. 1991).
 - *State v. Sotos*, 558 N.E.2d 909, 912 (Ind. Ct. App. 1990).
 - *Neaveill v. State*, 474 N.E.2d 1045, 1051 (Ind. Ct. App. 1985).
 - *Beach v. State*, 411 N.E.2d 363, 364-65 (Ind. Ct. App. 1980).
- If substantial evidence of probative value supports the conclusion that the defendant is guilty beyond a reasonable doubt, the appellate court will affirm the conviction.
 - *Smith v. State*, 543 N.E.2d 634, 636 (Ind. 1989).
 - *Ware v. State*, 816 N.E.2d 1167, 1173 (Ind. Ct. App. 2004).
 - *Sipe v. State*, 797 N.E.2d 336, 339 (Ind. Ct. App. 2003).
 - *Bone v. State*, 771 N.E.2d 710, 717 (Ind. Ct. App. 2002).
 - *Smith v. State*, 779 N.E.2d 111, 114 (Ind. Ct. App. 2002).
 - *Pope v. State*, 740 N.E.2d 1247, 1251 (Ind. Ct. App. 2000).
 - *Babin v. State*, 609 N.E.2d 3, 4 (Ind. Ct. App. 1993).
 - *Benson v. State*, 574 N.E.2d 934, 935 (Ind. Ct. App. 1991).
 - *State v. Sotos*, 558 N.E.2d 909, 912 (Ind. Ct. App. 1990).
 - *Neaveill v. State*, 474 N.E.2d 1045, 1051 (Ind. Ct. App. 1985).
 - *Beach v. State*, 411 N.E.2d 363, 364-65 (Ind. Ct. App. 1980).

XII. 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 action in conformity therewith. IND. R. EVID. § 404(b).
– *Marshall v. State*, + No. 35A02-0712-CR-1135, 2008 Ind. App. LEXIS 2121 (Ind. Ct. App. Sept. 30, 2008).
– *Pope v. State*, 740 N.E.2d 1247, 1250 (Ind. Ct. App. 2000).

B. Admissible

- Evidence of other crimes, wrongs, or acts may be admissible for proof of motive, intent, preparation, plan, knowledge, identity, absence of mistake, or absence of accident. IND. R. EVID. § 404(b).
– *Southern v. State*, 878 N.E.2d 315, 322 (Ind. Ct. App. 2007)
– *Pope v. State*, 740 N.E.2d 1247, 1250 (Ind. Ct. App. 2000).
- Evidence of uncharged misconduct, which is inextricably bound up with the charged offense, is properly admissible.
– *Pope v. State*, 740 N.E.2d 1247, 1250 (Ind. Ct. App. 2000).

C. Depraved Sexual Instinct

- Indiana has adopted Federal Rule of Evidence 404(b) to take the place of the depraved sexual instinct exception, saying that past sexual misconduct with children is no longer excepted to show action in conformity with a particular character trait, although it can still be used to show the presence of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake
– *Lannan v. State*, 600 N.E.2d 1334, 1339 (Ind. 1992).

XIII. Witness Testimony

A. Child Witnesses

1. Anatomical Descriptions

- A conviction for child molesting will be sustained when it is apparent from the circumstances and the victim's limited vocabulary that the victim described an act that involved penetration of the sex organ.
– *Smith v. State*, 779 N.E.2d 111, 115 (Ind. Ct. App. 2002).
- Lack of familiarity with anatomical terms does not make a child incompetent to testify when the facts are explained in simple or childlike language that the judge and jury can understand.
– *Smith v. State*, 779 N.E.2d 111, 115 (Ind. Ct. App. 2002).
- A detailed anatomical description of penetration is not necessary.
– *Smith v. State*, 779 N.E.2d 111, 115 (Ind. Ct. App. 2002).

2. Uncorroborated Testimony

- A conviction can stand on the uncorroborated testimony of a minor witness/molested child/rape victim.
 - *Sipe v. State*, 797 N.E.2d 336, 339 (Ind. Ct. App. 2003).
 - *Smith v. State*, 779 N.E.2d 111, 115 (Ind. Ct. App. 2002).
 - *Wise v. State*, 635 N.E.2d 221, 224 (Ind. Ct. App. 1994).

3. Videotaped Interviews

- When the State presents a videotape of a child incriminating a defendant, the defense should be allowed to show a videotape of the cross-examination of the child at a child-hearsay hearing.
 - *Carpenter v. State*, 786 N.E.2d 696, 701 (Ind. 2003).

B. Expert Witnesses

- Expert testimony that asserts the victim's behavior is consistent with post-traumatic-stress disorder and bears on whether or not rape has occurred is permissible.
 - *Steward v. State*, 636 N.E.2d 143, 146 (Ind. Ct. App. 1994).
 - *Goodwin v. State*, 573 N.E.2d 895, 897 (Ind. Ct. App. 1991).

C. Protected Person

- The Indiana protected-person statute, IND. CODE § 35-37-4-6, lists conditions where evidence is allowed for cases involving children or individuals with disabilities.
 - *Carpenter v. State*, 786 N.E.2d 696, 699 (Ind. 2003).
- A protected person's statements and videotape are admissible if the trial court determines that the time, content, and circumstances of the videotape provide sufficient reliability and the protected person is available for cross examination.
 - *Carpenter v. State*, 786 N.E.2d 696, 699 (Ind. 2003).
 - *Taylor v. State*, 841 N.E.2d 631, 636 (Ind. Ct. App. 2006).

D. Demonstrative Evidence

- If a witness is allowed to testify about a certain matter, photographs, films, and diagrams pertinent to the matter are admissible.
 - *Clifford v. State*, 474 N.E.2d 963, 972 (Ind. 1985).
 - *Wormbly v. State*, 550 N.E.2d 95, 97 (Ind. Ct. App. 1990)
- When a witness has seen a particular item, it is easily recognized, and tampering is unlikely, the witness' identification of it makes it sufficient for admission.

– *Johnston v. State*, 541 N.E.2d 514, 516 (Ind. 1989).

E. Witness Credibility: The “Incredible-Dubiosity” Rule

- The incredible-dubiosity rule permits an appellate court to reverse a trial court where the sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and where there is a complete lack of circumstantial evidence of the defendant’s guilt.
 - *Prickett v. State*, 856 N.E.2d 1203, 1207 (Ind. 2006)
 - *Carpenter v. State*, 786 N.E.2d 696, 705 (Ind. 2003).
 - *Hardley v. State*,+ No. 49A05-0801-CR-29, 2008 Ind. App. LEXIS 2106 (Ind. Ct. App. Sept. 26, 2008).
 - *Smith v. State*, 779 N.E.2d 111, 114 (Ind. Ct. App. 2002).

F. Hearsay

1. “Hearsay” Defined

- “Hearsay” is a statement made out-of court and offered into evidence to prove the facts of the statement. IND. R. EVID. 801(c).
 - *Carpenter v. State*, 786 N.E.2d 696, 698 (Ind. 2003).
 - *Arndt v. State*, 642 N.E.2d 224, 227 (Ind. 1994).

2. Admissibility

- When the out-of court declarant is present in court and subject to cross-examination, statements made out-of court are not inadmissible hearsay.
 - *Johnston v. State*, 541 N.E.2d 514, 517 (Ind. 1989).
 - *Jeffers v. State*, 605 N.E.2d 196, 198 (Ind. Ct. App. 1992).

3. Exceptions

- Hearsay is not admissible unless it fits within an exception to the hearsay rule. IND. R. EVID. 801, 803.
 - *Carpenter v. State*, 786 N.E.2d 696, 698 (Ind. 2003).
 - *Arndt v. State*, 642 N.E.2d 224, 227 (Ind. 1994).
- Exceptions to the hearsay rule exist because certain out-of-court statements are made in a way that guarantees reliability.
 - *Carpenter v. State*, 786 N.E.2d 696, 698 (Ind. 2003).
 - *Arndt v. State*, 642 N.E.2d 224, 227 (Ind. 1994).

a. Confrontation Clause

- For an exception not to offend the Confrontation Clause, the hearsay evidence must possess substantial indicia of reliability. This can be inferred where it fits within an exception or where there is the guarantee of trustworthiness. That guarantee can be

interpreted from the context of the situation where the statement is made and how it seems particularly believable.

- *Garner v. State*, 777 N.E.2d 721, 724 (Ind. 2002).
- *Arndt v. State*, 642 N.E.2d 224, 228 (Ind. 1994).

b. Past-Recollection Recorded

- When a videotape is made or a statement is taken well after the incident, the time reduces the spontaneity and increases the possibility of suggestion.
 - *Carpenter v. State*, 786 N.E.2d 696, 700 (Ind. 2003).
 - *Taylor v. State*, 841 N.E.2d 631, 636 (Ind. Ct. App. 2006).

G. Appellate Review: Failure to Object to Testimony

- If the defendant fails to object to cumulative testimony, he or she waives the issue for purposes of appeal.
 - *Surber v. State*, 884 N.E.2d 856, 863 (Ind. Ct. App. 2008).
 - *Goodwin v. State*, 573 N.E.2d 895, 896 (Ind. Ct. App. 1991).

XIV. Privileges

A. Physician-Patient Privilege

- Physicians, as to matter communicated to them, as such, by patients, in the course of their professional business, or advice given in such cases, are not competent witnesses. IND. CODE § 34-1-14-5.
 - *Goodwin v. State*, 573 N.E.2d 895, 897 n.1 (Ind. Ct. App. 1991).
- The physician-patient-privilege statute does not create an absolute incompetency but a privilege for the benefit of the patient that may be claimed or waived.
 - *Williams v. State*, 819 N.E.2d 381, 388 (Ind. Ct. App. 2004).
 - *Goodwin v. State*, 573 N.E.2d 895, 897 (Ind. Ct. App. 1991).
- The rule is intended to protect the patient, not to shield the alleged perpetrator.
 - *Goodwin v. State*, 573 N.E.2d 895, 897 (Ind. Ct. App. 1991).

B. Psychologist-Patient Privilege

- The psychologist-patient privilege may not be employed by an alleged rapist to prevent the introduction of admissible evidence of rape.
 - *Goodwin v. State*, 573 N.E.2d 895, 897 (Ind. Ct. App. 1991).

INDIANA

Age of Child Victim

A case with + indicates a decision not designated for publication.

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

I. Proving the Age of the Child Victim

A. Methods

- When an individual's age relates significantly to the case, it is appropriate for that individual to be described and presented to the jury.
– *Johnston v. State*, 541 N.E.2d 514, 516-17 (Ind. 1989).
- A jury that can learn from oral testimony may directly view the described object.
– *Johnston v. State*, 541 N.E.2d 514, 516-17 (Ind. 1989).

B. Specific Offenses

1. Child Molesting

- For a conviction on a charge of child molesting, the State must prove that the victim was a child under the age of 14.
– *Minton v. State*, 802 N.E.2d 929, 936 (Ind. Ct. App. 2004).

2. Sexual Conduct with a Minor

- Sexual conduct with a minor requires the State to prove that the victim was a person at least 14 years of age but less than 18 years of age. IND. CODE § 35-42-4-9.
– *Minton v. State*, 802 N.E.2d 929, 936 (Ind. Ct. App. 2004).

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

No relevant state cases reported.

INDIANA

Multiple Counts

A case with + indicates a decision not designated for publication.

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

I. What Constitutes an “Item” of Child Pornography?

No relevant state cases reported.

II. Issues of Double Jeopardy

- The double-jeopardy clause does not protect a defendant from being convicted of multiple counts of the same offense against the same victim; however, if the essential elements of one offense establish the essential elements of another challenged offense, in regards to the crimes’ statutory elements or evidence used to convict, two convictions may constitute the same offense and violate the double-jeopardy clause.
 - *Thomas v. State*, 840 N.E.2d 893, 900 (Ind. Ct. App. 2006).
 - *Minton v. State*, 802 N.E.2d 929, 936, 938 (Ind. Ct. App. 2004).
- Where a double-jeopardy challenge is premised upon convictions of multiple counts of the same offense, the statutory-elements test is inapplicable. Rather, the question becomes whether the actual evidence used to convict the defendant under one count was the same as the actual evidence used to convict the defendant under another count. In order to prevail upon this basis, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish essential elements of a second challenged offense.
 - *Thomas v. State*, 840 N.E.2d 893, 900 (Ind. Ct. App. 2006).
 - *Minton v. State*, 802 N.E.2d 929, 937 (Ind. Ct. App. 2004).

INDIANA

Defenses

A case with + indicates a decision not designated for publication.

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I. Abandonment

- It is a defense that the person who engaged in the prohibited conduct voluntarily abandoned his or her effort to commit the crime and voluntarily prevented its commission. IND. CODE § 35-41-3-10.
 - *Smith v. State*, 636 N.E.2d 124, 127 (Ind. 1994).
 - *Babin v. State*, 609 N.E.2d 3, 5 (Ind. App. Ct. 1993).
- The defense of abandonment is available only to the person who physically and mentally abandons the enterprise and when that decision comes from within and is not due to extraneous factors.
 - *Smith v. State*, 636 N.E.2d 124, 127 (Ind. 1994).
 - *Babin v. State*, 609 N.E.2d 3, 5 (Ind. App. Ct. 1993).
- The defendant must have renounced the criminal plan prior to the completion of the underlying crime or before it became inevitable.
 - *Smith v. State*, 636 N.E.2d 124, 127 (Ind. 1994).
 - *Babin v. State*, 609 N.E.2d 3, 5 (Ind. App. Ct. 1993).

II. Alibi

- The alibi statute, IND. CODE § 35-36-4-2, requires the prosecutor to state the time of the offense with such reasonable specificity as the circumstances of the case allow.
 - *Stewart v. State*, 521 N.E.2d 675, 676 (Ind. 1988).
 - *Clifford v. State*, 474 N.E.2d 963, 971 (Ind. 1985).
 - *McNeely v. State*, 529 N.E.2d 1317, 1322 (Ind. Ct. App. 1988).
- If the evidence available to the State permits, the prosecutor's statement must specify the time of day as well as the date; conversely, if the evidence does not permit exact determination of the time of the offense more exactly than a period of several days, the State is required only to respond that the offense occurred within such a period.
 - *Stewart v. State*, 521 N.E.2d 675, 676 (Ind. 1988).
 - *Clifford v. State*, 474 N.E.2d 963, 971 (Ind. 1985).
 - *McNeely v. State*, 529 N.E.2d 1317, 1322 (Ind. Ct. App. 1988).

III. Diminished Capacity

- Low mental capacity is not a defense to a criminal charge.
– *Neaveill v. State*, 474 N.E.2d 1045, 1048 (Ind. Ct. App. 1985).

A. Insanity

No relevant state cases reported, but see generally IND. CODE § 35-41-3-6.

B. Internet Addiction

No relevant state cases reported.

IV. Entrapment

- Entrapment exists when a government agency hires or induces a defendant to commit a crime he or she would have no predisposition to commit.
– *Beach v. State*, 411 N.E.2d 363, 365 (Ind. Ct. App. 1980).
- When the entrapment defense is raised, the court must determine whether law-enforcement officers or their informants initiated and actively participated in the criminal activity and whether there was evidence that the accused was predisposed to commit the crime so that the prescribed activity was not wholly the idea of law enforcement.
– *Beach v. State*, 411 N.E.2d 363, 365 (Ind. Ct. App. 1980).
- Evidence of events occurring at the time of, or after the initial contact by the officer with the defendant, or occurring at the time of the commission of the offense, is admissible to show predisposition.
– *Beach v. State*, 411 N.E.2d 363, 366 (Ind. Ct. App. 1980).

V. First Amendment

No relevant state cases reported.

VI. Impossibility

A. Factual

No relevant state cases reported.

B. Legal: Attempt Crimes

- The present ability to complete the crime is not a necessary element for the crime of attempt.
– *Noble v. State*, 725 N.E.2d 842, 845 (Ind. 2000).
– *Aplin v. State*, 889 N.E.2d 882, 884, 885 (Ind. Ct. App. 2008).
– *Laughner v. State*, 769 N.E.2d 1147, 1153 (Ind. Ct. App. 2002).

- If the defendant's conduct constitutes a substantial step towards the commission of the crime and has the necessary specific intent, the defendant has committed an attempt.
 - *Noble v. State*, 725 N.E.2d 842, 845 (Ind. 2000).
 - *Aplin v. State*, 889 N.E.2d 882, 884, 885 (Ind. Ct. App. 2008).
 - *Laughner v. State*, 769 N.E.2d 1147, 1153 (Ind. Ct. App. 2002).

VII. Manufacturing Jurisdiction

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

- The State must establish that a crime charged was committed within the statute of limitations.
 - *Sipe v. State*, 797 N.E.2d 336, 339 (Ind. Ct. App. 2003).

A. Specific Offenses

1. Child Molesting, Vicarious Sexual Gratification, and Child Solicitation

- A prosecution for child molesting, vicarious sexual gratification, and child solicitation is barred unless commenced before the date that the alleged victim of the offense reaches 31 years of age.
 - *Sipe v. State*, 797 N.E.2d 336, 340 (Ind. Ct. App. 2003).

2. Fondling or Touching

- Prosecution for child molesting in the form of fondling or touching must be commenced within five years of the offense.
 - *Sipe v. State*, 797 N.E.2d 336, 340 (Ind. Ct. App. 2003).

B. Tolling: Concealment of Evidence

- When an accused person actively conceals evidence of the offense, and the evidence employed to charge him or her is unknown to the prosecuting authority, or could not have been discovered by the authority by exercise of due diligence, the statute of limitations for the commencement of a prosecution is tolled. IND. CODE § 35-41-4-2(i)(2).
– *Sipe v. State*, 797 N.E.2d 336, 340 (Ind. Ct. App. 2003).
- For the concealment of evidence to sufficiently toll the limitations, the defendant must perform a positive act calculated to prevent discovery of the fact that a crime has been committed.
– *Sipe v. State*, 797 N.E.2d 336, 340 (Ind. Ct. App. 2003).

INDIANA

Sentencing Issues

A case with + indicates a decision not designated for publication.

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

I. Pretrial Home Detention

- Time served in pretrial home detention does not equate to pretrial time served in a prison or jail.
– *Molden v. State*, 750 N.E.2d 448, 451 (Ind. Ct. App. 2001).
- Pretrial home detainees should not receive credit for time served on home detention toward any eventual sentence.
– *Molden v. State*, 750 N.E.2d 448, 451 (Ind. Ct. App. 2001).

II. Sentence Imposition

- A defendant should only be sentenced on the basis of accurate information and is allowed to refute inaccurate or improper information.
– *Bluck v. State*, 716 N.E.2d 507, 512 (Ind. Ct. App. 1999).
- The sentencing process should be fair and a sentence based on false assumptions violates due process.
– *Bluck v. State*, 716 N.E.2d 507, 512 (Ind. Ct. App. 1999).

A. Evidence at Sentencing Hearing

- When determining the proper sentence to be imposed, the rules of evidence, other than those concerning matters of privilege, do not apply. IND. R. EVID. 101(c)(2).
– *Bluck v. State*, 716 N.E.2d 507, 512 (Ind. Ct. App. 1999).

1. Habitual Offenders

- In the habitual-offender phase of a felony trial, the State must prove beyond a reasonable doubt that the defendant has accumulated two prior unrelated felonies.
– *Smith v. State*, 543 N.E.2d 634, 636 (Ind. 1989).

- The defendant must have committed and been sentenced to the first crime and then the second crime before the commission of the offense in the immediate trial.
– *Smith v. State*, 543 N.E.2d 634, 636 (Ind. 1989).
- The State must introduce evidence to prove the two priors but the jury hearing the evidence knows that the defendant has been found guilty of the immediate crime.
– *Smith v. State*, 543 N.E.2d 634, 636 (Ind. 1989).
- The State is not required to prove the result of the third crime to the jurors.
– *Smith v. State*, 543 N.E.2d 634, 636 (Ind. 1989).

Deleted:

2. Sex Offenders

- When sentencing a sex offender, profile evidence regarding the typical child molester may or may not be probative.
– *Bluck v. State*, 716 N.E.2d 507, 512 (Ind. Ct. App. 1999).
- The court should base the sentencing decision on factors specific to the individual offender rather than on a class of offenders.
– *Bluck v. State*, 716 N.E.2d 507, 512 (Ind. Ct. App. 1999).

3. Statements by the Victim’s Family

- The victim’s family can make recommendations as to sentencing and testimonies regarding good character to assist in determining the sentence to be imposed; however, their statements do not constitute mitigating or aggravating circumstances.
– *Serino v. State*, 798 N.E.2d 852, 858 (Ind. 2003).

B. First-Time Offenders Versus Repeat Offenders

- The Indiana criminal-justice system is based on principles of reformation and where reasonably possible, sentencing orders should distinguish between first offenders and repeat offenders.
– *Bluck v. State*, 716 N.E.2d 507, 514 (Ind. Ct. App. 1999).

C. Presumptive Sentences and Enhancement

- When considering a sentence’s appropriateness, the court should focus on the presumptive sentence.
– *Asher v. State*, 790 N.E.2d 567, 570 (Ind. Ct. App. 2003).
- When the court enhances a presumptive sentence, the court must identify pertinent aggravating and mitigating factors, establish why the factors

aggravate or mitigate, and detail the balancing process of how the aggravating factors outweighed the mitigating ones.

- *Fitzgerald v. State*, 805 N.E.2d 857, 862 (Ind. Ct. App. 2004).
- *Pope v. State*, 740 N.E.2d 1247, 1253 (Ind. Ct. App. 2000).
- *Bluck v. State*, 716 N.E.2d 507, 511 (Ind. Ct. App. 1999).
- *Everroad v. State*, 701 N.E.2d 1284, 1286 (Ind. Ct. App. 1998).
- *Singer v. State*, 674 N.E.2d 11, 13 (Ind. Ct. App. 1996).

- The court may increase a presumptive sentence and/or impose consecutive sentences after consideration of appropriate aggravating and mitigating circumstances.
 - *Reynolds v. State*, 575 N.E.2d 28, 33 (Ind. Ct. App. 1991).
- Two factors can drive the cumulative sentence potential outside the statutory range for a crime. The first occurs when the perpetrator commits the same offense against the two victims. Enhanced and consecutive sentences justify the separate harms and acts against more than one person. The second factor entails the prosecutor electing to charge multiple aspects of the same event as separate counts defined by separate criminal statutes.
 - *Serino v. State*, 798 N.E.2d 852, 857 (Ind. 2003).

1. Mitigating Factors

- The trial court is not required to find or weigh mitigating factors.
 - *Fitzgerald v. State*, 805 N.E.2d 857, 862 (Ind. Ct. App. 2004).
 - *Bluck v. State*, 716 N.E.2d 507, 514 (Ind. Ct. App. 1999).
 - *Everroad v. State*, 701 N.E.2d 1284, 1286-87 (Ind. Ct. App. 1998).
 - *Singer v. State*, 674 N.E.2d 11, 23 (Ind. Ct. App. 1996).
 - *Bresson v. State*, 498 N.E.2d 91, 95 (Ind. Ct. App. 1986).
- a. **No Prior Criminal Record**
 - No prior criminal record should be a substantial mitigating factor.
 - *Fitzgerald v. State*, 805 N.E.2d 857, 857 (Ind. Ct. App. 2004).
 - *Bluck v. State*, 716 N.E.2d 507, 514 (Ind. Ct. App. 1999).
- b. **Guilty Pleas**
 - A defendant who enters a guilty plea extends a substantial benefit to the State and deserves to have a benefit in return.
 - *Singer v. State*, 674 N.E.2d 11, 21 (Ind. Ct. App. 1996).
 - Pleading guilty is one factor to be considered in sentencing.
 - *Singer v. State*, 674 N.E.2d 11, 21 (Ind. Ct. App. 1996).

2. Aggravating Factors

- A single valid aggravator sufficiently supports an enhanced sentence.

- *Bluck v. State*, 716 N.E.2d 507, 515 (Ind. Ct. App. 1999).
- *Bresson v. State*, 498 N.E.2d 91, 95 (Ind. Ct. App. 1986).

a. Age of the Victim

- Age 65 or older is an aggravating circumstance but young age is not statutorily addressed. IND. CODE § 35-38-1-7(d).
– *Bresson v. State*, 498 N.E.2d 91, 95 (Ind. Ct. App. 1986).
- The victim’s age and the criminal acts are material elements of child molesting and may not enhance a sentence.
– *Bluck v. State*, 716 N.E.2d 507, 513 (Ind. Ct. App. 1999).
– *Reynolds v. State*, 575 N.E.2d 28, 32 (Ind. Ct. App. 1991).

b. Criminal Record

- A defendant’s prior or lack of criminal history is so significant that trial courts must consider it when determining which sentence to impose. IND. CODE § 35-38-1-7.1.
– *Asher v. State*, 790 N.E.2d 567, 572 (Ind. Ct. App. 2003).
– *Bluck v. State*, 716 N.E.2d 507, 513 (Ind. Ct. App. 1999).
- Criminal charges pending at the time of the sentencing may enhance the sentence.
– *Davies v. State*, 730 N.E.2d 726, 742 (Ind. Ct. App. 2000).
– *Bluck v. State*, 716 N.E.2d 507, 514 (Ind. Ct. App. 1999).

c. Distribution/Intent to Traffic

No relevant state cases reported.

d. Lack of Remorse

- When a defendant displays disdain, recalcitrance, or an “I don’t care” attitude, he or she lacks remorse, which may be regarded as an aggravator.
– *Bluck v. State*, 716 N.E.2d 507, 513 (Ind. Ct. App. 1999).
– *Singer v. State*, 674 N.E.2d 11, 20 (Ind. Ct. App. 1996).

e. Maintaining Innocence

- A court cannot enhance a sentence because a defendant, in good faith, consistently maintains his or her innocence.
– *Bluck v. State*, 716 N.E.2d 507, 512 (Ind. Ct. App. 1999).
- The defendant has the right to protect his or her innocence throughout the criminal proceeding, including sentencing.
– *Bluck v. State*, 716 N.E.2d 507, 512 (Ind. Ct. App. 1999).

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f. Need for Treatment

- Need for correctional treatment served by commitment to a penal facility is proper only where the court explains why the defendant needs treatment for a longer period of time than the presumptive sentence.
– *Bluck v. State*, 716 N.E.2d 507, 512 (Ind. Ct. App. 1999).

g. Number of Images

No relevant state cases reported.

h. Pattern of Activity for Sexual Exploitation

- While molesting a child over a long period of time is not enumerated by the aggravating factors statute, it may be properly considered one.
– *Smith v. State*, 543 N.E.2d 634, 637 (Ind. 1989).
- The repetitive and ongoing nature and circumstances of the crime, including the uncharged acts against the victim, may be considered an aggravator. IND. CODE § 35-38-1-7.1(a)(2).
– *Bluck v. State*, 716 N.E.2d 507, 513 (Ind. Ct. App. 1999).
- Repeated molestations occurring over a period of time is a valid aggravator supporting a maximum enhancement of a sentence for child molesting.
– *Singer v. State*, 674 N.E.2d 11, 14 (Ind. Ct. App. 1996).

i. Physical Injury

- Physical injury to the victim can support a sentence enhancement; however, the absence of physical injury does not indicate that the court should not impose an enhanced sentence.
– *Bluck v. State*, 716 N.E.2d 507, 515 (Ind. Ct. App. 1999).

j. Position of Trust

- Abusing a position of trust is a valid aggravator that supports the maximum enhancement of a sentence for child molesting.
– *Singer v. State*, 674 N.E.2d 11, 14 (Ind. Ct. App. 1996).
- Being a neighbor, and nothing more, does not put one in a position of trust and should not be considered an aggravating circumstance.
– *Bluck v. State*, 716 N.E.2d 507, 514 (Ind. Ct. App. 1999).

k. Sadistic, Masochistic, or Violent Material

No relevant state cases reported.

l. Uncharged Misconduct

- Uncharged misconduct is a valid sentence aggravator.
– *Singer v. State*, 674 N.E.2d 11, 14 (Ind. Ct. App. 1996).

m. Use of Computers

No relevant state cases reported.

III. Concurrent Versus Consecutive Sentences

- The court determines whether the terms of imprisonment shall be served concurrently or consecutively.
– *Serino v. State*, 798 N.E.2d 852, 857 n.3 (Ind. 2003).
- The court can order imprisonment terms to be served consecutively even if the sentences are not served at the same time.
– *Serino v. State*, 798 N.E.2d 852, 857 n.3 (Ind. 2003).
- Except for crimes of violence, the total of the consecutive terms of imprisonment to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the presumptive sentence for a felony which is one class of felony higher than the most serious of the felonies for which the person has been convicted. IND. CODE § 35-50-1-2.
– *Serino v. State*, 798 N.E.2d 852, 857 n.3 (Ind. 2003).

IV. Appellate Review of Sentencing Decisions

A. Generally

- The sentencing decision is within the trial court's discretion and will be reversed only upon a showing of manifest abuse of discretion.
– *Reynolds v. State*, 575 N.E.2d 28, 33 (Ind. Ct. App. 1991).
- A sentence may be revised if it is inappropriate in light of the nature of the offense and the character of the offender. IND. APP. R. 7(b).
– *Fitzgerald v. State*, 805 N.E.2d 857, 864 (Ind. Ct. App. 2004).
– *Asher v. State*, 790 N.E.2d 567, 570 (Ind. Ct. App. 2003).
- An appellate court reviews a sentence that appears to be disproportionate.
– *Pope v. State*, 740 N.E.2d 1247, 1253 (Ind. Ct. App. 2000).
– *Everroad v. State*, 701 N.E.2d 1284, 1286 (Ind. Ct. App. 1998).
– *Bresson v. State*, 498 N.E.2d 91, 94-95 (Ind. Ct. App. 1986).

- If the court concludes that no reasonable person would find the sentence appropriate considering the offense and the offender, the court will revise the sentence appropriately.
 - *Pope v. State*, 740 N.E.2d 1247, 1253 (Ind. Ct. App. 2000).
 - *Everroad v. State*, 701 N.E.2d 1284, 1286 (Ind. Ct. App. 1998).
 - *Bresson v. State*, 498 N.E.2d 91, 94-95 (Ind. Ct. App. 1986).

B. Aggravating Factors

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- If the trial court lists the aggravating circumstance without specificity, the appellate court can infer from the evidence presented to the trial court how the court determined an aggravating circumstance.
 - *Bresson v. State*, 498 N.E.2d 91, 96 (Ind. Ct. App. 1986).

C. Post Conviction Relief

- The petitioner carries the burden of proof to establish his or her grounds for post-conviction relief by a preponderance of the evidence.
 - *Douglas v. State*, 490 N.E.2d 270, 271 (Ind. 1986).
- The decision will only be reversed where the evidence clearly leads to a different result from the trial court’s decision.
 - *Douglas v. State*, 490 N.E.2d 270, 271 (Ind. 1986).

V. Megan’s Law: Sex-Offender Registration and Notification

A. Dangerousness Hearing

- A sex offender has no right to a dangerousness hearing prior to publication of registry information because the legislature has decided that sex-offender-registry information must be publicly disclosed.
 - *Doe v. O’Connor*, 790 N.E.2d 985, 989 (Ind. 2003).

B. Juvenile Offenders: Evidentiary Hearing

- The trial court can not order a juvenile to be placed on the Sex Offender Registry until after the juvenile’s release from detention, when the court must hold an evidentiary hearing to determine whether the juvenile will be a repeat offender.
 - *In re G.B.*, 709 N.E.2d 352, 354 (Ind. Ct. App. 1999).
- The evidentiary hearing should determine, by clear and convincing evidence, whether the juvenile will likely be a repeat offender.
 - *M.L.H. v. State*, 799 N.E.2d 1, 3 (Ind. Ct. App. 2003).

- The clear-and-convincing standard requires a stricter degree of proof than a mere preponderance of evidence.
 - *M.L.H. v. State*, 799 N.E.2d 1, 3 (Ind. Ct. App. 2003).
 - *R.G. v. State*, 793 N.E.2d 238, 240 n.1 (Ind. Ct. App. 2003).

INDIANA

Supervised Release: Probation

A case with + indicates a decision not designated for publication.

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

I. Conditions of Probation

- The trial court has broad discretion in determining the terms of probation.
– *Smith v. State*, 779 N.E.2d 111, 117 (Ind. Ct. App. 2002).
- The only limitation is that the conditions be reasonably related to the treatment of the defendant and the protection of public safety.
– *Smith v. State*, 779 N.E.2d 111, 117 (Ind. Ct. App. 2002).
- The conditions of supervised release need to be sufficiently clear to indicate to a probationer what will result in a return to prison.
– *Fitzgerald v. State*, 805 N.E.2d 857, 867 (Ind. Ct. App. 2004).
– *Smith v. State*, 779 N.E.2d 111, 118 (Ind. Ct. App. 2002).

A. Constitutional Rights

- When a defendant argues that a probation condition implicates his or her constitutional rights, the court should consider the purpose of probation, the extent to which probationers should have constitutional rights, and the legitimate needs of law enforcement.
– *Fitzgerald v. State*, 805 N.E.2d 857, 864-65 (Ind. Ct. App. 2004).
– *Smith v. State*, 779 N.E.2d 111, 117 (Ind. Ct. App. 2002).
- Probation can restrict or deny constitutional rights if balancing factors indicate that it is warranted.
– *Smith v. State*, 779 N.E.2d 111, 117 (Ind. Ct. App. 2002).

B. Prohibitions and Restricted Access

1. Types of Offenders

a. Child Molesters

- Child molesters molest children to whom they have access; therefore, probation conditions that reduce this access are reasonable.

– *Smith v. State*, 779 N.E.2d 111, 117 (Ind. Ct. App. 2002).

b. Sexual Predators

- Sexual predators prey on individuals in their access; therefore, conditions that reduce this access are reasonable.
– *Fitzgerald v. State*, 805 N.E.2d 857, 867 (Ind. Ct. App. 2004).

2. Types of Restrictions

a. Computer Access

- A trial court may prohibit a defendant’s use of a computer or access to online computer services if the court reasons that the computer provides easy access to child pornography, which would be detrimental to the defendant’s rehabilitation.
– *Smith v. State*, 779 N.E.2d 111, 118 (Ind. Ct. App. 2002).

b. Pornography

- A blanket prohibition on pornography is unclear and vague in probation conditions.
– *Smith v. State*, 779 N.E.2d 111, 118 (Ind. Ct. App. 2002).

3. “Area Where Children Congregate”

- The phrase “area where children congregate” as a probation condition does not sufficiently distinguish forbidden places.
– *Fitzgerald v. State*, 805 N.E.2d 857, 868 (Ind. Ct. App. 2004).

C. Probationary Searches

- For a probationary search to be reasonable, there must be reasonable suspicion that the conditions of probation are being violated.
– *Fitzgerald v. State*, 805 N.E.2d 857, 865 (Ind. Ct. App. 2004).

II. Probation Revocation

Deleted:

- Being arrested for crime is not sufficient to revoke a defendant’s probation.
– *Gleason v. State*, 634 N.E.2d 67, 68 (Ind. Ct. App. 1994).
- There must be proof at the hearing or proof of conviction.
– *Gleason v. State*, 634 N.E.2d 67, 68 (Ind. Ct. App. 1994).
- At a revocation hearing, a probationer has certain due-process rights, including written notice of the alleged violations, disclosure of the evidence, an opportunity to

be heard and present evidence, the right of confrontation, and a neutral, detached hearing body.

– *Gleason v. State*, 634 N.E.2d 67, 68 (Ind. Ct. App. 1994).