

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

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**CA 19-00283**

PRESENT: CENTRA, J.P., CARNI, LINDLEY, NEMOYER, AND BANNISTER, JJ.

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IN THE MATTER OF THE APPLICATION OF STATE OF  
NEW YORK, PETITIONER-RESPONDENT,

V

MEMORANDUM AND ORDER

RICHARD F., RESPONDENT-APPELLANT,  
FOR CIVIL MANAGEMENT PURSUANT TO MENTAL HYGIENE  
LAW ARTICLE 10.

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SARAH M. FALLON, DIRECTOR, MENTAL HYGIENE LEGAL SERVICE, UTICA  
(PATRICK T. CHAMBERLAIN OF COUNSEL), FOR RESPONDENT-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATHLEEN M. TREASURE OF  
COUNSEL), FOR PETITIONER-RESPONDENT.

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Appeal from an order of the Supreme Court, Oneida County  
(Bernadette T. Clark, J.), entered December 27, 2018 in a proceeding  
pursuant to Mental Hygiene Law article 10. The order, insofar as  
appealed from, determined that respondent is a dangerous sex offender  
requiring confinement and committed respondent to a secure treatment  
facility.

It is hereby ORDERED that the order insofar as appealed from is  
unanimously reversed on the law without costs, the determination that  
respondent is a dangerous sex offender requiring confinement is  
vacated, and the matter is remitted to Supreme Court, Oneida County,  
for further proceedings in accordance with the following memorandum:  
In this proceeding pursuant to Mental Hygiene Law article 10,  
respondent, as limited by his brief, appeals from that part of an  
order finding him to be a dangerous sex offender requiring  
confinement. We agree with respondent that the evidence is legally  
insufficient to establish that he required confinement. We therefore  
reverse the order insofar as appealed from, vacate the determination  
that respondent is a dangerous sex offender requiring confinement, and  
remit the matter to Supreme Court for the imposition of a regimen of  
strict and intensive supervision and treatment in accordance with  
Mental Hygiene Law § 10.11.

It is well established that, in the dispositional phase of a  
Mental Hygiene Law article 10 proceeding, petitioner State of New York  
(State) bears the burden of proving by clear and convincing evidence  
that the respondent offender has "such a strong predisposition to  
commit sex offenses, and such an inability to control behavior, that  
[he or she] is likely to be a danger to others and to commit sex

offenses if not confined" (Mental Hygiene Law § 10.03 [e]; see *Matter of State of New York v Floyd Y.*, 22 NY3d 95, 105 [2013]; *Matter of State of New York v James R.C.*, 165 AD3d 1612, 1615 [4th Dept 2018]; see generally § 10.07 [f]). Put simply, "[t]he State may not civilly confine a sex offender in a locked treatment facility unless it proves that he or she has an 'inability' to control sexual misconduct" (*Matter of State of New York v George N.*, 160 AD3d 28, 29 [4th Dept 2018]). To hold that the State has no burden of proof at the dispositional phase of an article 10 proceeding, as the State asks us to in this appeal, would create grave doubt concerning the constitutionality of the entire article 10 process (see generally *Kansas v Crane*, 534 US 407, 412-413 [2002]), and it is beyond cavil that a statute—in this case, section 10.07 (f)—should "be construed so as to avoid grave doubts concerning its constitutionality" (*Fantis Foods v Standard Importing Co.*, 49 NY2d 317, 327 [1980]).

Here, given the unrefuted testimony from both the State's expert and respondent's expert that the 76-year-old respondent was not unable to control his sexual misconduct, we agree with respondent that the court's contrary determination was without foundation in the record and was thus unsupported by legally sufficient evidence (see generally *George N.*, 160 AD3d at 33-34). Contrary to the court's conclusion, there was no reason to disregard the unanimous expert testimony. Indeed, the court itself remarked that the State "has no case," and its determination to order respondent's confinement notwithstanding that fact was improper and without any legal basis.

Finally, we are compelled to express our deep concern with the trial judge's abandonment of her neutral judicial role in this case by calling a witness, aggressively cross-examining that witness, and repeatedly overruling respondent's objections to such questions. We reiterate that "it is the function of the judge to protect the record at trial, not to make it[, and] the line is crossed when," as here, "the judge takes on either the function or appearance of an advocate at trial" (*People v Arnold*, 98 NY2d 63, 67 [2002]). We therefore direct that the further proceedings in this matter be conducted before a different judge.