

The Virginia 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 Virginia 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 where it not for the support of NCMEC's Legal Staff and L.J. Decker, NLC Law Clerk (2L Georgetown University Law Center).

The Editors,

National Law Center for Children and Families
June 2008

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- A. Age of Victim**
- B. Distribution/Intent to Traffic**
- C. Number of Images**
- D. Pattern of Activity for Sexual Exploitation**
- E. Sadistic, Masochistic, or Violent Material**
- F. Use of Computers**

IX. SUPERVISED RELEASE

VIRGINIA

Topic Outline with Cases

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

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

I. OFFENSES DEFINED

A. Child Enticement/Solicitation

1. “Criminal Solicitation” Defined

- *Bloom v. Commonwealth*, 34 Va. App. 364 (2001)
- *Jeffers v. Commonwealth*,⁺ No. 1350-00-1, 2001 Va. App. LEXIS 111 (Va. Ct. App. Mar. 6, 2001)

2. The Defendant’s Mental State

- *Ford v. Commonwealth*, 10 Va. App. 224 (1990)
- *Goodson v. Commonwealth*,⁺⁺ 2006 Va. App. LEXIS 515 (Va. Ct. App. 2006).

3. Solicitation Through Course of Conduct

- *Jeffers v. Commonwealth*,⁺ No. 1350-00-1, 2001 Va. App. LEXIS 111 (Va. Ct. App. Mar. 6, 2001)

4. Commission of the Act Solicited

- *Frantz v. Commonwealth*, 9 Va. App. 348 (1990)
- *Goodson v. Commonwealth*,⁺⁺ 2006 Va. App. LEXIS 515 (Va. Ct. App. 2006).

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

No state cases reported.

B. Child Pornography

1. Producing Child Pornography

- *Freeman v. Commonwealth*, 223 Va. 301 (1982)

a. “Child Pornography” Defined

b. “Sexually Explicit Visual Material” Defined

- *Foster v. Commonwealth*, 6 Va. App. 313 (1988)

i. “Nudity” Defined

- *Foster v. Commonwealth*, 6 Va. App. 313 (1988)
- *Commonwealth v. Simone*, 63 Va. Cir. 216 (2003)

ii. When Is Nudity Sexually Explicit or Obscene?

(a) Sexually Explicit

- *Asa v. Commonwealth*, 17 Va. App. 714 (1994)

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- *Freeman v. Commonwealth*, 223 Va. 301 (1982)

c. The Defendant’s Mental State

- *Frantz v. Commonwealth*, 9 Va. App. 348 (1990)

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- *Slavek v. Commonwealth*,⁺ No. 2452-00-1, 2001 Va. App. LEXIS 553 (Va. Ct. App. Oct. 9, 2001)

3. Possession of Child Pornography

- *Commonwealth v. Simone*, 63 Va. Cir. 216 (2003)

II. SEARCH AND SEIZURE OF ELECTRONIC EVIDENCE

A. Search Warrants

1. Probable Cause

- *Freeman v. Commonwealth*,⁺ No. 1584-00-3, 2001 Va. App. LEXIS 439 (Va. Ct. App. July 24, 2001)

a. Degree of Specificity Required

- *Freeman v. Commonwealth*,⁺ No. 1584-00-3, 2001 Va. App. LEXIS 439 (Va. Ct. App. July 24, 2001)
- *Moyer v. Commonwealth*, 33 Va. App. 8 (2000)

b. The Defendant's Burden

- *Franks v. Delaware*,⁺⁺ 438 U.S. 154 (1978)
- *Freeman v. Commonwealth*,⁺ No. 1584-00-3, 2001 Va. App. LEXIS 439 (Va. Ct. App. July 24, 2001)

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- *Rosa v. Commonwealth*, 48 Va. App. 93 (2006).

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a. Generally

- *Moyer v. Commonwealth*, 33 Va. App. 8 (2000)

b. "Plain-View" Doctrine

- *Moyer v. Commonwealth*, 33 Va. App. 8 (2000)

3. Staleness

- *Commonwealth v. Robinson*,⁺⁺ No. 49064-02, 2002 Va. Cir. LEXIS 274 (Va. Cir. Ct. Oct. 17, 2002)

B. Anticipatory Warrants

No state cases reported.

C. Methods of Searching

No state cases reported.

D. Types of Searches

1. Civilian Searches

No state cases reported.

2. Consent Searches

No state cases reported.

3. Employer Searches

No state cases reported.

4. Private Searches

- *Buonocore v. The Chesapeake & Potomac Telephone Co. of Virginia*,⁺⁺ 254 Va. 469 (1997)

5. University-Campus Searches

No state cases reported.

E. Computer-Technician/Repairperson Discoveries

No state cases reported.

F. Photo-Development Discoveries

No state cases reported.

G. Criminal Forfeiture

No state cases reported.

H. Disciplinary Hearings for Federal and State Officers

No state cases reported.

I. Probation and Parolee Rights

No state cases reported.

III. JURISDICTION AND NEXUS

A. Jurisdictional Nexus

- *Foster-Zahid v. Commonwealth*,⁺⁺ 23 Va. App. 430 (1996)

B. Internet Nexus

No state cases reported.

C. State Jurisdiction, Federal Jurisdiction, Concurrent Jurisdiction

1. State

No state cases reported.

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. Discovery

1. Right to Discovery

- *Clark v. Commonwealth*, 262 Va. 517 (2001)

2. Physical Examination of the Victim

- *Clark v. Commonwealth*, 262 Va. 517 (2001)

B. Timely Review of Evidence

No state cases reported.

C. Defense Requests for Copies of Child Pornography

No state cases reported.

- *United States v. Knellinger*, 471 F. Supp. 2d 640, 650 (D. Va. 2007)
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D. Introduction of E-mails or Instant Messages into Evidence

- *Bloom v. Commonwealth*, 262 Va. 814 (2001)

1. Hearsay/Authentication Issues

No state cases reported.

2. Circumstantial Evidence

- *Bloom v. Commonwealth*, 34 Va. App. 364 (2001)

3. Technical Aspects of Electronic Evidence Regarding Admissibility

No state cases reported.

E. Introduction of Text-Only Evidence

1. Introduction into Evidence

No state cases reported.

2. Relevance

No state cases reported.

F. 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.

G. Prior Bad Acts

1. Inadmissible

a. General Rule

- *Blaylock v. Commonwealth*, 26 Va. App. 579 (1998)
- *Staton v. Commonwealth*,⁺ No. 1362-01-4, 2002 Va. App. LEXIS 453 (Va. Ct. App. Aug. 6, 2002)

b. Intent Is Not an Issue

- *Blaylock v. Commonwealth*, 26 Va. App. 579 (1998)

2. Admissible

a. Motive or Intent Is an Issue

- *Blaylock v. Commonwealth*, 26 Va. App. 579 (1998)
- *Moore v. Commonwealth*, 222 Va. 72 (1981)

b. Common Plan or Scheme

- *Goodman v. Commonwealth*,⁺ No. 0213-93-4, 1994 Va. App. LEXIS 708 (Va. Ct. App. Nov. 29, 1994)

c. *Modus Operandi*

- *Goodman v. Commonwealth*,⁺ No. 0213-93-4, 1994 Va. App. LEXIS 708 (Va. Ct. App. Nov. 29, 1994)

d. Previous Acts of Sexual Intercourse

- *Herron v. Commonwealth*, 208 Va. 326 (1967)

e. Evidence of Possession of Pornography

- *Croxton v. Commonwealth*, 2005 Va. App. Lexis 166 (Va. Ct. App. 2005)

f. Hearsay Exceptions

i. “Recent-Complaint” Exception

- *Commonwealth v. Wills*, 44 Va. Cir. 459 (1998)
- *Mitchell v. Commonwealth*, 25 Va. App. 81 (1997)
- *Wilson v. Commonwealth*, 615 S.E.2d 500 (Va. Ct. App. 2005)

ii. “Excited-Utterance” Exception

- *Martin v. Commonwealth*, 4 Va. App. 438 (1984)

iii. Test for Admissibility

- *Staton v. Commonwealth*,⁺ No. 1362-01-4, 2002 Va. App. LEXIS 453 (Va. Ct. App. Aug. 6, 2002)

H. Witness Testimony

1. Child Witnesses

a. Competence of Child to Testify

- *Commonwealth v. Gibson*, 58 Va. Cir. 296 (2002)

b. Mental Evaluation of Child

- *Commonwealth v. Gibson*, 58 Va. Cir. 296 (2002)

c. Timely Complaint Rule

- *Wilson v. Commonwealth*, 615 S.E.2d 500 (Va. Ct. App. 2005)

d. Testimony via Closed-Circuit Television

- *Civitello v. Commonwealth*,⁺ No. 1963-01-2, 2003 Va. App. LEXIS 2 (Va. Ct. App. Jan. 7, 2003)

i. Statutory Requirements

- *Civitello v. Commonwealth*,⁺ No. 1963-01-2, 2003 Va. App. LEXIS 2 (Va. Ct. App. Jan. 7, 2003)

ii. Necessity of Procedure

- *Johnson v. Commonwealth*, 40 Va. App. 605 (2003)
- *Roadcap v. Commonwealth*, 50 Va. App. 732 (2007)

iii. Sixth Amendment

- *Johnson v. Commonwealth*, 40 Va. App. 605 (2003)

d. Leading Questions

- *Lansberry v. Commonwealth*,⁺ No. 2296-99-4, 2000 Va. App. LEXIS 723 (Va. Ct. App. Nov. 14, 2000)

2. Expert Testimony

a. At State Expense

- *Hoverter v. Commonwealth*, 23 Va. App. 454 (1996)

b. Opinion Testimony

- *Freeman v. Commonwealth*, 223 Va. 301 (1982)

3. Testimony by Spouses

- *Whitehead v. Commonwealth*,⁺ No. 0576-95-3, 1996 Va. App. LEXIS 370 (Va. Ct. App. May 21, 1996)

I. Privilege Against Self-Incrimination

- *Moyer v. Commonwealth*, 33 Va. App. 8 (2000)

V. AGE OF CHILD VICTIM

A. Proving the Age of the Child Depicted

- *Freeman v. Commonwealth*, 223 Va. 301 (1982)

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

No state cases reported.

VI. MULTIPLE COUNTS

A. What Constitutes an Item of Child Pornography?

- *Educational Books, Inc. v. Commonwealth*, 228 Va. 392 (1984)

B. Double Jeopardy

1. Test

- *Ragsdale v. Commonwealth*, 38 Va. App. 421 (2002)

2. Application

- *Ragsdale v. Commonwealth*, 38 Va. App. 421 (2002)
- *Slavek v. Commonwealth*,⁺ No. 2452-00-1, 2001 Va. App. LEXIS 553 (Va. Ct. App. Oct. 9, 2001)

VII. DEFENSES

A. Age

1. Victim

No state cases reported.

2. Defendant

- *Bloom v. Commonwealth*, 34 Va. App. 364 (2001)

B. Virtual or Simulated Child Pornography

- *Commonwealth v. Simone*, 63 Va. Cir. 216 (2003)

C. Diminished Capacity

1. Addiction to the Internet

No state cases reported.

2. Insanity

No state cases reported.

D. First Amendment

- *Holden v. Commonwealth*, 26 Va. App. 403 (1998)

E. Manufacturing Jurisdiction

No state cases reported.

F. Outrageous Conduct

No state cases reported.

G. Researcher

No state cases reported.

H. Sexual Orientation

No state cases reported.

VIII. SENTENCING ISSUES: 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.

IX. SUPERVISED RELEASE

No state cases reported.

VIRGINIA

Case List by Court

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

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

I. United States Supreme Court

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

II. United States District Court

- *United States v. Knellinger*, 471 F.Supp.2d 640 (D. Va. 2007)

III. Supreme Court of Virginia

- *Ashby v. Commonwealth*, 208 Va. 443 (1968)
- *Bloom v. Commonwealth*, 262 Va. 814 (2001)
- *Buonocore v. The Chesapeake & Potomac Telephone Co. of Virginia*,⁺⁺ 254 Va. 469 (1997)
- *Campbell v. Commonwealth*, 227 Va. 196 (1984)
- *Clark v. Commonwealth*, 262 Va. 517 (2001)
- *Educational Books, Inc. v. Commonwealth*, 228 Va. 392 (1984)
- *Freeman v. Commonwealth*, 223 Va. 301 (1982)
- *Herron v. Commonwealth*, 208 Va. 326 (1967)
- *Howard v. Commonwealth*, 221 Va. 904 (1981)
- *McKeon v. Commonwealth*, 211 Va. 24 (1970)
- *Moore v. Commonwealth*, 222 Va. 72 (1981)

IV. Court of Appeals of Virginia

- *Asa v. Commonwealth*, 17 Va. App. 714 (1994)
- *Blaylock v. Commonwealth*, 26 Va. App. 579 (1998)
- *Bloom v. Commonwealth*, 34 Va. App. 364 (2001)
- *Civitello v. Commonwealth*,⁺ No. 1963-01-2, 2003 Va. App. LEXIS 2 (Va. Ct. App. Jan. 7, 2003)
- *Croxtton v. Commonwealth*,⁺⁺ 2005 Va. App. LEXIS 166 (Va. Ct. App. 2005)
- *Ford v. Commonwealth*, 10 Va. App. 224 (1990)
- *Foster v. Commonwealth*, 6 Va. App. 313 (1988)
- *Foster-Zahid v. Commonwealth*,⁺⁺ 23 Va. App. 430 (1996)
- *Frantz v. Commonwealth*, 9 Va. App. 348 (1990)

- *Freeman v. Commonwealth*,⁺ No. 1584-00-3, 2001 Va. App. LEXIS 439 (Va. Ct. App. July 24, 2001)
- *Goodman v. Commonwealth*,⁺ No. 0213-93-4, 1994 Va. App. LEXIS 708 (Va. Ct. App. Nov. 29, 1994)
- *Goodson v. Commonwealth*,⁺⁺ 2006 Va. App. LEXIS 515 (Va. Ct. App. 2006)
- *Holden v. Commonwealth*, 26 Va. App. 403 (1998)
- *Hoverter v. Commonwealth*, 23 Va. App. 454 (1996)
- *Jeffers v. Commonwealth*,⁺ No. 1350-00-1, 2001 Va. App. LEXIS 111 (Va. Ct. App. Mar. 6, 2001)
- *Jett v. Commonwealth*, 29 Va. App. 190 (1999)
- *Johnson v. Commonwealth*, 40 Va. App. 605 (2003)
- *Keller v. Commonwealth*,⁺ No. 1591-99-2, 2000 Va. App. LEXIS 517 (Va. Ct. App. July 18, 2000)
- *Krampen v. Commonwealth*, 29 Va. App. 163 (1999)
- *Lansberry v. Commonwealth*,⁺ No. 2296-99-4, 2000 Va. App. LEXIS 723 (Va. Ct. App. Nov. 14, 2000)
- *Martin v. Commonwealth*, 4 Va. App. 438 (1987)
- *Mitchell v. Commonwealth*, 25 Va. App. 81 (1997)
- *Moyer v. Commonwealth*, 33 Va. App. 8 (2000)
- *Paris v. Commonwealth*, 35 Va. App. 377 (2001)
- *Ragsdale v. Commonwealth*, 38 Va. App. 421 (2002)
- *Roadcap v. Commonwealth*, 50 Va. App. 732 (2007)
- *Rosa v. Commonwealth*, 48 Va. App. 93 (2006)
- *Seibert v. Commonwealth*, 22 Va. App. 40 (1996)
- *Shull v. Commonwealth*, 16 Va. App. 667 (1993)
- *Slavek v. Commonwealth*,⁺ No. 2452-00-1, 2001 Va. App. LEXIS 553 (Va. Ct. App. Oct. 9, 2001)
- *Smith v. Commonwealth*,⁺ No. 1546-97-4, 1998 Va. App. LEXIS 608 (Va. Ct. App. Dec. 1, 1998)
- *Staton v. Commonwealth*,⁺ No. 1362-01-4, 2002 Va. App. LEXIS 453 (Va. Ct. App. Aug. 6, 2002)
- *Whitehead v. Commonwealth*,⁺ No. 0576-95-3, 1996 Va. App. LEXIS 370 (Va. Ct. App. May 21, 1996)
- *Wilson v. Commonwealth*, 615 S.E.2d 500 (Va. Ct. App. 2005)

V. Circuit Court of Virginia

A. City of Newport News

- *Commonwealth v. Robinson*,⁺⁺ No. 49064-02, 2002 Va. Cir. LEXIS 274 (Va. Cir. Ct. Oct. 17, 2002)

B. City of Portsmouth

- *Commonwealth v. Simone*, 63 Va. Cir. 216 (2003)

C. Spotsylvania County

- *Commonwealth v. Gibson*, 58 Va. Cir. 296 (2002)
- *Commonwealth v. Wills*, 44 Va. Cir. 459 (1998)

VIRGINIA

Case Highlights

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

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Asa v. Commonwealth, 17 Va. App. 714 (1994)

The defendant's photographs, which contain as their primary focus the close-up views of a teenager's genitalia, depict the teenager sitting with her knees up to her breasts and her legs widely spread to expose a frontal view of her genitalia. These photographs are sexually explicit.

Ashby v. Commonwealth, 208 Va. 443 (1968)

Indecent exposure is not included within the offense of sodomy.

Blaylock v. Commonwealth, 26 Va. App. 579 (1998)

In the defendant's trial, the actual issue was commission of the act itself, rather than the appellant's intent in committing the act. Because neither the Commonwealth's evidence nor that developed by the defendant put the issue of intent in genuine dispute, child pornography and a sexually explicit story were, on this ground, inadmissible to prove the defendant's intent.

Bloom v. Commonwealth, 34 Va. App. 364 (2001)

Messages received over the Internet are admissible against the sender if the evidence establishes the identity of the sender.

Bloom v. Commonwealth, 262 Va. 814 (2001)

The personal facts obtained by the victim over time from the defendant's Instant-Messenger screenname matched the personal information of the defendant, who admitted using the screenname and engaging in Instant Messaging with it. These facts, plus the ongoing nature of the online relationship with the victim, were sufficient to identify the defendant as the person making contact with the victim using the screenname.

Buonocore v. The Chesapeake & Potomac Telephone Co. of Virginia,⁺⁺ 254 Va. 469 (1997)

Searching the cabinets in another person's home, outside the direction of any law-enforcement officer, is not conduct proscribed by the Fourth Amendment.

Campbell v. Commonwealth, 227 Va. 196 (1984)

The defendant gestured towards himself four times, both before and after pulling down his pants. He placed himself in a position where he could be seen, made sure that he was seen by the victim, and then proceeded to undo his pants and push them to his knees in full view of the child. Finally, he beckoned again to the child once his pants were down.

This evidence is sufficient to show that the defendant intentionally exposed himself and that he did so with lascivious intent.

Civitello v. Commonwealth,⁺ No. 1963-01-2, 2003 Va. App. LEXIS 2 (Va. Ct. App. Jan. 7, 2003)
The defendant's Sixth Amendment right of confrontation was not violated by a court order that the child victims' testimony be taken by closed-circuit television because the court had sufficient evidence upon which to base its finding that the victims demonstrated a substantial inability to communicate about the offense.

Clark v. Commonwealth, 262 Va. 517 (2001)

The due-process rights of a Virginia defendant do not include the right to compel the physical examination of the victim in a statutory-rape case.

Commonwealth v. Gibson, 58 Va. Cir. 296 (2002)

No child is deemed incompetent to testify solely because of age. The competence of a child to testify as a witness depends not upon the child's age, but upon the child's individual maturity, sense of moral responsibility, and capacity.

Commonwealth v. Robinson,⁺⁺ No. 49064-02, 2002 Va. Cir. LEXIS 274 (Va. Cir. Ct. Oct. 17, 2002)

When a warrant has been issued based upon probable cause, whether probable cause continues to exist at the time the warrant is executed depends on the length of delay and the nature of the observed criminal activity, that is, whether the activity is an ongoing enterprise or an isolated incident.

Commonwealth v. Simone, 63 Va. Cir. 216 (2003) *rev'd on separate grounds*.

Defendant was indicted for possessing sexually explicit visual material that used or had as a subject a person less than 18 years of age, in violation of Virginia's child pornography possession statute. The statute was not vague on the issue of whether it applied to images that utilized real children and it was therefore narrowly tailored to achieve its purpose, as required by the strict scrutiny standard applied to governmental restrictions on speech. The statute was not overbroad because it only applied to images utilizing actual children. The decision was reversed on the grounds that defendant had abandoned the computer on which the images were found, and therefore had no constructive possession of child pornography. The circuit court's theories on what constitutes child pornography were not touched upon in the opinion of the higher court.

Commonwealth v. Wills, 44 Va. Cir. 459 (1998)

The Commonwealth may offer evidence of a fresh complaint only if the victim testifies.

Croxton v. Commonwealth,⁺⁺ 2005 Va. App. LEXIS 166 (Va. Ct. App. 2005).

Evidence that defendant in child molestation case owned pornographic videos was not unfairly prejudicial because it tended to corroborate the victim's allegations when the victim alleged that she had watched the pornographic videos with the defendant and that he had "taught" her to act like the persons in the films.

Educational Books, Inc. v. Commonwealth, 228 Va. 392 (1984)

The sale of each obscene magazine constitutes a separate offense. Although the legal test in each instance is the same, each magazine is different. Because the jury applied the same legal principles to nine different sets of evidentiary facts, different evidence was used by the Commonwealth in prosecuting each of the nine counts and the store's double-jeopardy rights were not violated by the nine convictions.

Ford v. Commonwealth, 10 Va. App. 224 (1990)

Statements by a defendant that were no more than the expression of his own desire and did not constitute a command, entreaty, or attempt to persuade the victims to engage in oral sodomy, are insufficient to allow the Commonwealth to sustain its burden of proving that the defendant spoke to the victims with the intent to induce either of them to act.

Foster v. Commonwealth, 6 Va. App. 313 (1988)

The photographing of exposed nipples, while within the literal definition of nudity, is not, without more, lewd exhibition of nudity.

Foster-Zahid v. Commonwealth,⁺⁺ 23 Va. App. 430 (1996)

Jurisdiction may exist where the immediate harm occurs, even if the criminal act does not physically occur there.

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.

Frantz v. Commonwealth, 9 Va. App. 348 (1990)

A jury convicted the defendant of soliciting children under the age of 18 with the intent to induce or force each of them to be the subjects of sexually explicit visual material. The defendant was also convicted of knowingly encouraging, with lascivious intent, children under the age of 18 to be the subjects of sexually explicit visual material; however, no photographs taken by the appellant were offered at trial. The only evidence of their content was the testimony of the boys who posed for them. There was no testimony from the victims that they were sexually aroused or that they took part in any type of sexual conduct while being photographed by the defendant. To sustain the convictions, the photographs, as described by the boys, must have represented lewd exhibitions of nudity to qualify as sexually explicit visual material. Consequently, the defendant's convictions were reversed.

Freeman v. Commonwealth, 223 Va. 301 (1982)

The phrase “obscene for children” is not unconstitutionally vague in that it requires the producer of sexually explicit visual material to consider the possible obscenity with regard to all children without regard to age, sex, or other factors.

Freeman v. Commonwealth,⁺ No. 1584-00-3, 2001 Va. App. LEXIS 439 (Va. Ct. App. July 24, 2001)

A warrant was issued in relation to the production, sale, and possession of obscene items, supported by an affidavit that specifically enumerated the things or persons to be searched for; therefore, the pertinent instruments sufficiently detailed the objects of the search, together with a compelling nexus to the offenses under investigation, thereby satisfying both constitutional and statutory safeguards.

Goodman v. Commonwealth,⁺ No. 0213-93-4, 1994 Va. App. LEXIS 708 (Va. Ct. App. Nov. 29, 1994)

Evidence of other crimes was relevant and admissible to show that the defendant was the person who committed the crimes against the victim due to the similarities between the offenses, particularly the indication of a common *modus operandi* and the repeated use of the term “magic button.”

Goodson v. Commonwealth,⁺⁺ 2006 Va. App. LEXIS 515 (2006).

The defendant’s solicitation of a criminal act is enough for the crime of solicitation; there is no requirement that the accused proceed to the point of some overt act in the commission of crime.

Herron v. Commonwealth, 208 Va. 326 (1967)

It was error to allow an instruction that permitted the jury to find the defendant guilty of an offense with which he was not charged so long as the jury believed that the defendant was guilty of a similar offense on an earlier date.

Holden v. Commonwealth, 26 Va. App. 403 (1998)

Obscenity enjoys no constitutional protection. The value of child pornography has been characterized as exceedingly modest, if not *de minimus*.

Hoverter v. Commonwealth, 23 Va. App. 454 (1996)

The indigent defendant, who sought appointment of an expert witness at the Commonwealth’s expense, was required to show a particularized need for the expert testimony and that he would be prejudiced by the lack of expert assistance.

Howard v. Commonwealth, 221 Va. 904 (1981)

Fondling or feeling a child’s breast with lascivious intent is a violation of the express provisions of “taking indecent liberties with a child,” but it is not a lesser-included offense of attempted sodomy.

Jeffers v. Commonwealth,⁺ No. 1350-00-1, 2001 Va. App. LEXIS 111 (Va. Ct. App. Mar. 6, 2001)

The appellant’s words and actions were more than an expression of his desire for oral sex. Once rebuffed, he asked, “Are you sure?” This question belies the appellant’s

contention that he only expressed a desire. By asking this question, the appellant was challenging the victim's negative response to his request for oral sex. His entire course of conduct underscored his desire for the victim to act upon his entreaty.

Jett v. Commonwealth, 29 Va. App. 190 (1999)

Penetration may be proved by circumstantial evidence and is not dependent on direct testimony from the victim that penetration occurred. The evidence of the victim's pain and swollen clitoris established by circumstantial evidence the element of penetration.

Johnson v. Commonwealth, 40 Va. App. 605 (2003)

Certain narrow circumstances may warrant dispensing with confrontation at trial. Where face-to-face confrontation causes significant emotional distress in a child witness, there is evidence that such confrontation would in fact disserve the Confrontation Clause's truth-seeking goal.

Keller v. Commonwealth,⁺ No. 1591-99-2, 2000 Va. App. LEXIS 517 (Va. Ct. App. July 18, 2000)

Proof of the defendant's possession of a trove of sex toys corroborated the victim's account of the defendant's attack on him. Furthermore the defendant's possession and use of those items was probative of his intent toward his victims. Because the existence of intent to do an act makes it more probable that the person committed the act, intent is circumstantial evidence of guilt.

Krampen v. Commonwealth, 29 Va. App. 163 (1999)

A "custodial or supervisory relationship" is not limited to those situations where legal custody exists. The term includes those individuals 18 years of age or older who have a temporary, custodial relationship with a child such as teachers, athletic instructors, and babysitters.

Lansberry v. Commonwealth,⁺ No. 2296-99-4, 2000 Va. App. LEXIS 723 (Va. Ct. App. Nov. 14, 2000)

At the beginning of his testimony, the child victim testified that he did not remember the defendant's name, although the defendant had lived with the victim for approximately five months. The victim stated on the morning of the trial that he was "a little scared" and spoke softly in responding to questions. Under these circumstances, there was no error in allowing the use of some leading questions by the Commonwealth.

Martin v. Commonwealth, 4 Va. App. 438 (1987)

Excited utterances prompted by a startling event are admissible, but the declaration must be made at such time and under such circumstances as to preclude the presumption that it was made as the result of deliberation. The brief lapse of time between the starting event and the victim's declaration, "That boy put his pee-pee on me," indicates the statement's spontaneity and a lack of deliberation. The reliability of the victim's declaration is bolstered by her lack of capacity, at age 23 months, to fabricate the statement.

McKeon v. Commonwealth, 211 Va. 24 (1970)

The fact that the defendant told the victim to turn around and he was smiling at her at the time, when she was 35 feet away from him, is not proof beyond a reasonable doubt that he knowingly and intentionally exposed himself with lascivious intent.

Mitchell v. Commonwealth, 25 Va. App. 81 (1997)

It is consistent with human experience that a child victim will lodge his or her recent complaint in the form of a description of the event, and in that description lies his or her complaint of the offense. The testimony of the victim's brother described such a complaint. It exceeded in no significant way a report of the offense. The details of the victim's complaint were elements of the offense. Without those details, the complaint would have been incomplete.

Moore v. Commonwealth, 222 Va. 72 (1981)

Because a similar, subsequent offense, occurring only three months after the instant crime, showed the conduct or attitude of the defendant toward the victim, indicated the ongoing nature of their relationship, and negated the possibility that the defendant's touching of the victim was accidental or for a purpose misunderstood by the victim, it was not error to admit the evidence concerning the subsequent occurrence.

Moyer v. Commonwealth, 33 Va. App. 8 (2000)

The defendant's diaries, which were prepared voluntarily, are not protected by the Fifth Amendment privilege against self-incrimination, unless the appellant was compelled to produce them, and then, only the act of production and not the contents of the diaries would be protected.

Paris v. Commonwealth, 35 Va. App. 377 (2001)

The defendant's acts of oral sodomy on his 15-year-old nephew were not protected by "the enjoyment of life and liberty" and "the pursuing and obtaining happiness" clauses of the Virginia constitution.

Ragsdale v. Commonwealth, 38 Va. App. 421 (2002)

For purposes of double jeopardy, the test to be applied to determine whether there are two offenses or only one is whether each statutory provision requires proof of a fact that the other does not. Carnal knowledge does not require the act of sexual intercourse or the use of force required by rape; therefore, carnal knowledge is not a lesser-included offense of rape.

Roadcap v. Commonwealth, 50 Va. App. 732 (2007).

During trial, the court did not violate defendant's Confrontation Clause rights by refusing to train the camera on his while the victim was testifying via closed-circuit, because the court found that the case law requirement that the trial court meet the three requirements to approve one-way closed-circuit television testimony had been met. The three requirements are: (1) the finding of necessity must be case-specific; (2) the child must be traumatized, not by the courtroom generally, but by the presence of the defendant; and (3) the emotional distress suffered by the child witness must be more than mere nervousness or excitement or reluctance to testify.

Rosa v. Commonwealth, 48 Va. App. 93 (2006).

A police search of defendant's picture files was not an unreasonable search when there was a warrant to search his computer for suspected illicit conversations between defendant and a minor, because defendant could apply any label to file extensions, regardless of the file's contents. Once the police opened the picture files and found items of suspected child pornography, the pornographic files were in plain view and the officers then obtained a second warrant to search for child pornography. The fact that defendant had deleted the files is irrelevant to the question of possession.

Seibert v. Commonwealth, 22 Va. App. 40 (1996)

A lesser-included offense is an offense that is composed entirely of elements that are also elements of the greater offense. All the elements of the crime of taking indecent liberties are not included in the crime of aggravated sexual battery. Only individuals over age 18 who maintain a custodial relationship with the victim can be convicted of taking indecent liberties. This distinction alone is enough to render aggravated sexual battery and taking indecent liberties distinct offenses.

Shull v. Commonwealth, 16 Va. App. 667 (1993)

The plain meaning of “carnal knowledge” is any sexual bodily connection, not simply sexual intercourse; therefore, “carnal knowledge” is not restricted to sexual intercourse. The evidence showed that the defendant’s mouth came in contact with the minor’s penis, and thus the trial court’s conclusion that the defendant had carnal knowledge of the minor was not plainly wrong.

Slavek v. Commonwealth,⁺ No. 2452-00-1, 2001 Va. App. LEXIS 553 (Va. Ct. App. Oct. 9, 2001)

Virginia law plainly and unambiguously forbids accessing and printing sexually explicit images of children.

Smith v. Commonwealth,⁺ No. 1546-97-4, 1998 Va. App. LEXIS 608 (Va. Ct. App. Dec. 1, 1998)

The defendant’s membership in the North American Man-Boy Love Association and evidence and pornographic materials were admissible as evidence of his lascivious intent with regard to the charges of taking indecent liberties with children and taking indecent liberties with children by a person in a custodial or supervisory relationship. The evidence was also admissible to prove that the appellant engaged in acts with the intent to sexually molest, arouse, or gratify any person, when he massaged the victim’s buttocks.

Staton v. Commonwealth,⁺ No. 1362-01-4, 2002 Va. App. LEXIS 453 (Va. Ct. App. Aug. 6, 2002)

The issues in this case came down to an assessment of the credibility of the victim and the defendant. Proof of the appellant’s bad character and unsavory interests (*i.e.*, the existence of child pornography on his computer) did not address his credibility but placed him in a highly prejudiced posture before the jury. It had the effect of converting the trial from an assessment of the charges against him to a general inquiry as to his character, thus denying him a fair trial on the issues.

United States v. Knellinger, 471 F. Supp. 2d 640, 650 (D. Va. 2007).

Federal case in Commonwealth of Virginia in which defendant’s request for copies of the child pornography in question was granted based on defendant’s right to discovery and the fact that defendant’s expert witnesses demonstrated to the court a need to have access to the evidence outside of a government facility.

Whitehead v. Commonwealth,⁺ No. 0576-95-3, 1996 Va. App. LEXIS 370 (Va. Ct. App. May 21, 1996)

Conduct that does not convey information to the other spouse is not privileged information; therefore, the defendant’s argument that by placing his penis in his daughter’s mouth he communicated privileged information to his wife is meritless.

Wilson v. Commonwealth, 615 S.E.2d 500 (Va. Ct. App. 2005).

When the victim of an alleged rape takes longer than is reasonable in reporting the incident, the timeliness of the complaint may be used by the jury as evidence regarding the truthfulness of the alleged victim.

VIRGINIA

Offenses Defined

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

I. **Child Enticement/Solicitation**

A. **“Criminal Solicitation” Defined**

- Criminal solicitation involves the attempt of the accused to incite another to commit a criminal offense.
 - *Bloom v. Commonwealth*, 34 Va. App. 364, 373 (2001).
 - *Jeffers v. Commonwealth*,⁺ No. 1350-00-1, 2001 Va. App. LEXIS 111, *6 (Va. Ct. App. Mar. 6, 2001).
- It is immaterial whether the solicitation is of any effect and whether the crime solicited is in fact committed. The gist of the offense is incitement.
 - *Bloom v. Commonwealth*, 34 Va. App. 364, 373 (2001).
 - *Jeffers v. Commonwealth*,⁺ No. 1350-00-1, 2001 Va. App. LEXIS 111, *6 (Va. Ct. App. Mar. 6, 2001).
- It is immaterial whether the solicitation is of any effect and whether the crime solicited is in fact committed. The gist of the offense is incitement.
 - *Bloom v. Commonwealth*, 34 Va. App. 364, 373 (2001).
 - *Jeffers v. Commonwealth*,⁺ No. 1350-00-1, 2001 Va. App. LEXIS 111, *6 (Va. Ct. App. Mar. 6, 2001).

B. **“Use of a Computer to Solicit a Minor”**

- It shall be unlawful for any person 18 years of age or older to use a communications system, including but not limited to computers or computer networks or bulletin boards, or any other electronic means, for the purposes of soliciting, with lascivious intent, any person he knows or has reason to believe is a child less than 15 years of age. VA. CODE ANN. § 18.2-374.3(C).

C. **The Defendant’s Mental State**

- The conduct consisting of the act of solicitation must be done with the intent to induce another to act.
 - *Ford v. Commonwealth*, 10 Va. App. 224, 227 (1990).
- Standing alone, an expression of desire may not support a conviction for criminal solicitation.
 - *Ford v. Commonwealth*, 10 Va. App. 224, 227 (1990).

- *Goodson v. Commonwealth*,⁺⁺ 2006 Va. App. LEXIS 515 (Va. Ct. App. 2006).

D. Solicitation Through Course of Conduct

- Solicitation may comprise a course of conduct, intended to induce another to act, that continues over an extended period.
– *Jeffers v. Commonwealth*,⁺ No. 1350-00-1, 2001 Va. App. LEXIS 111, *6 (Va. Ct. App. Mar. 6, 2001).
- All the evidence bearing upon the accused's intent is relevant to a determination of his or her guilt or innocence.
– *Jeffers v. Commonwealth*,⁺ No. 1350-00-1, 2001 Va. App. LEXIS 111, *6 (Va. Ct. App. Mar. 6, 2001).

E. Commission of the Act Solicited

- Actual creation of sexually explicit material is not a required element of offenses involving the solicitation or encouragement of children under the age of 18 to appear in sexually explicit visual material. The statutes prohibit solicitation or knowing encouragement of children to appear in such material. When the photographs or other visual material are never made, the finder of fact may infer from other evidence that the defendant intended that they be sexually explicit.
– *Frantz v. Commonwealth*, 9 Va. App. 348, 354 (1990).
- The offense is complete at the time of the actual solicitation; there is no requirement that the accused proceed to the point of some overt act in the commission of crime.
– *Goodson v. Commonwealth*,⁺⁺ 2006 Va. App. LEXIS 515 (Va. Ct. App. 2006).

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

No state cases reported.

III. Child Pornography

A. Producing Child Pornography

- A person shall be guilty of production of child pornography if he or she:
 1. Accosts, entices or solicits a person less than 18 years of age with intent to induce or force such person to perform in or be a subject of child pornography; or
 2. Produces or makes or attempts or prepares to produce or make child pornography; or
 3. Who knowingly takes part in or participates in the filming, photographing, or other production of child pornography by any means; or

4. Knowingly finances or attempts or prepares to finance child pornography.
VA. CODE ANN. § 18.2-374.1(B).
– *Freeman v. Commonwealth*, 223 Va. 301, 309 (1982).

1. “Child Pornography” Defined

- “*Child pornography*” is sexually explicit visual material which utilizes or has as a subject an identifiable minor. VA. CODE ANN. § 18.2-374.1(A).

2. “Sexually Explicit Visual Material” Defined

- “Sexually explicit visual material” is a picture, photograph, drawing, sculpture, motion-picture film, digital image, or similar visual representation that is obscene for children and that depicts nudity, sexual excitement, sexual conduct, sexual intercourse, or sadomasochistic abuse, or a book, magazine, or pamphlet that contains such a visual representation. VA. CODE ANN. § 18.2-374.1(A).
– *Foster v. Commonwealth*, 6 Va. App. 313, 316 (1988).

a. “Nudity” Defined

- “Nudity” means a state of undress so as to expose the human male or female genitals, pubic area, or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering below the top of the nipple. VA. CODE ANN. § 18.2-390.
– *Foster v. Commonwealth*, 6 Va. App. 313, 329 (1988).
– *Commonwealth v. Simone*, 63 Va. Cir. 216 (2003).

b. When Is Nudity Sexually Explicit or Obscene?

i. Sexually Explicit

- Photographs of nude people are sexually explicit if they are “lewd.” “Lewd” is a synonym of lascivious and indecent.
– *Asa v. Commonwealth*, 17 Va. App. 714, 718 (1994).
- Patently offensive representations or descriptions of lewd exhibition of the genitals are among the plain examples of what could be regulated.
– *Asa v. Commonwealth*, 17 Va. App. 714, 719 (1994).

ii. Obscene

- Nudity alone is not enough to make material legally obscene.

– *Freeman v. Commonwealth*, 223 Va. 301, 311 (1982).

- The depiction of nudity is proscribed only if it is obscene for children.
– *Freeman v. Commonwealth*, 223 Va. 301, 311 (1982).
- To aid a jury in the determination of whether the materials are obscene, the methods of their creation, promotion, or dissemination are relevant.
– *Freeman v. Commonwealth*, 223 Va. 301, 314 (1982).
- The Court has considered motivation relevant to the ultimate evaluation of obscenity if the prosecution offers evidence of motivation.
– *Freeman v. Commonwealth*, 223 Va. 301, 314 (1982).

3. “Identifiable Minor” Defined

- An “identifiable minor” is a person who was a minor at the time the visual depiction was created, adapted, or modified; or whose image as a minor was used in creating, adapting or modifying the visual depiction; and who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and shall not be construed to require proof of the actual identity of the identifiable minor. VA. CODE ANN. § 18.2-374.1(A).

4. The Defendant’s Mental State

- It is necessary only that the defendant knows the nature and character of the material he or she produces or intends to produce, not whether they met the legal standard of sexually explicit material.
– *Frantz v. Commonwealth*, 9 Va. App. 348, 354 (1990).

B. Reproducing Child Pornography

- The reproduction of child pornography, by any means, including but not limited to computer-generated reproduction, is prohibited. VA. CODE ANN. § 18.2-374.1(B)(3).
– *Slavek v. Commonwealth*,⁺ No. 2452-00-1, 2001 Va. App. LEXIS 553, *14 (Va. Ct. App. Oct. 9, 2001).
- Any person who intentionally operates an Internet website for the purpose of facilitating payment for access to child pornography is guilty of a Class 4 felony. VA. CODE ANN. § 18.2-374.1:1(D).

C. Possession of Child Pornography

- Any person who knowingly possesses child pornography is guilty of a Class 6 felony. VA. CODE ANN. § 18.2-374.1:1(A).
– *Commonwealth v. Simone*, 63 Va. Cir. 216 (2003).

IX. Transporting a Minor for Purposes of Prostitution

No state cases reported.

VIRGINIA

Search and Seizure of Electronic Evidence

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

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

I. Search Warrants

A. Probable Cause

- While the Fourth Amendment provides that a search warrant shall issue only upon a showing of probable cause supported by oath or affirmation, the task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him or her, including the veracity and the basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

– *Freeman v. Commonwealth*,⁺ No. 1584-00-3, 2001 Va. App. LEXIS 439, *10 (Va. Ct. App. July 24, 2001).

1. Degree of Specificity Required

- The degree of specificity required may necessarily vary according to the circumstances and type of items involved.
– *Freeman v. Commonwealth*,⁺ No. 1584-00-3, 2001 Va. App. LEXIS 439, *7 (Va. Ct. App. July 24, 2001).
– *Moyer v. Commonwealth*, 33 Va. App. 8, 21 (2000).
- So long as the search warrant describes the objects of the search with reasonable specificity, it complies with the dictates of the Fourth Amendment.
– *Freeman v. Commonwealth*,⁺ No. 1584-00-3, 2001 Va. App. LEXIS 439, *7 (Va. Ct. App. July 24, 2001).
– *Moyer v. Commonwealth*, 33 Va. App. 8, 21 (2000).

2. The Defendant's Burden

- Because search warrants are favored, and warrantless searches are presumptively invalid under the Fourth Amendment, a presumption of validity attaches when a search is conducted pursuant to a warrant issued by a neutral and detached magistrate or judicial officer; therefore, where law enforcement conducts a search pursuant to a

judicially sanctioned warrant, the defendant must rebut the presumption of validity by proving that the warrant is illegal or invalid. – *Freeman v. Commonwealth*,⁺ No. 1584-00-3, 2001 Va. App. LEXIS 439, *2 (Va. Ct. App. July 24, 2001).

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

B. Scope of Search

1. Generally

- A search may be as extensive as reasonably required to locate the items described in the warrant.
– *Moyer v. Commonwealth*, 33 Va. App. 8, 26 (2000).
– *Rosa v. Commonwealth*, 48 Va. App. 93 (2006).
- A warrant to search a premises would support a search of every part of the premises that might contain the object of the search.
– *Moyer v. Commonwealth*, 33 Va. App. 8, 26 (2000).

2. “Plain-View” Doctrine

- While law enforcement is lawfully engaged in such a search, the plain-view doctrine applies, and they may seize any item if it is immediately apparent that the item may be evidence of a crime, contraband, or otherwise subject to seizure.
– *Moyer v. Commonwealth*, 33 Va. App. 8, 26 (2000).

3. Computer Searches

- Computer searches are technical and complex and cannot be limited to precise, specific steps or only one permissible method.
– *Rosa v. Commonwealth*, 48 Va. App. 93 (2006).
- Where it is not immediately apparent whether a [computer] document falls within the scope of the search warrant, an officer has the ability to examine the item to see if it falls within the warrant's purview.
– *Rosa v. Commonwealth*, 48 Va. App. 93 (2006).
- While officers, pursuant to a warrant, cannot simply conduct a sweeping, comprehensive search of a computer's hard drive because of the amount of private material potentially stored there, a search may be proper when an officer uses a clear search methodology and obtains a

second warrant as soon as he views images he believes fall outside of the scope of the first warrant.

– *Rosa v. Commonwealth*, 48 Va. App. 93 (2006).

C. Staleness

- The issue of staleness is resolved by looking at all the facts and circumstances of the case, including the nature of the unlawful activity alleged, the length of the activity, and the nature of the property to be seized.

– *Commonwealth v. Robinson*,⁺⁺ No. 49064-02, 2002 Va. Cir. LEXIS 274, *8 (Va. Cir. Ct. Oct. 17, 2002).

- The test is whether probable cause still existed at the time of execution.

– *Commonwealth v. Robinson*,⁺⁺ No. 49064-02, 2002 Va. Cir. LEXIS 274, *8 (Va. Cir. Ct. Oct. 17, 2002).

II. Anticipatory Warrants

No state cases reported.

III. Methods of Searching

No state cases reported.

IV. Types of Searches

A. Civilian Searches

No state cases reported.

B. Consent Searches

No state cases reported.

C. Employer Searches

No state cases reported.

D. Private Searches

- The Fourth Amendment prohibition against unreasonable searches and seizures does not apply to private individuals acting on their own initiative.

– *Buonocore v. The Chesapeake & Potomac Telephone Co. of Virginia*,⁺⁺ 254 Va. 469, 473 (1997).

E. University-Campus Searches

No state cases reported.

V. Computer-Technician/Repairperson Discoveries

No state cases reported.

VI. Photo-Development Discoveries

No state cases reported.

VII. Criminal Forfeiture

No state cases reported.

VIII. Disciplinary Hearings for Federal and State Officers

No state cases reported.

IX. Probation and Parolee Rights

No state cases reported.

VIRGINIA

Jurisdiction and Nexus

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

I. Jurisdictional Nexus

- Jurisdiction may exist where the immediate harm occurs, even if the criminal act does not physically occur there.
– *Foster-Zahid v. Commonwealth*,⁺⁺ 23 Va. App. 430, 441 (1996).

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.

VIRGINIA

Discovery and Evidence

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

I. Discovery

A. Right to Discovery

- There is no general constitutional right to discovery in a criminal case.
– *Clark v. Commonwealth*, 262 Va. 517, 520 (2001).

B. Physical Examination of the Victim

- If an accused in Virginia has no right to interview a rape case victim, no right to discover statements made by the Commonwealth's witnesses to agents of the Commonwealth, and no right to discover certain internal Commonwealth documents, surely the accused should have no right to a physical examination of the victim in a statutory rape case.
– *Clark v. Commonwealth*, 262 Va. 517, 520 (2001).

II. Timely Review of Evidence

No state cases reported.

III. Defense Requests for Copies of Child Pornography

No state cases reported.

- *United States v. Knellinger*, 471 F. Supp. 2d 640, 650 (D. Va. 2007). (federal case on topic)

IV. Introduction of E-mails or Instant Messages into Evidence

- Conversations over the Internet are not analogous to telephone conversations. For example in telephone conversation, unlike communications via the Internet, the participants have the opportunity for voice recognition.
– *Bloom v. Commonwealth*, 262 Va. 814, 822 (2001).

A. Hearsay/Authentication Issues

No state cases reported.

B. Circumstantial Evidence

- Messages received over the Internet are admissible against the sender if the evidence establishes the identity of the sender.
– *Bloom v. Commonwealth*, 34 Va. App. 364, 369 (2001).

C. Technical Aspects of Electronic Evidence Regarding Admissibility

No state cases reported.

V. Introduction of Text-Only Evidence

A. Introduction into Evidence

No state cases reported.

B. Relevance

No state cases reported.

VI. 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.

VII. Prior Bad Acts

A. Inadmissible

1. General Rule

- As a general rule, evidence of other crimes has no probative value and is inadmissible.
 - *Blaylock v. Commonwealth*, 26 Va. App. 579, 588 (1998).
 - *Staton v. Commonwealth*,⁺ No. 1362-01-4, 2002 Va. App. LEXIS 453, *8 (Va. Ct. App. Aug. 6, 2002).

2. Intent Is Not an Issue

- Evidence of other crimes is not admissible on the issue of intent when intent is not genuinely in dispute.
 - *Blaylock v. Commonwealth*, 26 Va. App. 579, 590 (1998).
- Where a defendant's intent is genuinely uncontested, any nominal probative value from the challenged evidence will be easily outweighed by the danger of prejudice.
 - *Blaylock v. Commonwealth*, 26 Va. App. 579, 590 (1998).

B. Admissible

1. Motive or Intent Is an Issue

- Where the motive, intent, or knowledge of the accused is at issue, evidence of other offenses is admissible if it shows the conduct or attitude of the accused towards his or her victim, establishes the relationship between the parties, or negates the possibility of accident or mistake.
 - *Blaylock v. Commonwealth*, 26 Va. App. 579, 588 (1998).
 - *Moore v. Commonwealth*, 222 Va. 72, 76 (1981).

2. Common Plan or Scheme

- Utilization of the common scheme or plan exception to the inadmissibility of other crimes evidence is appropriate where a prior criminal act or acts tend to show a system or uniform plan from which motive, criminal intent, or knowledge may be inferred.
 - *Goodman v. Commonwealth*,⁺ No. 0213-93-4, 1994 Va. App. LEXIS 708, *4 (Va. Ct. App. Nov. 29, 1994).

3. *Modus Operandi*

- As proof of *modus operandi*, evidence of other crimes need not bear such an exact resemblance to the crime on trial as to constitute a

signature. Rather it is sufficient if the other crimes bear a singularly strong resemblance to the pattern of the offense charged.

– *Goodman v. Commonwealth*,⁺ No. 0213-93-4, 1994 Va. App. LEXIS 708, *4 (Va. Ct. App. Nov. 29, 1994).

4. Previous Acts of Sexual Intercourse

- Evidence of acts of sexual intercourse for which the defendant is not being tried should be admitted only for limited purposes. A jury should be permitted to consider such evidence if it believes the evidence to be true, as showing the defendant’s inclination to commit the act with which he or she is charged and as tending to corroborate the testimony of the alleged victim with respect to the act with which the defendant is charged. A jury should not be permitted to consider such evidence as proof of the defendant’s guilt of any offense with which he or she is not charged or as direct proof of the defendant’s guilt of the offense with which he or she is charged.

– *Herron v. Commonwealth*, 208 Va. 326, 327 (1967).

5. Evidence of Possession of Pornography

- Evidence that defendant owned pornographic videos and watched them with a child in the house is not automatically inadmissible. If such evidence is probative to the offense charged, it will not be excluded merely because it also shows the accused to be guilty of another crime.

– *Croxton v. Commonwealth*, 2005 Va. App. Lexis 166 (Va. Ct. App. 2005).

6. Hearsay Exceptions

a. “Recent-Complaint” Exception

- A recent complaint by the victim of one of several specified sexual offenses – crimes against nature, incest, taking indecent liberties with children, and taking indecent liberties with children by a person in a custodial relationship – is admissible as an exception to the hearsay rule. VA. CODE ANN. § 19.2-268.2.
– *Commonwealth v. Wills*, 44 Va. Cir. 459, 460 (1998).
– *Mitchell v. Commonwealth*, 25 Va. App. 81, 85 (1997).
- The recent-complaint exception embraces only the fact of the complaint and not details reported by the victim.
– *Mitchell v. Commonwealth*, 25 Va. App. 81, 86 (1997).
- Evidence of the victim’s out-of-court complaint is not admissible as independent evidence of the offense; however, it

is admissible to corroborate the victim's testimony and other independent evidence of the offense.

– *Commonwealth v. Wills*, 44 Va. Cir. 459, 460 (1998).

– *Mitchell v. Commonwealth*, 25 Va. App. 81, 85 (1997).

– *Wilson v. Commonwealth*, 615 S.E.2d 500 (Va. Ct. App. 2005).

- The Commonwealth may offer evidence of a fresh complaint only if the victim testifies because the purpose of that evidence would be to corroborate the victim's testimony.

– *Commonwealth v. Wills*, 44 Va. Cir. 459, 463 (1998).

- The timeliness of a recent complaint is measured as of the date of the offense, not as of the date of prior complaints.

– *Wilson v. Commonwealth*, 615 S.E.2d 500 (Va. Ct. App. 2005).

b. “Excited-Utterance” Exception

- Excited utterances prompted by a startling event, and not the product of premeditation, reflection, or design, are admissible, but the declaration must be made at such time and under such circumstances as to preclude the presumption that it was made as the result of deliberation.

– *Martin v. Commonwealth*, 4 Va. App. 438, 441 (1987).

- Particularly in the case of statements made by young children, the element of trustworthiness underscoring the spontaneous and excited-utterance exceptions finds its source primarily in the child's lack of capacity to fabricate rather than the lack of time to fabricate.

– *Martin v. Commonwealth*, 4 Va. App. 438, 442 (1987).

c. Test for Admissibility

- With respect to the hearsay exceptions, the test for admissibility is whether the legitimate probative value outweighs the incidental prejudice to the accused.

– *Staton v. Commonwealth*,⁺ No. 1362-01-4, 2002 Va. App. LEXIS 453, *8 (Va. Ct. App. Aug. 6, 2002).

VIII. Witness Testimony

A. Child Witnesses

1. Competence of Child to Testify

- No child is deemed incompetent to testify solely because of age.

– *Commonwealth v. Gibson*, 58 Va. Cir. 296, 297 (2002).

- The competence of a child to testify as a witness depends not upon the child's age, but upon the child's individual maturity, sense of moral responsibility, and capacity.
– *Commonwealth v. Gibson*, 58 Va. Cir. 296, 297 (2002).
- The child must have a consciousness of the duty to speak the truth.
– *Commonwealth v. Gibson*, 58 Va. Cir. 296, 297 (2002).

2. Mental Evaluation of Child

- An alleged victim of sexual molestation should not be put through the ordeal of a mental evaluation or other pretrial evaluation without at least a threshold showing that the prospective witness may suffer some mental, emotional, or moral deficiency that would make it incumbent upon the trial judge to seek the assistance of mental healthcare professionals in determining competence.
– *Commonwealth v. Gibson*, 58 Va. Cir. 296, 299 (2002).

3. Timely Complaint Rule

- The only time requirement for the making of a complaint regarding sexual assault is that the complaint be made without a delay which is unexplained or is inconsistent with the occurrence of the offense.
– *Wilson v. Commonwealth*, 615 S.E.2d 500 (Va. Ct. App. 2005).
- Failure to report an incident of sexual abuse for an unreasonably long period casts suspicion and doubt on the victim's testimony unless there is a credible explanation for the delay.
– *Wilson v. Commonwealth*, 615 S.E.2d 500 (Va. Ct. App. 2005).

4. Testimony via Closed-Circuit Television

- If the Commonwealth makes an adequate showing of necessity, the Commonwealth's interest in protecting child witnesses from the trauma of testifying in a child-abuse case is sufficiently important to justify the use of a special procedure that permits a child witness in such cases to testify at trial against a defendant in the absence of face-to-face confrontation with the defendant.
– *Civitello v. Commonwealth*,⁺ No. 1963-01-2, 2003 Va. App. LEXIS 2, *5 (Va. Ct. App. Jan. 7, 2003).

a. Statutory Requirements

- The court may order that the testimony of the child be taken by closed-circuit television if it finds that the child is unavailable to testify in open court in the presence of the defendant, the jury, the judge, and the public, for any of the following reasons:

- (1) the child's persistent refusal to testify despite judicial requests to do so;
- (2) the child's substantial inability to communicate about the offense; or
- (3) the substantial likelihood, based upon expert-opinion testimony, that the child will suffer severe emotional trauma from testifying.

VA. CODE ANN. § 18.2-67.9(B).

– *Civitello v. Commonwealth*,⁺ No. 1963-01-2, 2003 Va. App. LEXIS 2, *4 (Va. Ct. App. Jan. 7, 2003).

b. Necessity of Procedure

- The finding of necessity must be case-specific.
– *Johnson v. Commonwealth*, 40 Va. App. 605, 615 (2003).
- The child must be traumatized, not by the courtroom generally, but by the presence of the defendant, and the emotional distress suffered by the child witness must be more than mere nervousness or excitement or reluctance to testify.
– *Johnson v. Commonwealth*, 40 Va. App. 605, 615 (2003).
– *Roadcap v. Commonwealth*, 50 Va. App. 732 (2007).

c. Sixth Amendment

- The Sixth Amendment's Confrontation Clause provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him or her; however, the Supreme Court has never held that the Confrontation Clause guarantees criminal defendants the absolute right to a face-to-face meeting with witnesses against them at trial.
– *Johnson v. Commonwealth*, 40 Va. App. 605, 612 (2003).

5. Leading Questions

- The trial court may properly permit leading questions where the witness is reluctant to answer, slow to understand, or is under some incapacity such as infancy.
– *Lansberry v. Commonwealth*,⁺ No. 2296-99-4, 2000 Va. App. LEXIS 723, *11 (Va. Ct. App. Nov. 14, 2000).

B. Expert Testimony

1. At State Expense

- An indigent defendant's constitutional right to the appointment of an expert at State expense is not absolute.
– *Hoverter v. Commonwealth*, 23 Va. App. 454, 466 (1996).

- An indigent defendant who seeks appointment of an expert witness at the Commonwealth's expense must demonstrate that the subject necessitating the assistance of the expert is likely to be a significant factor in his or her defense and he or she will be prejudiced by the lack of expert assistance.

– *Hoverter v. Commonwealth*, 23 Va. App. 454, 466 (1996).

2. **Opinion Testimony**

- An expert witness may express an opinion within his or her field of expertise but not as to an ultimate issue of fact within the province of the jury.

– *Freeman v. Commonwealth*, 223 Va. 301, 315 (1982).

C. **Testimony by Spouses**

- In criminal cases, a husband and wife may be compelled to testify as a witness against the other in the case of a prosecution for an offense committed by one against a minor child of either. VA. CODE ANN. §19.2-271.2.

– *Whitehead v. Commonwealth*,⁺ No. 0576-95-3, 1996 Va. App. LEXIS 370, *3 (Va. Ct. App. May 21, 1996).

IX. **Privilege Against Self-Incrimination**

- The Fifth Amendment protects against compelled self-incrimination, not the disclosure of private information.

– *Moyer v. Commonwealth*, 33 Va. App. 8, 20 (2000).

VIRGINIA

Age of Child Victim

I. Proving the Age of the Child Depicted

- A person who is depicted as or presents the appearance of being under the age of 18 in sexually explicit visual material is *prima facie* presumed to be under the age of 18.
– *Freeman v. Commonwealth*, 223 Va. 301, 309 (1982).

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

No state cases reported.

VIRGINIA

Multiple Counts

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

I. What Constitutes an Item of Child Pornography?

- The Virginia Code prohibits the sale of any obscene item. VA. CODE ANN. § 18.2-374.
– *Educational Books, Inc. v. Commonwealth*, 228 Va. 392, 395 (1984).
- Statutory language shows an unmistakable legislative intent that the sale of each obscene magazine shall constitute a separate offense.
– *Educational Books, Inc. v. Commonwealth*, 228 Va. 392, 395 (1984).
- “Obscene items” include any obscene magazine. VA. CODE ANN. § 18.2-373.
– *Educational Books, Inc. v. Commonwealth*, 228 Va. 392, 395 (1984).
- The gravamen of the offense is the sale of a single obscene item.
– *Educational Books, Inc. v. Commonwealth*, 228 Va. 392, 395 (1984).

II. Double Jeopardy

A. Test

- Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact that the other does not.
– *Ragsdale v. Commonwealth*, 38 Va. App. 421, 428 (2002).

B. Application

- In applying the double-jeopardy test, the court looks at the offenses charged in the abstract without referring to the particular facts of the case under review.
– *Ragsdale v. Commonwealth*, 38 Va. App. 421, 428 (2002).
- Although multiple offenses may be the same, an accused may be subjected to legislatively authorized cumulative punishments. It is judicial punishment in excess of legislative intent that offends the double-jeopardy clause.
– *Slavek v. Commonwealth*,⁺ No. 2452-00-1, 2001 Va. App. LEXIS 553, *10 (Va. Ct. App. Oct. 9, 2001).

VIRGINIA

Defenses

I. Age

A. Victim

- It may be inferred by text, title or appearance that a person who is depicted as or presents the appearance of being less than 18 years of age in sexually explicit visual material is less than 18 years of age. VA. CODE ANN. §18.2-374.1:1.

B. Defendant

- A person's physical appearance may be considered as proof that he or she is older than a given age.
– *Bloom v. Commonwealth*, 34 Va. App. 364, 371 (2001).
- The defendant's physical appearance alone is sufficient evidence of his or her age, and the fact-finder may resolve that issue based only on the defendant's physical appearance.
– *Bloom v. Commonwealth*, 34 Va. App. 364, 371 (2001).

II. Virtual or Simulated child pornography

- Possession of computer-generated child pornography that does not depict actual children in any way is not prohibited.
– *Commonwealth v. Simone*, 63 Va. Cir. 216 (2003).
- While the possession of computer-generated child pornography that does not depict actual children is not prohibited, it may meet the definition of obscenity.
– *Commonwealth v. Simone*, 63 Va. Cir. 216 (2003).
- Possession with intent to sell, rent, lend, transport or distribute any obscene item is prohibited.
– *Commonwealth v. Simone*, 63 Va. Cir. 216 (2003).
- Possession or production of morphed images that use real children is prohibited
– *Commonwealth v. Simone*, 63 Va. Cir. 216 (2003).

III. Diminished Capacity

A. Addiction to the Internet

No state cases reported.

B. Insanity

No state cases reported.

IV. First Amendment

- The First Amendment does not shield an accused from punishment for the possession, creation, and dissemination of documents that advocate, in sexually explicit terms, illegal sexual relations with children.
– *Holden v. Commonwealth*, 26 Va. App. 403, 409 (1998).

V.

VI. Manufacturing Jurisdiction

No state cases reported.

VII. Outrageous Conduct

No state cases reported.

VIII. Researcher

No state cases reported.

IX. Sexual Orientation

No state cases reported.

VIRGINIA

Sentencing Issues: Enhancement

I. Age of Victim

No state cases reported.

II. Distribution/Intent to Traffic

No state cases reported.

III. Number of Images

No state cases reported.

IV. Pattern of Activity for Sexual Exploitation

No state cases reported.

V. Sadistic, Masochistic, or Violent Material

No state cases reported.

VI. Use of Computers

No state cases reported.

VIRGINIA
Supervised Release

No state cases reported.

