SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 10, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Mazzarelli, Richter, Manzanet-Daniels, JJ.

15905 In re Nashawn Dezmen C.,
and Another,

Children Under Eighteen
Years of Age, etc.,

Temikia C.,
Respondent-Appellant,

-against-

Commissioner of Social Services
of the City of New York,
Petitioner-Respondent.

_____

Law Office of Thomas R. Villecco, P.C., Jericho (Thomas R. Villecco of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Amy Hausknecht of counsel), attorney for the children.

_____

Order, Family Court, New York County (Jane Pearl, J.), entered on or about August 12, 2014, which, after a fact-finding hearing, determined that respondent mother had neglected the subject children, unanimously reversed, on the law and the facts,

without costs, the finding of neglect vacated, and the petition dismissed.

Petitioner failed to demonstrate by a preponderance of the evidence that the mother had educationally neglected the children (*see* Family Ct Act §§ 1012[f], 1046[b][i]). Respondent testified that the children were late to school because it took over an hour to travel from their shelter to the children's school, and because the shelter's rules prevented her from leaving the shelter before 6 a.m. Respondent ultimately succeeded in transferring to a shelter closer to the school, and the children's attendance improved (*see Matter of Brianna R. [Maribel R.]*, 115 AD3d 403, 404-405 [1st Dept 2014]).

Moreover, petitioner failed to show that the lateness placed the children in imminent danger of impairment, since there was no evidence of a causal link between the lateness and the children's academic performance (*see Nicholson v Scoppetta*, 3 NY3d 357, 368-370 [2004]; *Matter of Giancarlo P.*, 306 AD2d 28, 28-29 [1st Dept 2003]). Although there are some problems in some of the children's grades, child M. received mostly grades of satisfactory. Child C. received a mix of grades of satisfactory, needs improvement, and unsatisfactory. However, child C. was diagnosed with several learning and other disabilities, which may

have been the cause of his difficulties. Further, respondent obtained help for child M. by enrolling her in math tutoring and a therapy program, and she obtained help for child C.'s special needs and learning disabilities (*see Giancarlo P.*, 306 AD2d at 28-29; *see also Brianna R.*, 115 AD3d at 404-405).

We find that the mother exercised the minimum degree of care required in light of the significant and numerous obstacles present for each child, and thus, the finding of educational neglect was unwarranted.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 10, 2015

CLERK

Mazzarelli, J.P., Renwick, Richter, Kapnick, JJ.

14823-
14824 Abyssinian Development Corporation, et al., Plaintiffs-Respondents-Appellants,

-against-

David Bistricer, et al., Defendants-Appellants-Respondents.

Index 115576/08

Stahl & Zelmanovitz, New York (Joseph Zelmanovitz of counsel), for appellants-respondents.

Windels Marx Lane & Mittendorf LLP, New York (Mel P. Barkan of counsel), for respondents-appellants.

Judgment, Supreme Court, New York County (Richard F. Braun, J.), entered October 10, 2013, after a nonjury trial, awarding plaintiffs sums of money as against defendant Clipper Equity Holdings, LLC, dismissing plaintiffs' claims against defendant Bistricer, and dismissing the counterclaim, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered September 9, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The trial court's factual findings are based on a fair interpretation of the evidence, and its legal conclusions are correct. Neither delivery of the letter of intent nor the closing of the contract to purchase Starrett City was a condition

precedent to the enforceability of the parties' obligations under § 18 of the letter of intent (*see Schuler-Haas Elec. Co. v Aetna Cas. & Sur. Co.*, 40 NY2d 883 [1976]). Execution of the letter of intent by plaintiff organization was not unreasonably delayed, especially in light of the fact that defendants were still making efforts to obtain execution until just days before the letter was signed.

Amendment of the answer to assert the defense of illegal lobbying activity was properly denied for lack of merit.

Plaintiffs substantially performed under the letter of intent by "cooperating with" defendants and "actively supporting" their efforts to obtain community and governmental approval of the planned purchase.

Plaintiff law firm is entitled to recover its fees based on an account stated in light of the fact that defendants retained its itemized bill without objection for 4½ months from the date it was first rendered in August 2007 (*see Ellenbogen & Goldstein v Brandes*, 226 AD2d 237 [1st Dept 1996], *lv denied* 89 NY2d 806 [1997]). No equitable considerations warrant a departure from this conclusion.

The claim for legal fees was correctly dismissed as against defendant Bistricer, who is not personally liable for the fees.

His alleged oral promise to pay them is barred by the statute of frauds (General Obligations Law § 5-701[a][2]). It was not rendered enforceable by any new consideration flowing to him (*see DePetris & Bachrach, LLP v Srour*, 71 AD3d 460, 463 [1st Dept 2010]). Nor is there an exception under General Obligations Law § 5-701 for part performance (*see Gural v Drasner*, 114 AD3d 25 [1st Dept 2013], *lv dismissed* 24 NY3d 935 [2014]). In any event, the law firm's continued work was not unequivocally referable to Bistricer's alleged oral promise to be personally liable for the fees.

The trial court correctly dismissed the counterclaim for fraud based on its finding that the claimed representation was not made and on defendants' failure to prove by clear and convincing evidence that plaintiffs never intended to comply with their contractual obligations (*see Callisto Pharm., Inc. v Picker*, 74 AD3d 545 [1st Dept 2010]).

Plaintiffs' request for attorneys' fees was correctly denied since it was not even asserted in a wherefore or an ad damnum clause (*see Vertical Computer Sys., Inc. v Ross Sys., Inc.*, 59 AD3d 205, 206 [1st Dept 2009]; *Fairchild Camera & Instrument Corp. v Barletta*, 31 AD2d 534 [1st Dept 1968]).

We have considered the parties' other arguments for affirmative relief and find them unavailing.

The Decision and Order of this Court entered herein on April 16, 2015 is hereby recalled and vacated (*see* M-2665 decided simultaneously herewith).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 10, 2015

CLERK

Mazzarelli, J.P., Renwick, Andrias, Manzanet-Daniels, JJ.

15844 In re Issa Kohler-Hausmann, Index 100759/13
Petitioner-Appellant,

-against-

New York City Police Department,
et al.,
Respondents-Respondents.

- - - - -

The Associated Press, Daily News, L.P.,
The New York Times Company and Propublica,
Amici Curiae.

_____

Issa Kohler-Hausmann, Brooklyn, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Julie Steiner of counsel), for respondents.

Media Freedom and Information Access Clinic, New York (David A. Schultz of counsel), for amici curiae.

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Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered January 17, 2014, which, insofar as appealed from as limited by the briefs, denied petitioner's request for attorney's fees or litigation costs, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously modified, on the law, to reinstate the proceeding, remand to Supreme Court for proceedings consistent with this order, and otherwise affirmed, without costs.

After acknowledging receipt of petitioner's FOIL request on August 1, 2012, respondent New York City Police Department (NYPD) extended its time to respond to petitioner's FOIL request to January 15, 2013, pursuant to Public Officers Law § 89(3)(a). By failing to respond for months after that deadline, NYPD constructively denied the FOIL request (*see* 21 NYCRR 1401.5[e]). Contrary to the court's finding, petitioner's administrative remedies were exhausted when NYPD denied her administrative appeal from the constructive denial of her FOIL request (*see Matter of New York Times Co. v City of N.Y. Police Dept.*, 103 AD3d 405, 408 [1st Dept 2013], *lv dismissed* 21 NY3d 930 [2013], *lv denied* 22 NY3d 854 [2013]).

Although petitioner effectively concedes that the merits of her petition are moot as a result of NYPD's voluntary disclosure, petitioner's claim for attorney's fees and other litigation costs is not moot (*see Matter of New York State Defenders Assn. v New York State Police*, 87 AD3d 193, 195 [3d Dept 2011] [holding that "the voluntariness of ... disclosure is irrelevant to the issue of whether petitioner substantially prevailed in [a FOIL] proceeding," since "to allow a respondent to automatically forestall an award of counsel fees simply by releasing the requested documents before asserting a defense would contravene

the very purposes of FOIL's fee-shifting provision"]; *Matter of Purcell v Jefferson County Dist. Attorney*, 77 AD3d 1328, 1329 [4th Dept 2010] [request for attorney's fees was not rendered moot by disclosure of documents, where agency "offered to produce the majority of the records sought by [the] petitioner if she agreed to withdraw her request for attorney's fees"]; *Matter of Powhida v City of Albany*, 147 AD2d 236, 238-239 [3d Dept 1989]).

The attorney petitioner's self-representation does not preclude an award of attorneys' fees. Other similarly worded statutes have been interpreted to authorize an award of attorneys' fees to a prevailing litigant who represented himself or herself or had the benefit of free legal services *(see Maplewood Mgt. v Best*, 143 AD2d 978 [1st Dept 1988] [Real Property Law § 234]; *see also Diaz v Audi of Am., Inc.,* 57 AD3d 828 [2d Dept 2008] [General Business Law § 198-b (Lemon Law)]; *Senfeld v I.S.T.A. Holding Co.*, 235 AD2d 345 [1st Dept 1997] [Real Property Law § 234], *lv dismissed* 91 NY2d 956 [1998], *lv denied* 92 NY2d 818 [1998]; *Thomas v Coughlin*, 194 AD2d 281 [3d Dept 1993] [CPLR 8601]; *Sharp v Sharp*, 161 AD2d 624 [2d Dept 1990] [Domestic Relations Law § 238], *lv dismissed* 76 NY2d 889 [1990]; *Crooker v United States Dept. of Treasury*, 634 F2d 48, 49 [2d Cir 1980] [FOIA]).

Petitioner meets the statutory requirements for seeking "other litigation costs reasonably incurred" by her, since she "has substantially prevailed" and NYPD "failed to respond to [her request] ... within the statutory time" (Public Officers Law § 89[4][c][ii]; *see Matter of New York State Defenders Assn. v New York State Police*, 87 AD3d at 195).

Accordingly, we remand to Supreme Court for consideration of petitioner's request for attorneys' fees and litigation costs.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 10, 2015

CLERK

Tom, J.P., Renwick, Andrias, Moskowitz, Manzanet-Daniels, JJ.

15964 In re Jean St. Vil, Index 100147/13
Petitioner-Appellant,

-against-

Board of Education of the
City School District of the
City of New York, etc., et al.,
Respondents-Respondents.

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Richard E. Casagrande, New York (Michael J. Del Piano of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Terri Feinstein Sasanow of counsel), for respondents.

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Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered January 28, 2014, denying the petition to annul respondents' determination, dated September 19, 2012, which sustained petitioner teacher's unsatisfactory rating for the 2010-2011 school year, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the petition granted, the unsatisfactory rating annulled, and the matter remanded to respondents for further proceedings.

The record demonstrates deficiencies in the performance review process resulting in petitioner's unsatisfactory rating (U-rating) for the 2010-2011 school year that were not merely

technical but undermined the integrity and fairness of the process (*see Matter of Gumbs v Board of Educ of the City of Sch. Dist. of the City of N.Y.*, 125 A3d 484 [1st Dept. 2015]; *Matter of Kolmel v City of New York*, 88 AD3d 527, 529 [1st Dept 2011]; *Matter of Brown v City of New York*, 111 AD3d 426 [1st Dept 2013]).

Petitioner's unsatisfactory rating was based primarily on the principal's alleged personal observations as a rating officer. However, petitioner never received any post-observation reports by the rating officer until the U-rating appeal hearing and the principal does not claim to have spoken with petitioner following the alleged observations. Nor were comments critical of petitioner's performance placed in his file. Thus, there is no evidence that petitioner was notified before the end of the school year, in June 2011, that his work was considered unsatisfactory. The mere fact that he had the assistance of a

guidance counselor and literary coach at some time during the school year did not constitute warning that he was at risk of an unsatisfactory rating since petitioner was never told that he was not improving in the areas of concern despite this assistance.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 10, 2015

CLERK

Mazzarelli, J.P., Andrias, Saxe, Moskowitz, JJ.

16079 The People of the State of New York, Ind. 515/13
Respondent,

-against-

James Johnson,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Molly Ryan of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Bradley Gershel of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Ethan Greenberg, J. at plea; Raymond L. Bruce, J. at sentencing), rendered July 17, 2014, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the third degree, and sentencing him to an aggregate term of 1 1/2 years of imprisonment, to be followed by two years of post-release supervision, unanimously affirmed.

Although we do not find that defendant made a valid waiver of the right to appeal, we perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 10, 2015

CLERK

Mazzarelli, J.P., Renwick, Saxe, Moskowitz, JJ.

16080 In re Second and Third Avenue LLC, Index 100182/14
Petitioner-Appellant,

-against-

New York State Division of Housing
and Community Renewal,
Respondent-Respondent,

Adolfo Velasquez,
Intervenor-Respondent.

_____

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for appellant.

Adam H. Schuman, New York (Dawn Ivy Schindelman of counsel), for New York State Division of Housing and Community Renewal, respondent.

Fishman & Mallon, LLP, New York (Susan K. Crumiller of counsel), for Adolfo Velasquez, respondent.

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Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered November 7, 2014, denying the petition to annul the determination of respondent (DHCR), dated December 18, 2013, which limited petitioner's rent increase for the subject apartment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DHCR's determination that the rent increase resulting from petitioner's first-time painting of the apartment (*see* 9 NYCRR 2202.4[a][1], [2]) should be based on the highest estimate

submitted by the tenant ($2,940), rather than the invoice submitted by petitioner ($13,750), is rational and is entitled to great deference (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428-429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]). The equities do not support the greater increase proposed by petitioner, since the actual cost of the project is in dispute, and the cost alleged by petitioner, for which it did not provide an itemized invoice or proof of payment other than a handwritten notation of a "cash" payment, would increase the rent by 130% (9 NYCRR 2202.22[a], [b][6]; *see Matter of W 54-7 LLC v New York State Div. of Hous. & Community Renewal*, 39 AD3d 312 [1st Dept 2007]).

We have considered petitioner's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 10, 2015

CLERK

Mazzarelli, J.P., Renwick, Saxe, Moskowitz, JJ.

16081-
16081A In re Destiny Marie M.,

A Child under Eighteen
Years of Age, etc.,

Phillip F.,
Respondent-Appellant,

-against-

Administration for Children's Services,
Petitioner-Respondent.

_____

Law Office of Cabelly & Calderon, Jamaica (Lewis S. Calderon of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Marta Ross of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Amy Hausknecht of counsel), attorney for the child.

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Order of disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about July 30, 2014, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about the same date, which found that respondent father had neglected the subject child, unanimously affirmed, without costs. Appeal from fact-finding order unanimously dismissed, without costs, as subsumed in the appeal from the order of disposition.

The finding of neglect is supported by a preponderance of the evidence, including the caseworker's and mother's testimony that the father was aware of the child's existence in 2010 but failed to assert his parental rights and assume his parental responsibilities until three years later, when the child was four years old (*see* Family Ct Act § 1012[f]; *Nicholson v Scoppetta*, 3 NY3d 357, 368 [2004]). The court's credibility determination is entitled to deference (*see Matter of Irene O.*, 38 NY2d 776, 777 [1975]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 10, 2015

CLERK

Mazzarelli, J.P., Renwick, Saxe, Moskowitz, JJ.

16083 Herbert Levy, etc., Index 157901/13
Plaintiff-Appellant,

-against-

Daniel D. Bartfeld, et al.,
Defendants-Respondents.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about March 18, 2014,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated October 9, 2015,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 10, 2015

CLERK

Mazzarelli, J.P., Friedman, Renwick, Moskowitz, JJ.

16084 SS Marks LLC, Index 650049/09
Plaintiff-Appellant,

-against-

Morrison Cohen LLP, et al.,
Defendants-Respondents.

_____

Schwartz & Ponterio, PLLC, New York (John Ponterio of counsel), for appellant.

Furman Kornfeld & Brennan LLP, New York (A. Michael Furman and Bain R. Loucks of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered April 18, 2014, which, to the extent appealed from as limited by the briefs, granted defendants' motion for summary judgment dismissing plaintiff's complaint alleging legal malpractice, unanimously affirmed, without costs.

Plaintiff failed to show that defendants were negligent or that their alleged negligence was the proximate cause of the alleged damages (*see Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 9 [2008], *lv denied* 12 NY3d 715 [2009]). It did not, as is required in any legal malpractice case, establish that defendants "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession [or] meet the exacting standard that but for the attorney's negligence the

outcome of the matter would have been substantially different" (*id.*, internal quotation marks and citations omitted]). In particular, the documentary evidence refutes plaintiff's claim that defendants failed to advise him of the existence and consequence of a subordination provision added to the lease at issue. Further, defendants' failure to obtain a personal guaranty did not cause plaintiff any damages, as the documentary evidence shows that plaintiff assigned its rights to any guaranty to the lenders on the subject transaction.

We have considered plaintiff's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 10, 2015

CLERK

Mazzarelli, J.P., Renwick, Saxe, Moskowitz, JJ.

16085 The People of the State of New York, Ind. 6287/07
Respondent,

-against-

Jerome Ford, Jr.,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Rosemary Herbert of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered December 21, 2009, convicting defendant, after a jury trial, of murder in the second degree and two counts of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 25 years to life, unanimously affirmed.

The court properly exercised its discretion in admitting evidence of defendant's gang affiliation, along with expert testimony that new members of the gang commit violent crimes to impress senior members and rise in status. This evidence was highly probative of defendant's motive and central to the jury's understanding of an otherwise unexplained murder (*see People v Edwards*, 295 AD2d 270 [1st Dept 2002], *lv denied* 99 NY2d 557

[2002]). Contrary to defendant's argument, the testimony actually given by the expert fully supported the People's theory of admissibility. The court also properly exercised its discretion in receiving evidence that witnesses observed defendant selling drugs on prior occasions, which was probative of their ability to make a reliable identification, and in precluding defendant from introducing physical evidence that lacked probative value under the circumstances of the case.

The court properly denied defendant's motion to suppress identification testimony. The record supports the court's finding that the photo array was not unduly suggestive. Defendant and the other participants were reasonably similar in appearance, and there was no substantial likelihood that defendant would be singled out (*see People v Chipp*, 75 NY2d 327, 336 [1990], *cert denied* 498 US 833 [1990]). Moreover, even if there was anything suggestive about the photo array, the passage of time between the photo procedure and the lineups sufficed to attenuate any taint (*see e.g. People v Leibert*, 71 AD3d 513, 514 [1st Dept 2010], *lv denied* 15 NY3d 752 [2010]). The court also correctly found that the lineups were not unduly suggestive, notwithstanding any age discrepancy between defendant and the fillers (*see People v Jackson*, 98 NY2d 555, 559 [2002]).

The evidence at an ex parte hearing established an overriding interest that warranted closure of the courtroom during the testimony of five of the People's civilian witnesses (*see Waller v Georgia*, 467 US 39 [1984]), and the ex parte proceedings did not violate defendant's rights (*see People v Frost*, 100 NY2d 129, 137 [2003]). There was abundant evidence that raised serious concerns about witness safety and intimidation. The court's determination carefully satisfied each of the requirements set forth in *Waller* (467 US at 48).

The court properly denied defendant's application for a material witness order since he failed to establish "reasonable cause to believe" that the proposed witness possessed "information material to the determination" of the case (CPL 620.20[1][a]). We find unpersuasive defendant's assertion that the proffered witness's inability to make the same observations that were made by a prosecution witness cast doubt on that witness's credibility.

We perceive no basis for reducing the sentence.

We decline to revisit this Court's prior determinations (2013 NY Slip Op 84721[U]) concerning sealed and redacted materials.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 10, 2015

CLERK

Mazzarelli, J.P., Renwick, Saxe, Moskowitz, JJ.

16086- Ind. 1091/09
16086A The People of the State of New York, SCI 3920/09
Respondent,

-against-

Chester Burns,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (David J. Klem of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

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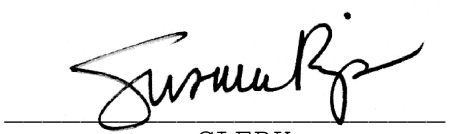
Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Bonnie Wittner, J.), rendered on or about December 9, 2011,

Said appeals having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgments so appealed from be and the same are hereby affirmed.

ENTERED: NOVEMBER 10, 2015



CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Mazzarelli, J.P., Renwick, Saxe, Moskowitz, JJ.

16087 The People of the State of New York, Ind. 3566/12
Respondent,

-against-

Jeffrey Otero,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Allen Fallek of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Jared Wolkowitz of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Gregory Carro, J.), rendered on or about January 16, 2013,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: NOVEMBER 10, 2015

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Mazzarelli, J.P., Renwick, Saxe, Moskowitz, JJ.

16089 ERC 16W Limited Partnership, Index 600870/09
Plaintiff-Appellant,

-against-

Xanadu Mezz Holdings LLC, et al.,
Defendants-Respondents.

_____

Kasowitz, Benson, Torres & Friedman LLP, New York (Sheron Korpus of counsel), for appellant.

Allen & Overy LLP, New York (Jacob Pultman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered January 15, 2015, which granted defendants' motion to dismiss plaintiff's claim for consequential damages, unanimously affirmed, with costs.

Plaintiff seeks consequential damages, representing the amount of plaintiff's lost equity investment in a development project, arising out of defendant Xanadu Mezz Holdings LLC's (XMH) alleged breach of a loan agreement. The court correctly dismissed plaintiff's claim for consequential damages, because "the provisions in the [loan agreement] providing remedy for a default do not suggest or provide for such a heavy responsibility on the part of" defendants, and the evidence fails to show that such damages were foreseeable and contemplated by the parties

before or at the time of the agreement's formation (*Kenford Co. v County of Erie*, 67 NY2d 257, 262 [1986]).

Although the remedies set forth in the loan agreement are not the exclusive remedies available to plaintiff in the event of a default (*see ERC 16W Ltd. Partnership v Xanadu Mezz Holdings LLC*, 95 AD3d 498, 500-501 [1st Dept 2012]), they are evidence that defendants did not "assume[] consciously" liability for plaintiff's entire equity investment in the event of XMH's default (*Kenford Co. v County of Erie*, 73 NY2d 312, 319 [1989]). With the remedy provisions of the loan agreement in place, providing for, among other things, termination and transfer of the defaulting participant's interest in the agreement (*see* 95 AD3d at 500-501), it was not foreseeable that plaintiff would lose its entire equity investment in the project upon XMH's default (*see Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 192-193 [2008]).

Additionally, given that plaintiff seeks direct claims of only $23 million and that defendants were responsible for only a limited portion of the $1.015 billion loan, plaintiff's claim for consequential damages equaling its entire equity investment of $1.3 billion "is out of proportion to any liability contemplated

by the contract" (*Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 107 [1st Dept 2002]).

We have considered plaintiff's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 10, 2015

CLERK

Mazzarelli, J.P., Renwick, Saxe, Moskowitz, JJ.

16090 The People of the State of New York, Ind. 3053/12
Respondent,

-against-

Noel Serrano,
Defendant-Appellant.

_____

Cardozo Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered March 13, 2013, as amended April 5, 2013, convicting defendant, after a jury trial, of two counts of criminal possession of a weapon in the second degree, and sentencing him, as a second felony offender, to concurrent terms of five years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The location of the weapon and the surrounding circumstances tended to corroborate defendant's ex-girlfriend's testimony that he possessed a pistol, which he stored in a closet in her apartment.

Defendant's claims regarding uncharged crime evidence are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 10, 2015

CLERK

Mazzarelli, J.P., Renwick, Saxe, Moskowitz, JJ.

16091 Rosemarie A. Herman, et al., Index 652698/12
Plaintiffs-Appellants,

-against-

Atmas Corp., et al.,
Defendants,

Pound West Trading Corp., et al.,
Defendants-Respondents.

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Law Offices of Craig Avedisian, P.C., New York (Craig Avedisian of counsel), and Jaspan Schlesinger LLP, Garden City (Steven R. Schlesinger of counsel), for appellants.

Akin Gump Strauss Hauer & Feld LLP, New York (Sean O'Donnell of counsel), for Pound West Trading Corp., respondent.

Milber, Makris, Plousadis & Seiden, LLP, Woodbury (Lorin A. Donnelly of counsel), for Savastano Kaufman & Company, LLC and Kenneth Kaufman, respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered April 3, 2014, which, to the extent appealed from as limited by the briefs, granted defendants Savastano, Kaufman and Company LLC and Kenneth Kaufman's motion to dismiss the cause of action for conspiracy as against them, unanimously reversed, on the law, without costs, and the motion denied.

The conspiracy cause of action against the Kaufman defendants is not time-barred. In *Herman v 36 Gramercy Park*

Realty Assoc., LLC (131 AD3d 422 [1st Dept 2015]), a related action, we reinstated a cause of action for conspiracy based on fraud, constructive fraud and breach of fiduciary duty claims against Michael Offit in his capacity as trustee, brought in a related action commenced in 2011, because the tort claims had not accrued until Offit resigned as trustee less than six years before the action against 36 Gramercy Park was commenced. That determination applies as well to the conspiracy cause of action as against the Kaufman defendants, who were plaintiff Rosemarie Herman's accountants and are alleged to have known that certain transactions were fraudulent and to have actively assisted Offit and others in concealing them from plaintiff (*see Kenney v City of New York*, 74 AD3d 630 [1st Dept 2010]).

In view of the foregoing, the doctrine of equitable estoppel is inapplicable (*see Zumpano v Quinn*, 6 NY3d 666, 674 [2006]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 10, 2015

CLERK

Mazzarelli, J.P., Renwick, Saxe, Moskowitz, JJ.

16092 In re James S.,

A Child Under the Age of
Eighteen Years, etc.,

Desthaney S.,
Respondent-Appellant,

Leake and Watts Services, Inc.,
Petitioner-Respondent.

_____

Andrew J. Baer, New York, for appellant.

Law Offices of James M. Abramson, PLLC, New York (Kristin K. Cheney of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), attorney for the child.

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Order of disposition, Family Court, New York County (Jane Pearl, J.), entered on or about May 1, 2014, which, after a fact-finding hearing, terminated respondent mother's parental rights to the subject child on the ground of permanent neglect, and committed custody and guardianship of the child jointly to Leake and Watts Services, Inc. and the Commissioner of Social Services of the City of New York, for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and convincing evidence which demonstrates that the agency made

diligent efforts to encourage and strengthen the parental relationship by, among other things, referring respondent for various parenting programs and mental health services, as well as scheduling and facilitating visitation with the child (*see Matter of Ashley R. [Latarsha R.]*, 103 AD3d 573, 574 [1st Dept 2013], *lv denied* 21 NY3d 857 [2013]; *see also Matter of Marissa Tiffany C.-W. [Faith W.]*, 125 AD3d 512 [1st Dept 2015]; *Matter of Alani G. [Angelica G.]*, 116 AD3d 629 [1st Dept 2014], *lv denied* 24 NY3d 903 [2014]).

Despite these efforts, however, respondent failed to visit regularly, follow through with the agency's referrals for services and programs to reunite her with the child, or otherwise plan for the child's return, including obtaining suitable housing, improving quality of visits, or understanding the child's special needs and engaging in his care (*see Matter of Alliyah C. [Colleen C.]*, 113 AD3d 562, 563 [1st Dept 2014], *lv denied* 23 NY3d 901 [2014]; *Matter of Tashameeka Valerie P. [Priscilla P.]*, 102 AD3d 614 [1st Dept 2013], *lv denied* 21 NY3d 852 [2013]).

In addition, the record supports the determination that termination is in the best interests of the child under the circumstances, and suspended judgment is unwarranted as

respondent failed to demonstrate a realistic and feasible plan to provide an adequate and stable home for the child (*see Matter of Charles Jahmel M. (Charles E.M.)*, 124 AD3d 496, 497 [1st Dept 2015], *lv denied* 25 NY3d 905 [2015]; *Matter of Jaelyn Hennesy F. (Jose F.)*, 113 AD3d 411, 412 [1st Dept 2014]).

We have considered respondent's remaining arguments and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 10, 2015

CLERK

Mazzarelli, J.P., Renwick, Saxe, Moskowitz, JJ.

16097 The People of the State of New York, Ind. 4479/12
Respondent,

-against-

Jonathan Stewart,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Shane Tela of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Brian R. Pouliot of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Renee White, J.), rendered on or about September 30, 2013,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: NOVEMBER 10, 2015

CLERK

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department.

Mazzarelli, J.P., Renwick, Saxe, Moskowitz, JJ.

16098 The People of the State of New York, Ind. 4108/13
Respondent,

-against-

Juan Boria,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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Judgment, Supreme Court, New York County (Bonnie Wittner, J.), rendered on or about October 24, 2013, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 10, 2015

CLERK

Mazzarelli, J.P., Renwick, Saxe, Moskowitz, JJ.

16099-
16100N Jose Reyes,
Plaintiff,

-against-

Metro Loft Management, LLC., et al.,
Defendants.

- - - - -

Elliott H. Taub,
Nonparty Appellant,

Kenneth Marder,
Nonparty Respondent.

Index 113508/08

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The Taub Law Firm, P.C., New York (Elliot H. Taub of counsel), for appellant.

Marder, Eskesen & Nass, New York (Kenneth Marder of counsel), for respondent.

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Order, Supreme Court, New York County (Carol Robinson Edmead, J.), entered February 20, 2015, which, inter alia, denied nonparty appellant Taub's motion for an order directing equal division of an attorney's fee between him and nonparty respondent Marder, and granted Marder's cross motion for an order directing such attorney's fee to be paid in full to him, with costs, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered April 1, 2015, which, upon granting Taub's motion for reargument, adhered to its prior determination,

unanimously dismissed, without costs, as academic.

A portion of the attorney's fees awarded upon settlement of the instant personal injury action is payable to the dissolved firm of Taub & Marder. Pursuant to the parties' dissolution agreement, Marder is entitled to the proceeds of all checks involving either a client who executed a form substituting Marder's new firm as counsel after the dissolution, or one who remained unchallenged on the "Marder List," meaning the "client list maintained by the Partnership on which [Marder] is designated as the responsible attorney." In opposition to Taub's motion, Marder provided evidence, undisputed by Taub, that he was the partner assigned to the Reyes case and listed as the primary attorney in the firm's case management system before another firm was substituted as counsel.

The former partners' conflicting interpretations of the terms "client list" and "responsible attorney," as used in the dissolution agreement do not render these terms ambiguous, since the intention of the parties may be gathered from the four corners of the instrument (*Dreisinger v Teglasi*, 130 AD3d 524, 527 [1st Dept 2015]). Although no client list was physically printed out by Taub or Marder at the time of the dissolution, a list showing the designated responsible attorney could be

generated by either partner from the firm's case management system. Taub himself prepared a list prior to the dissolution, which showed that Marder was the assigned attorney for the Reyes case. The only reasonable interpretation of the terms "client list" and "responsible attorney," that would give meaning to all of the terms of the dissolution agreement, is the one proffered by Marder (*see U.S. Bank Natl. Assn. v Lightstone Holdings LLC*, 103 AD3d 458, 459 [1st Dept 2013]; *150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 6 [1st Dept 2004]). As such, the motion court properly determined that Marder is entitled to the full amount of the attorneys' fees at issue.

Taub's remaining arguments are unavailing. Under the terms of the dissolution agreement, the lower court correctly awarded Marder reasonable costs and attorneys' fees as the prevailing party on the motion. Sanctions are not warranted against Marder.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 10, 2015

CLERK

Mazzarelli, J.P., Renwick, Saxe, Moskowitz, JJ.

16101 In re James Jones, Index 400516/14
[M-4434] Petitioner,

-against-

Jonathan David, etc.,
Respondent.

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James Jones, petitioner pro se.

Zachary W. Carter, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

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The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 10, 2015

CLERK

Tom, J.P., Acosta, Moskowitz, Richter, JJ.

15756- Index 30061/08
15756A In re State of New York,
Petitioner-Appellant,

-against-

Floyd Y. (Anonymous),
Respondent-Respondent.

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Eric T. Schneiderman, Attorney General, New York (Matthew W. Grieco of counsel), for appellant.

Marvin Bernstein, Mental Hygiene Legal Services, New York (Sadie Zea Ishee of counsel), for respondent.

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Orders, Supreme Court, New York County (Daniel P. Conviser, J.), entered March 19, 2015, reversed, on the law, without costs, and the verdict and petition reinstated.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rolando T. Acosta
Karla Moskowitz
Rosalyn Richter, JJ.

15756-15756A
Index 30061/08

_____x

In re State of New York,
Petitioner-Appellant,

-against-

Floyd Y. (Anonymous),
Respondent-Respondent.

_____x

Petitioner appeals from the orders of the Supreme Court, New York County (Daniel P. Conviser, J.), entered March 19, 2015, which, after a jury verdict that respondent suffers from a mental abnormality requiring civil management under article 10 of the Mental Hygiene Law, granted respondent's motion to set aside the verdict and dismissed the petition for sex offender civil management.

Eric T. Schneiderman, Attorney General, New York (Matthew W. Grieco and Steven C. Wu of counsel), for appellant.

Marvin Bernstein, Mental Hygiene Legal Services, New York (Sadie Zea Ishee and Maura Martin Klugman of counsel), for respondent.

RICHTER, J.

In this appeal, we are asked to decide whether there was legally sufficient evidence to support a jury's conclusion that respondent suffers from a mental abnormality under article 10 of the Mental Hygiene Law. The jury found that respondent has a mental disorder that predisposes him to commit sexual offenses, and that results in his having serious difficulty controlling that conduct. The trial court set aside the verdict, concluding that the evidence was not sufficient to establish that respondent had the requisite serious difficulty. In overturning the verdict, the trial court relied upon the Court of Appeals' decision in *Matter of State of New York v Donald DD. (Kenneth T.)* (24 NY3d 174 [2014]) and this Court's decision in *Matter of State of New York v Frank P.* (126 AD3d 150 [1st Dept 2015]). We now reverse and conclude that the jury's verdict was based on legally sufficient evidence. Nothing in *Kenneth T.* or *Frank P.* warrants a different result.

Respondent Floyd Y. is a recidivist sex offender who was most recently convicted of sexually abusing his prepubescent stepson and stepdaughter. The conviction stemmed from four separate incidents which took place over an almost two-year period, when the children were 8 to 10 years old. After a trial, respondent was found guilty of four counts each of sexual abuse

in the first degree and endangering the welfare of a child. Respondent was sentenced to a term of imprisonment of from 4 to 8 years, and upon his release from prison, he was transferred to a psychiatric facility.

Petitioner State of New York subsequently brought this petition seeking sex offender civil management pursuant to article 10 of the Mental Hygiene Law. Under article 10, a detained sex offender is subject to civil management if the State establishes, by clear and convincing evidence, that the offender has a "mental abnormality," that is, "a congenital or acquired condition, disease or disorder that affects the emotional, cognitive, or volitional capacity of a person in a manner that predisposes him or her to the commission of conduct constituting a sex offense and that results in that person having serious difficulty in controlling such conduct" (Mental Hygiene Law § 10.03[i], [q]). Thus, it must be shown that the offender's disorder "results in both a predisposition to commit sex offenses and a serious difficulty controlling that behavior" (*Matter of State of New York v John S.*, 23 NY3d 326, 348 [2014]).

After a hearing, Supreme Court determined that there was probable cause to believe that respondent suffers from pedophilia, polysubstance dependence and antisocial personality disorder, and that he was a sex offender requiring civil

management. The case went to trial, and the jury returned a verdict finding that respondent suffers from a disorder that: (1) predisposes him to commit conduct constituting a sex offense; and (2) results in his having serious difficulty controlling that conduct. The trial court granted respondent's motion to set aside the verdict, finding that the evidence was legally insufficient to establish the second prong.[1] The State now appeals.

A trial court may set aside a jury verdict as legally insufficient when "there is no valid line of reasoning and permissible inferences that could possibly lead a rational person to the conclusion reached by the jury" (*Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 349 [1st Dept 2006]). In deciding the motion, the trial court was required to afford the State every inference that may properly be drawn from the facts presented, and the evidence should have been considered in the light most favorable to the State (*John S.*, 23 NY3d at 348; *KBL, LLP v Community Counseling & Mediation Servs.*, 123 AD3d 488, 489 [1st Dept 2014]). Moreover, in article 10 proceedings, issues concerning the viability and reliability of the respondent's diagnosis are properly reserved for resolution by the jury

[1] The sufficiency of the evidence on the first prong is not at issue on this appeal.

(*Matter of State of New York v Robert V.*, 111 AD3d 541, 542 [1st Dept 2013], *lv denied* 23 NY3d 901 [2014]).

Judged by these standards, we conclude that the State presented legally sufficient evidence that respondent's mental condition results in his having serious difficulty controlling his sexual conduct. At trial, the State offered the testimony of Stuart Kirschner, an expert psychologist who evaluated respondent. Dr. Kirschner testified about respondent's repeated sexual abuse of his two prepubescent stepchildren over a nearly two-year period. On several occasions, respondent entered his stepdaughter's room and fondled her vagina, sometimes removing her clothes and licking her genitals. Respondent also molested his stepson two times, reaching into the boy's underwear while he was sleeping, and squeezing his penis.[2] Dr. Kirschner also reviewed records containing an admission by respondent that he had sexual urges toward his stepdaughter, and that he tried to resist them for a significant period of time, but ultimately gave in to them. This was confirmed by the trial testimony of respondent's own expert, who interviewed respondent. Respondent told the expert that after abusing his stepdaughter, he

[2] Although the children's mother eventually obtained orders of protection against respondent, he repeatedly ignored those orders.

recognized the wrongfulness of his conduct, said, "I am going to stop," but had an urge and did it again nine months later. Respondent also admitted to his expert that he had "deviant needs."

Dr. Kirschner explained that a person has pedophilia if he has sexual urges, fantasies or behaviors involving prepubescent children, and acts upon, or experiences significant distress at, those urges for more than six months. He concluded that respondent's repeated offenses against his stepchildren over a two-year period, and his admitted sexual urges, supported a pedophilia diagnosis.[3] Dr. Kirschner testified that pedophilia is a chronic condition, and that respondent still suffers from it because he failed to fully engage in the necessary treatment to control his urges (*see* American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders at 699 [5th ed 2013] [DSM-5] [describing pedophilia as a "lifelong condition"]).

Dr. Kirschner reviewed respondent's sex offender treatment records and concluded that he has not developed the cognitive skills necessary to control his pedophilia. According to Dr.

[3] Dr. Kirschner described respondent's pedophilia as "non exclusive," meaning that he also has sexual interest in people other than prepubescent children.

Kirschner, respondent neither understands nor accepts the fact that he is sexually attracted to children. Respondent fails to take full responsibility for his actions, and instead offers "numerous explanations" and "different stories" about his misconduct in an attempt to minimize his offending behavior. In addition, Dr. Kirschner testified that respondent does not have a viable relapse prevention plan that would prevent him from reoffending in the future. Dr. Kirschner described respondent's progress in treatment as "minimal," explaining that he "wasn't really involved," had attendance issues, was removed from sessions on occasion, and generally exhibited a negative and hostile attitude. Indeed, respondent has gone so far as to state that he does not need any more therapy because he will be released in the near future.

In addition to the pedophilia diagnosis, Dr. Kirschner found that respondent suffers from antisocial personality disorder (ASPD), as evidenced by his extensive history of sexually offending behavior, physical abuse of his wife, anger issues, deceitful conduct and lack of remorse. Dr. Kirschner based his opinion on, inter alia, reports of four sexual offenses committed by respondent. One incident involved the repeated molestation of a 15-year-old girl, who had been temporarily placed in respondent's home after she fled abuse by her own father. In

another incident, after raping his next-door neighbor three times in one evening, respondent left his phone number and asked her to call him if she wanted to see him again. Dr. Kirschner described respondent's offenses as "predatory behavior" where the nonconsensual element became a "driving force" for him. Dr. Kirschner explained that, as with his stepchildren, respondent exhibited a lack of sympathy for the other sexual offense victims and made attempts to minimize his misconduct.

The jury also heard testimony from Cara, another one of respondent's victims. Cara testified that when she was 10 years old, respondent touched her hands, which were laying on her lap, in a way that made her feel uncomfortable. Dr. Kirschner opined that this behavior was not "just a shaking of the hand," but was consistent with a "pattern of engaging in sexually deviant conduct with minors." Cara also described other incidents, when she was 14 years old, where respondent stuck his tongue in her mouth, tried to put his hands up her pants and shirt, and tickled her between her legs.

Dr. Kirschner also diagnosed respondent with alcohol abuse disorder, cannabis abuse disorder, and cocaine use disorder. Dr. Kirschner testified that respondent has had trouble maintaining sobriety, and that his substance abuse problems have caused significant problems in his ability to function. Dr.

Kirschner explained that an individual under the influence of alcohol, marijuana or cocaine loses the ability to exercise control over his impulses. Indeed, Dr. Kirschner noted that respondent blames some of his sexually offending behavior on his being intoxicated under various substances. For instance, respondent acknowledged that he "should have stopped" one of his sexual assaults, but he was in "a drunken stupor." Although respondent completed a substance abuse treatment program while in prison, Dr. Kirschner described it as "short-lived," noted that respondent had refused toxicology testing on multiple times, and opined that respondent's substance abuse disorders are not resolved.

In concluding that respondent has serious difficulty controlling his sex-offending misconduct, Dr. Kirschner focused on the combined diagnosis of respondent's pedophilia, ASPD, and substance abuse disorders, his lack of adequate treatment for these problems, and his failure to have a clear relapse prevention plan. Dr. Kirschner described pedophilia and ASPD as a "very toxic mixture" that makes an individual more likely to act on his sexual urges toward children. Even respondent's expert witness acknowledged that the DSM-5 expressly recognizes that the combination of pedophilia and ASPD increases the likelihood of an offender acting upon his sexual urges toward

children (*see* DSM-5 at 699 [interaction between pedophilia and antisociality makes males with both traits "more likely to act out sexually with children"]). Dr. Kirschner further explained that respondent's substance abuse disorders and ASPD impair his ability to control his sexual desires for children, and increase his propensity to engage in impulsive behavior. We find that the totality of this evidence, when viewed in the light most favorable to the State, and affording the State all proper inferences, is sufficient to uphold the jury's verdict that respondent has difficulty controlling his sexually offending behavior.

We disagree with the trial court's conclusion that the Court of Appeals' decision in *Kenneth T.* (24 NY3d at 174) mandates a finding that the evidence here was legally insufficient. In *Kenneth T.*, the State's expert testified that Kenneth T. suffered from paraphilia not otherwise specified (paraphilia NOS) and ASPD, and that, together, these disorders predisposed him to committing sexual misconduct and resulted in his having serious difficulty controlling that conduct. In concluding that Kenneth T. had the requisite serious difficulty, the expert identified two factors: the fact that Kenneth T. had carried out two rapes under circumstances allowing for identification by his victims, and the fact that he committed the second rape despite having

spent significant time in prison for the earlier rape. In finding this evidence legally insufficient, the Court stated that the serious difficulty prong could rarely, if ever, be satisfied from the facts of a sex offense alone (*id.* at 188-191).

Here, in contrast, Dr. Kirschner did not solely rely on the facts of respondent's sex offenses in concluding that he had serious difficulty controlling his urges. Instead, Dr. Kirschner based his opinion on respondent's triple diagnosis (pedophilia, ASPD and substance abuse disorders), his pattern of sexual misconduct, and his abject failure to satisfactorily progress in treatment. Notably, the underlying sexual disorder in *Kenneth T.* was paraphilia NOS, not pedophilia. The distinction is critical because, unlike paraphilia, pedophilia can only be diagnosed where the individual has actually acted upon sexual urges towards prepubescent children (or has experienced significant distress at those urges) for more than six months. Thus, pedophilia, by definition, involves an element of difficulty in control. Further, the DSM-5 explicitly recognizes that the dangerous combination of respondent's ASPD and pedophilia increases the likelihood that he will act out sexually with children (*see* DSM-5 at 699). In addition, the diagnosis of respondent's substance abuse disorders, not present in *Kenneth T.*, provides a further basis for the jury's finding of serious difficulty.

Further distinguishing this case from *Kenneth T.* is the fact that respondent here failed to satisfactorily progress in sex offender treatment, did not have an adequate relapse prevention plan, and exhibited a cavalier attitude toward participation in therapy. Dr. Kirschner specifically identified these factors, not present in *Kenneth T.*, in concluding that respondent had serious difficulty in controlling his sexual urges toward children (*see Matter of State of New York v Robert F.*, 25 NY3d 448, 454-455 [2015] [post-*Kenneth T.* case, where the Court of Appeals, in describing the "overwhelming evidence" in an article 10 dispositional hearing, focused on the respondent's failure to progress in sex offender treatment and failure to prepare an adequate relapse prevention plan]; *Matter of State of New York v Richard TT.*, 132 AD3d 72 [3d Dept 2015], *appeal dismissed* ___ NY3d ___, 2015 NY Slip Op 88113 [2015] [serious difficulty prong shown by, inter alia, the respondent's failure to complete sex offender treatment and failure to develop meaningful strategies for dealing with his sexual urges]).

This Court's decision in *Frank P.* (126 AD3d at 150) is likewise distinguishable. Like *Kenneth T.*, *Frank P.* did not involve the pedophilia and substance abuse diagnoses presented here, nor was there a showing that the respondent failed to successfully complete sex offender treatment. In fact, the Court

in *Frank P.* noted that the respondent had voluntarily attended such treatment while in prison. Further, unlike here, neither of the State's experts in *Frank P.* explained how they arrived at their conclusion that the respondent has serious difficulty controlling his sexual behavior.

By this decision, we do not hold that all offenders who suffer from pedophilia are automatically, by virtue of that diagnosis alone, subject to mandatory civil management. We simply hold that the State's evidence in this case — including respondent's multiple diagnoses, his history of sexual misconduct, his admitted inability to control his pedophilic urges, his lack of satisfactory progress in sex offender treatment and his failure to have a viable relapse prevention plan — was legally sufficient to uphold the jury's conclusion that respondent has difficulty controlling his sexually offending behavior.

Accordingly, the orders of the Supreme Court, New York County (Daniel P. Conviser, J.), entered March 19, 2015, which, after a jury verdict that respondent suffers from a mental abnormality requiring civil management under article 10 of the

Mental Hygiene Law, granted respondent's motion to set aside the verdict and dismissed the petition for sex offender civil management, should be reversed, on the law, without costs, and the verdict and petition reinstated.

All concur.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: NOVEMBER 10, 2015

CLERK