

USE OF A CHILD IN A SEXUAL PERFORMANCE
(C Felony)
PENAL LAW 263.05
(Committed on or after February 1, 2001)

The _____ count is Use of a Child in a Sexual Performance.

Under our law, a person is guilty of Use of a Child in a Sexual Performance if, knowing the character and content thereof,

Select appropriate alternative:

he or she employs, authorizes or induces a child less than seventeen years of age to engage in a sexual performance.

or

and being a parent, legal guardian or custodian of a child less than seventeen years of age, he or she consents to the participation by such child in a sexual performance.

The term, "SEXUAL PERFORMANCE," used in this definition has its own special meaning in our law. I will now give you the meaning of that term: "sexual performance."

SEXUAL PERFORMANCE means any performance or part thereof which includes sexual conduct by a child less than seventeen years of age.¹

The terms "performance" and "sexual conduct" used in the definition of "sexual performance" also have their own special meanings.

"Performance" means any play, motion picture, photograph or dance. ["Performance" also means any other visual

¹ See Penal Law § 263.00(1).

representation exhibited before an audience.^{2]}

“Sexual conduct” means actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.³

“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.⁴

“Deviate sexual intercourse” means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva.⁵

“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.⁶

[Add where appropriate:

In order to determine whether the person who participated in a sexual performance was under the age of seventeen years, you may make such determination by

Select appropriate alternative(s):

personal inspection of the child,

² See Penal Law § 263.00(4).

³ See Penal Law § 263.00(3).

⁴ See Penal Law § 263.00(6).

⁵ See Penal Law § 263.00(7), Penal Law § 130.00(2).

⁶ See Penal Law § 263.00(8), Penal Law § 235.20.

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.^{7]}

[Add where the affirmative defense is not raised:

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 seventeen years of age.^{8]}

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 appropriate alternative:

employed, authorized or induced a child less than seventeen years of age to engage in a sexual performance; and

or

being a parent, legal guardian or custodian of a child less

⁷ 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."

⁸ See Penal Law § 15.05(3).

than seventeen years of age, he/she consented to the participation by such child in a sexual performance; and

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

[NOTE: If the affirmative defense does not apply:

Therefore, if you find that the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of the crime of Use of a Child in a Sexual Performance as charged in the _____ count.

On the other hand, 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 Use of a Child in a Sexual Performance as charged in the _____ count.]

[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 Use of a Child in a Sexual Performance as charged in the _____ count.

On the other hand, 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 Use of a Child in a Sexual Performance, you will not consider the affirmative defense.

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

Select appropriate alternative:

the defendant in good faith reasonably believed the person appearing in the performance was seventeen years of age or over.⁹

or

the defendant was a librarian engaged in the normal course of his/her 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 responsible for acquiring such material for sale, rental or exhibition.¹⁰

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

⁹ See Penal Law § 263.20(1).

¹⁰ See Penal Law § 263.20(2).

outweigh any evidence to the contrary.

Therefore, 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 Use of a Child in a Sexual Performance, you must find the defendant guilty of that crime as charged in the _____ count.

On the other hand, 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 Use of a Child in a Sexual Performance as charged in the _____ count.]