

**POSSESSING A SEXUAL PERFORMANCE BY A CHILD**  
**Penal Law § 263.16**  
**(Committed on or after Sept. 7, 2012<sup>1</sup>)**

The (*specify*) count is Possessing a Sexual Performance by a Child.

Under our law, a person is guilty of possessing a sexual performance by a child when, knowing the character and content thereof, he or she

Select the appropriate alternative(s):

knowingly has in his or her possession or control

or

knowingly accesses with intent to view

any performance which includes sexual conduct by a child less than sixteen years of age.

The following terms used in that definition have a special meaning:

PERFORMANCE means any play, motion picture, photograph, including a digital computer image, or dance. ["Performance" also means any other visual representation exhibited before an audience]. <sup>2</sup>

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<sup>1</sup> Effective September 7, 2012, the definition of the crime was amended to add the element: "or knowingly accesses with intent to view." Thus, this charge, absent references to that element, will apply to crimes committed on or after November 1, 2003 and prior to September 7, 2012. For the charge for this crime which was in effect on or after November 1, 1996 and prior to November 1, 2003, see "Instructions for Certain Former Crimes" section.

<sup>2</sup> Penal Law § 263.00(4). *People v. Fraser*, 96 NY2d 318, 328 (2001)(a photograph includes a digital computer image).

SEXUAL CONDUCT means actual or simulated sexual intercourse, oral sexual conduct, anal sexual conduct, sexual bestiality, masturbation, sadomasochistic abuse, or lewd exhibition of the genitals.<sup>3</sup>

*Include additional definition(s) as appropriate:*

“Simulated” means the explicit depiction of any sexual conduct which creates the appearance of such conduct and which exhibits any uncovered portion of the breasts, genitals or buttocks.<sup>4</sup>

“Oral sexual conduct” means conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina.<sup>5</sup>

“Anal sexual conduct” means conduct between persons consisting of contact between the penis and anus.<sup>6</sup>

“Sado-masochistic abuse” means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.<sup>7</sup>

POSSESS means to have physical possession or otherwise to exercise dominion or control over tangible property. [Images

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<sup>3</sup> Penal Law § 263.00(3).

<sup>4</sup> Penal Law § 263.00(6).

<sup>5</sup> Penal Law §§ 263.00(7); 130.00(2)(a).

<sup>6</sup> Penal Law §§ 263.00(7); 130.00(2)(b).

<sup>7</sup> Penal Law §§ 263.00(8); 235.20.

stored in the cache of a computer may constitute evidence of images that were previously viewed. However, viewing computer images of a sexual performance by a child on a computer does not by itself constitute possession or control of such images. Rather, some affirmative act, such as printing, saving, downloading or the like, is required to show that defendant in fact exercised dominion and control over the images that were on his or her screen.]<sup>8</sup>

Add if appropriate:

The terms “possession” or “control” shall not include conduct by an attorney when the performance was provided to such attorney in relation to the representation of a person under investigation or charged with a Penal Law offense or as a respondent pursuant to the Family Court Act, and was limited in use for the purpose of representation for the period of such representation.<sup>9</sup>

Select the appropriate alternative(s):

A person KNOWINGLY has in his or her possession a performance, which includes sexual conduct by a child less than sixteen years of age, when that person is aware that he or she is in possession of such performance.<sup>10</sup>

A person KNOWINGLY accesses with intent to view a performance which includes sexual conduct by a child less than sixteen years of age, when that person is aware that he or she is accessing with intent to view such performance.<sup>11</sup> Intent means conscious objective or purpose. Thus, a person acts with intent to view any

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<sup>8</sup> See Penal Law § 10.00(8). *People v. Kent*, 19 NY3d 290 (2012).

<sup>9</sup> See Penal Law § 263.00(9).

<sup>10</sup> See Penal Law § 15.05(2).

<sup>11</sup> *Id.*

performance which includes sexual conduct by a child when that person's conscious objective or purpose is to do so.<sup>12</sup>

It is not an element of this crime, and thus the People are not required to prove beyond a reasonable doubt, that the defendant knew the child was less than sixteen years of age.<sup>13</sup>

Add where age of child is in issue:

Although the People are not required to prove that the defendant knew the child was less than sixteen years of age, the People are required to prove that the child in the performance was less than sixteen years of age. You may determine whether the person who participated in a sexual performance was under the age of sixteen years by:

Select appropriate alternative(s):

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.<sup>14</sup>

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<sup>12</sup> See Penal Law § 15.05(1).

<sup>13</sup> See Penal Law § 15.20(3).

<sup>14</sup> See Penal Law § 263.25. That statute also authorizes proof of the age of the child by "any other method authorized by any applicable provision of law or by the rules of evidence at common law."

In order for you to find the defendant guilty of this crime, the People are required to prove, from all of the evidence in the case, beyond a reasonable doubt, both of the following two elements:

1. That on or about   (date)  , in the County of   (county)  , the defendant,   (defendant's name)  ,

*Select the appropriate alternative(s):*

knowingly had in his/her possession or control a performance which included sexual conduct by a child less than sixteen years of age;

*or*

knowingly accessed with intent to view a performance which included sexual conduct by a child less than sixteen years of age;

and 2. That the defendant knew the character and content of the performance.

*[NOTE: If the affirmative defense does not apply:*

If you find the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of this crime.

If you find the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of this crime.

*[NOTE: If the affirmative defense does apply:*

If you find that the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of the crime of Possessing a Sexual Performance by a Child.

If you find that the People have proven beyond a reasonable doubt both of those elements, you must consider an affirmative defense the defendant has raised. Remember, if you have already found the defendant not guilty of Possessing a Sexual Performance by a Child, you will not consider the affirmative defense.

Under our law, it is an affirmative defense to this charge of Possessing a Sexual Performance by a Child that

*Select appropriate alternative:*

the defendant in good faith reasonably believed the person appearing in the performance was sixteen years of age or older.<sup>15</sup>

*or*

the defendant was

[a librarian engaged in the normal course of his employment, a motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter or in any other non-managerial or non-supervisory capacity in a motion picture theatre];

provided he/she has no financial interest, other than his/her employment, which employment does not encompass compensation based upon any proportion of the gross receipts, in the promotion of a sexual performance for sale, rental or exhibition or in the promotion, presentation or direction of any sexual performance, or is in any way

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<sup>15</sup> Penal Law § 263.20(1).

responsible for acquiring such material for sale, rental or exhibition.<sup>16</sup>

Under our law, the defendant has the burden of proving an affirmative defense by a preponderance of the evidence.

In determining whether the defendant has proven the affirmative defense by a preponderance of the evidence, you may consider evidence introduced by the People or by the defendant.

A preponderance of the evidence means the greater part of the believable and reliable evidence, not in terms of the number of witnesses or the length of time taken to present the evidence, but in terms of its quality and the weight and convincing effect it has. For the affirmative defense to be proved by a preponderance of the evidence, the evidence that supports the affirmative defense must be of such convincing quality as to outweigh any evidence to the contrary.

If you find that the defendant has not proven the affirmative defense by a preponderance of the evidence, then, based upon your initial determination that the People had proven beyond a reasonable doubt both of the elements of Possessing a Sexual Performance by a Child, you must find the defendant guilty of the crime of Possessing a Sexual Performance by a Child.

If you find that the defendant has proven the affirmative defense by a preponderance of the evidence, then you must find the defendant not guilty of the crime of Possessing a Sexual Performance by a Child.]

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<sup>16</sup> Penal Law § 263.20(2).