

There are two categories of "transactional" offenses. One in which a single act or omission represents two separate crimes, the other in which one offense also represents a material element of another Penal Law Section 70.25(2). In either case, the sentences on two such offenses must be concurrent. The only exception, permitting consecutive sentences, is for wearing a soft body vest under PL 270.20.

When the issue is whether one offense constitutes "a material element" of another offense (one category of transactional crimes which must be sentenced concurrently), the recent Court of Appeals decision in *People v Alford* (decided May 4, 2010) is very helpful. "Because it is impossible to determine whether the act that formed the basis for the jury's guilty verdict on count 1 ... 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 you can't tell whether or not one offense was an element of the other, then they must run concurrently. In other words, we only need to demonstrate that it is possible, and the prosecution must then establish that it is impossible, for one crime to have been a material element of the other.

For example, defendant is charged with Criminal Contempt and theft from the subject of an order of protection. So long as the basis of the contempt verdict (or plea) *could have been* the theft, then the two crimes cannot be the subject of consecutive sentences. Because it is impossible to tell whether the theft was the basis for the jury's verdict on the criminal contempt, the two sentences must run concurrently.

Furthermore, on the issue of whether two crimes were committed through "a single act or omission", I see no reason why the burden would not be on the People as well, why the analysis would be any different. So if two offenses might have been committed through a single act or omission, the fact that they might not doesn't get the People consecutive time.

Example, the defendant may have cause the injuries he was convicted of causing in one of three possible ways, the least likely of which would require concurrent sentences. So long as it is "impossible to determine" that the least likely way did not form the basis of the jury's verdict, the sentences must be run concurrently. The alternative is that the defendant is sentenced consecutively when it is conceivable that the jury's verdict was based on a determination which would not permit that to happen. Following the logic of *People v Alford*, a possibility that consecutive sentences would be improper is enough to make them unlawful. We must be sure, or sentences must be concurrent.

Further, as I see it, the only way for the prosecution to establish any of the necessary facts to permit consecutive sentences is not to request a specialized verdict sheet. I don't think there is authority for such a thing (though I welcome any correction on this point). What the prosecution must do, it seems to me, is request a charge to the jury on the elements of the specific offenses which forfeits the relevant potential basis for the jury finding. If and only if the jury has been specifically instructed that they cannot use fact X to support a verdict of guilty can we be able to determine that it did not form a basis for the jury's verdict. If they want the possibility of a consecutive sentence, they have to close

every conflicting path to a guilty verdict.