

## **OBSCENITY OFFENSES INVOLVING MINORS Criminal Law & Procedure: Criminal Offenses: Sex Crimes: Child Pornography**

Because obscene material is not protected by the First Amendment to the United States Constitution, states have a right to regulate the distribution of obscene material. Where the distribution of the material involves a minor, states have a further right to define the type of material that is obscene or harmful to the minor.

In some states, a person commits an offense when he or she sells, distributes, displays, or exhibits harmful material to a minor. A person also commits an offense when he or she hires or employs a minor in the sale, distribution, display, or exhibition of harmful material. Harmful material is defined as material that appeals to the prurient interest of a person in sex, nudity, or excretion, that is patently offensive to the adult community standards with regard to minors, and that has no redeeming social value for minors.

The offense of selling or exhibiting harmful material to a minor involves the actual showing of the harmful material to the minor. It is not necessary that the entire material be viewed by the minor. The offense is committed by the mere exhibition of a portion of the material to the minor.

In order to be convicted of the offense of selling or exhibiting harmful material to a minor, the prosecution must prove that a defendant knew that the material was harmful and that the person to whom the material was sold or exhibited was a minor. A minor is generally defined as a person under a certain age. If the defendant did not believe that the person was a minor, the defendant must prove that he or she had a reasonable basis for his or her mistake with regard to the person's age. In other words, the defendant must prove that he or she made a bona fide attempt to determine the person's age.

Other defenses to the offense of selling or exhibiting harmful material to a minor include that the material was sold or exhibited for scientific or educational purposes or that the minor was accompanied by his or her parent, guardian, or spouse.

The offense of selling or exhibiting harmful material to a minor is normally punished as a misdemeanor. However, the punishment may be increased to a felony if the minor was hired or employed for the sale or exhibition of the material or if the offense was committed during a ritual or a ceremony.

Another obscenity offense regarding minors is the employment or inducement of a minor to engage in a sexual performance or sexual conduct. In order to be convicted of this offense, the prosecution must prove that a defendant knew the character and content of the performance and knew that the person whom he or she hired was a minor. The prosecution may prove the age of the minor by showing the minor to a jury, by showing the performance to the jury, by the testimony of a witness to the performance, or by expert medical testimony as to the age of the minor.

The word "performance" under this offense means any play, movie, photograph, or other visual representation that is exhibited before an audience. The words "sexual performance" include any sexual conduct on the part of the minor. The words "sexual

conduct" include actual or simulated sexual intercourse or a lewd exhibition of the genitals, the anus, or the female breast.

Defenses with regard to employing or inducing a minor to engage in a sexual performance or sexual conduct include a defendant's good faith belief that the person was not a minor, that the defendant was the spouse of the minor, or that the performance or the conduct was for scientific, educational, or medical purposes.

The offense of employing or inducing a minor to engage in a sexual performance or sexual conduct is normally punished as a felony.

Another obscenity offense involving minors is the possession or promotion of child pornography. A person commits the offense of possession of child pornography when he or she knowingly and intentionally possesses material that contains a visual image of a minor who is engaging in sexual conduct. Visual material includes films, photographs, videotapes, negatives, or slides. Visual material also includes any image that is displayed on a computer or a video screen.

Although the possession of pornography can be banned only if it is obscene, that is, if it appeals to the prurient interest in sex, is patently offensive to the community, and lacks serious scientific, literary, or artistic value, the possession of child pornography does not need to meet these standards. The mere possession of material that depicts a minor who is engaged in sexual conduct is a felony. In some states, persons have an affirmative duty to report the existence of material involving child pornography to the authorities.

The offense of promotion of child pornography involves the procurement, manufacture, selling, or transfer of child pornography. The offense also includes the advertisement of child pornography. In some states, there is a presumption that a person who possesses more than a certain amount of child pornography is possessing the material with an intent to promote. The offense of promotion of child pornography is normally punished as a felony.