

PART V

**SUPREME COURT OF THE
STATE OF NEW YORK**

CRIMINAL DIVISION

THE PEOPLE OF THE
STATE OF NEW YORK

versus

BRANDON BERRY, DEFENDANT)
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Case No. MT-99

STATEMENT OF STIPULATED FACTS*

In February 1997, Jamie June's contempt for her former boyfriend, Brandon Buckley Galord, was at odds with her need to get her life back in order. While she still blamed him for his role in the sexual harassment she allegedly suffered during their senior year at Dry Gulch High, she blamed the school much more. But with the lawsuit (Jamie June v. Dry Gulch Public School District) about to go to trial, Jamie decided to reach out to Brandon and called him at the University of Missouri, where he attended the School of Journalism. They made plans to get together in Dry Ridge on Saturday, March 1, 1997. Jamie and Brandon spent that night together. The next day, Brandon joined his parents in Vermont for a ski trip. Afterwards, Jamie didn't call Brandon and though he tried to reach her, she didn't return his calls.

Jamie's sexual harassment lawsuit against the Dry Gulch Schools ultimately settled after trial and before a verdict. In early May of 1997 Jamie, who was pregnant, moved to Metropolis, NY to start a new life. She kept her pregnancy secret.

In late May of 1997, Brandon completed his first year of college. Tired of working at the family newspaper and disenchanted with college, Brandon approached his parents with a proposal—he would take a year off from school, move to Metropolis, and make a place for himself in journalism, with his parents footing the bill for the year. After a year, if things didn't work out, he would finish college and return to Dry Ridge to join the family business. Brandon's parents were less than enthusiastic about the proposal and unwilling to finance his year off in Metropolis.

His mind already made up, Brandon moved to Metropolis anyway, planning to use the proceeds of a trust fund set up for him by his maternal grandparents to get him through. Angry over his parents' unwillingness to pay for his year off, Brandon legally changed his last name from "Galord" to "Berry" after his maternal grandparents. He also checked in with his old friend, Sandy Hill, to see what was up with Jamie June. To his surprise and delight, he learned that Jamie had relocated to Metropolis.

Jamie found it hard to survive in Metropolis on her budget and quickly realized that her remaining money would not be sufficient to make the monthly

lease payments, maintain and park her car, buy food, and pay her utilities for the year. In addition, she had not had a single pre-natal visit, made no plans in terms of her pregnancy, and increasingly turned to drinking alcohol and watching television to escape her problems.

Brandon Berry arrived in Metropolis in early June and checked into the posh Palace Hotel, expecting to stay there until he got a feel for Metropolis. Within days of his arrival, there was a knock at the door of Jamie's apartment. To her surprise, and secretly to her relief, it was Brandon Berry. She immediately welcomed him in and they talked all night. Jamie shared her financial woes, her inability to deal effectively with the issues in her life, and the fact that she was pregnant—and that Brandon was the father.

Brandon quickly proposed that they get married. He moved in the next day and they were married in a civil ceremony by the end of the week. There were more fireworks than normal in Dry Ridge, NY on July 4, 1997, when Brandon and Jamie announced that they were married and expecting a child. The newlyweds spent the rest of the summer and early fall getting to know Metropolis and having a lot of fun.

On Monday, November 3, 1997 at about 4:00 a.m., Jamie was awakened by a sharp pain in her abdomen. She dismissed it as a symptom of too much partying the night before, but when the pains continued at regular intervals, she woke Brandon, who determined that Jamie was ready to deliver their baby. Jamie and Brandon had not done any research or planning regarding the birth of their child, obstetricians, or hospitals, so they called a cab to take them to the nearest hospital.

The maternity staff at Ivy League University Hospital quickly picked up on Jamie's and Brandon's low level of sophistication and took a very "hands on" approach with the couple. They were concerned with the fact that Jamie had not been under the care of any medical professional during her pregnancy. The baby was delivered approximately four weeks premature and appeared to have complications. The hospital contacted the county social work department and Dana Dowright, MSW, was assigned to the family to look out for the best interests of the child.

Allowed to be discharged with the baby, who they named Terry ("T" for short), after a three-day hospital stay, Jamie and Brandon were nervous about their departure from the hospital with T and were guardedly happy to accept after-care services from Dana.

Over the next several months, Jamie and Brandon had their hands full caring for themselves and the baby, who recovered completely from its post-delivery complications. Jamie, however, seemed to be drinking more and becoming more and more depressed. Dana confronted Jamie about her abuse of alcohol, but Jamie denied that she had a problem. Dana believed that if Brandon wasn't in the picture, she would have to petition the Court to remove the child and place it in foster care.

In December, Brandon reached out to Jamie's parents by telephone. He was worried about Jamie's drinking and the fact that most of his time was spent

caring for T. Auggie June listened, empathized, gave him advice, and volunteered to come visit; this began a running dialogue of discussions between Brandon and Jamie's parents concerning baby care and Jamie.

By the end of April, 1998, Brandon Berry had evolved into a caring, competent father and T Berry was a thriving six-month old. In February, Dana Dowright had reduced her contact with the Berry family to monthly visits which continued to be productive for Brandon.

Brandon had made no progress with his job search and realized that Jamie was going to have to become more of a participant in T's care. It was clear that the family would have to move into a much cheaper place on June 1, when their lease expired.

In early May, Auggie June, who was visiting the Berrys in Metropolis, got Jamie to visit the Interfaith Alliance, located across the street from her apartment building. A volunteer psychologist, Marsh Mellow, was available to speak with Jamie. Dr. Mellow listened intently as Jamie shared the ups and downs of her life over the last few years. In a rare moment of strength, Jamie agreed to try to get her drinking under control so that she could become more of a parent to T, thereby enabling Brandon to get a job. Jamie liked the psychologist's non-judgmental, easy-to-talk-with style, and they met on several occasions in May.

In early June, Marsh Mellow helped the Berry family relocate to a "bare bones" apartment, with a month-to-month lease, some twenty blocks away from their current apartment in Metropolis. With the exception of the oven, everything seemed to be in working order, and the oven was repaired the next day.

On June 11, 1998, at approximately 1:00 p.m., Dana made a surprise visit to the Berry's new apartment. There was no response to the knocks on the door, yet T could be heard crying inside the apartment. Instinctively, Dana tried the door and found it unlocked. Dana found Jamie passed out near the couch on the floor in the living room which was adjacent to the kitchen. T was sitting on the floor near her. Dana noticed that the oven door in the kitchen was open and that the oven was on. Brandon was nowhere to be found.

Dana called 911 and Officer Jo Viernes of the Metropolis Police Department was the first to respond to the scene, followed by an ambulance. Officer Viernes established that Jamie, though still unconscious, had a discernible pulse. She was breathing on her own, smelled of alcohol, and did not appear to be injured. Working with Officer Viernes, Dana Dowright arranged for the temporary removal of T Berry and Jamie was taken to the hospital. Dana left a note for Brandon with the social worker's contact information and a brief explanation of what had transpired.

Brandon arrived home from a day of job-searching at approximately 4:45 p.m. on the 11th, read the note, called Dr. Mellow, and rushed to the hospital. Jamie had regained consciousness by the time Brandon arrived at her room, where he was met by Dr. Mellow and Dana Dowright. Jamie insisted that she

could stop drinking anytime she wanted and Dana suggested that “now” might be a good time. Jamie consented to an evaluation, which Dana quickly arranged.

Jamie was temporarily released from the hospital the next day and appeared in Family Court with Brandon. It was decided that T Berry would be returned to the couple immediately, provided that Jamie agreed to the detox program and to entering a 12-Step Program (Alcoholics Anonymous Program). Jamie agreed and the matter was adjourned in contemplation of dismissal. T was returned to the couple and Jamie returned to Ivy League University Hospital that day to begin detox. Brandon called Jamie’s parents that night to tell them what had happened.

Jamie completed the detox program on June 16, 1998. Vowing to never drink again, she was determined to stay sober and become a better mother. Brandon was anxious to have Jamie care for T on a daily basis. Marsh Mellow hooked Jamie up with an Alcoholics Anonymous (AA) group at the Interfaith Alliance and continued to meet with her twice a week. Dana Dowright checked in with the Berrys frequently.

Initially, Jamie attended church services weekly, went to four AA meetings each week, met with Dr. Mellow twice each week, and began to eat better and exercise regularly. By August, she found herself doing things around the apartment to make it a more appealing place to spend time. That same month, Jamie even called maintenance twice to take another look at the oven as it didn’t seem to be working properly. On one occasion in August, Officer Viernes surprised the couple with a visit to their apartment and complemented them on how well things seemed to be going.

Throughout the month of August, Brandon would leave Jamie and T alone for periods of time with no problems. However, on some occasions, Brandon would arrive to find the baby crying and Jamie stressing out about how to pacify T. As always, Brandon patiently worked through the various strategies for soothing the baby with Jamie, who seemed to become a little more empowered each time.

On one occasion in August, Brandon became quite angered when he arrived home, finding the baby asleep on their bed with Jamie nowhere to be found. Jamie returned approximately thirty minutes later, claiming that she must have just missed him, and that she just needed to get out of the house for a few minutes. Brandon calmly worked through the reasons why T should not be left alone at home together with the responsibilities they had as parents and the various options at Jamie’s disposal should a similar situation arise in the future.

By September of 1998, Brandon was working on finding a job on a full-time basis with Jamie caring for T on her own. They shared the responsibility for T’s care in the evenings and on the weekends. This schedule enabled Jamie to continue to meet with Marsh Mellow, now just once a week in the evenings, and to attend AA meetings twice a week at night.

Dana Dowright’s last scheduled visit with the Berry family would take place in October. However, it was Dana’s belief that Jamie would always be at risk to resume drinking and she shared this concern with Brandon and Jamie.

In mid October 1998, Brandon spotted a classified ad in the *Daily Times* for a “utility player” in the journalism field, willing to work long hours and grow with a weekly newspaper in Enterprise, a small town, 175 miles northwest of Metropolis. He had such a good feeling about his prospects that he decided to drive there without an appointment and talk his way past the receptionist and into the boss’ office. He decided not to tell Jamie until after he had returned with the job offer.

On Wednesday, October 14, 1998 Brandon walked into the offices of the *Enterprise Herald* on Main Street in Enterprise and introduced himself to the owner of the paper, Kerry White, who was impressed with the fact that Brandon drove some 175 miles to take a shot at the job without an appointment for an interview. Kerry liked the fact that Brandon had some experience and was hungry for the job, so Kerry offered him employment for a one month trial period. Lodging would be provided in Enterprise, which he would need, of course, if he landed the job permanently.

Brandon trumpeted the news to Jamie that night and suggested that maybe he should spend the month alone in Enterprise, working seven days a week, to ensure that he would be able to keep the job and that Jamie and T could move there in time for the Berry family to celebrate Thanksgiving together. Jamie decided that if Dr. Mellow thought she could handle things on her own for a month, then she’d give it a try.

The next day, Jamie, Brandon, and T met with Marsh Mellow in the morning to explain the situation. The psychologist came out in favor of the couple “splitting-up the team” for a month, believing that the job offer was a good opportunity and that in the long run the family would be happier in Enterprise. Marsh noted that it would be a struggle for both of them, but that if they took things one day at a time it could all work out. The couple thanked Marsh Mellow for the advice. On the way out of the office, Brandon asked the doctor to stop in to check on Jamie from time to time, at the doctor’s convenience, just to be sure everything was OK. Dr. Mellow promised to do just that and wished Brandon luck.

That afternoon, the Berrys had an appointment with Dana Dowright, who, after hearing the proposal in detail, came out against it. Dana said that she doubted that Jamie would be able to keep it all together without Brandon and expressed serious concerns about the health and safety of T in Brandon’s absence.

The next day, Friday, October 16, 1998, Jamie and Brandon agreed that Brandon would take the job on a trial basis. Brandon called Kerry to accept the job. He spent the rest of the weekend packing, helping Jamie prepare for her month on her own—including a review of strategies for handling T and a discussion about the responsibility of taking care of T—and playing with T, who was two weeks shy of one year old. On Sunday, before Brandon departed, they had an early birthday party for little Terry Berry.

Brandon threw himself into his work but still spoke to Jamie and T every couple of days, encouraging Jamie to “hang in there” and bubbling over with excitement and pride over his accomplishments. During their conversations,

Jamie tried to put a positive spin on things from her end, but the truth was that she was struggling with life on her own with T.

Jamie had made arrangements with sixteen year old Jan Grady of the family across the hall to baby-sit for T on the evenings when she met with Marsh Mellow and when she attended her AA meetings. Usually, Jan came to the Berry apartment to watch T and to get homework done in a quieter setting. In addition to the regular schedule, once in a while Jamie would ask Jan at the last minute to watch T. Jan was usually available.

Friday, November 6, 1998 was a particularly tough day for Jamie. Brandon had been away nineteen days. T stayed awake all day and by 7:00 p.m. had fallen asleep in the playpen, which Jamie kept in an alcove of the kitchen. She called Brandon, but was told that he was "on assignment" and couldn't be reached for a while.

Jamie needed to get out of the apartment and get to an AA meeting and she knocked on Jan Grady's door. She was upset when no one answered the door after numerous knocks, as there was always someone home at the Grady's. As she turned to walk away, Jan, whose face was red, opened the door when she saw it was Jamie. Jamie blurted out, "You've got to watch T for me for a little while!" Jan didn't want to let Jamie down, but at the same time, it was one of those rare occasions at the Grady house where Jan was home alone with a date. Jamie told Jan that T was asleep for the night and that they could set up a baby monitor so that Jan could hear T if the baby woke. Everything was set up in minutes and Jamie was out the door in a flash and on her way to an AA meeting in her old neighborhood, some twenty blocks away.

On the way to the meeting, Jamie stopped in at *Inebriations*, a bar in the old neighborhood, walked up to an open seat at the bar, and ordered a scotch. She stared at the glass for several minutes, picked it up, but she quickly put it down and ran out of the bar. As it happened, Dana Dowright was at *Inebriations* that night playing foosball. She saw the bartender serve Jamie a drink, and a few minutes later, when her game was done, she went to confront Jamie, but Jamie was gone. Dana had seen Jamie in *Inebriations* prior to June 11.

Marsh Mellow was a little worried about Jamie in light of their recent counseling session and decided to stop by to see her. Dana Dowright didn't like what had just transpired and decided to pay a surprise visit to the Berry residence.

Jamie's abrupt departure from the bar was motivated by her recollection of her promise to be a better mother. About fifteen minutes before she arrived back home at 7:55 p.m., the contents of the oven caught on fire, setting off the central smoke alarm system in the building, which was automatically relayed to the fire department. The fire department responded within seven minutes of the alarm. Jan and Jan's date were completely startled by the alarm, rushed to look presentable, and in the confusion exited the building, completely forgetting about T, who was awake, crying, and coughing, standing in the playpen.

Police Officer Jo Viernes was the first to arrive on the scene. Making sense of Jan's almost incoherent screams about "the baby," the Officer got the

apartment number, ran upstairs, broke the apartment door down, and quickly removed T, bringing the baby to a firefighter outside the building who summoned the paramedics. Marsh Mellow arrived just as Viernes was handing the baby to a firefighter and immediately recognized the child as Terry Berry.

A couple of minutes later, Jamie arrived and frantically tried to gain access to the building, screaming, "My Baby, My Baby!" A firefighter stopped her and redirected her in the direction of the paramedics. The paramedics' initial exam suggested that T would be OK, and they wanted to take the child to the Ivy League University Hospital ER for further examination. As Jamie and Dr. Mellow boarded the ambulance, Dana Dowright arrived on the scene and was briefed by a bystander on what was going on. Dana resolved to thoroughly investigate the circumstances.

Jamie called Brandon from the hospital. He left Enterprise immediately and arrived at the hospital in approximately two hours and fifteen minutes. As he arrived, the ER staff was completing their examination of T and Officer Viernes was completing an interview with Jamie. Brandon and Jamie embraced and both of them broke into tears as the hospital staff announced that T seemed fine but that they would hold T overnight for observation. Officer Viernes questioned Brandon before they left the hospital with Marsh Mellow, who offered to put them up for the night at the Interfaith Alliance. T was subsequently placed in an approved foster home by Dana Dowright pending a Family Court hearing.

On Monday, November 9, 1998, Jamie and Brandon were separately charged with Endangering the Welfare of a Child. Jamie worked out a plea agreement with the District Attorney.

The People's theory is that the defendant, Brandon Berry, is guilty of a class A misdemeanor, Endangering the Welfare of a Child [N.Y. Penal Law § 260.10 (2)], in that as a parent of a child (T Berry) less than eighteen, he failed or refused to exercise reasonable diligence in the control of such child to prevent him from becoming a neglected child; that is, a child less than eighteen, whose physical condition was in imminent danger of becoming impaired; in that, he allowed his child, less than eighteen years of age, to be kept at home knowing that his wife, the child's mother, was an alcoholic and was incapable of caring for the child on her own and that as a result of such action, the child could have died or sustained serious injury when fire broke out in the home and the child was left unattended in the home; and as a result of his failure to exercise a minimum degree of care in providing his child with proper supervision he subjected the child to be inflicted with a substantial risk of harm.

Brandon Berry entered a plea of not guilty. He argues that he lacks culpability in this isolated incident; in fact he was not even on the scene and could not have prevented the harm, that at all times he acted as a reasonably prudent parent, that this type of harm was not foreseeable, and that there was no proximate cause that could be linked to him. He maintains that he never failed or refused to exercise reasonable care for his child and that his wife had, in fact, acted appropriately and reasonably in providing a baby-sitter for T. And that additionally, it was impossible or him to have acted in any other way.

WITNESSES

FOR THE PROSECUTION

Dana Dowright, MSW
Social Worker
Metropolis County
Department of Social Services

Jo Viernes
Police Officer
City of Metropolis

Auggie June
Parent of Jamie June-Berry

FOR THE DEFENSE

Marsh Mellow, Ph.D.
Psychologist

Jamie June-Berry¹
Wife/Mother

Brandon Berry²
Husband/Father/Defendant

¹Gender Stipulated Female

²Gender Stipulated Male

*This case is hypothetical. Any resemblance between the fictitious persons, facts and circumstances described in this mock trial and real persons, facts, and circumstances is coincidental. It is stipulated that any enactment of this case is conducted after the named dates in the fact pattern and witness statements.

STIPULATIONS

1. For the purposes of this mock trial, the gender of two of the witnesses are determined and stipulated as follows: Jamie June-Berry is female; Brandon Berry is male. Notwithstanding this, it is understood that a school may, for example, use a male to portray Jamie June-Berry if no females are available for that role. In such a case, however, the witness will be understood to be of the stipulated gender for that individual, as listed above.

As in the 1990 and 1997 mock trial cases, single gender schools will be ***allowed***, but ***not required***, to include a student member of the opposite sex from another school for the sole purpose of playing the gender-stipulated witness (Jamie June-Berry for an all-male school or Brandon Berry for an all-female school).

Note that no student currently participating on any school's mock trial team may switch teams to assist a single-gender school; likewise, any student brought onto a single-gender school's team is limited to playing the gender-specified role and may not, in addition, serve as an attorney or as another witness.

2. It is understood that the four remaining witnesses, Marsh Mellow, Dana Dowright, Jo Viernes, and Auggie June can be portrayed by either sex, the names being gender neutral.

3. Witness statements are sworn and notarized.

4. All items of evidence are eligible for use at trial, following proper procedure for identification and submission. No other physical evidence, aside from those provided, can be introduced at trial.

5. The Counselor-Client Privilege has been waived.

6. No right to or claim of spousal immunity can be made.

7. All applicable motions have been made and decided. The constitutionality of all statements is not in question. All other evidentiary questions are preserved for the Court. The case is ready for trial before the Criminal Division of the Supreme Court of the State of New York, Metropolis County, which, for purposes of this mock trial, is a county in New York State.

8. The temporary removals and placements of Terry Berry without a Court Order in June 1998, and November 1998, were legally proper in all respects.

AFFIDAVIT OF DANA DOWRIGHT

Witness for the Prosecution

My name is Dana Dowright and I am a Social Worker with the Metropolis County Department of Social Services. I completed my undergraduate and graduate degrees in Social Work at the State University of New York at Albany, currently hold a Master of Science Degree in Social Work (MSW), and am certified and duly licensed as a social worker by the New York State Education Department. I have worked for the County Department of Social Services in the Division of Children and Families, Office of Child Protective Services for the past 15 years. Essentially, my job is to look out for the best interests of children. When necessary, as part of my job and as required by the State Social Services Law, I take whatever measures are appropriate to protect a child's life and health. Unfortunately, in some situations, it is necessary to take a child into protective custody without the consent of the parent(s). This occurs when the circumstances of the child are such that staying in his or her residence, in the care and custody of his or her parent(s), presents an imminent danger to the child's life or health.

I first became acquainted with Brandon Berry and his wife, Jamie June-Berry, on November 3, 1997, when the Ivy League University Hospital maternity staff called my office with serious concerns about a newborn child named Baby June-Berry and the ability of the child's parents to provide adequate care. It was a Monday afternoon and I was "on-call." The mother had delivered the child at 12:12 p.m. that day and I arrived at the hospital that afternoon. When I interviewed Brandon Berry, I learned that he and Jamie had no pre-natal training, no post-natal plans, and, in fact, had not even picked out a name for the baby. I knew I had my work cut out for me.

I put my standard, intensive three-day, in-hospital training program into play with the family and made extensive arrangements to ensure that Brandon and Jamie were also equipped with the basic supplies, clothing, and equipment necessary for the most important job that they'd ever have—parenting. By the end of day three, I was satisfied that the couple was minimally, but sufficiently, competent to leave the hospital with their newborn baby, who they had named Terry Berry, "T" for short. Even so, I was not optimistic about how things would go, having had to remove children from families who left the hospital under circumstances similar to those of Brandon and Jamie on several occasions in the past.

To the couple's credit, they accepted my offer of after-care services, which entail periodic visits with the family at their home. After-care services are offered by the county to parents under circumstances like that of Brandon's and Jamie's without charge for up to 1 1/2 years.

During the months of November and December of 1997 and January of 1998, I visited the family weekly. Based on my weekly visits, it was my observation that Jamie was relying on Brandon to be T's primary caretaker while she became alcohol dependent. Whenever Jamie and I shook hands, her palms were sweaty. Her eyes were often red or "blood-shot." She avoided engaging in up close, face-to-face conversations with me. She generally appeared

unkempt. I have learned over the years that these kinds of things are often signs of alcoholism.

Brandon, on the other hand, was becoming a loving and skillful father and the baby was thriving. I felt that I was making progress with Brandon and T, while Jamie distanced herself from me. Based on the good care T was getting from “dad”, and knowing that Jamie would have to figure out on her own that she was an alcoholic and needed help, I reduced my contact with the Berry family to monthly visits beginning in February of 1998.

The situation remained status quo for March and April, and in May of 1998, I learned that the family would be moving to a less expensive apartment in Metropolis. I wanted to be sure that the new apartment would be a healthy and safe environment and so I made a surprise visit on June 11, at about 1:00 p.m. In an unsupervised case like the Berry’s, that is, a case where the Court has not mandated that the parents’ interactions with their child be supervised, random, unscheduled visits are standard.

I thought it was odd that no one answered the door, yet there was the sound of an infant crying coming from inside. I double checked the address and knocked again. When there was still no answer, I tried the door and, amazingly, it was open. As I entered, I recognized the Berry’s furniture and saw that the crying was coming from T. Jamie appeared to be asleep on the floor with T sitting near her crying. I couldn’t wake Jamie, but she seemed to be breathing—the smell of alcohol was unmistakable. She had a pulse and didn’t appear to be bleeding. I called 911 and picked up T who then stopped crying and otherwise seemed to be OK. Brandon was nowhere to be found and there was no other person on the scene. I couldn’t believe it; the oven door was open and the oven was on. In cold weather, some families unsafely try to heat their apartments using their ovens, but it was June. Luckily, I came along when I did—who knows what might have happened to 7 month-old Terry if left unattended any longer.

Officer Jo Viernes of the City’s Police Department was the first to respond, followed by the paramedics who transported Jamie June-Berry to Ivy League University Hospital’s Emergency Room. I was glad to see Officer Viernes because I had worked with the Officer in the past on child removal cases and Officer Viernes likes to do everything “by the book,” which is the only way I work. We completed the paperwork, I left a note for Brandon, and then I left with the baby, who I temporarily placed with an approved foster family that our department works with on cases like this. I then went on to the hospital.

Brandon arrived at the hospital a little after 5:00 p.m. and introduced me to Dr. Marsh Mellow, a volunteer at the Interfaith Alliance. After Jamie’s diagnosis of alcohol intoxication, I was glad to learn that she had been plugged into counseling, but I knew that with alcoholism, it’s not quite that simple. In Jamie’s room, Brandon, at wits end, accused Jamie of being an alcoholic. Jamie said she could stop drinking anytime and I took advantage of the opportunity, suggesting that “now” might be a good time. She consented to a forensic evaluation.

I appeared in Family Court the next day and testified that the chips were stacked against T Berry with Jamie as the baby's mother and if there ever came a time when Brandon wasn't in the picture, it would, in my opinion, only be a matter of time before I or some other mandated reporter would be obligated to report a perceived incident of child abuse or neglect that would result in the removal of Terry from the family. I had "been there, done that" so many times before in the last 15 years. Understanding that T would be returned to Brandon and that Jamie was plugging into detox and AA, I agreed to continue to check in with the Berry's on a regular basis, although no such supervision was ordered by the Court.

July, August, and September rolled along and T seemed to be doing well based on my bi-weekly visits in July and August and monthly visit in September with the family. I was aware of the fact that Jamie had completed detox and that she was active in AA, counseling, and church. But it was my professional judgment that she would start drinking again and I told Brandon so. I did have to agree with Brandon, however, that Jamie was more involved in T's daily care.

On Thursday, October 15, 1998, I met with the Berry's. They asked me what I thought about Brandon moving to Enterprise for a month, leaving Jamie to care for T on her own in Metropolis. I knew it might be a good opportunity financially, but all I could focus on was what would be best for T. I did not believe that Jamie could handle things without Brandon and it was imprudent for him to leave in light of Jamie's struggle with alcoholism. Unfortunately, they didn't follow my advice to stay together. In fact, I think my comments upset Brandon and Jamie, with Jamie taking my view as a challenge for her to prove me wrong.

Frankly, I wasn't surprised to see Jamie at *Inebriation's* on the evening of Friday, November 6, 1998. I even saw the bartender serve her a drink and it confirmed my hunch that she would be drinking again. What worried me was the last I knew, Brandon was out of town and I wondered who was caring for one-year old Terry. As soon as I finished my foosball game, I went to confront Jamie, but she was gone. I decided to leave the bar and go check on Terry, who I hoped was with Brandon or a babysitter. I arrived at the Berry's apartment building to find police and fire personnel. A bystander informed me that Terry Berry was rescued from a fire in the Berry apartment and that Jamie, who arrived at the scene after the rescue, went to the hospital with Terry and a man who wasn't her husband.

I immediately made arrangements to have Terry Berry placed in foster care. I'm completely comfortable in making this affidavit and, if necessary, testifying in court against Brandon Berry. As far as I'm concerned, this isn't about Brandon or, for that matter, Jamie; it's all about Terry Berry and what's in the best interest of the child.

 11/20/98
Dana Dowright, November 23, 1998

AFFIDAVIT OF JO VIERNES

Witness for the Prosecution

My name is Jo Viernes and I am a Police Officer with the Metropolis Police Department. After high school, I earned a Bachelor of Science Degree in Criminology and Policing at the Metropolis University here in the City. After graduation from college, I joined the U.S. Army, completed basic training, and a twenty-week Military Police (MP) Training Program. I served this great country of ours as an MP for ten years. After my honorable discharge, I was recruited by the Metropolis Police Department some thirteen years ago. Since completing the twenty-week Metropolis Police Department Training Program, I have been assigned to patrol various neighborhoods throughout Metropolis. From time to time, I assist the Department in training new recruits. For the last two years, I have been working the Southside section of the City on foot patrol.

On Thursday, June 11, 1998, I was on patrol when I received a radio message at approximately 1:05 p.m. to respond to a situation at 1718 Grant Avenue, Apartment 2-J. The apartment building was just a few blocks away from where I was when I got the message and is in a neighborhood that is part of my regular patrol.

I arrived at the Berry Apartment at approximately 1:09 p.m. and was met by County Social Worker Dana Dowright, who I recognized from past cases in Family Court. She identified the only two people on the scene, Jamie June-Berry and an infant named Terry Berry. My initial assessment of Ms. June-Berry was that she was unconscious, but I detected a pulse and was satisfied that she was breathing on her own. She appeared to be in her early twenties. A faint odor of alcohol was emanating from her breath and she did not appear to be injured. She was apparently unconscious from alcohol intoxication. Upon entering the apartment, Dana told me that paramedics were on the way. They arrived at approximately 1:15 p.m., examined Ms. June-Berry, and transported her to the Ivy League University Hospital Emergency Room.

I then turned my attention to Dana Dowright and Terry Berry, who appeared to be approximately six months old. There did not appear to be any other adult(s) on the scene charged with caring for the infant and Dana and I found no clues as to the whereabouts of the child's father, who Dana indicated was Brandon Berry. My interview of Ms. Jan Grady, who was living in the apartment across the hall, did not shed any light on Mr. Berry's whereabouts, so Dana Dowright and I followed the proper procedures for the temporary removal of Terry Berry. Before leaving with the child, Dana left a note for Mr. Berry. I remained on the scene to make notes of "just the facts" for use in preparing my report. In addition to the fact that there was an unattended infant in the apartment, I was particularly troubled to discover that the oven door was open and the oven was on. I was also advised by Dana that the apartment door was unlocked. This all added up for me to "an accident waiting to happen" and a *prima facie* case of neglect.

I appeared in Family Court the next day and testified briefly before the Judge. I was glad to know that Ms. June-Berry had agreed to a detox program to get the help she needed. I took Mr. Berry aside to share my concerns about leaving an infant unattended in an unlocked apartment with the oven on. He

appreciated my concern and introduced me to Dr. Marsh Mellow, the family psychologist. I made a mental note to check-in on the couple during the summer. I'm not sure I would have returned the child so quickly, if I were the Judge.

On Tuesday, August 25, 1998, while on duty, I took it upon myself to visit the Berry family at their apartment. I arrived at approximately 5:45 p.m. and before knocking on the door, I tried it to see if it was locked. I was pleased to discover that it was. My subsequent knocks on the door were quickly answered by Mr. Berry, who was holding Terry. I told him I was there to see how things were going and was invited in. Jamie June-Berry was busy preparing dinner in the kitchen and appeared to be in good spirits. Brandon Berry placed the infant in the playpen, which was located in the kitchen, and described his job search. The apartment appeared to be fairly neat and orderly and the baby looked to be healthy and happy. I left the apartment feeling that the kids were on the right track.

On Friday, November 6, 1998, while on patrol, I heard the report, over my radio at 7:45 p.m., of a fire at 1718 Grant Avenue. Just minutes from the scene, I quickly proceeded there and was the first to arrive. I recognized Jan Grady, who was outside screaming about a baby in the building. She gave me the apartment number, which I recognized as being the Berry apartment, and I took the stairs to the second floor. I broke the door of Apt. 2-J down and went straight to the kitchen, which was filling with smoke. Sure enough, the oven was on fire and Terry Berry was standing in the playpen in the kitchen crying and coughing. I scooped the child up, exited the apartment and the building, and handed the baby off to a firefighter who summoned the paramedics. The firefighter administered first aid until the paramedics arrived. This was the second time in a five-month period that Terry Berry was unattended in the apartment with the oven on and this time the child was in imminent danger.

I interviewed Jan Grady while still on the scene. She was home alone that evening and had taken advantage of that situation by having her boyfriend over for an evening alone, unbeknownst to her parents. The babysitting arrangement involved leaving the infant asleep in the Berry apartment with an audio monitor on. A receiver was set up in the Grady apartment so that Jan could monitor the child without leaving the apartment. The fire alarm startled Jan and her boyfriend, who quickly rushed outside, completely forgetting about Terry Berry who could not be heard over the ringing alarm.

I next went to the Ivy League University Hospital to interview Jamie June-Berry. She maintained that she hadn't done anything wrong. She believed that she had put an adequate babysitting arrangement in place so that she could get a break after a long nineteen days alone with her baby. She admitted going to the bar, *Inebriation's*, but maintained that she did not consume any alcoholic beverages. She intimated that her presence in the bar reminded her of her goal to be a better mother. She also said that she did not leave the apartment door unlocked but rather left a key with Jan Grady. Finally, she was sure that the oven was defective and caused the fire.

As I was interviewing Jamie that evening in the hospital, Brandon Berry arrived and I interviewed him. He indicated that he had completed a special

assignment earlier that day at his probationary job at the *Enterprise Herald* and made it in record time from Enterprise to Metropolis.

I then returned to my precinct offices to complete and file my report. On Monday, November 9, 1998, Jamie June-Berry and Brandon Berry were each charged with Endangering the Welfare of a Child, a class A misdemeanor.

Jr Viernes 11/20/98
Jr Viernes, November 20, 1998

AFFIDAVIT OF AUGGIE JUNE

Witness for the Prosecution

My name is Auggie June and I am Jamie June's parent. I live with my spouse and three sons at 212 Pakwood Drive in Dry Ridge, NY. For the last five years, I have worked at a local mill and prior to that, I ran a daycare program in our home until our youngest was in school full time. Our daughter, Jamie, was a hardworking, confident, fun, well-liked, ambitious, go-getter during the fall of her senior year in 1995. She had the talent and the desire to go to college—something no one in our family had ever done. Then there was the sexual harassment she suffered at Dry Gulch High School during the fall of 1995; it has hung over her like a dark cloud ever since and, I believe, it changed her life forever. By the time the whole mess was settled in May of 1997, Jamie still hadn't regained her self-confidence, she was fairly withdrawn, and she didn't seem interested in the least in pursuing her life's dream of attending college.

When she announced, out of the blue, in May of 1997, that she was moving to Metropolis, my spouse and I were shocked. We strongly opposed the move, encouraging Jamie to consider college, if she was ready to move out of our home; but there was no stopping her. We weren't optimistic about the move, but she had the money from her settlement and there wasn't anything we could do.

When we learned that she had gotten back together with Brandon Berry, who we used to know as "Buck Galord", and that they were expecting a baby, well, we were initially speechless. I, for one, was also angry as I had blamed Brandon for much of Jamie's undoing. He was at the center of the sexual harassment, egging the other kids on, making Jamie miserable.

The fact was, however, that they were married and expecting a child and so like most parents of young adults, we rallied behind our child, supporting her in the choices she had made. The distance between us and our daughter and her husband was actually helpful to us in developing a close relationship with our son-in-law. We spoke with Brandon by telephone on numerous occasions after our grandchild, Terry, was born. We were initially overwhelmed by the choice of the name "Terry," as Jamie had a sister (our youngest child) named "Terry," who died before she reached her first birthday.

Over the months, we provided the best advice we could to Brandon and Jamie on the "nuts-n-bolts" of caring for a baby from diapers, to feeding, to clothing, to bathing, to when to take the baby to the pediatrician, to what's normal for a baby, and so on. We also talked with Brandon about his relationship with our daughter and gave him advice on how to encourage her to get more involved with the day-to-day care of young Terry. We tried to encourage him in terms of his job search. We shared his concerns over Jamie's drinking and after we started talking by phone in December of 1997, I started saving money so that I could come and visit Terry, Jamie, and Brandon in Metropolis.

I was able to arrange child care at home for my boys in early May of 1997 and had saved enough money and vacation time to visit Terry and the kids. I stayed with them from Saturday, May 2 until Saturday, May 9. It was a delight to meet and be with my grandchild, who was a cutie-pie in every way. I was

surprised, but impressed, by how adept Brandon had become at parenting. On the other hand, I was worried about my daughter's drinking and lack of interest in caring for her child. Jamie needed to get into the picture so that Brandon could get a job. Plus, their apartment was nice, but obviously well beyond their means and I knew they'd have to move to survive financially. Unfortunately, they were set on staying in Metropolis. I even offered to have them move in with us in Dry Ridge until they got on their feet. Jamie and Brandon could use Jamie's old bedroom and Terry could be very comfortable in my daughter Terry's nursery, which is still set up from the days when I was running the daycare at home. But, to no avail; they were staying put.

I must tell you though that the visit was particularly successful in that Jamie and I had our first heart-to-heart talk in over a year. Brandon had taken Terry for a walk and I just laid it on the line with Jamie. I told her that she had to get her act together, get off of alcohol, and be a better mother. My timing must have been perfect because she seemed to hear what I was saying and, crying, she said she wanted to, but didn't know where to start.

Recognizing that alcoholism is a disease and that Brandon and I couldn't be with Jamie all day, every day, I suggested that we see if there might be some help for her at the Interfaith Alliance, which was just across the street from their apartment building. We went there together and met Dr. Mellow.

It seemed to me that Jamie had found someone with whom she could connect. Brandon was elated and I left Metropolis with a feeling that, at least at that point, I had done all I could for my grandchild, my daughter, and her marriage. I believed, oddly enough, that Brandon and Jamie loved each other and that they could make a good home for Terry if Brandon could get a job and if Jamie could responsibly take care of our little Terry.

Needless to say, June 12, 1998 was not a happy day for me. I never expected to hear that my daughter had passed out from too much alcohol and that my grandchild had to be removed by Social Services. I didn't fault Brandon; he was out doing what he was supposed to—looking for a job. I tried to put a positive spin on the future, pointing out that the combination of detox and Alcoholics Anonymous, together with counseling from Dr. Mellow, should do the trick. Frankly, I wasn't optimistic.

Based on my telephone conversations with Jamie and Brandon this past summer, it sounded like Jamie had turned a corner and she was actually starting to become a better mother. We kept our fingers crossed for Brandon, that he find a job.

The job in Enterprise was a shock and I strongly urged Brandon not to leave Jamie alone with T. He had told me so many times about Jamie's inability to cope and react appropriately to new or stressful situations with Terry that—well, it didn't seem reasonable to me to put so much pressure on Jamie so soon. I told Brandon that he was risking his marriage and my grandchild—but he refused to listen. Unfortunately, I was right. It's hard for me to say this, but my daughter's an alcoholic and my son-in-law should have known better than to leave her alone with my Terry. Jamie could have gone to jail. Now Brandon has to be taught a lesson.

Knowing Jamie and Brandon as well as I do, I believe that they need time to get themselves straightened out, if they can, before they add the tremendous responsibility of being parents. In the meantime, the Family Court Judge should place T with me temporarily where the child can get the care and nurturing so vital to healthy growth. My nursery is all ready and when the kids get straightened out and when the Court says so, I'll give Terry back. I've talked with my spouse and we are in agreement on this. It is better than a foster home for T and obviously Jamie needs time to get back on her feet.

It's not easy to say all of this and it won't be easy to testify against Brandon in a trial, if it comes to that, but in my heart I know it's the best thing for Terry Berry and I only hope that someday Jamie and Brandon will understand. I've lost one Terry in my life and I don't want them to go through that pain.

Auggie June 11/30/98
Auggie June, November 30, 1998

AFFIDAVIT OF BRANDON BERRY

Witness for the Defense

My name is Brandon Berry and I live at 1718 Grant Avenue, Apartment 2-J, in Metropolis, New York. I stand accused of Endangering the Welfare of my child Terry, which is inconceivable, it's so far from the truth. I love my wife Jamie and our T, and have worked to take care of both of them, helping Terry thrive and helping to bring my wife back from her long ordeal of depression. I sit here today as Jamie's husband only because she is the most forgiving person in the world. During high school I was an arrogant, immature rich kid, and I wrongly hurt Jamie terribly. Somehow Jamie was able to forgive me when I admitted my stupidity in March 1997 and she has never blamed me subsequently for any of her personal problems—which really are all my fault.

Jamie and I have had great and terrible times together; she's been both the strongest and the most vulnerable person I've ever known. I'm telling you this because the charges against me claim that I wasn't reasonable in leaving Terry in Jamie's care, and that I endangered my child by doing so. That might be true if I thought Jamie was unable to care for T, but that is clearly not the case. No one knows Jamie better than I do and I know that the weak Jamie of June had been transformed into a much stronger wife and mother by September. I could see it and hear it and I experienced it, in dozens of ways big and small. Jamie's attitudes and actions, her self-confidence, her ability to meet T's every need with a mother's deep love were real. That social worker, Dana Dowright, never gave Jamie a chance and refused to see what tremendous progress Jamie had made. It's ridiculous to think that by dropping by once a month you can really know someone and make an intelligent, informed judgment about them. Dana knows so little about Jamie compared to Doc Mellow it's laughable. Doc knows everything about her and us, because we opened up to him and he cared about us. Dowright has acted like a scared bureaucrat, afraid to support us and too overwhelmed with other cases to really get to know us.

I feel like I'm caught up in the middle of a bad novel, with the past being used to accuse me of a crime over an incident that was no more than a freak accident. It is true that Jamie had a significant problem with alcohol, from the time we married until T was about 6 months old. That was apparent to anybody, even Dana, and I repeatedly talked with my in-laws about ways to snap Jamie out of it. With the help of Auggie June, who got Jamie to go see Doc Mellow, and the intervention of that freak accident when Jamie—who had been drinking the night before—fainted while cleaning the oven with some strong oven cleaner, we got her to face the truth. Jamie willingly went into detox, came out clinging to hope, and worked to stay sober through AA, Doc, and church. We sure like to point fingers, condemn, and look down on drug users and alcoholics—but we're too slow to accept and applaud people like Jamie who have really made a commitment to stay straight. Jamie isn't perfect—who is?—but she's made tremendous progress in a short time and loves T beyond words.

When my job opportunity in Enterprise came up, I did all the right things—we talked with Doc and Dana, and I spoke with Auggie. While Auggie and Dana were against Jamie being left at home with T, Doc, who knew us best, was very supportive. I was thrilled with Doc's analysis because I knew that succeeding at this

was just the kind of confidence boost that Jamie needed to complete her comeback. I absolutely believed that she was capable of, and would, take good care of T. I thought Dana's nay saying was the knee jerk reaction of a bureaucrat who didn't want to go on record as approving anything. Dana did not threaten or act to take T away from us, even though she knew I was going on October 18th. Didn't she have a duty to intervene if she really believed T would be in danger?

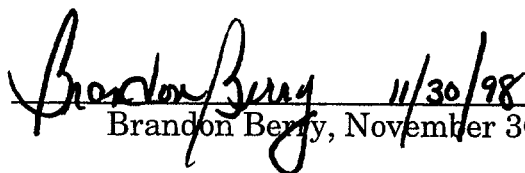
As far as Auggie's opinion, I learned that you always had to look for the hidden agenda—which was aimed at getting us, and especially Terry, back closer to Auggie in Dry Ridge. Auggie helped a lot with specific baby care advice and with Jamie, but was single-minded in pushing for us to come live with them. As everyone knows, young couples living with in-laws is extremely stressful under most any circumstances and I knew that it wouldn't be good for Jamie or for our young marriage and family. I would never bring this up in normal circumstances, but I guess it's obvious that your in-law willingly testifying against you is anything but "normal". Auggie has never gotten over Jamie's leaving Dry Ridge. Auggie had never liked me to begin with and blamed me for Jamie's not going to college; I knew she only talked to me because I was caring for Terry and needed help. I don't like saying any of this, but I think Auggie's twisted emotions makes this seem like a neat way of getting Terry and getting rid of me.

What's amazing is that Jamie really did become a good caregiver. Since June, there was only one time when I was really unhappy with Jamie, when she left T asleep alone in the apartment in August. Jamie understood why that wasn't OK and promised never to leave T alone again. Was I wrong to believe her? Am I not entitled to trust my wife? The prosecutor says I am not ... I disagree. I could never foresee this happening. Even so, from 175 miles away, it was impossible for me to intervene immediately.

I think what Jamie did on November 6 was smart and resourceful, using the intercom that Auggie gave us to wire T and Jan together. Anyone who has cared for a teething baby knows that you do need a break, and Jamie was going to an AA meeting to recharge her batteries.

Finally, it's just not possible that Jamie left the oven on. She's a fanatic about checking stuff like that and even unplugs the TV and toaster if we are going out for the day. That oven has been nothing but trouble and we've called in repair call after call. They claimed they had finally gotten it fixed right, but they were wrong.

I know I'm not a lawyer, but I do know what kind of care children need and deserve. I was taking a gamble on a job, not with my child. I'm thankful that Officer Viernes was at the right place at the right time and rescued T. But it was Jan, not Jamie, who failed in her duty and abandoned our baby. Jan's actions superceded anything Jamie or I may have done wrong. If anyone endangered T it was Jan Grady. I knew T would get good care from Jamie, and Jamie had every reason, from previous experience, to expect that T would be safe with Jan.

 11/30/98
Brandon Berry, November 30, 1998

AFFIDAVIT OF JAMIE JUNE-BERRY

Witness for the Defense

My name is Jamie June-Berry and I'm the mother of Terry and married to Brandon Berry. I'm an alcoholic and it's been 168 days since my last drink. I'm sober and I'm a good mom to Terry, something that Brandon and Doc Mellow knew and that Dana Dowright should have and would have known if she spent half as much time with me as filling out paperwork. I'm willing to waive my right not to testify and stand up for my husband, because this case is really all about me. While the D.A. let me off the hook, he's pushed this bogus charge against Brandon.

Basically Brandon is being charged with Endangerment under the theory that he knew that leaving T in my care was dangerous. That would have been true in May or early June, but not by the fall. When Dana Dowright found me unconscious on June 11, everyone but Brandon assumed that I had passed out after drinking too much and I know the hospital diagnosis was alcohol intoxication. I knew that I was feeling woozy from the day before, but it was my foolish attempt to clean that terrible oven with one of those spray on cleaners that really did me in. We had recently moved in and it was really gross it was so dirty. I accepted detox and started AA then because I realized that my judgment was affected by my previous day's drinking—if I was thinking straight I never would have used that stuff. Unfortunately I hadn't showered and still smelled of alcohol from the night before.

What my collapse did was focus my mind in a wonderful way. I realized that my earlier problems may have been caused by others, but my current pain was self-inflicted. Detox, AA, and meetings with Doc Mellow helped bring about a huge change in me; by September I was thinking and feeling more and more like my old self. I still had fears that it might all fall apart, but Brandon's belief in me gave me more confidence.

I won't pretend that I don't struggle and sometimes make mistakes. That deal in August with me leaving T alone for a few minutes; well I know I was wrong and haven't failed like that since. With Brandon and Doc and AA, my pillars of support, I've been remarkably even keeled and consistently upbeat for months. That's why I couldn't see changing everything and going with Brandon to Enterprise. Brandon and Doc thought I was ready and able to take over care of T 24/7. Dana's opinion has never carried much weight with me because "Dudley"—that's what I called Dowright—always swept in and out of our home, looking for any little thing to criticize. Dana was like somebody on a mission from the census bureau, collecting data, but not getting to know me except superficially. Dana would ask me everything about my eating and sleeping habits and things like that, but never engaged the real me in conversation. So I took Dana's criticism of my ability to care for Terry alone as one more example of instant, shallow analysis by someone who I found to be hugely annoying.

My days alone with Terry, after Brandon went to Enterprise, were a challenge for me because all the housework and baby care needs fell to me. I would have freaked in June, but I was ready by October. Meals, laundry, meeting T's every need, well I realized that I was pretty good at juggling all those pieces that non-homemakers are clueless about.

November 6 was an especially tough day for poor little T, who was pushing through a couple of new teeth. At first I thought T was getting a cold; T had a runny nose and slight fever. But T was whiny and putting everything in the mouth—more so than normal—so I checked and sure enough, two new teeth were coming in. I gave T some painkiller, put topical analgesic on the gums and kept giving T frozen teething rings to bite on. Anyway, that made T feel a little better, but Terry was never completely comfortable and stayed up through a normal afternoon nap.

We ate at 6:30 and T crashed in the playpen right after dinner. I realized that I was exhausted, tense, and hadn't spoken to an adult all day. I knew the chances were real good that Terry would have another bad day on Saturday, and realized that I needed to relax and stay focused on my "one day at a time" theme. I had a responsibility to T to be strong and going to an AA meeting seemed like a real good idea.

I went to see if any of the Grady kids were home to baby-sit and Jan eventually came to the door, looking a bit panicked. I explained my situation and she explained hers—she was alone with her boyfriend. I asked Jan if she would baby-sit Terry, who I knew was sacked-out for the night. Jan was hesitant until I suggested that I could set the intercom up, so she could hear and get T on the slight chance that T woke up. Jan agreed. I set the monitors up, and then did a "sound check" to make sure Jan could hear well. I locked the door and gave Jan a key, expecting that she would do her normal responsible job, which was going to be simpler than ever. I left around 7:10 p.m.

I was on my way to my AA meeting when I succumbed to temptation and went in a bar. When I put my hand around that scotch and started to pick it up, an almost terrifying thing happened: I saw me looking at myself, with my life at a crossroads, and I had to choose—self-indulgence or putting Terry, Brandon, and me, our family, first. I dropped the drink, splattering myself, and ran home to be with T and to wait for Brandon's call. I was so relieved and happy—well you can't imagine what a shock it was to find firetrucks at our building. I was frantic to find out where Terry was and was so mad when I found out that Jan had abandoned T and run out with her boyfriend. I mean, who would ever do that? Once I discovered that T was okay I started to cry uncontrollably.

My uncle runs an appliance repair shop and has taught me to respect and fear electricity and not to leave appliances on. I drive Brandon nuts unplugging toasters and TVs, even coffee pots, that aren't in use. I know that I did leave the leftovers in the oven, but it was off when I left. I would never have left my child in a room with a hot oven on.

The charges against me were flimsy and this case against Brandon is worse. It was OK for Brandon to trust me alone with T, as I proved by three weeks of good care. He could never foresee, nor could I, that Jan would leave Terry behind in the event of a fire. Given the history of that oven, how could someone find us criminally liable for an accidental fire? The fact that one of my parents is willing to testify against Brandon is sick. I love Auggie, but the blind fixation on my Terry at the expense of my family is hard to accept. Auggie didn't want Brandon to go to Enterprise for one reason—it wasn't Dry Ridge; if he made it there, Auggie knew that is where we would likely stay.

I got a second chance on life thanks to Brandon, Doc Mellow, and AA. I can hardly believe that anyone could call what we did a crime and take T away from us. Listen to Doc Mellow—Doc's the one who knows me and thought I could handle things alone. I'm a good mom and neither Brandon nor I will ever let anything harm our Terry.

Jamie June Berry 11/25/98
Jamie June-Berry, November 25, 1998

AFFIDAVIT OF MARSH MELLOW

Witness for the Defense

My name is Dr. Marsh Mellow and I reside on Riverview Parkway in Metropolis. I am a trained counselor with graduate degrees in Divinity from Asbury Theological Seminary and a Doctorate in Psychology from the University of Kentucky in Lexington. I have twenty years of clinical experience, including 15 years in private practice. I volunteer extensively at the Interfaith Alliance and several other private entities who reach out to the poor and others needing free counseling. I know how to get people to open up and I know what makes them tick—the mental, emotional, physical and, dare I say, spiritual sides. I've counseled hundreds of patients struggling with substance abuse and low self-esteem issues. From my training and experience I know, with a high degree of certainty after a few months, which patients will "make it" and who will likely continue to have significant problems.

I happened to be the professional volunteer on-site when Auggie June brought Jamie June-Berry in the first time in May 1998. Jamie presented a complex and fascinating set of factors underlying her alcohol-dependence. My first impression was that she had low self-esteem and appeared withdrawn and depressed. This is common among alcoholics.

Over the course of my meetings with Jamie and her husband in May and early June, I found that Brandon served many roles: that of rescuer, faithful supporter, and dutiful father to their child. We made limited progress because of Jamie's continued drinking and inability to focus, and her unwillingness to admit the depth of her drinking problem, along with unresolved anger over the course her life had taken.

Jamie's collapse on June 11, which I attributed to her drinking, was actually a blessing because one often needs to hit rock bottom before he or she starts on the road to recovery. Our discussions after detox indicated that she knew she was out of control and that her behavior was a threat to her health, her marriage, and her child. What transpired over the next three months was professionally and personally gratifying. Throughout that period Jamie made steady progress, utilizing our sessions, AA meetings, church, and Brandon's support to rebuild her life. She stayed sober and moved from the weak, fuzzy thinking young woman I met in May to a stronger, more focused, often humorous, survivor by the fall.

If, in May, Brandon and Jamie had asked me to support the proposition of Brandon's moving to Enterprise without Jamie, I would have been unequivocally against it. But that couple of May no longer existed in October and I was confident that Jamie would be able to adequately care for Terry and that she would be able to keep things together while Brandon was gone. Initially I would have preferred that Brandon be able to come home on weekends, at least the first one, and discussed that option with Brandon. Brandon objected. I ultimately agreed because of the great changes that I had independently observed. Our sessions had moved from ones focusing on her despair and depression to ones attempting to reinforce her successes and strengthen her coping mechanisms. I saw a Jamie emerging from the shadows, one that Brandon had told me existed; she was a winner who was coming out of her cocoon of anger and self-pity. I made it clear to Jamie and Brandon that

Jamie would have to focus day-to-day. In my professional opinion Jamie was sufficiently self-supportive and I knew that succeeding at this opportunity would help Jamie realize that she really was going to make it.

Anyone who has spent a few hours taking care of a baby who's teething knows exactly how Jamie felt. One of my old professors in graduate school advised me, when my first child was teething and I was the caregiver, to rub some bourbon on his gums—and take a shot myself. Of course he was half joking—but the truth is that that kind of caregiving to a child in pain is a very difficult way to spend a day. Jamie's decision to go to an AA meeting was healthy and should be applauded, not prosecuted. Her side trip to the bar was, in the end, a wonderfully clarifying event for her. After a terrible day she gave in to temptation, but was strong enough to say “no” when it really counted.

Her reaction to her situation and her thought processes were reasonable and even innovative, especially in the appropriate application of monitoring technology to take care of T. She had often remarked in May and June, and later when she had difficult days, that it felt like “the walls were closing in on her.” I'm sure she felt that kind of pressure on November 6. It's exactly at those times that substance abusers are most vulnerable to impulsive actions, regardless of the consequences. Jamie's ability to stay focused so well on T's needs while maintaining her own stability are good indicators of just how far she had come. It's what I expected her to be able to do when approving of Brandon's job offer in October.

I think the charges against Brandon are nonsense; Brandon took mature and reasonable steps in deciding to spend the month apart from his family. When Brandon and Jamie asked for my guidance, I gave it. Knowing what I know today, I would still give the same advice.

These “Endangering” laws were passed to protect children by punishing parents and others who fail to appropriately care for and protect children from neglect or harm. The punitive sanctions imposed by the Penal Law recognizes that children come first and are entitled to special consideration. There was no lack of consideration in this case by either parent, but especially not by Brandon. At every crucial time in T's life Brandon was a responsible and nurturing parent. To hold Brandon accountable for creating a danger to his child while he was 175 miles away is not what was intended by the statute and should not be tolerated in this jurisdiction. If Brandon is in fact guilty so am I and so are all the parents who at one time or another trusted his or her spouse to be alone with a child.

Marsh Mellow, 11/30/98
Marsh Mellow, Ph.D., November 30, 1998

Aided Police Report

(form Y2K-01)

Metropolis Police Department
Metropolis, New York

RECORD OF RESPONSE TO CALL

REASON FOR CALL: Fire at 1718 Grant Avenue

DATE: November 6, 1998

TIME: 7:45 p.m.

LOCATION: 1718 Grant Avenue

RESPONDING OFFICER: Jo Viernes

BADGE NO. 8726

"Brief Description Of Incident," "Actions Taken," "Witnesses Interviewed" and "Investigation":

Incident: On November 6, 1998, at 7:45 p.m., while on routine patrol, I heard the radio call for a fire at 1718 Grant Avenue.

Actions Taken: I arrived at approximately 7:48. A teenage subject, whom I recognized as Jan Grady, a resident of the apartment building, was screaming "the baby, the baby." Taking control, I asked her "where?" She responded "The Berry baby, in their apartment, 2J." I ran into the building, used the stairway, and ran to the Berry apartment. Seeing no smoke, but hearing a baby crying, I broke the door down. The apartment was filling with smoke. I quickly located what appeared to be a one-year-old infant. After establishing that no one else was in the apartment by calling out "Anyone here?" I was able to exit the building with the child, who was later identified as Terry Berry, and handed the child over to a firefighter. I informed the fire captain that the oven in 2J was smoking heavily and that an unconscious adult had been found in the apartment on a previous occasion. The fire chief ordered a response and the smoking oven was quickly extinguished, and the apartment was aerated.

Witnesses Interviewed: 1) 8:15 - 8:30 p.m.: Jan Grady, a sixteen year-old female, resident of Apt. 2-K at 1718 Grant Avenue. Grady reported that at about 7 p.m. a "frenzied knocking" started at her parents' apartment door (2K). She seemed embarrassed to admit that she was home alone with her boyfriend, who she claimed was assisting her with a computer science lab report, because she was so technically inept. Jan reported hesitating to answer the door; when she did Jamie June-Berry, resident of Apt. 2J, in an "agitated" state said she needed Jan to babysit. Grady reported that she tried to say "no," but that Ms. June-Berry was insistent, saying "the walls are closing in on me and I have to get out." The witness reported that she said "yes" after Ms. June-Berry said that monitors could be set up between the apartments and that "T" was "out cold." Jan Grady told me that Jamie June-Berry came back shortly and handed her the monitor,

"Brief Description Of Incident," "Actions Taken," "Witnesses Interviewed" and "Investigation": (p. 2, con't)

telling her to plug it in and turn up the sound, and that she had left the apartment door unlocked. Ms. Grady claimed to be remorseful about having failed to bring the baby out when she fled the building, but said that she did not hear anything from the monitor to remind her of T's presence. She feared that she hadn't turned the monitor on. Jan reported that she hadn't seen Jamie June-Berry this "hyper" in the past and feared that the baby would be "left alone again if I didn't say yes."

2) 9:15 - 9:30 p.m.: Jamie June-Berry, 21 year-old female resident of 1718 Grant Avenue, Apt. 2J and mother of child, Terry Berry. After examining the apartment, I followed to Ivy League University Hospital to check on the child and to interview the baby's mother. Mrs. June-Berry stated that she had "a terrible day" caring for "T," who was not feeling well, and admitted leaving the child in the apartment, so she could go to an AA meeting to "stay in control." However, she claimed that she hired Jan Grady to babysit before she left. She had herself set up both monitors, locked the door, and left a key with Ms. Grady. She stated that Jan had "always been completely reliable" and was "always available at a moment's notice." Mrs. June-Berry blamed Jan for abandoning "poor little T" to "save herself, neglecting her responsibilities."

3) 10:50 - 10:55 p.m.: Brandon Berry, 21 year-old male, child's father, husband of Jamie June-Berry and former resident of Apt. 2-J. After Mr. Berry's arrival at 10:35 p.m. from Enterprise, some 175 miles away, and the 10:45 p.m. report from the Emergency Room staff that they were admitting Terry Berry for observation, I spoke to the father. Mr. Berry claimed ignorance of the particulars of the events of that evening. He claimed that Jamie was very responsible, would "never leave a stove on," and that they had regularly relied on Jan Grady in the past. He refused comment on Ms. Grady's assertions of Jamie June-Berry's "agitated," "insistent" behavior. He refused to discuss the events which had resulted in his absence from his child's home. He made no further statements.

Investigative Observations: When the apt. was cleared for safe re-entry I carefully examined it, noting that the playpen in the kitchen was located in a small alcove approximately 8-9 feet away from the stove and the sink. The position of the oven knobs when the fire started is unknown, but by 8:15 p.m. the position of all the knob controls were "off." I spoke with the firemen who had actually put the fire out; they said that they used a heavy, forceful jet of chemical foam on the electric oven and stove and its surroundings and had "man handled" the stove out of its position to check for fire involvement in the surrounding structures.



Jo Viernes, Badge #8726
11/7/98

REPAIR REPORT

PART I

REPAIR REQUEST

DATE: *June 2, 1998*

APARTMENT NO. *Apt. 2-J*

TELEPHONE: *421-1600*

PERSON MAKING REQUEST: *Brandon Berry*

BRIEFLY DESCRIBE THE PROBLEM: (Be specific as to location)

Oven does not work. (BB)

PART II

INSPECTION REPAIR RECORD

DATE: *June 3, 1998*

APARTMENT NO. *Apt. 2J*

REPAIRED BY: *Carmen Ortiz*

PARTS: *1 Heating Element/Electric Oven*

LABOR: *20 minutes*

PART III

TENANT COMMENTS

Great job. Appreciate it. (BB)

White Copy to Tenant
Pink Copy to Maintenance
Yellow Copy to Superintendent

REPAIR REPORT

PART I

REPAIR REQUEST

DATE: *August 7, 1998*

APARTMENT NO. *Apt. 2-J*

TELEPHONE: *421-1600*

PERSON MAKING REQUEST: *Jamie June-Berry*

BRIEFLY DESCRIBE THE PROBLEM: (Be specific as to location)

Oven turns on by itself (JJ-B)

PART II

INSPECTION REPAIR RECORD

DATE: *August 10, 1998*

APARTMENT NO. *Apt. 2-J*

REPAIRED BY: *John Brown*

PARTS: *None*

LABOR: *Checked oven, works OK.*

PART III

TENANT COMMENTS

I still think its broken. (JJ-B)

White Copy to Tenant
Pink Copy to Maintenance
Yellow Copy to Superintendent

REPAIR REPORT

PART I

REPAIR REQUEST

DATE: *August 13, 1998*

APARTMENT NO. *Apt. 2-J*

TELEPHONE: *421-1600*

PERSON MAKING REQUEST: *Jamie June-Berry*

BRIEFLY DESCRIBE THE PROBLEM: (Be specific as to location)

Oven turns on by itself, still. (JB-B)

PART II

INSPECTION REPAIR RECORD

DATE: *August 14, 1998*

APARTMENT NO. *Apt. 2-J*

REPAIRED BY: *John Brown*

PARTS: *Oven thermostat*

LABOR: *Checked oven. Replaced thermostat.*

PART III

TENANT COMMENTS

Thanks. Appreciate persistence. (JJ-B)

White Copy to Tenant
Pink Copy to Maintenance
Yellow Copy to Superintendent

REPAIR REPORT

PART I

REPAIR REPORT

DATE: *September 29, 1998*

APARTMENT NO. *Apt. 2-J*

TELEPHONE: *421-1600*

PERSON MAKING REQUEST: *Brandon Berry*

BRIEFLY DESCRIBE THE PROBLEM: (Be specific as to location)

Oven turns self on. (BB)

PART II

INSPECTION REPAIR RECORD

DATE: *October 1, 1998*

APARTMENT NO. *Apt. 2-J*

REPAIRED BY: *John Brown*

PARTS: *None*

LABOR: *40 minutes. Thoroughly check out oven system. All OK.*

PART III

TENANT COMMENTS

Tenant requests new oven (BB)

White Copy to Tenant
Pink Copy to Maintenance
Yellow Copy to Superintendent

PART VI

PERTINENT LAW AND INFORMATION

Statutory Law

N.Y. Penal Law § 260.10—Endangering the welfare of a child

A person is guilty of endangering the welfare of a child when: . . .

(2) Being a parent, guardian or other person legally charged with the care or custody of a child less than eighteen years old, he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming an “abused child,” [or] a “neglected child,” . . . as those terms are defined in article[] ten . . . of the family court act.

Endangering the welfare of a child is a class A misdemeanor.

N.Y. Jud. Law—Family Court Act § 1012—Definitions

When used in this article and unless the specific context indicates otherwise: . . .

(f) “Neglected child” means a child less than eighteen years of age

(i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care . . .

(B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, . . .

N.Y. Soc. Serv. Law § 417—Taking a child into protective custody

1. (a) Pursuant to the requirements and provisions of the family court act, . . . a police officer, . . . or a designated employee of a city or county department of social services, . . . shall take all appropriate measures to protect a child’s life and health including, when appropriate, taking or keeping a child in protective custody without the consent of a parent . . . if such person has reasonable cause to believe that the circumstances or condition of the child are such that continuing in his or her place of residence or in the care and custody of the parent . . . presents an imminent danger to the child’s life or health. . . .

3. Whenever a child protective service takes a child into protective custody and the parent . . . of the child is not present, the service shall immediately notify the local police station closest to the child’s home of such removal, and shall provide them with a copy of the notice required pursuant to paragraph (iii) of subdivision (b) of section one thousand twenty-four of the family court act. Upon request by the parent, . . . the police shall provide such person with a copy of the notice.

Case Law

People v. Scully, 134 Misc. 2d 906 (N.Y. Crim. Ct.—Kings Co., 1987)

In this case it was held that N.Y. Penal Law § 260.10 (2) requires a parent, when necessary, to protect his child from the child's other parent until the other parent is no longer a menace to the child.

Under § 260.10 (2), "a parent of a minor is guilty if he fails . . . to exercise reasonable diligence in the control of [his] child to prevent [her] from becoming an abused child. . . . The defendant, Patrick Scully, ran afoul of this provision by permitting a dangerous situation at home to persist until his three-month-old daughter, Deirdre Scully, eventually became an abused child."

The defendant's wife, who lived with the defendant and their child, was addicted to drugs and alcohol. On two separate occasions, the defendant had briefly removed the child from the home, fearing that, in a "narcotic frenzy," his wife might injure the child. The Court observed that the defendant "should have kept Deirdre away from his wife on a permanent basis until such time that his wife was no longer a menace to the child," adding that, "Section 260.10 (2) required no less of a response on the defendant's part."

The Court referred to the statute's history of interpretation, holding that a parent is strictly liable to exercise reasonable diligence ("take affirmative steps") to protect a child from child abuse "regardless of the source . . . our children come first and are entitled to special consideration." The Court sympathized with the defendant's difficult decision, but noted that when "he deferred or delayed in making the decision—using stopgap measures instead—he allowed his daughter's very life to be in peril. . . . In this complicated day and age, our children have a hard time growing up as it is, any statute designed to improve their chance to become healthy adults must be implemented fully."

In re Ishmael D., 202 A.D. 2d 1030 (4th Dept., 1994)

In this case, the conduct of the defendant father in leaving his two, allegedly sick, children—ages 16 months and 6 months—asleep and alone in a locked apartment at 1:00 a.m. was deemed to have placed the physical condition of the children in imminent danger of becoming impaired and the children, in turn, to have been neglected. The facts were as follows. The defendant had left the television blaring, the temperature of the apartment was 85 to 90 degrees, the apartment smelled of grease, clothing was strewn across the floor and beds, food was left on the kitchen counter with dirty dishes and pans, and the children were left sleeping on adult beds in front of the television.

In re James HH., 234 A.D. 2d 783 (3rd Dept., 1996)

The Court found that the child in this case was neglected due to his mother's failure to exercise a minimum degree of care which resulted in the child's physical condition being impaired or being in imminent danger of being impaired. "An isolated accidental injury may constitute neglect if the parent was aware of the intrinsic danger of the situation. . . . The danger of leaving a one-year-old child unsupervised in the same room as a kerosene heater is apparent." The child sustained second degree burns after touching the heater with his hand.

In re Joseph DD., 214 A.D. 2d 794 (3rd Dept., 1995)

“A finding of abuse or neglect may be sustained only where ‘it can be determined, on the basis of objective evidence, that a reasonably prudent parent would have acted differently and, in so doing, prevented the injury.’” The Court went on to point out that the defendant had to know or reasonably should have known that her son was in danger in order to sustain a finding of neglect. The Court concluded that the child in this case was, in fact, neglected inasmuch as his mother failed to investigate where the child would be staying in her absence, did not ensure that the caregiver had the necessary resources to feed the child and, if necessary, provide emergency care, did not know exactly where the child was for prolonged periods when he was with the sitter, and did not adequately assess the competency of the sitter to care for her child.

In re O'Donnell, 61 N.Y. Supp. 2d 822 (N.Y. Children's Ct.—N.Y. Co., 1946)

The defendant left home knowing that her adult daughter would be going to work thereafter, thus leaving the defendant's other children and grandchildren home alone without supervision. A fire broke out and two of the five children died. The defendant did not return home and was located in the company of a man, not her husband, and was intoxicated; her daughter was found in a saloon. They were both found to have neglected their children. The defendant was sentenced to three months in the workhouse as a “deterrent not only for this defendant but as a caution to other parents that they might meet the same punishment if they neglect their children.

People v. Conte, 159 A.D. 2d 993 (4th Dept., 1990)

This case held, in part, that “the offense of endangering the welfare of a child may be committed by multiple acts and may be a continuing offense committed over a period of time,” citing *People v. Keindl* 68 NY 2d 410, 421 (1986), which, in turn, noted that “a defendant may be guilty of this crime by virtue of a series of acts, none of which may be enough by itself to constitute the offense, but each of which when combined make out the crime.”

People v. Cruz, 152 Misc. 2d 436 (N.Y. Crim. Ct.—N.Y. Co., 1991)

This case stands for the proposition that in an endangering the welfare of a child prosecution, the child does not, in fact, have to actually suffer harm, as long as the potential existed for the child to be harmed. In *Cruz*, the defendant was driving a car while intoxicated with two small children as passengers and the Court noted that, “‘it takes little imagination’ to recognize the likelihood of harm to the children implicit in defendant's conduct where, with unsteady feet, he was working the accelerator and brake system as he drove at 9:30 at night across a bridge, his eyes blurry and his voice slurred by the amount of alcohol he had ingested.”

In re Rosemary Augustine, 88 Misc. 2d 487 (Sup. Ct.—Suffolk Co., 1976)

In this case, the mother of two children, ages one and two years-old, left the children alone at home—one asleep in a crib, the other asleep in a high chair—for approximately one-half hour while she went to the supermarket. The Court found that this single, isolated incidence did not constitute neglect.

People v. William Mantley, N.Y.L.J., June 2, 1994 at 30 (N.Y. Crim. Ct.—Richmond Co., 1994)

It was held that a seven year-old who was left home alone for a “few hours” in a very messy environment was not neglected, but rather situated similarly to the many “latch key” children who, because of economics, are forced to come home to an empty home until their parent or older sibling arrives on the scene.

People v. Seward, 173 Misc. 2d 1020 (Mount Vernon City Ct., 1997)

Leaving a six-year-old home alone at approximately 2:00 a.m. for approximately one hour “does not evidence good parenting skills, and it is not a practice that this court agrees should be used with children of this age. However, the court nevertheless finds that the sole fact of leaving a six-year-old child at home alone for one hour during the night does not rise to the level of criminal activity on the part of the defendant. . . .”

People v. Hope Smith, N.Y.L.J., Sept. 24, 1998 at 28 (N.Y. Crim. Ct.—Kings Co., 1998)

Here, a 34 year-old mother of four children, ages 5, 7, 12, and 13, left the children home alone in the family apartment during the afternoon for a couple of hours without any food and was charged with four counts of Endangering the Welfare of a Child. The Court determined that the facts did not rise to the level of a crime under P.L. § 260.10 (2). The Court did not make much out of the fact that the apartment was devoid of food, pointing out that it was quite possible that the defendant left the younger children with the older children so that she could go grocery shopping without having to take the children along.

It was also the Court’s view that leaving non-infant children in the care of their 12 and 13 year-old siblings for a reasonable period of time is a common and well-established practice in our society. The Court concluded, “Until such time as the legislature clarifies its intentions with respect to these troubling “home alone” cases so that the public in general, and unwary parents in particular, can be made aware of the legal ramifications of leaving children home alone; well established and traditionally accepted community standards must continue to be carefully applied on a case by case basis.”