

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

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

Additionally, the manual would not have been completed 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, (JD George Washington School of Law 2008) and Tara Steinnerd (3L Catholic University School of Law). The NLC also gratefully acknowledges the support of Mrs. Norma Zimdahl for her generous support of this project.

The Editors,

National Law Center for Children and Families
June 2008

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NEW YORK

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NEW YORK

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- *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153 (1992)
- *People v. Adler*, 50 N.Y.2d 730 (1980)
- *People v. Bigelow*, 66 N.Y.2d 417 (1985)
- *People v. Bilsky*, 95 N.Y.2d 172 (2000)
- *People v. Darden*, 34 N.Y.2d 177 (1974)
- *People v. Evans*, 94 N.Y.2d 499 (2000)
- *People v. Foley*, 94 N.Y.2d 668 (2000)
- *People v. Fraser*, 96 N.Y.2d 318 (2001)
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III. Supreme Court of New York

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- *People v. Bolarinwa*, 687 N.Y.S.2d 442 (N.Y. App. Div. 1999)
- *People v. Burke*, 385 N.Y.S.2d 156 (N.Y. App. Div. 1976)
- *People v. Caldarola*, 732 N.Y.S.2d 360 (N.Y. App. Div. 2001)
- *People v. Chew*, 834 N.Y.S.2d 605 (N.Y. App. Div. 2007)

- *People v. Church*, 819 N.Y.S.2d 155 (N.Y. App. Div. 2006)
- *People v. Clark*, 725 N.Y.S.2d 154 (N.Y. App. Div. 2001)
- *People v. Clarke*, 570 N.Y.S.2d 305 (N.Y. App. Div. 1991)
- *People v. Cohen*, 450 N.Y.S.2d 497 (N.Y. App. Div. 1982)
- *People v. Cruz*, 709 N.Y.S.2d 717 (N.Y. App. Div. 2000)
- *People v. Duboy*, 540 N.Y.S.2d 905 (N.Y. App. Div. 1989)
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- *People v. Fraser*, 704 N.Y.S.2d 426 (N.Y. App. Div. 2000)
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- *People v. Gibbs*, 731 N.Y.S.2d 102 (N.Y. App. Div. 2001)
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- *People v. Manngard*, 712 N.Y.S.2d 582 (N.Y. App. Div. 2000)
- *People v. Moffitt*, 798 N.Y. S.2d 174 (N.Y. App. Div. 2005)
- *People v. Moon*, 571 N.Y.S.2d 580 (N.Y. App. Div. 1991)
- *People v. Mormile*, 812 N.Y.S.2d 524 (N.Y. App. Div. 2006)
- *People v. Padilla*, 517 N.Y.S.2d 299 (N.Y. App. Div. 1987)
- *People v. Pimental*, 587 N.Y.S.2d 365 (N.Y. App. Div. 1992)
- *People v. Pinkoski*, 752 N.Y.S.2d 421 (N.Y. App. Div. 2002)
- *People v. Plaisted*, 767 N.Y.S.2d 518 (N.Y. App. Div. 2003)
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- *People v. Reyes*, 556 N.Y.S.2d 916 (N.Y. App. Div. 1990)
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- *People v. Teribury*, 458 N.Y.S.2d 85 (N.Y. App. Div. 1982)
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- *People v. Walker*, 727 N.Y.S.2d 731 (N.Y. App. Div. 2001)
- *People v. Watson*, 721 N.Y.S.2d 700 (N.Y. App. Div. 2001)
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- *People v. Bennett*, 653 N.Y.S.2d 835 (N.Y. Sup. Ct. 1997)
- *People v. Henry*, 579 N.Y.S.2d 565 (N.Y. Sup. Ct. 1991)

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- *People v. Barrows*, 677 N.Y.S.2d 672 (N.Y. Sup. Ct. 1998)
- *People v. Barrows*, 664 N.Y.S.2d 410 (N.Y. Sup. Ct. 1997)
- *People v. Burke*, 690 N.Y.S.2d 897 (N.Y. Sup. Ct. 1999)

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E. Nassau County

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G. Richmond County

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H. Suffolk County

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- *People v. Doe*, 515 N.Y.S.2d 982 (N.Y. Crim. Ct. 1987)

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- *People v. Bimonte*, 712 N.Y.S.2d 829 (N.Y. Crim. Ct. 2000)
- *People v. Pietramala*, 377 N.Y.S.2d 883 (N.Y. Crim. Ct. 1975)

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B. Nassau County

- *People v. Levitz*, 521 N.Y.S.2d 977 (N.Y. County Ct. 1987)

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- *People v. Skya*, 789 N.Y.S.2d 403 (N.Y. County Ct. 2004)

D. Orange County

- *People v. Etheridge*, 820 N.Y.S.2d 738 (N.Y. County Ct. 2006)

E. Suffolk County

- *People v. Capitello*, 528 N.Y.S.2d 263 (N.Y. County Ct. 1988)
- *People v. Garing*, 781 N.Y.S.2d 626 (N.Y. County Ct. 2003).

F. Westchester County

- *People v. Gallicchio*, 730 N.Y.S.2d 671 (N.Y. County Ct. 2001)
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NEW YORK

Topic Outline With Cases

I. OFFENSES DEFINED

A. Child Pornography

1. Dost Factors

- *People v. Bimonte*, 726 N.Y.S.2d 830 (N.Y. Crim. Ct. 2001)

2. Virtual/Simulated Child Pornography

No state cases reported.

B. Deviate Sexual Intercourse

1. Elements

- *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153 (1992)
- *People v. Gonzales*, 561 N.Y.S.2d 358 (N.Y. County Ct. 1990)

2. Sexual Conduct

- *People v. Barrows*, 677 N.Y.S.2d 672 (N.Y. Sup. Ct. 1998)
- *People v. Pinkoski*, 729 N.Y.S.2d 585 (N.Y. County Ct. 2001)

C. Disseminating Indecent Material to Minors in the First Degree

- *People v. Foley*, 94 N.Y.2d 668 (2000)
- *People v. Barrows*, 677 N.Y.S.2d 672 (N.Y. Sup. Ct. 1998)
- *People v. Barrows*, 664 N.Y.S.2d 410 (N.Y. Sup. Ct. 1997)
- *People v. Gallicchio*, 730 N.Y.S.2d 671 (N.Y. County Ct. 2001)

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- *People v. Gallicchio*, 730 N.Y.S.2d 671 (N.Y. County Ct. 2001)

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- *People v. Foley*, 94 N.Y.2d 668 (2000)
- *People v. Barrows*, 677 N.Y.S.2d 672 (N.Y. Sup. Ct. 1998)
- *People v. Gallicchio*, 730 N.Y.S.2d 671 (N.Y. County Ct. 2001)

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

See infra “Disseminating Indecent Material to Minors in the First Degree,” Part I.C.

E. Patronizing a Prostitute in the Third Degree

- *People v. Doe*, 515 N.Y.S.2d 982 (N.Y. Criminal Ct. 1987)

F. Possessing a Sexual Performance by a Child

- *People v. Fraser*, 96 N.Y.2d 318 (2001)
- *People v. Fraser*, 704 N.Y.S.2d 426 (N.Y. App. Div. 2000)
- *In re Millan*, 730 N.Y.S.2d 392 (N.Y. Sup. Ct. 2001)
- *People v. Gilmour*, 678 N.Y.S.2d 436 (N.Y. Sup. Ct. 1998)
- *People v. Bimonte*, 726 N.Y.S.2d 830 (N.Y. Crim. Ct. 2001)
- *People v. Bimonte*, 712 N.Y.S.2d 829 (N.Y. Crim. Ct. 2000)

1. Sexual Performance

- *People v. Fraser*, 96 N.Y.2d 318 (2001)
- *People v. Duboy*, 540 N.Y.S.2d 905 (N.Y. App. Div. 1989)
- *People v. Gilmour*, 678 N.Y.S.2d 436 (N.Y. Sup. Ct. 1998)
- *People v. Bimonte*, 712 N.Y.S.2d 829 (N.Y. Crim. Ct. 2000)
- *People v. Capitello*, 528 N.Y.S.2d 263 (N.Y. County Ct. 1988)

2. Sexual Conduct

- *People v. Fraser*, 96 N.Y.2d 318 (2001)
- *People v. Duboy*, 540 N.Y.S.2d 905 (N.Y. App. Div. 1989)
- *People v. Gilmour*, 678 N.Y.S.2d 436 (N.Y. Sup. Ct. 1998)
- *People v. Bimonte*, 712 N.Y.S.2d 829 (N.Y. Crim. Ct. 2000)
- *People v. Capitello*, 528 N.Y.S.2d 263 (N.Y. County Ct. 1988)

3. Performance

- *People v. Fraser*, 96 N.Y.2d 318 (2001)
- *People v. Keyes*, 75 N.Y.2d 343 (1990)
- *People v. Fraser*, 704 N.Y.S.2d 426 (N.Y. App. Div. 2000)
- *People v. Keyes*, 535 N.Y.S.2d 162 (N.Y. App. Div. 1988)
- *People v. Gilmour*, 678 N.Y.S.2d 436 (N.Y. Sup. Ct. 1998)
- *People v. Bimonte*, 712 N.Y.S.2d 829 (N.Y. Crim. Ct. 2000)

4. Simulated

- *People v. Bimonte*, 712 N.Y.S.2d 829 (N.Y. Crim. Ct. 2000)

G. Promoting an Obscene Sexual Performance by a Child

1. Elements

- *People v. Keyes*, 75 N.Y.2d 343 (1990)
- *People v. Keyes*, 535 N.Y.S.2d 162 (N.Y. App. Div. 1988)
- *People v. Barrows*, 677 N.Y.S.2d 672 (N.Y. Sup. Ct. 1998)
- *People v. Bimonte*, 726 N.Y.S.2d 830 (N.Y. Crim. Ct. 2001)
- *People v. Levitz*, 521 N.Y.S.2d 977 (N.Y. County Ct. 1987)

2. Promote

- *People v. Keyes*, 75 N.Y.2d 343 (1990)
- *People v. Keyes*, 535 N.Y.S.2d 162 (N.Y. App. Div. 1988)
- *People v. Barrows*, 677 N.Y.S.2d 672 (N.Y. Sup. Ct. 1998)
- *People v. Godek*, 449 N.Y.S.2d 428 (N.Y. Sup. Ct. 1982)
- *People v. Levitz*, 521 N.Y.S.2d 977 (N.Y. County Ct. 1987)

H. Rape in the Third Degree

- *People v. Gonzales*, 561 N.Y.S.2d 358 (N.Y. County Ct. 1990)

I. Sexual Abuse in the First Degree

- *People v. Shapiro*, 50 N.Y.2d 747 (1980)

J. Sexual Contact

- *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153 (1992)
- *People v. Watson*, 721 N.Y.S.2d 700 (N.Y. App. Div. 2001)

K. Sodomy in the Third Degree

- *People v. Gonzales*, 561 N.Y.S.2d 358 (N.Y. County Ct. 1990)

L. Transporting Minor for the Purposes of Prostitution

No state cases reported.

M. Use of a Child in a Sexual Performance

- *People v. Duboy*, 540 N.Y.S.2d 905 (N.Y. App. Div. 1989)
- *People v. Capitello*, 528 N.Y.S.2d 263 (N.Y. County Ct. 1988)

II. SEARCH AND SEIZURE OF ELECTRONIC EVIDENCE

A. Search Warrants

- *People v. Godek*, 449 N.Y.S.2d 428 (N.Y. Sup. Ct. 1982)

1. Probable Cause

- *People v. Bilsky*, 95 N.Y.2d 172 (2000)
- *People v. Bigelow*, 66 N.Y.2d 417 (1985)
- *People v. Nieves*, 36 N.Y.2d 396 (1975)
- *People v. Harper*, 653 N.Y.S.2d 771 (N.Y. App. Div. 1997)
- *People v. Teribury*, 458 N.Y.S.2d 85 (N.Y. App. Div. 1982)
- *People v. Burke*, 385 N.Y.S.2d 156 (N.Y. App. Div. 1976)
- *People v. Bennett*, 653 N.Y.S.2d 835 (N.Y. Sup. Ct. 1997)
- *In re Marcario*, 462 N.Y.S.2d 1000 (N.Y. Fam. Ct. 1983)
- *People v. Pietramala*, 377 N.Y.S.2d 883 (N.Y. Crim. Ct. 1975)

a. Probable Cause to Believe that an Abused or Neglected Child May Be Found on the Premises

- *In re Marcario*, 462 N.Y.S.2d 1000 (N.Y. Fam. Ct. 1983)

b. Unsworn Hearsay

- *People v. Hetrick*, 80 N.Y.2d 344 (1992)
- *People v. Burke*, 690 N.Y.S.2d 897 (N.Y. Sup. Ct. 1999)

c. Informants

i. Identified

- *People v. Hetrick*, 80 N.Y.2d 344 (1992)
- *People v. Burke*, 690 N.Y.S.2d 897 (N.Y. Sup. Ct. 1999)

ii. Confidential

- *People v. Darden*, 34 N.Y.2d 177 (1974)

- *People v. Pimental*, 587 N.Y.S.2d 365 (N.Y. App. Div. 1992)
- *Onderdonk v. New York*, 648 N.Y.S.2d 214 (N.Y. Ct. Cl. 1996)
- *In re Marcario*, 462 N.Y.S.2d 1000 (N.Y. Fam. Ct. 1983)

d. Information to Be Provided

- *People v. Nieves*, 36 N.Y.2d 396 (1975)
- *People v. Williams*, 670 N.Y.S.2d 893 (N.Y. App. Div. 1998)
- *People v. Teribury*, 458 N.Y.S.2d 85 (N.Y. App. Div. 1982)
- *People v. Burke*, 690 N.Y.S.2d 897 (N.Y. Sup. Ct. 1999)
- *People v. Bennett*, 653 N.Y.S.2d 835 (N.Y. Sup. Ct. 1997)

i. Description of Property

- *People v. Hulsen*, 577 N.Y.S.2d 48 (N.Y. App. Div. 1991)
- *People v. Bennett*, 653 N.Y.S.2d 835 (N.Y. Sup. Ct. 1997)

ii. Expert Opinion

- *People v. Burke*, 690 N.Y.S.2d 897 (N.Y. Sup. Ct. 1999)

iii. Reasonable Inferences

- *People v. Burke*, 690 N.Y.S.2d 897 (N.Y. Sup. Ct. 1999)

e. The Defendant's Burden

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

f. Material Previously Submitted to a Judge

- *People v. Hawley*, 596 N.Y.S.2d 205 (N.Y. App. Div. 1993)

2. Reconsideration of Previously Issued Unexecuted Search Warrants

- *People v. Moon*, 571 N.Y.S.2d 580 (N.Y. App. Div. 1991)

3. Scope of Search Warrant

a. Seizure of Items Not in Search Warrant

- *People v. Burke*, 690 N.Y.S.2d 897 (N.Y. Sup. Ct. 1999)

b. Incorporation of Description Found in Search-Warrant Application

- *People v. Bennett*, 653 N.Y.S.2d 835 (N.Y. Sup. Ct. 1997)

4. Staleness

a. Probable Cause

- *People v. Walker*, 727 N.Y.S.2d 731 (N.Y. App. Div. 2001)
- *People v. Manngard*, 712 N.Y.S.2d 582 (N.Y. App. Div. 2000)
- *Town of East Hampton v. Omabuild USA No. 1, Inc.*, 627 N.Y.S.2d 723 (N.Y. App. Div. 1995)
- *People v. Acevedo*, 572 N.Y.S.2d 101 (N.Y. App. Div. 1991)
- *People v. Clarke*, 570 N.Y.S.2d 305 (N.Y. App. Div. 1991)
- *People v. Padilla*, 517 N.Y.S.2d 299 (N.Y. App. Div. 1987)
- *People v. Teribury*, 458 N.Y.S.2d 85 (N.Y. App. Div. 1982)

b. Ten-Day Expiration on Search Warrants

- *People v. Pietramala*, 377 N.Y.S.2d 883 (N.Y. Crim. Ct. 1975)

5. Minor Omissions and Inconsistencies

- *People v. Bennett*, 653 N.Y.S.2d 835 (N.Y. Sup. Ct. 1997)

6. “Law-of-the-Case” Doctrine

- *People v. Bilsky*, 95 N.Y.2d 172 (2000)
- *People v. Evans*, 94 N.Y.2d 499 (2000)

B. Anticipatory Warrants

No state cases reported.

C. Warrantless Searches

1. Types of Warrantless Searches

a. Automobile Searches

- *People v. Henry*, 579 N.Y.S.2d 565 (N.Y. Sup. Ct. 1991)

b. Exigent Circumstances

- *People v. Adler*, 50 N.Y.2d 730 (1980)

c. Consent Searches

- *People v. Cruz*, 709 N.Y.S.2d 717 (N.Y. App. Div. 2000)

2. Scope of Search

a. In General

- *People v. Henry*, 579 N.Y.S.2d 565 (N.Y. Sup. Ct. 1991)

b. Exigent Circumstances

- *People v. Kane*, 573 N.Y.S.2d 729 (N.Y. App. Div. 1991)
- *People v. Cohen*, 450 N.Y.S.2d 497 (N.Y. App. Div. 1982)

D. Timely Review of Evidence

No state cases reported.

E. Methods of Searching

No state cases reported.

F. Employer Searches

No state cases reported.

G. Private Searches

- *People v. Adler*, 50 N.Y.2d 730 (1980)
- *People v. Jones*, 47 N.Y.2d 528 (1979)
- *People v. Rhodes*, 484 N.Y.S.2d 135 (N.Y. App. Div. 1985)

H. Civilian Searches

No state cases reported.

I. University-Campus Searches

No state cases reported.

J. Computer Technician/Repairperson Discoveries

- *People v. Fraser*, 704 N.Y.S.2d 426 (N.Y. App. Div. 2000)

K. Photo-Development Discoveries

- *People v. Burke*, 690 N.Y.S.2d 897 (N.Y. Sup. Ct. 1999)
- *People v. Bimonte*, 712 N.Y.S.2d 829 (N.Y. Crim. Ct. 2000)

L. Criminal Forfeiture

No state cases reported.

M. Disciplinary Hearings for Federal and State Officers

No state cases reported.

N. PROBATION AND PAROLEES RIGHTS

- *People v. Etheridge*, 820 N.Y.S.2d 738 (N.Y. County Ct. 2006)

III. JURISDICTION AND NEXUS

A. Jurisdictional Nexus

No state cases reported.

B. Internet Nexus

No state cases reported.

C. State Jurisdiction, Federal Jurisdiction, Concurrent Jurisdiction

1. State

- *Fischbarg v. Doucet*, 832 N.Y.S.2d 164 (N.Y. App. Div. 2006)

2. Federal

No state cases reported.

3. Concurrent

No state cases reported.

D. Interstate Possession of Child Pornography

No state cases reported.

IV. DISCOVERY AND EVIDENCE

A. Defense Requests for Copies of Child Pornography

No state cases reported.

B. Introduction of E-mails into Evidence

1. Hearsay/Authentication Issues

No state cases reported.

2. Circumstantial Evidence

No state cases reported.

3. Technical Aspects of Electronic Evidence Regarding Admissibility

No state cases reported.

C. Text-Only Evidence

1. Introduction into Evidence

- *People v. Carratu*, 755 N.Y.S.2d 800 (N.Y. Sup. Ct. 2003)

2. Relevance

No state cases reported.

D. Evidence Obtained from Internet Service Providers

1. Electronic Communications Privacy Act

No state cases reported.

2. Cable Act

No state cases reported.

3. Patriot Act

a. National Trap and Trace Authority

No state cases reported.

b. State-Court-Judge Jurisdictional Limits

No state cases reported.

E. Prior Bad Acts

1. Motion for Disclosure of Uncharged Bad Acts

- *People v. Gallicchio*, 730 N.Y.S.2d 671 (N.Y. County Ct. 2001)

2. The Defendant's Burden

- *People v. Gallicchio*, 730 N.Y.S.2d 671 (N.Y. County Ct. 2001)

3. Admissibility

a. Generally

- *People v. Bolarinwa*, 687 N.Y.S.2d 442 (N.Y. App. Div. 1999)
- *People v. Basir*, 578 N.Y.S.2d 603 (N.Y. App. Div. 1992)

b. Case Specific

- *People v. Caldarola*, 732 N.Y.S.2d 360 (N.Y. App. Div. 2001)
- *People v. Clark*, 725 N.Y.S.2d 154 (N.Y. App. Div. 2001)
- *People v. Watson*, 721 N.Y.S.2d 700 (N.Y. App. Div. 2001)
- *People v. Archer*, 649 N.Y.S.2d 204 (N.Y. App. Div. 1996)
- *People v. Reyes*, 556 N.Y.S.2d 916 (N.Y. App. Div. 1990)

c. The Defendant Chooses to Testify

- *People v. Gray*, 84 N.Y.2d 709 (1995)
- *People v. Sandoval*, 34 N.Y.2d 371 (1974)
- *People v. Gibbs*, 731 N.Y.S.2d 102 (N.Y. App. Div. 2001)
- *People v. Allen*, 604 N.Y.S.2d 378 (N.Y. App. Div. 1993)

d. Youth Offenders

- *People v. Gray*, 84 N.Y.2d 709 (1995)

F. Privileges

No state cases reported.

V. AGE OF CHILD VICTIM

A. Proving the Age of the Child Depicted

- *People v. Foley*, 94 N.Y.2d 668 (2000)

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

- *People v. Gilmour*, 678 N.Y.S.2d 436 (N.Y. Sup. Ct. 1998)

VI. MULTIPLE COUNTS

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

- *People v. Emerson*, 766 N.Y.S.2d 482 (N.Y. Sup. Ct. 2003)

B. Issues of Double Jeopardy

1. Court-Martial Prosecution

- *Northrup v. Relin*, 613 N.Y.S.2d 506 (N.Y. App. Div. 1994)

2. Two Offenses Based on Same Act or Criminal Transaction

- *Northrup v. Relin*, 613 N.Y.S.2d 506 (N.Y. App. Div. 1994)

VII. DEFENSES

A. Consent

- *People v. Gonzales*, 561 N.Y.S.2d 358 (N.Y. County Ct. 1990)

B. Diminished Capacity

1. Addiction to the Internet

No state cases reported.

2. Insanity

- *People v. Poquee*, 780 N.Y.S.2d 247 (N.Y. App. Div. 2004)

3. Physical Incapacity

- *People v. Steinberg*, 573 N.Y.S.2d 965 (N.Y. App. Div. 1991)

C. Entrapment

- *People v. Keyes*, 597 N.Y.S.2d 785 (N.Y. App. Div. 1993)

D. Extreme Emotional Disturbance

1. Defense

- *People v. Adams*, 423 N.Y.S.2d 936 (N.Y. App. Div. 1980)

2. Burden

- *People v. Adams*, 423 N.Y.S.2d 936 (N.Y. App. Div. 1980)

E. First Amendment

No state cases reported.

F. Impossibility

1. Factual

No state cases reported.

2. Legal

- *People v. Mormile*, 812 N.Y.S.2d 524 (N.Y. App. Div. 2006)

G. Manufacturing Jurisdiction

No state cases reported.

H. Mistake of Fact: Age of Child Victim

- *People v. Fraser*, 96 N.Y.2d 318 (2001)
- *People v. Manngard*, 712 N.Y.S.2d 582 (N.Y. App. Div. 2000)
- *People v. Gilmour*, 678 N.Y.S.2d 436 (N.Y. Sup. Ct. 1998)

I. Mistake of Law

- *People v. Marrero*, 69 N.Y.2d 382 (1987)
- *People v. Fraser*, 704 N.Y.S.2d 426 (N.Y. App. Div. 2000)

J. Outrageous Conduct

No state cases reported.

K. Parental-Alienation Syndrome (PAS)

- *People v. Bimonte*, 712 N.Y.S.2d 829 (N.Y. Crim. Ct. 2000)

L. Private Possession of Child Pornography

- *People v. Keyes*, 75 N.Y.2d 343 (1990)
- *People v. Gaito*, 604 N.Y.S.2d 992 (N.Y. App. Div. 1993)
- *People v. Duboy*, 540 N.Y.S.2d 905 (N.Y. App. Div. 1989)
- *People v. Keyes*, 535 N.Y.S.2d 162 (N.Y. App. Div. 1988)
- *People v. Godek*, 449 N.Y.S.2d 428 (N.Y. Sup. Ct. 1982)
- *People v. Levitz*, 521 N.Y.S.2d 977 (N.Y. County Ct. 1987)

M. Researcher: Persons or Institutions Having Scientific, Educational, Governmental, or Other Similar Justification

- *People v. Fraser*, 96 N.Y.2d 318 (2001)
- *People v. Fraser*, 704 N.Y.S.2d 426 (N.Y. App. Div. 2000)

N. Sexual Orientation

No state cases reported.

VIII. SENTENCING ISSUES

A. Conditions of Probation

- *People v. Gould*, 662 N.Y.S.2d 520 (N.Y. App. Div. 1997)

B. Consecutive Sentences

1. Imposition

- *People v. Lynch*, 738 N.Y.S.2d 116 (N.Y. App. Div. 2002)

2. Mitigating Circumstances

- *People v. Victor J.*, 724 N.Y.S.2d 162 (N.Y. App. Div. 2001)

C. Enhancement

1. Age of Victim

No state cases reported.

2. Distribution/Intent to Traffic

No state cases reported.

3. Number of Images

No state cases reported.

3. Pattern of Activity for Sexual Exploitation

- *People v. Chew*, 834 N.Y.S.2d 605 (N.Y. App. Div. 2007)

5. Sadistic, Masochistic, or Violent Material

No state cases reported.

6. Use of Computers

No state cases reported.

IX. SUPERVISED RELEASE

- *People v. Espinoza-Aguilar*, 806 N.Y.S.2d 271 (N.Y. App. Div. 2005)

NEW YORK

Case Highlights

Allstate Ins. Co. v. Mugavero, 79 N.Y.2d 153 (1992)

When the victim is a child under the age of 11, acts of deviate sexual intercourse and sexual contact constitute the serious felonies of first-degree sodomy and first-degree sexual abuse.

Fischbarg v. Doucet, 832 N.Y.S.2d 164 (N.Y. App. Div. 2006)

Given advances in technology, the court indicated that it would not require physical presence in the State to establish State Jurisdiction. Rather, emails, faxes, phone calls, and other attempts to communicate with persons within the state would be taken into serious consideration in determining whether one has purposely availed themselves of a state's rights and benefits.

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.

In re Marcario, 462 N.Y.S.2d 1000 (N.Y. Fam. Ct. 1983)

Where there is probable cause to believe that an abused or neglected child may be found on the premises, an order may authorize a person conducting the child-protective investigation, accompanied by a law-enforcement officer, to enter the premises to determine whether such child is present.

In re Millan, 730 N.Y.S.2d 392 (N.Y. Sup. Ct. 2001)

Laws requiring registration of sex offenders are remedial and, therefore, constitutional.

Northrup v. Relin, 613 N.Y.S.2d 506 (N.Y. App. Div. 1994)

A court-martial prosecution constituted prosecution in a court of any jurisdiction within the United States.

Onderdonk v. New York, 648 N.Y.S.2d 214 (N.Y. Ct. Cl. 1996)

A search warrant may be issued based upon information supplied by a confidential informant provided that there is a showing that the information itself is reliable and that the informant is credible.

People v. Acevedo, 572 N.Y.S.2d 101 (N.Y. App. Div. 1991)

A search warrant based on supporting affidavits containing allegations of a solitary sale of cocaine two months earlier with no allegations of ongoing or continuing criminal activity was invalid.

People v. Adams, 423 N.Y.S.2d 936 (N.Y. App. Div. 1980)

The extreme emotional disturbance defense enables a defendant to establish the existence of mitigating circumstances, collateral to the principal facts at issue.

People v. Adler, 50 N.Y.2d 730 (1980)

Where exigency is employed to justify a seizure but the threat of harm or of destruction of evidence has been neutralized by law-enforcement dominion over the property, the Fourth Amendment mandates the intervention of a detached magistrate and the issuance of a warrant before there occurs a further intrusion on an individual's privacy interests.

People v. Allen, 604 N.Y.S.2d 378 (N.Y. App. Div. 1993)

When a defendant takes the stand, he or she can be cross-examined on prior convictions or bad acts that bear on his or her credibility.

People v. Archer, 649 N.Y.S.2d 204 (N.Y. App. Div. 1996)

Prior bad acts of a sexual nature that the defendant purportedly perpetrated upon the victim were admissible to establish that the defendant engaged in a course of conduct that was likely to be injurious to the physical or moral welfare of the victim, an essential element of the crime of endangering the welfare of a child that was charged in two counts of the indictment.

People v. Barrows, 664 N.Y.S.2d 410 (N.Y. Sup. Ct. 1997)

The Supreme Court of New York, Kings County, upheld the validity of a statute prohibiting the transmission of obscene or pornographic materials with the intent to lure a minor into sexual conduct.

People v. Barrows, 677 N.Y.S.2d 672 (N.Y. Sup. Ct. 1998)

The Supreme Court of New York, Kings County, found a statute prohibiting disseminating indecent materials to minors unconstitutionally vague and overbroad in violation of the First Amendment to the U.S. Constitution; however, the court found no merit to the defendant's challenge to the constitutionality of the statute prohibiting the promotion of an obscene sexual performance by a child.

People v. Basir, 578 N.Y.S.2d 603 (N.Y. App. Div. 1992)

Since the defendant sought to establish that the child was murdered by an unidentified man or persons with access to her room key, the evidence of her prior beatings of her children was admissible to show identity.

People v. Bennett, 653 N.Y.S.2d 835 (N.Y. Sup. Ct. 1997)

A description contained in the application for a search warrant may, by incorporation into the warrant, cure what would otherwise be a defect in the warrant's description of the property to be seized.

People v. Bigelow, 66 N.Y.2d 417 (1985)

There are two ways to verify whether an informant knows what he or she is talking about – through his or her own description of underlying circumstances personally observed and by law-enforcement investigation that corroborates the defendant’s actions or that develops information consistent with detailed predictions by the informant.

People v. Bilsky, 95 N.Y.2d 172 (2000)

The “law-of-case” doctrine does not apply to search-warrant applications.

People v. Bimonte, 712 N.Y.S.2d 829 (N.Y. Crim. Ct. 2000)

Parental-Alienation-Syndrome testimony applies in child-custody cases, not in prosecutions involving possession of a sexual performance of a child.

People v. Bimonte, 726 N.Y.S.2d 830 (N.Y. Crim. Ct. 2001)

In applying the *Dost* factors to two photographs at issue, the court found that there was no impermissibly expansive construction to the proscription on lewd exhibitions of the genitals.

People v. Bolarinwa, 687 N.Y.S.2d 442 (N.Y. App. Div. 1999)

Charges of neglect against the defendant were properly admitted as they addressed the defendant’s knowledge and were relevant on the issue of the defendant’s subjective mental state at the time of the crime.

People v. Burke, 385 N.Y.S.2d 156 (N.Y. App. Div. 1976)

A magistrate issuing a search warrant may accord great weight to the personal observations of a member of the sheriff’s department.

People v. Burke, 690 N.Y.S.2d 897 (N.Y. Sup. Ct. 1999)

Identified citizen informants are presumed to be reliable, and expert opinions about the probable location of criminal evidence may be considered by the magistrate in determining the sufficiency of a warrant application.

People v. Caldarola, 732 N.Y.S.2d 360 (N.Y. App. Div. 2001)

Five instances of prior bad acts toward the complainant were admissible to complete the narration and to demonstrate the intentional use of force, thereby contradicting the defendant’s claim of consensual sex.

People v. Capitello, 528 N.Y.S.2d 263 (N.Y. County Ct. 1988)

The phrase “lewd exhibition of the genitals” is not unduly vague or unfamiliar in criminal law.

People v. Carratu, 755 N.Y.S.2d 800 (N.Y. Sup. Ct. 2003)

Computer files containing false identification documents were not inadvertently discovered and were thus inadmissible as falling outside the scope of search warrant, in prosecution for possession of illegal cable boxes. The warrant authorized search of defendant’s computers for documentary evidence relating to cable box operation; folder

was unambiguously labeled “Fake I.D.,” and file extension names on the files in that folder indicated they likely contained images and thus were not the type of text files sought by warrant.

People v. Chew, 834 N.Y.S.2d 605 (N.Y. App. Div. 2007)

A sentence, imposed after defendant was convicted for first-degree sexual abuse was properly, may be enhanced pursuant to the second child sexual assault felony offender statute where defendant was previously convicted for third-degree sodomy of a child.

People v. Clark, 725 N.Y.S.2d 154 (N.Y. App. Div. 2001)

Evidence of the defendant’s prior bad acts was admitted for the limited purpose of establishing motive and/or intent.

People v. Clarke, 570 N.Y.S.2d 305 (N.Y. App. Div. 1991)

When combined, two drug transactions provided significant indicia of continuing criminal activity to allow the issuing justice to conclude that probable cause existed to believe that narcotics were being kept at the defendant’s premises.

People v. Cohen, 450 N.Y.S.2d 497 (N.Y. App. Div. 1982)

When a constitutionally protected area becomes the scene of a crime, law enforcement may subject the premises to a preliminary search and inspection whose scope and duration must be limited by and reasonably related to the exigencies of the situation. Once that preliminary investigation has come to an end, however, no further searches for evidence may be conducted on the premises unless authorized by a warrant.

People v. Cruz, 709 N.Y.S.2d 717 (N.Y. App. Div. 2000)

A tenant has the authority to consent to the search of his or her apartment.

People v. Darden, 34 N.Y.2d 177 (1974)

Where there is insufficient evidence to establish probable cause apart from the testimony of the arresting officer as to communications received from an informer, when the issue of identity of the informer is raised at the suppression hearing, for the suppression judge then to conduct an *in camera* inquiry.

People v. Doe, 515 N.Y.S.2d 982 (N.Y. Crim. Ct. 1987)

The actual age of the person solicited is a critical element to a charge of patronizing a prostitute in the third degree.

People v. Duboy, 540 N.Y.S.2d 905 (N.Y. App. Div. 1989)

The State’s compelling interest in regulating child pornography is not dependent on whether the material is distributed commercially or possessed privately since the focus is on the harm to the child.

People v. Emerson, 766 N.Y.S.2d 482 (N.Y. Sup. Ct. 2003)

Each file of child pornography, found by a computer repairman, in a folder on defendant’s computer constituted an item of child pornography.

People v. Espinoza-Aguilar, 806 N.Y.S.2d 271 (N.Y. App. Div. 2005)

No extraordinary circumstances warranted reduction, in conviction for first-degree rape, of sentence of 15 years in prison and five years of supervised release, even though defendant had no criminal record; defendant admitted he repeatedly had sexual intercourse with his girlfriend's 12-year-old niece over a period of time without regard to her age, and he was sentenced in accordance with the plea agreement.

People v. Etheridge, 820 N.Y.S.2d 738 (N.Y. County Ct. 2006)

Special condition of probation, which prohibited probationer, who had been convicted of rape in the third degree, from entering adult bookstores, strip clubs and viewing materials which depicted or appeared to depict nudity, or actual or simulated sexual conduct of any kind, was not overbroad prohibition of free speech; probationer's First Amendment rights were circumscribed by the fact that he was a sex offender placed on probation after a felony conviction, he was the only person affected by the condition, and conditions were legitimate means of ensuring that probationer followed his course of treatment. Enforcement of these requirements do not violate the rights of a defendant that was found with photographs and video clips of women in positions and making movements designed to arouse.

People v. Evans, 94 N.Y.2d 499 (2000)

The law of the case cannot apply in a court reviewing an order on appeal.

People v. Foley, 94 N.Y.2d 668 (2000)

Court of Appeals upheld a statute prohibiting the dissemination of indecent materials to minors.

People v. Fraser, 704 N.Y.S.2d 426 (N.Y. App. Div. 2000)

The defendant's claim that he was a licensed social worker and that he downloaded child pornography from the Internet in connection with research he was conducting to develop treatment methods for Internet child pornographers was no defense to charges of possessing a sexual performance by a child.

People v. Fraser, 96 N.Y.2d 318 (2001)

Application of the affirmative defense that the persons to whom allegedly obscene or indecent material was disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational, governmental, or other similar justification for possessing, disseminating, or viewing the same, is limited to prosecutions for obscenity or disseminating indecent material to minors in the second degree.

People v. Gaito, 604 N.Y.S.2d 992 (N.Y. App. Div. 1993)

The defendant incorrectly contends that absent proof that the pornographic pictures were intended for other than private use, the crime of use of a child in a sexual performance does not occur.

People v. Gallicchio, 730 N.Y.S.2d 671 (N.Y. County Ct. 2001)

In order for a communication to violate the “disseminating-indecent-materials-to-minors-in-the-first-degree” statute, it is not necessary for the communication to be limited to a visual image, but includes a written communication of sexually explicit language.

People v. Gibbs, 731 N.Y.S.2d 102 (N.Y. App. Div. 2001)

The defendant’s direct testimony opened the door to the prosecutor’s questioning concerning the defendant’s prior bad acts.

People v. Gilmour, 678 N.Y.S.2d 436 (N.Y. Sup. Ct. 1998)

In a possession-of-sexual-performance case, the prosecutor is required to prove beyond a reasonable doubt that a defendant knows both the character and content of the material possessed.

People v. Godek, 449 N.Y.S.2d 428 (N.Y. Sup. Ct. 1982)

Magazines and films depicting obscene activity between children under the age of 16 may be criminally prosecuted even if the articles are privately displayed to consenting adults and even if there is insufficient proof that the participants resided in the State of New York.

People v. Gonzales, 561 N.Y.S.2d 358 (N.Y. County Ct. 1990)

Actual consent of individuals under 17 is legally inoperative.

People v. Gould, 662 N.Y.S.2d 520 (N.Y. App. Div. 1997)

Conditions of probation must be rehabilitative and not punitive.

People v. Gray, 84 N.Y.2d 709 (1995)

Inquiry into the actual nature of the acts constituting the basis for the youthful-offender or juvenile-delinquency adjudication is permitted, and a defendant can even be impeached with prior bad acts that did not result in a criminal charge.

People v. Harper, 653 N.Y.S.2d 771 (N.Y. App. Div. 1997)

An investigator’s analysis of language used in telephone conversations was properly accepted by the judge issuing the search warrant to establish probable cause because cryptic and ambiguous conversations may serve as a predicate for probable cause when reasonably interpreted by an experienced investigator.

People v. Hawley, 596 N.Y.S.2d 205 (N.Y. App. Div. 1993)

Material previously submitted to a judge may be incorporated by reference in a subsequent warrant application to a judge as long as it was given under oath, is available to him or her, or is sufficiently fresh in his or her mind that he or she can assess it.

People v. Henry, 579 N.Y.S.2d 565 (N.Y. Sup. Ct. 1991)

If a proper warrantless search for specific items discloses other items that immediately appear to be incriminating, judged by the probable-cause standard, those items may also be seized.

People v. Hetrick, 80 N.Y.2d 344 (1992)

The requirement of probable cause may be satisfied by unsworn hearsay when the law-enforcement officer applying for the warrant has knowledge of facts derived from a reasonably trustworthy source sufficient to cause a person of reasonable caution to believe that contraband is present in the premises to be searched.

People v. Hulsen, 577 N.Y.S.2d 48 (N.Y. App. Div. 1991)

The degree of precision concerning records requested in a warrant necessarily must vary with the type of items, the nature of the operation, and the circumstances of the case.

People v. Jones, 47 N.Y.2d 528 (1979)

An unauthorized search or seizure by private individuals, including store detectives, does not render the evidence inadmissible at subsequent civil or criminal proceedings.

People v. Kane, 573 N.Y.S.2d 729 (N.Y. App. Div. 1991)

When a law-enforcement officer reasonably perceives that an emergency situation exists, he or she may enter and conduct a warrantless search of the premises, the scope and duration of which is limited by and reasonably related to the exigencies of the situation.

People v. Keyes, 535 N.Y.S.2d 162 (N.Y. App. Div. 1988)

The question of whether child pornography is distributed commercially or possessed privately is irrelevant to whether a child has been harmed by its production.

People v. Keyes, 75 N.Y.2d 343 (1990)

The statute prohibiting the promotion of a sexual performance by a child is directed at consumers of child pornography as well as at its manufacturers and distributors.

People v. Keyes, 597 N.Y.S.2d 785 (N.Y. App. Div. 1993)

The affirmative defense of entrapment, a defense that is essentially a factual issue, must be established by a preponderance of the evidence.

People v. Levitz, 521 N.Y.S.2d 977 (N.Y. County Ct. 1987)

It is not solely the commercial use or promotion that creates the harm to the child but it is the record of the child's conduct exacerbated by the circulation that is within the State's legitimate interests to protect through proscribing that conduct.

People v. Lynch, 738 N.Y.S.2d 116 (N.Y. App. Div. 2002)

Sentences may be imposed consecutively if multiple offenses are committed through separate and distinct acts, even though they may be part of a single transaction.

People v. Manngard, 712 N.Y.S.2d 582 (N.Y. App. Div. 2000)

The affirmative defense that the defendant had a good-faith, reasonable belief that the person appearing in the sexual performance was 16 years of age or older must be established by a preponderance of the evidence.

People v. Marrero, 69 N.Y.2d 382 (1987)

Mistakes of law do not excuse the commission of prohibited acts.

People v. Moon, 571 N.Y.S.2d 580 (N.Y. App. Div. 1991)

A court may reconsider a previously issued unexecuted search warrant when additional information is discovered and may reissue the warrant without the necessity of an entirely new application, so long as the previously submitted application and the information upon which it was based is not so old as to be deemed stale and so long as all of the information, taken together, can be said to establish probable cause.

People v. Mormile, 812 N.Y.S.2d 524 (N.Y. App. Div. 2006)

The Supreme Court, Appellate Division, held that it was not legal impossibility for defendant to have committed crime of second-degree attempted rape for attempting to have sex with police officer who posed as 13-year-old girl on internet, even though, with regard to age of victim, crime was one of strict liability.

People v. Nieves, 36 N.Y.2d 396 (1975)

Particularity is required in order that the executing officer can reasonably ascertain and identify the persons or places authorized to be searched and the things authorized to be seized.

People v. Padilla, 517 N.Y.S.2d 299 (N.Y. App. Div. 1987)

A search warrant issued 18 days after the first undercover drug transaction took place and 11 days after the second was not based on stale information.

People v. Pietramala, 377 N.Y.S.2d 883 (N.Y. Crim. Ct. 1975)

First-hand knowledge by an officer as to the information required to uphold the issuance of a search warrant, as contained in a sworn affidavit, will usually support an issuing magistrate's action.

People v. Pimental, 587 N.Y.S.2d 365 (N.Y. App. Div. 1992)

Due process concerns require that a defendant have the opportunity to challenge an informant's basis of knowledge regarding the criminal activity for which he or she is arrested.

People v. Pinkoski, 729 N.Y.S.2d 585 (N.Y. County Ct. 2001)

For behavior to be lewd, the actor must do something in addition to merely being nude.

People v. Poquee, 780 N.Y.S.2d 247 (N.Y. App. Div. 2004)

A defendant is presumed to be competent and is not entitled to a competency hearing unless the court has reasonable grounds to believe that, because of mental disease or defect, the defendant is incapable of assisting in his or her own defense or of understanding the proceedings against him or her.

People v. Reyes, 556 N.Y.S.2d 916 (N.Y. App. Div. 1990)

Evidence of threats made by the defendant against one of the People's witnesses, although evidence of prior bad acts, was admissible on the issue of consciousness of guilt.

People v. Rhodes, 484 N.Y.S.2d 135 (N.Y. App. Div. 1985)

An unauthorized search or seizure by private individuals does not render the evidence inadmissible at subsequent civil or criminal proceedings.

People v. Sandoval, 34 N.Y.2d 371 (1974)

The defendant shall inform the court of prior convictions and misconduct that might unfairly affect him or her as a witness in his or her own behalf.

People v. Shapiro, 50 N.Y.2d 747 (1980)

Allegations of sexual abuse and the promotion of prostitution do not come within the intentment of the federal statute regarding the bases for eavesdropping warrants.

People v. Steinberg, 573 N.Y.S.2d 965 (N.Y. App. Div. 1991)

A videotape of an individual's physical condition was properly admitted since it was relevant to assist the jury in evaluating whether the individual had the physical capacity to inflict the victim's fatal injuries.

People v. Teribury, 458 N.Y.S.2d 85 (N.Y. App. Div. 1982)

Factors to be considered when determining probable cause include the source of the information and the manner in which it was acquired, the expertise of the officers involved, the extent to which the information was verified, and the nature of the crime.

People v. Victor J., 724 N.Y.S.2d 162 (N.Y. App. Div. 2001)

The explanation the defendant provided for his criminal conduct, namely, that he had been sexually molested in the past, which trauma propelled him to re-enact that molestation, does not bear on the manner in which the crime was committed, and therefore was not a mitigating circumstance.

People v. Walker, 727 N.Y.S.2d 731 (N.Y. App. Div. 2001)

Information in a search warrant is not necessarily stale for purposes of establishing probable cause just because an informant waited until three months after the victim's death to approach law enforcement.

People v. Watson, 721 N.Y.S.2d 700 (N.Y. App. Div. 2001)

The introduction of the defendant's prior bad acts against his victims' immediate family members with whom he lived during the period of time in which the crimes occurred was permissible for the purposes of explaining the defendant's relationship with the victims and their mother and establishing the elements of forcible compulsion.

People v. Williams, 670 N.Y.S.2d 893 (N.Y. App. Div. 1998)

The informant's first-hand observations, related to the court in sworn testimony, provided ample information sufficient for the court to reasonably believe that an on-going drug enterprise was being operated from the subject premises.

Town of East Hampton v. Omabuild USA No. 1, Inc., 627 N.Y.S.2d 723 (N.Y. App. Div. 1995)

Allegations were not stale when viewed in the context of the continuing and permanent nature of the alleged violations on the premises.

NEW YORK

Offenses Defined

I. Child Pornography

A. *Dost* Factors

- The *Dost* factors serve to distinguish between the innocent family photo or artistic depiction of a nude child and the victimization of that child in the creation of child pornography.
– *People v. Bimonte*, 726 N.Y.S.2d 830, 835 (N.Y. Crim. Ct. 2001).
- The *Dost* factors are:
 - (1) whether the focal point of the visual depiction is on the child’s genitals;
 - (2) whether the setting of the visual depiction is sexually suggestive (*i.e.*, in a place or pose generally associated with sexual activity);
 - (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
 - (4) whether the child is fully or partially clothed or nude;
 - (5) whether the visual depiction suggests coyness or a willingness to engage in sexual activity; and
 - (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.– *People v. Bimonte*, 726 N.Y.S.2d 830, 835 (N.Y. Crim. Ct. 2001).
- Under the *Dost* test, absent a statutory provision to the contrary, the trier of fact need not find that all of the six factors are present in order to conclude that there was a “lewd exhibition of the genitals.” That determination must be made on a case-by-case basis, based on an analysis of the overall content of the visual depiction, taking into account the age of the child.
– *People v. Horner*, 752 N.Y.S.2d 147 (N.Y. App. Div. 2002).
– *People v. Bimonte*, 726 N.Y.S.2d 830, 836 (N.Y. Crim. Ct. 2001) (applying the *Dost* factors to find that there was no impermissibly expansive construction to the proscription on lewd exhibition of the genitals).

B. Virtual/Simulated Child Pornography

No state cases reported.

II. Deviate Sexual Intercourse

A. Elements

- Deviate sexual intercourse means sexual conduct between persons not married to each other consisting of contact between the penis and anus, the mouth and penis, or the mouth and vulva. *N.Y. Penal Law § 130.00(2)*.
– *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153, 160 n.1 (1992).
– *People v. Gonzales*, 561 N.Y.S.2d 358, 359 (N.Y. County Ct. 1990).
- When the victim is a child under the age of 11, the Legislature has declared that acts of deviate sexual intercourse and sexual contact constitute the serious felonies of first-degree sodomy and first-degree sexual abuse.
– *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153, 160 (1992).

B. Sexual Conduct

- Sexual conduct means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals; pubic area; buttocks; or, if such person be a female, breast. *N.Y. Penal Law. § 235.20(3)*.
– *People v. Plaisted*, 767 N.Y.S.2d 518 (N.Y. App. Div. 2003).
– *People v. Barrows*, 677 N.Y.S.2d 672, 685 n.15 (N.Y. Sup. Ct. 1998).
– *People v. Pinkoski*, 729 N.Y.S.2d 585, 587 (N.Y. County Ct. 2001).
- The behavior must involve more than mere nudity: first, genitals must be visible; second, they must be more than merely visible – they must be exhibited; and finally, the exhibition of the genitals must be lewd. For behavior to be lewd, the actor must do something in addition to merely being nude.
– *People v. Gibeault*, 773 N.Y.S.2d 751 (N.Y. App. Div. 2004).
– *People v. Pinkoski*, 729 N.Y.S.2d 585, 587 (N.Y. County Ct. 2001).

III. Disseminating Indecent Material to Minors in the First Degree

- A person is guilty of disseminating indecent material to minors in the first degree when:
 - (1) knowing the character and content of the communication which, in whole or part, depicts actual or simulated nudity, sexual conduct, or sadomasochistic abuse, and which is harmful to minors, he or she intentionally uses any computer communication system allowing the input, output, examination, or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor; and
 - (2) by means of such communication he or she importunes, invites, or induces a minor to engage in sexual intercourse, deviate sexual intercourse, or sexual contact with him or her, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his or her benefit. *N.Y. Penal Law § 235.22*.
– *People v. Foley*, 94 N.Y.2d 668, 676 (2000).

- *People v. Barrows*, 677 N.Y.S.2d 672, 679-80 (N.Y. Sup. Ct. 1998).
- *People v. Barrows*, 664 N.Y.S.2d 410, 412-13 (N.Y. Sup. Ct. 1997).
- *People v. Gallicchio*, 730 N.Y.S.2d 671, 675-76 (N.Y. County Ct. 2001).

A. Depict

- The definition of the word “depict” is not limited to a visual representation, but also includes “to represent in words; describe,” or “to picture in words, describe.”
 - *People v. Kozlow*, 870 N.E.2d 118 (2007).
 - *People v. Skya*, 789 N.Y.S.2d 403 (N.Y. County Ct. 2004).
 - *People v. Gallicchio*, 730 N.Y.S.2d 671, 677 (N.Y. County Ct. 2001).

B. Harmful to Minors

- New York Penal Law § 235.20(6) defines what is “harmful to minors” as: [T]hat quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse when it:
 - (1) considered as a whole, appeals to the prurient interest in sex of minors;
 - (2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
 - (3) considered as a whole, lacks serious literary, artistic, political, and scientific value for minors.
 - *People v. Foley*, 94 N.Y.2d 668, 677 n.1 (2000).
 - *People v. Barrows*, 677 N.Y.S.2d 672, 682 (N.Y. Sup. Ct. 1998).
 - *People v. Gallicchio*, 730 N.Y.S.2d 671, 677 (N.Y. County Ct. 2001).
- A written sexually explicit communication that is transmitted to a minor is equally violative of the statute in that it too would be harmful to a minor where its purpose is the luring of a child into a sexual encounter; therefore, in order for a communication to violate the statute it is not necessary for it to be limited to a visual image, but, it includes a written sexual communication of sexually explicit language.
 - *People v. Gallicchio*, 730 N.Y.S.2d 671, 677 (N.Y. County Ct. 2001).

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

See infra “Disseminating Indecent Material to Minors in the First Degree,” Part III.

V. Patronizing a Prostitute in the Third Degree

- There are three elements to the charge of patronizing a prostitute in the third degree which must be alleged and supported by factual allegations of an evidentiary nature supporting or tending to support the charge. Those three elements are:
 - (1) that the defendant be over 21 years of age;
 - (2) that he or she patronize a prostitute; and
 - (3) that the prostitute be less than 17 years of age.

- *People v. Doe*, 515 N.Y.S.2d 982, 983 (N.Y. Criminal Ct. 1987).
- The actual age of the person solicited is a critical element.
 - *People v. Doe*, 515 N.Y.S.2d 982, 983 (N.Y. Criminal Ct. 1987).

VI. Possessing a Sexual Performance by a Child

- A person is guilty of possessing a sexual performance by a child when, knowing the character or content thereof, he or she knowingly has in his or her possession or control any performance which includes sexual conduct by a child less than 16 years of age. *N.Y. Penal Law § 263.16*.
 - *People v. Fraser*, 96 N.Y.2d 318, 323 (2001).
 - *People v. Fraser*, 704 N.Y.S.2d 426, 428 (N.Y. App. Div. 2000).
 - *In re Millan*, 730 N.Y.S.2d 392, 394 (N.Y. Sup. Ct. 2001).
 - *People v. Gilmour*, 678 N.Y.S.2d 436, 437 (N.Y. Sup. Ct. 1998).
 - *People v. Bimonte*, 726 N.Y.S.2d 830, 833 n.6 (N.Y. Crim. Ct. 2001).
 - *People v. Bimonte*, 712 N.Y.S.2d 829, 830 (N.Y. Crim. Ct. 2000).
- A prosecutor is required to prove beyond a reasonable doubt that a defendant knows both the character and content of the material possessed.
 - *People v. Gilmour*, 678 N.Y.S.2d 436, 439 (N.Y. Sup. Ct. 1998).

A. Sexual Performance

- Sexual performance means any performance or part thereof, which includes sexual conduct by a child less than 16 years of age. *N.Y. Penal Law § 263.16*.
 - *People v. Fraser*, 96 N.Y.2d 318, 325 (2001).
 - *People v. Duboy*, 540 N.Y.S.2d 905, 906 (N.Y. App. Div. 1989).
 - *People v. Gilmour*, 678 N.Y.S.2d 436, 437 (N.Y. Sup. Ct. 1998).
 - *People v. Bimonte*, 712 N.Y.S.2d 829, 830 (N.Y. Crim. Ct. 2000).
 - *People v. Capitello*, 528 N.Y.S.2d 263, 265 (N.Y. County Ct. 1988).
- In determining whether photographs constitute lascivious exhibition of the genitals or public area, for purposes of statute prohibiting possession of sexual performance by a child, one must consider the combined effect of the setting, attire, pose and emphasis on the genitals and whether it is designed to elicit a sexual response in the viewer, albeit perhaps not the average viewer, but perhaps in the pedophile viewer.
 - *People v. Horner*, 752 N.Y.S.2d 147 (N.Y. App. Div. 2002).
- Separate convictions for possession will be dictated by the number of images/videos possessed, but rather by the number of occasions where defendant obtained images/videos.
 - *People v. Lynch*, 738 N.Y.S.2d 116 (N.Y. App. Div. 2002).

B. Sexual Conduct

- Sexual conduct means actual or simulated intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals. *N.Y. Penal Law § 263.16*.
 - People v. Fraser*, 96 N.Y.2d 318, 325 (2001).
 - People v. Pinkoski*, 752 N.Y.S.2d 421 (N.Y. App. Div. 2002).
 - People v. Duboy*, 540 N.Y.S.2d 905, 906 (N.Y. App. Div. 1989).
 - People v. Gilmour*, 678 N.Y.S.2d 436, 437 (N.Y. Sup. Ct. 1998).
 - People v. Bimonte*, 712 N.Y.S.2d 829, 830 (N.Y. Crim. Ct. 2000).
 - People v. Capitulo*, 528 N.Y.S.2d 263, 265 (N.Y. County Ct. 1988).
- A videotaped child fleetingly pretending to masturbate while fully clothed, and parodying momentary acts of [deviate] sexual intercourse with an adult does not qualify as simulated sexual conduct.
 - *People v. Gibeault*, 773 N.Y.S.2d 751 (N.Y. App. Div. 2004).

C. Performance

- Performance means any play, motion picture, photograph, or dance. Performance also means any other visual representation exhibited before an audience. *N.Y. Penal Law § 263.16*.
 - People v. Fraser*, 96 N.Y.2d 318, 323, 327 (2001).
 - People v. Keyes*, 75 N.Y.2d 343, 347 (1990).
 - People v. Pinkoski*, 752 N.Y.S.2d 421 (N.Y. App. Div. 2002).
 - People v. Fraser*, 704 N.Y.S.2d 426, 428 (N.Y. App. Div. 2000).
 - People v. Keyes*, 535 N.Y.S.2d 162, 164 (N.Y. App. Div. 1988).
 - People v. Gilmour*, 678 N.Y.S.2d 436, 437 (N.Y. Sup. Ct. 1998).
 - People v. Bimonte*, 712 N.Y.S.2d 829, 830 (N.Y. Crim. Ct. 2000).
- A photograph may include a computer image.
 - People v. Fraser*, 704 N.Y.S.2d 426, 430 (N.Y. App. Div. 2000).
 - People v. Garing*, 781 N.Y.S.2d 626 (N.Y. County Ct. 2003).

D. Simulated

- Simulated means the explicit depiction of any of the conduct set forth in subdivision three of this section which creates the appearance of such and which exhibits any uncovered portion of the breasts, genitals, or buttocks. *N.Y. Penal Law § 263.16*.
 - People v. Bimonte*, 712 N.Y.S.2d 829, 830 (N.Y. Crim. Ct. 2000).

VII. Promoting an Obscene Sexual Performance by a Child

A. Elements

- A person is guilty of promoting an obscene sexual performance by a child when, knowing the character and content thereof, he or she produces, directs,

or promotes any obscene performance which includes sexual conduct by a child less than 16 years of age. *N.Y. Penal Law § 263.10*.

– *People v. Keyes*, 75 N.Y.2d 343, 347 (1990).

– *People v. Keyes*, 535 N.Y.S.2d 162, 163 (N.Y. App. Div. 1988).

– *People v. Barrows*, 677 N.Y.S.2d 672, 686 n.18 (N.Y. Sup. Ct. 1998).

– *People v. Bimonte*, 726 N.Y.S.2d 830, 833 n.6 (N.Y. Crim. Ct. 2001).

– *People v. Levitz*, 521 N.Y.S.2d 977, 979 (N.Y. County Ct. 1987).

B. Promote

- Promote means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit, or advertise or to offer to do the same. *N.Y. Penal Law § 263.00(5)*.

– *People v. Barrows*, 677 N.Y.S.2d 672, 686 n.18 (N.Y. Sup. Ct. 1998).

– *People v. Godek*, 449 N.Y.S.2d 428, 433 (N.Y. Sup. Ct. 1982).

– *People v. Keyes*, 535 N.Y.S.2d 162, 163-64 (N.Y. App. Div. 1988).

– *People v. Keyes*, 75 N.Y.2d 343, 347 (1990).

– *People v. Levitz*, 521 N.Y.S.2d 977, 979 (N.Y. County Ct. 1987).

VIII. Rape in the Third Degree

- A person is guilty of rape in the third degree when being 21 years old or more, he or she engages in sexual intercourse with another person, to whom the actor is not married, less than 17 years old.

– *People v. Gonzales*, 561 N.Y.S.2d 358, 359 (N.Y. County Ct. 1990).

IX. Sexual Abuse in the First Degree

- Sexual abuse in the first degree is defined in terms of subjecting another person to sexual contact by forcible compulsion or when the other person is incapable of consent by reason of being physically helpless or when the other person is less than 11 years old. *N.Y. Penal Law § 130.65*.

– *People v. Shapiro*, 50 N.Y.2d 747, 764 n.10 (1980).

X. Sexual Contact

- Sexual contact means any touching of the sexual or intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing. *N.Y. Penal Law § 130.00(3)*.

– *Allstate Ins. Co. v. Mugavero*, 79 N.Y.2d 153, 160 n.2 (1992).

- It is clearly appropriate to infer sexual gratification from conduct alone when a nonrelative causes intimate contact with a child.

– *People v. Watson*, 721 N.Y.S.2d 700, 706 (N.Y. App. Div. 2001).

- Touching two separate sexual or intimate parts during the same incident does not constitute separate, indictable acts of “sexual contact.”

– *People v. Moffitt*, 798 N.Y. S.2d 174 (N.Y. App. Div. 2005).

- Touching top of victim's undergarments is sufficient to satisfy "sexual contact" element of sexual abuse conviction. Statute proscribes "any touching of the sexual or intimate part," whether directly or through clothing.
– *People v. Stephens*, 767 N.Y.S.2d 514 (N.Y. App. Div. 2003).

XI. Sodomy in the Third Degree

- A person is guilty of sodomy in the third degree when being 21 years old or more, he or she engages in deviate sexual intercourse with a person less than 17 years of age. *N.Y. Penal Law § 130.40*.
– *People v. Gonzales*, 561 N.Y.S.2d 358, 359 (N.Y. County Ct. 1990).

XII. Transporting Minor for the Purposes of Prostitution

No state cases reported.

XIII. Use of a Child in a Sexual Performance

- A person is guilty of the use of a child in a sexual performance if knowing the character and content thereof he or she employs, authorizes, or induces a child less than 16 years of age to engage in a sexual performance. *N.Y. Penal Law § 263.05*.
– *People v. Duboy*, 540 N.Y.S.2d 905, 906 (N.Y. App. Div. 1989).
– *People v. Capitello*, 528 N.Y.S.2d 263, 265 (N.Y. County Ct. 1988).

NEW YORK

Search and Seizure of Electronic Evidence

I. Search Warrants

- There is no requirement that an adversary proceeding take place before an initial seizure – only that a judicial determination must occur promptly so that administrative delay does not in itself become a form of censorship.
– *People v. Godek*, 449 N.Y.S.2d 428, 432 (N.Y. Sup. Ct. 1982).

A. Probable Cause

- Article I, § 12 of the New York State Constitution contains language identical to that found in the Fourth Amendment of the U.S. Constitution: “no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”
– *People v. Bennett*, 653 N.Y.S.2d 835, 837 n.6 (N.Y. Sup. Ct. 1997).
- Probable cause exists when there is a reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious man in the belief that the law is being violated on the premises to be searched. Only the probability of criminal activity need be shown, and affidavits in support of a warrant need not meet the rigorous standards for the admissibility of evidence at trial.
– *People v. Burke*, 385 N.Y.S.2d 156, 157-58 (N.Y. App. Div. 1976).
- Issuing magistrates may utilize common sense in making their determinations.
– *People v. Burke*, 385 N.Y.S.2d 156, 158 (N.Y. App. Div. 1976).
- The critical element in reviewing the validity of a search warrant to determine whether it was supported by probable cause is whether facts and circumstances made known to the issuing magistrate at the time the warrant application was determined were sufficient to establish that nucleic ingredient of probable cause.
– *People v. Bilsky*, 95 N.Y.2d 172, 177 (2000).
– *People v. Nieves*, 36 N.Y.2d 396, 402 (1975).
- First-hand knowledge by the officer as to the information required to uphold the issuance of a warrant, as contained in a sworn affidavit, will usually support an issuing magistrate’s action.
– *People v. Pietramala*, 377 N.Y.S.2d 883, 885 (N.Y. Crim. Ct. 1975).

- Warrant applications should not be read in a hyper-technical manner, but they must be considered in light of everyday experiences and accorded all reasonable inferences.
– *In re Marcario*, 462 N.Y.S.2d 1000, 1002 (N.Y. Fam. Ct. 1983).
- Factors to be considered in establishing probable cause include the source of the information and the manner in which it was acquired, the expertise of the officers involved, the extent to which the information was verified, and the nature of the crime.
– *People v. Church*, 819 N.Y.S.2d 155 (N.Y. App. Div. 2006).
– *People v. Rodriguez*, 758 N.Y.S.2d 172 (N.Y. App. Div. 2003).
– *People v. Walker*, 727 N.Y.S.2d 731 (N.Y. App. Div. 2001).
– *People v. Teribury*, 458 N.Y.S.2d 85, 86 (N.Y. App. Div. 1982).
- Probable cause to support a search warrant does not require proof sufficient to warrant a conviction beyond a reasonable doubt but merely information sufficient to support a reasonable belief that an offense has been or is being committed or that evidence of a crime may be found in a certain place.
– *People v. Bigelow*, 66 N.Y.2d 417, 423 (1985).
– *People v. Harper*, 653 N.Y.S.2d 771, 771 (N.Y. App. Div. 1997).

1. Probable Cause to Believe that an Abused or Neglected Child May Be Found on the Premises

- The search warrant must contain allegations of fact supporting a statement that there is reasonable cause to believe that a neglected or abused child will be found on the premises proposed to be searched. Such allegations must be based upon the personal knowledge of the applicant or upon information and belief where the sources of such information and the grounds of such belief are stated.
– *In re Marcario*, 462 N.Y.S.2d 1000, 1002 (N.Y. Fam. Ct. 1983).

2. Unsworn Hearsay

- Probable cause may be based on unsworn hearsay only when the two-prong test of *Aguilar v. Texas* and *Spinelli v. United States* is satisfied. There must be a reasonable showing that the informant was reliable and had a basis of knowledge for the statement.
– *People v. Hetrick*, 80 N.Y.2d 344, 348 (1992).
– *People v. Burke*, 690 N.Y.S.2d 897, 903 (N.Y. Sup. Ct. 1999).

3. Informants

a. Identified

- An identified citizen informant is presumed to be reliable.
– *People v. Hetrick*, 80 N.Y.2d 344, 349 (1992).
– *People v. Burke*, 690 N.Y.S.2d 897, 903 (N.Y. Sup. Ct. 1999).

b. Confidential

- A search warrant may be issued based upon information supplied by a confidential informant provided that there are sufficient indicia of reliability of the information and the informer has a basis of knowledge for the statement. In sum, there must be a showing that the information itself is reliable and that the informant is credible.
 - *Onderdonk v. New York*, 648 N.Y.S.2d 214, 217 (N.Y. Ct. Cl. 1996).
 - *In re Marcario*, 462 N.Y.S.2d 1000, 1002 (N.Y. Fam. Ct. 1983).
- The defendant must receive a copy of the court's report of its interview with the confidential informant, relative to both the existence of the informer and with respect to the communications made by the informer to law enforcement to which law enforcement testifies.
 - *People v. Darden*, 34 N.Y.2d 177, 181 (1974).
 - *People v. Pimental*, 587 N.Y.S.2d 365, 367 (N.Y. App. Div. 1992).
- An *in camera* inquiry should be held, on the record, to consider the necessity for redacting the search-warrant affidavit. This inquiry should include whether an informant's life or ongoing investigations would be jeopardized were his or her identity disclosed. The prosecutor and, if possible, the informant should be present, but not the defendant or his or her counsel. In the event that the court finds that the confidential informant's identity needs protection, the court should redact the search-warrant affidavit in such a way as to maximize the information that the defendant receives while securing, to the greatest degree possible, the informant's anonymity.
 - *People v. Pimental*, 587 N.Y.S.2d 365, 367-68 (N.Y. App. Div. 1992).

4. Information to Be Provided

- When a search warrant authorizes seizure of property, the warrant must include a description of the property that is the subject of the search.
 - *People v. Bennett*, 653 N.Y.S.2d 835, 837 n.6 (N.Y. Sup. Ct. 1997).
- A search-warrant application must provide the magistrate with information sufficient to support a reasonable belief that evidence of illegal activity will be present at the specific time and place of the search.
 - *People v. Williams*, 670 N.Y.S.2d 893, 894 (N.Y. App. Div. 1998).
 - *People v. Burke*, 690 N.Y.S.2d 897, 903 (N.Y. Sup. Ct. 1999).

- A warrant should be sufficiently specific to leave nothing to the discretion of the searcher in executing the warrant.
 - *People v. Nieves*, 36 N.Y.2d 396, 401 (1975).
 - *People v. Bennett*, 653 N.Y.S.2d 835, 837 (N.Y. Sup. Ct. 1997).
- The descriptions in the warrant and its supporting affidavits must be sufficiently definite to enable the searcher and to identify the persons, places, or things that the magistrate has previously determined should be searched or seized.
 - *People v. Nieves*, 36 N.Y.2d 396, 401 (1975).
 - *People v. Bennett*, 653 N.Y.S.2d 835, 837 (N.Y. Sup. Ct. 1997).
- Whether a search warrant is sufficiently particular necessarily depends upon the facts and circumstances of each case.
 - *People v. Nieves*, 36 N.Y.2d 396, 402 (1975).
 - *People v. Bennett*, 653 N.Y.S.2d 835, 837 (N.Y. Sup. Ct. 1997).
- The requirement of particularity must be measured in terms of common sense, not hypertechnical accuracy.
 - *People v. Teribury*, 458 N.Y.S.2d 85, 87 (N.Y. App. Div. 1982).
- In determining the reasonableness of a particular warrant application it is also appropriate to consider the difficulty of a more specific description.
 - *People v. Teribury*, 458 N.Y.S.2d 85, 87 (N.Y. App. Div. 1982).

a. Description of Property

- A description of the property will be acceptable if it is as specific as the circumstances and nature of the activity under investigation permit.
 - *People v. Hulsen*, 577 N.Y.S.2d 48, 49 (N.Y. App. Div. 1991).
 - *People v. Bennett*, 653 N.Y.S.2d 835, 837 (N.Y. Sup. Ct. 1997).
- A general description of property is constitutionally acceptable when more specificity is not possible, either because of the nature of the property or because a more specific description was not available to the applicant.
 - *People v. Bennett*, 653 N.Y.S.2d 835, 837 (N.Y. Sup. Ct. 1997).

b. Expert Opinion

- Expert opinion about the probable location of criminal evidence may be considered by the magistrate in determining the sufficiency of a warrant application.
 - *People v. Burke*, 690 N.Y.S.2d 897, 904 (N.Y. Sup. Ct. 1999).

c. Reasonable Inferences

- Based on the nature of the evidence and the type of offense, a magistrate may draw reasonable inferences about where evidence is likely to be kept.
– *People v. Burke*, 690 N.Y.S.2d 897, 904 (N.Y. Sup. Ct. 1999).

5. 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).

6. Material Previously Submitted to a Judge

- Material previously submitted to a judge may be incorporated by reference in a subsequent warrant application to a judge as long as it was given under oath, is available to him or her, or is sufficiently fresh in his or her mind that he or she can assess it.
– *People v. Hawley*, 596 N.Y.S.2d 205, 207 (N.Y. App. Div. 1993).

B. Reconsideration of Previously Issued Unexecuted Search Warrants

- A court may reconsider a previously issued unexecuted search warrant when additional information is discovered and may reissue the warrant without the necessity of an entirely new application, so long as the previously submitted application and the information upon which it was based is not so old as to be deemed “stale” and so long as all of the information, taken together, can be said to establish probable cause.
– *People v. Moon*, 571 N.Y.S.2d 580, 583 (N.Y. App. Div. 1991).

C. Scope of Search Warrant

1. Seizure of Items Not in Search Warrant

- Law enforcement may seize items not specified in the warrant if the warrant authorized seizure of that type of property.
– *People v. Burke*, 690 N.Y.S.2d 897, 905 (N.Y. Sup. Ct. 1999).

2. Incorporation of Description Found in Search-Warrant Application

- The application must be explicitly incorporated in the warrant so that the executing officers are directed to the application for guidance concerning the scope of the search.
– *People v. Bennett*, 653 N.Y.S.2d 835, 838 (N.Y. Sup. Ct. 1997).

D. Staleness

1. Probable Cause

- The statutory scheme in New York does not impose any time limitation on the revelation of information that leads to the issuance of a search warrant.
– *People v. Acevedo*, 572 N.Y.S.2d 101, 102 (N.Y. App. Div. 1991).
- The question of whether information is stale for the purpose of establishing probable cause cannot be resolved merely by counting the number of days between the events giving rise to the information and the issuance of the warrant. Information may be acted upon as long as the practicalities dictate that probable cause existent in the past may continue, which depends largely upon the property's nature.
– *People v. Walker*, 727 N.Y.S.2d 731, 733 (N.Y. App. Div. 2001).
– *Town of East Hampton v. Omabuild USA No. 1, Inc.*, 627 N.Y.S.2d 723, 726 (N.Y. App. Div. 1995).
– *People v. Teribury*, 458 N.Y.S.2d 85, 87 (N.Y. App. Div. 1982).
- The question of staleness necessarily turns upon the nature of the alleged offense and the degree to which it constitutes an ongoing or continuing activity.
– *People v. Manngard*, 712 N.Y.S.2d 582, 584 (N.Y. App. Div. 2000).
– *Town of East Hampton v. Omabuild USA No. 1, Inc.*, 627 N.Y.S.2d 723, 726 (N.Y. App. Div. 1995).
- The allegations underlying a warrant application must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time.
– *People v. Manngard*, 712 N.Y.S.2d 582, 584 (N.Y. App. Div. 2000).
– *Town of East Hampton v. Omabuild USA No. 1, Inc.*, 627 N.Y.S.2d 723, 725-26 (N.Y. App. Div. 1995).
– *People v. Acevedo*, 572 N.Y.S.2d 101, 102 (N.Y. App. Div. 1991).
– *People v. Padilla*, 517 N.Y.S.2d 299, 300 (N.Y. App. Div. 1987).
- Probable cause is not determined simply by counting the number of days between the occurrence of the events relied upon and the warrant's issuance.
– *People v. Teribury*, 458 N.Y.S.2d 85, 87 (N.Y. App. Div. 1982).

- Information may be acted upon as long as the practicalities dictate that a state of facts existing in the past, which is sufficient to give rise to probable cause, continues to exist at the time the application for a search warrant is made.
 - *People v. Manngard*, 712 N.Y.S.2d 582, 584 (N.Y. App. Div. 2000).
 - *People v. Clarke*, 570 N.Y.S.2d 305, 306 (N.Y. App. Div. 1991).
 - *People v. Teribury*, 458 N.Y.S.2d 85, 87 (N.Y. App. Div. 1982).
- Where there is a time lapse between disclosure of the information sought to establish probable cause and the issuance of a warrant, substantial reliance will be placed on the nature of the offense in order to determine whether the requisite probable cause continues to exist.
 - *People v. Acevedo*, 572 N.Y.S.2d 101, 102 (N.Y. App. Div. 1991).
- Where the activity is of a continuing nature, a greater time lapse is justified than where the offense is an isolated one.
 - *People v. Acevedo*, 572 N.Y.S.2d 101, 102 (N.Y. App. Div. 1991).

2. Ten-Day Expiration on Search Warrants

- It is important that the warrant be executed and returned to the magistrate within the 10-day period.
 - *People v. Pietramala*, 377 N.Y.S.2d 883, 886 (N.Y. Crim. Ct. 1975).
- The failure of a search warrant to include a direction in it that it be executed within 10 days of issuance does not invalidate the warrant since the warrant, if not executed within that period, falls.
 - *People v. Pietramala*, 377 N.Y.S.2d 883, 886 (N.Y. Crim. Ct. 1975).
- An unintentional dating error has also been held as not affecting the validity of the warrant.
 - *People v. Pietramala*, 377 N.Y.S.2d 883, 886 (N.Y. Crim. Ct. 1975).

E. Minor Omissions and Inconsistencies

- Minor omissions and inconsistencies should have no effect upon an otherwise valid warrant.
 - *People v. Bennett*, 653 N.Y.S.2d 835, 837 (N.Y. Sup. Ct. 1997).

F. “Law-of-the-Case” Doctrine

- Rulings on a search-warrant applications are not the type of determinations to which the law-of-the-case doctrine is intended to apply, even if a prior probable-cause determination has been previously made.
 - *People v. Bilsky*, 95 N.Y.2d 172, 176 (2000).
- The “law-of-the-case” doctrine addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation before final

judgment, and it contemplates that the parties had a “full and fair” opportunity to litigate the initial determination.

– *People v. Bilsky*, 95 N.Y.2d 172, 175 (2000).

– *People v. Evans*, 94 N.Y.2d 499, 502 (2000).

- The doctrine serves as a concept regulating pre-judgment rulings made by courts of coordinate jurisdiction in a single litigation. Thus this practical protocol presupposes that legal determinations of a merits nature have been made or are necessarily implicated.

– *People v. Bilsky*, 95 N.Y.2d 172, 175 (2000).

– *People v. Evans*, 94 N.Y.2d 499, 503 (2000).

II. Anticipatory Warrants

No state cases reported.

III. Warrantless Searches

A. Types of Warrantless Searches

1. Automobile Searches

- A moving vehicle can be stopped and searched without a warrant as long as there is at least reasonable suspicion to stop it, and probable cause to search it based on the belief that the vehicle contains contraband, a weapon, or evidence of a crime.

– *People v. Henry*, 579 N.Y.S.2d 565, 573 (N.Y. Sup. Ct. 1991).

- No warrant is needed because vehicles are mobile and their users have a reduced expectation of privacy in them.

– *People v. Henry*, 579 N.Y.S.2d 565, 573 (N.Y. Sup. Ct. 1991).

2. Exigent Circumstances

- Where exigency is employed to justify a seizure but the threat of harm or of destruction of evidence has been neutralized by law-enforcement dominion over the property, the Fourth Amendment mandates the intervention of a detached magistrate and the issuance of a warrant before there occurs a further intrusion on an individual’s privacy interests.

– *People v. Adler*, 50 N.Y.2d 730, 736 (1980).

3. Consent Searches

- A tenant has the authority to consent to the search of his or her apartment.

– *People v. Cruz*, 709 N.Y.S.2d 717, 720 (N.Y. App. Div. 2000).

B. Scope of Search

1. In General

- If a proper warrantless search for specific items discloses other items that immediately appear to be incriminating, judged by the probable-cause standard, those items may be seized.
– *People v. Henry*, 579 N.Y.S.2d 565, 569 (N.Y. Sup. Ct. 1991).

2. Exigent Circumstances

- Where a law-enforcement officer reasonably perceives that an emergency situation exists, he or she may enter and conduct a warrantless search of the premises, the scope and duration of which is limited by and reasonably related to the exigencies of the situation.
– *People v. Kane*, 573 N.Y.S.2d 729, 730 (N.Y. App. Div. 1991).
– *People v. Cohen*, 450 N.Y.S.2d 497, 501 (N.Y. App. Div. 1982).

IV. Timely Review of Evidence

No state cases reported.

V. Methods of Searching

No state cases reported.

VI. Employer Searches

No state cases reported.

VII. Private Searches

- A search by a private person, even an unlawful search, does not implicate Fourth Amendment considerations; however, private conduct may be so imbued with governmental involvement that it loses its character as such and calls into play the full panoply of Fourth Amendment protections.
– *People v. Adler*, 50 N.Y.2d 730, 737 (1980).
- It is settled that an unauthorized search or seizure by private individuals does not render the evidence inadmissible at subsequent civil or criminal proceedings.
– *People v. Jones*, 47 N.Y.2d 528, 533 (1979).
– *People v. Rhodes*, 484 N.Y.S.2d 135, 136 (N.Y. App. Div. 1985).

VIII. Civilian Searches

No state cases reported.

IX. University-Campus Searches

No state cases reported.

X. Computer Technician/Repairperson Discoveries

In *People v. Fraser*, 704 N.Y.S.2d 426 (N.Y. App. Div. 2000), the defendant took his computer to a repair shop and a technician noticed child-pornography files, at which point law enforcement was brought in. The discovery of the files on the computer by the technician is not developed any further.

XI. Photo-Development Discoveries

There are two cases that vaguely address photo-development discoveries.

In *People v. Bimonte*, 712 N.Y.S.2d 829 (N.Y. Crim. Ct. 2000), the defendant took a roll of film to a Genovese Drug Store for developing. *Id.* at 830. When Genovese developed the film, it found, among other photographs, one depicting two naked female children on a bed, each bending down with her face in a pillow, and with her anus and vagina facing the camera. *Id.* Genovese deemed the photographs to be such as might subject it to criminal liability, notified the defendant that it declined to develop the negatives for him, and gave them to a law-enforcement officer, resulting in the defendant's subsequent arrest. *Id.* However, that is as far as the photo-development issue goes. The defendant never challenged the discovery of the photographs.

In *People v. Burke*, 690 N.Y.S.2d 897 (N.Y. Sup. Ct. 1999), the defendant turned in a roll of film to be developed. *Id.* at 899. The technician who developed the film noticed pictures of a sexual nature involving a minor and called law enforcement. *Id.* at 899. The defendant was arrested when he presented himself at the photo lab and requested the photographs. *Id.* at 899. Law enforcement investigated and obtained a warrant to search the defendant's home, where they found a video and numerous photographs of minors. *Id.* at 900. Other than a basic statement of the facts, the photo-development issue was not addressed in the case.

XII. Criminal Forfeiture

No state cases reported.

XIII. Disciplinary Hearings for Federal and State Officers

No state cases reported.

XIV. Probation and Parolees Rights

No state cases reported.

NEW YORK
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 YORK

Discovery and Evidence

I. Defense Requests for Copies of Child Pornography

No state cases reported.

II. 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.

III. Text-Only Evidence

A. Introduction into Evidence

No state cases reported.

B. Relevance

No state cases reported.

IV. 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.

V. Prior Bad Acts

A. Motion for Disclosure of Uncharged Bad Acts

- The People must notify the defendant of all specific instances of the defendant's prior uncharged criminal, vicious, or immoral conduct of which the People have knowledge and which the people intend to use at trial for purposes of impeaching the credibility of the defendant.
– *People v. Gallicchio*, 730 N.Y.S.2d 671, 679 (N.Y. County Ct. 2001).

B. The Defendant's Burden

- The defendant has the burden of informing the court of whatever evidence of his or her prior conduct he or she seeks preclusion.
– *People v. Gallicchio*, 730 N.Y.S.2d 671, 679 (N.Y. County Ct. 2001).

C. Admissibility

1. Generally

- Evidence of prior bad acts cannot be introduced solely to establish the defendant's criminal propensity.
– *People v. Bolarinwa*, 687 N.Y.S.2d 442, 446 (N.Y. App. Div. 1999).
- Evidence of prior bad acts is admissible if it relates to a material issue of fact pertaining to the crime charged and if its probative value outweighs its prejudicial effect.
– *People v. Bolarinwa*, 687 N.Y.S.2d 442, 446 (N.Y. App. Div. 1999).
– *People v. Basir*, 578 N.Y.S.2d 603, 605 (N.Y. App. Div. 1992).
- The State must demonstrate that the evidence of prior bad acts is relevant to another issue, including but not limited to motive, intent, absence of mistake or accident, common scheme or plan, or identity.
– *People v. Bolarinwa*, 687 N.Y.S.2d 442, 446 (N.Y. App. Div. 1999).
– *People v. Basir*, 578 N.Y.S.2d 603, 605 (N.Y. App. Div. 1992).

- Particularly in cases involving child abuse, evidence of prior bad acts is highly relevant to establish a lack of mistake or accident.
– *People v. Basir*, 578 N.Y.S.2d 603, 605 (N.Y. App. Div. 1992).

2. Case Specific

- Instances of prior bad acts toward the complainant are admissible to complete the narration and to demonstrate the intentional use of force, thereby contradicting the defendant's claim of consensual sex.
– *People v. Caldarola*, 732 N.Y.S.2d 360, 360 (N.Y. App. Div. 2001).
- The defendant's prior bad acts may be admitted for the limited purpose of establishing motive and/or intent.
– *People v. Clark*, 725 N.Y.S.2d 154, 155 (N.Y. App. Div. 2001).
- Prior bad acts are admissible for purposes of explaining the defendant's relationship with the victims and their mother and establishing the elements of forcible compulsion.
– *People v. Watson*, 721 N.Y.S.2d 700, 703 (N.Y. App. Div. 2001) (finding that the information was explanatory of the victims' behavior in that it completed the narrative of the abusive and controlling setting in which the criminal acts occurred and the defendant's motives in perpetrating these acts and opportunity to do so, and tended to show the absence of mistake or accident).
- Prior bad acts are admissible as evidence to establish the defendant's identity as the perpetrator of the victim's injuries.
– *People v. Watson*, 721 N.Y.S.2d 700, 703 (N.Y. App. Div. 2001).
- Evidence of prior bad acts of a sexual nature that the defendant purportedly perpetrated upon the victim are admissible to establish that the defendant engaged in a course of conduct that was likely to be injurious to the physical or moral welfare of the victim, an essential element of the crime of endangering the welfare of a child that was charged in two counts of the indictment.
– *People v. Archer*, 649 N.Y.S.2d 204, 206 (N.Y. App. Div. 1996).
- Evidence of threats made by the defendant against one of the People's witnesses, although evidence of prior bad acts, is admissible on the issue of consciousness of guilt. Evidence of consciousness of guilt, while weak, is admissible.
– *People v. Reyes*, 556 N.Y.S.2d 916, 917 (N.Y. App. Div. 1990).

3. The Defendant Chooses to Testify

- A criminal defendant who chooses to testify may be cross-examined concerning prior criminal vicious or immoral acts that bear logically on that individual's credibility as a witness.
– *People v. Gray*, 84 N.Y.2d 709, 712 (1995).

- A prosecutor may question the defendant's prior bad acts when the defendant's direct testimony opens the door to that line of questioning.
– *People v. Gibbs*, 731 N.Y.S.2d 102, 104 (N.Y. App. Div. 2001).
- Use of prior criminal convictions and bad acts to impeach a testifying defendant is largely a matter of discretion that rests with the trial courts and fact-reviewing intermediate appellate courts.
– *People v. Gray*, 84 N.Y.2d 709, 712 (1995).
- A *Sandoval* ruling entitles a defendant to advance notice of the scope of the cross-examination regarding prior convictions or bad acts.
– See generally *People v. Sandoval*, 34 N.Y.2d 371 (1974).
– *People v. Allen*, 604 N.Y.S.2d 378, 379 (N.Y. App. Div. 1993).

4. Youth Offenders

- It is impermissible to use a youthful-offender or juvenile-delinquency adjudication as an impeachment weapon, because such adjudications are not convictions of a crime. The prosecutor may, however, bring out the illegal or immoral acts underlying such adjudications.
– *People v. Gray*, 84 N.Y.2d 709, 712 (1995).
- In New York, inquiry into the actual nature of the acts constituting the basis for the youthful-offender or juvenile-delinquency adjudication is permitted, and a defendant can even be impeached with prior bad acts that did not result in a criminal charge.
– *People v. Gray*, 84 N.Y.2d 709, 713 (1995).
- The use of prior convictions for impeachment purposes is a matter resting largely within the sound discretion of the courts.
– *People v. Gray*, 84 N.Y.2d 709, 714 (1995).

VI. Privileges

No state cases reported.

NEW YORK

Age of Child Victim

I. Proving the Age of the Child Depicted

- Whenever it becomes necessary to determine whether a child who participated in a sexual performance was under the age of 16 years, the Court or jury may make such determination by any of the following: personal inspection of the child, inspection of a photograph or motion picture which constituted the sexual performance, oral testimony by a witness to the sexual performance as to the age of the child based upon the child's appearance, expert-medical testimony based upon the appearance of the child in the sexual performance, and any other method authorized by any applicable provision of law or by the rules of evidence at common law. *N.Y. Penal Law § 263.25*.
– *People v. Foley*, 94 N.Y.2d 668, 675 (2000).

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

- It is an affirmative defense that the defendant, in good faith, reasonably believed the person appearing in the performance was 16 years of age or over. *N.Y. Penal Law § 263.16(1)*.
– *People v. Gilmour*, 678 N.Y.S.2d 436, 440 (N.Y. Sup. Ct. 1998).

NEW YORK

Multiple Counts

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

No state cases reported.

II. Issues of Double Jeopardy

A. Court-Martial Prosecution

- A court-martial prosecution constitutes prosecution in a court of any jurisdiction within the United States. N.Y. Crim. Proc. Law § 40.30(1).
– *Northrup v. Relin*, 613 N.Y.S.2d 506, 509 (N.Y. App. Div. 1994).

B. Two Offenses Based on Same Act or Criminal Transaction

- A person may not be separately prosecuted for two offenses based upon the same act or criminal transaction unless each of the offenses as defined contains an element which is not an element of the other, and the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil.
– *Northrup v. Relin*, 613 N.Y.S.2d 506, 509 (N.Y. App. Div. 1994).

NEW YORK

Defenses

I. Consent

- Actual consent of those under age 17 is legally inoperative.
– *People v. Gonzales*, 561 N.Y.S.2d 358, 362 (N.Y. County Ct. 1990).

II. Diminished Capacity

A. Addiction to the Internet

No state cases reported.

B. Insanity

No state cases reported.

C. Physical Incapacity

- A party is entitled to offer evidence that a person lacked the physical capacity to perpetrate the crime charged.
– *People v. Steinberg*, 573 N.Y.S.2d 965, 980 (N.Y. App. Div. 1991).

III. Entrapment

- The affirmative defense of entrapment must be established by a preponderance of the evidence. *N.Y. Penal Law § 25.00(2)*.
– *People v. Keyes*, 597 N.Y.S.2d 785, 786 (N.Y. App. Div. 1993).
- The defense is essentially a factual issue.
– *People v. Keyes*, 597 N.Y.S.2d 785, 786 (N.Y. App. Div. 1993).

IV. Extreme Emotional Disturbance

A. Defense

- New York, by permitting the extreme emotional disturbance defense, enables a defendant to establish the existence of mitigating circumstances, collateral to the principal facts at issue.
– *People v. Adams*, 423 N.Y.S.2d 936, 940 (N.Y. App. Div. 1980).
- The purpose of the extreme emotional disturbance defense is to permit the defendant to show that his or her actions were caused by a mental infirmity

not arising to the level of insanity, and that he or she is less culpable for having committed them.

– *People v. Adams*, 423 N.Y.S.2d 936, 940-41 (N.Y. App. Div. 1980).

B. Burden

- The defendant bears the burden of persuasion for demonstrating that he or she acted under the influence of extreme emotional disturbance.

– *People v. Adams*, 423 N.Y.S.2d 936, 941 (N.Y. App. Div. 1980).

V. First Amendment

No state cases reported.

VI. Impossibility

A. Factual

No state cases reported.

B. Legal

No state cases reported.

VII. Manufacturing Jurisdiction

No state cases reported.

VIII. Mistake of Fact: Age of Child Victim

- New York Penal Law § 263.20 contains affirmative defenses applicable when a defendant, in good faith, reasonably believes that the persons depicted were over 16 years of age and when a person is engaged in certain specified occupations.

– *People v. Fraser*, 96 N.Y.2d 318, 323 (2001).

– *People v. Gilmour*, 678 N.Y.S.2d 436, 440 (N.Y. Sup. Ct. 1998).

- The defendant must establish by a preponderance of the evidence the affirmative defense that he or she had a good-faith, reasonable belief that the person appearing in the performance was 16 years of age or older. *N.Y. Penal Law § 263.20(1)*.

– *People v. Manngard*, 712 N.Y.S.2d 582, 583 (N.Y. App. Div. 2000).

IX. Mistake of Law

- It is a defense to criminal liability that the defendant engaged in prohibited conduct because he has a mistaken belief that the conduct was legal as the result of an interpretation of a statute or law officially made or issued by a public servant, agency, or body legally charged or empowered with the responsibility or privilege of

administering, enforcing, or interpreting such statute or law. *N.Y. Penal Law § 15.20(2)(d)*.

– *People v. Fraser*, 704 N.Y.S.2d 426, 429 (N.Y. App. Div. 2000).

- The defense applies only where an individual demonstrates an effort to learn what the law is; relies on the validity of that law; and, later, it is determined that there was a **mistake in the law itself**.

– *People v. Marrero*, 69 N.Y.2d 382, 390 (1987).

– *People v. Fraser*, 704 N.Y.S.2d 426, 432 (N.Y. App. Div. 2000).

X. Outrageous Conduct

No state cases reported.

XI. Parental-Alienation Syndrome (PAS)

- PAS is a disorder that arises primarily in the context of child-custody disputes. Its primary manifestation is the child's campaign of denigration against the parent, a campaign that has no justification. It results from a combination of a programming "brainwashing" parent's indoctrinations of the child's own contributions to the nullification of the target parent. When true parental abuse and/or neglect is present, the child's animosity may be justified, and so the parental-alienation-syndrome explanation for the child's hostility is not applicable.

– *People v. Bimonte*, 712 N.Y.S.2d 829, 830-33 (N.Y. Crim. Ct. 2000) (finding that PAS is most commonly used in child-custody disputes and denying the defendant's motion for an order permitting expert testimony in the field of PAS).

XII. Private Possession of Child Pornography

- The State's compelling interest in regulating child pornography is not dependent on whether the material is distributed commercially or possessed privately since the focus is on the harm to the child.

– *People v. Gaito*, 604 N.Y.S.2d 992, 992-93 (N.Y. App. Div. 1993).

– *People v. Duboy*, 540 N.Y.S.2d 905, 906 (N.Y. App. Div. 1989).

– *People v. Levitz*, 521 N.Y.S.2d 977, 979 (N.Y. County Ct. 1987) (finding that it is not solely the commercial use or promotion which creates the harm to the child but it is the **record** of the child's conduct exacerbated by the circulation, in this instance through the mail, which is within the State's legitimate interests to protect through proscribing the conduct).

- Magazines and films depicting obscene activity between children under the age of 16 may be criminally prosecuted under New York Penal Law § 263.10 even if the articles are privately displayed to consenting adults and even if there is insufficient proof that the participants resided in the State.

– *People v. Godek*, 449 N.Y.S.2d 428, 435 (N.Y. Sup. Ct. 1982).

- The question of whether the proscribed material is distributed commercially or possessed privately is irrelevant to whether a child has been harmed by its production.

– *People v. Keyes*, 535 N.Y.S.2d 162, 165 (N.Y. App. Div. 1988).

- New York Penal Law § 263.15 is directed at the consumers of child pornography as well as its manufacturers and distributors.
– *People v. Keyes*, 75 N.Y.2d 343, 348 (1990).

XIII. Researcher: Persons or Institutions Having Scientific, Educational, Governmental, or Other Similar Justification

- In any prosecution of **obscenity**, or **disseminating indecent material to minors**, it is an affirmative defense that the persons to whom allegedly obscene or indecent material was disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational, governmental, or other similar justification for possessing, disseminating, or viewing the same. *N.Y. Penal Law § 235.15(1)*.
– *People v. Fraser*, 96 N.Y.2d 318, 323, 326 (2001).
– *People v. Fraser*, 704 N.Y.S.2d 426, 428 (N.Y. App. Div. 2000).

XIV. Sexual Orientation

No state cases reported.

NEW YORK

Sentencing Issues

I. Conditions of Probation

- Conditions of probation must be rehabilitative, and not punitive. *N.Y. Penal Law § 65.10(2)*.
 - *People v. Gould*, 662 N.Y.S.2d 520, 521 (N.Y. App. Div. 1997) (finding that the requirements of presenting a “travel letter” to the local law-enforcement agency and informing any future employers and the law-enforcement agency where the individual resides of the nature of his conviction and the special conditions of probation which prohibit him from associating with persons under 18 years of age were not punitive, while requiring the individual to obtain permission to visit his brother’s family may be punitive in nature).
- New York Penal Law § 65.10(3) provides that the defendant shall remain within the court’s jurisdiction unless the court or probation officer grants him or her permission to travel.
 - *People v. Gould*, 662 N.Y.S.2d 520, 521 (N.Y. App. Div. 1997).

II. Consecutive Sentences

A. Imposition

- Sentences are authorized to be imposed consecutively if multiple offenses are committed through separate and distinct acts, even though they may be part of a single transaction.
 - *People v. Lynch*, 738 N.Y.S.2d 116, 118 (N.Y. App. Div. 2002).

B. Mitigating Circumstances

- New York Penal Law § 70.25(2-b) creates an exception for a consecutive-sentencing requirement where the court finds mitigating circumstances that bear directly upon the manner in which the crime was committed. It has been held that traditional sentencing factors, such as criminal’s age, background, and criminal history, are not appropriate to the mitigating-circumstances analysis. Rather the court must rely only on factors related to the defendant’s conduct in committing the crime, such as a lack of injury to others or evidence that the defendant did not display a weapon during the crime.
 - *People v. Victor J.*, 724 N.Y.S.2d 162, 163 (N.Y. App. Div. 2001) (citations omitted) (holding that the explanation the defendant provided for his criminal conduct, namely that he himself had been sexually molested in the past, which trauma propelled him to re-enact that molestation, does not bear on the manner in which the crime was committed).

III. 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.

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No state cases reported.

