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This memorandum is uncorrected and subject to revision before
publication in the New York Reports.

No. 143 SSM 19
The People &c.,
Respondent,
v.
Gary Alford,
Appellant.

Submitted by Paul J. Connolly, for appellant.
Submitted by Steven M. Sharp, for respondent.

MEMORANDUM:

The order of the Appellate Division should be modified
by providing that the sentence imposed on count 4 of the
indictment run concurrently with the sentences imposed on counts
1 and 3 of the indictment, and, as so modified, affirmed.

Penal Law § 70.25 (2) provides, “[w]hen more than one sentence of imprisonment is imposed on a person for two or more offenses committed through a single act or omission, or through an act or omission which in itself constituted one of the offenses and also was a material element of the other, the sentences . . . must run concurrently.” Here, counts 1 and 4 of the indictment both charged defendant with predatory sexual assault against a child. A person is guilty of that crime when he or she, being 18 years old or more, commits one of several lesser crimes and the victim is less than 13 years old (Penal Law § 130.96). Count 1 alleged that defendant committed the lesser crime of criminal sexual act in the first degree on or about March 12, 2007 by engaging in anal sexual conduct with the victim. Count 4 alleged that defendant committed the lesser crime of course of sexual conduct against a child in the first degree by engaging in at least two acts of sexual conduct with the victim between August 2006 and March 2007. Because it is impossible to determine whether the act that formed the basis for the jury's guilty verdict on count 1 - anal sexual conduct occurring on March 12, 2007 - was also one of the two or more acts that formed the basis for its guilty verdict on count 4, County Court should have ordered the sentences on those counts to run concurrently.

If the People wish to seek consecutive sentencing in a case such as this, they should request a form of verdict that

will require the jury to explicitly delineate that an act constituting one offense is not a material element of another offense.

Defendant's remaining contention is without merit.

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On review of submissions pursuant to section 500.11 of the Rules, order modified in accordance with the memorandum herein and, as so modified, affirmed. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided May 4, 2010