

To Be Argued By:
Andrew R. Borelli
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New York Supreme Court

APPELLATE DIVISION — FOURTH DEPARTMENT



In the Matter of the Application of

JUN WANG, M.D.,

Petitioner-Appellant,

For a Judgment Pursuant to CPLR Article 78
and CPLR Section 3001

against

LETITIA JAMES, ATTORNEY GENERAL
OF THE STATE OF NEW YORK,

Respondent-Respondent.

Docket No.
CA 21-01301

REPLY BRIEF FOR PETITIONER-APPELLANT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
QUESTION PRESENTED	1
PRELIMINARY STATEMENT	2
STATEMENT OF FACTS	3
ARGUMENT	4
I. THE STATE’S DETERMINATION DENYING DEFENSE AND INDEMNIFICATION TO DR. WANG UNDER CORRECTION LAW § 24-a IS NOT ENTITLED TO DEFERENCE BECAUSE THE STATE’S INTERPRETATION OF THE STATUTE IS UNREASONABLE	5
A. Undisputed Facts	5
B. The State’s determination denying defense and indemnification should not be accorded any deference because it lacks a sound basis in reason	6
1. Interpretation of Correction Law § 24-a is not ambiguous and does not lend itself to conflicting interpretations.....	8
2. Even considering the State’s understanding of Correction Law § 24-a, the State’s proposed “two-part test” for determining whether a physician performs a medical service at the request of DOCCS does not justify denying defense and indemnification to Dr. Wang.....	12
II. THE STATE’S CONSIDERATION OF THE LEGISLATIVE PURPOSE AND HISTORY OF CORRECTION LAW § 24-a IS UNAVAILING	16

CONCLUSION.....	18
PRINTING SPECIFICATIONS STATEMENT	20

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Blitstein v. Capital Dist. Transp. Auth.</i> , 81 AD2d 981 [3d Dept 1981]	8
<i>Common Cause Indiana v. Lawson</i> , 937 F3d 944 [7th Cir 2019].....	13, 14, 15
<i>Connecticut v. Winer</i> , 286 Conn 666, 945 A2d 430 [2008]	13, 15
<i>Matter of Am. Tr. Ins. Co. v. Corcoran</i> , 105 AD2d 30 [1st Dept 1984], <i>affd</i> 65 NY2d 828 [1985]	8
<i>Matter of Chin v. New York City Bd. of Stds. & Appeals</i> , 97 AD3d 485 [1st Dept 2012], <i>lv denied</i> 19 NY3d 815 [2012].....	7, 9
<i>Matter of Level 3 Communications, LLC v. Chautauqua County</i> , 148 AD3d 1702 [4th Dept 2017], <i>rearg denied</i> 153 AD3d 1675 [4th Dept 2017], <i>lv denied</i> 30 NY3d 913 [2018].....	8
<i>Matter of Nearpass v. Seneca County Indus. Dev. Agency</i> , 152 AD3d 1192 [4th Dept 2017]	7, 8, 9
<i>Matter of O'Brien v. Spitzer</i> , 7 NY3d 239 [2006]	7, 8, 9, 16
<i>Matter of Rowles v. Orsini</i> , 309 AD2d 1307 [4th Dept 2003]	8
<i>Matter of Walker v. State Univ. of N.Y.</i> , 19 AD3d 1058 [4th Dept 2005], <i>lv denied</i> 5 NY3d 713 [2005].....	7

<i>Mulitex USA, Inc. v. Marvin Knitting Mills, Inc.</i> , 12 AD3d 169 [1st Dept 2004].....	11
---	----

Statutes

52 USC § 20507 [a] [3] [A]	13
52 USC § 20507 [d]	14
Correction Law § 24-a	<i>passim</i>
CPLR Article 78.....	4
CPLR § 7803 [3]	7
Indiana Code § 3-7-38.2-5 [d]-[e].....	14
Public Officers Law § 17	14, 16
Statutes § 143	8

Other Authorities

Black’s Law Dictionary [11th ed 2019], ratification.....	12
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QUESTION PRESENTED

1. Is Petitioner Jun Wang, M.D. (Dr. Wang) entitled to representation and indemnification from New York State (the State) pursuant to Correction Law § 24-a in the medical malpractice action commenced in New York State Supreme Court (New York County) by Omar Alvarez, an incarcerated individual in the custody of the New York State Department of Corrections and Community Supervision (DOCCS)?

Yes. Petitioner Jun Wang, M.D. is entitled to representation and indemnification from the State pursuant to Correction Law § 24-a.

PRELIMINARY STATEMENT

Dr. Wang submits this reply brief in further support of his appeal and in opposition to the State's brief.

This Court should reverse the trial court's determination that there was no possible factual or legal basis on which the State eventually might be obligated to indemnify Dr. Wang and that the State's determination denying defense and indemnification for Dr. Wang is entitled to deference. Contrary to the State's position on appeal, Dr. Wang is entitled to the protections of Correction Law § 24-a because DOCCS undisputedly approved R. Wayne Cotie, M.D.'s request for the biopsy at issue (*see* R. at 44, 74, 109, 224-225, 409). Thus, Dr. Wang would not have performed the pathology review if the biopsy had not been approved.

Indeed then, there is a factual and legal basis by which the State is obligated to defend and indemnify Dr. Wang. Therefore, the State's determination is arbitrary and capricious and the trial court erred in denying Dr. Wang's petition seeking such relief.

STATEMENT OF FACTS

Dr. Wang has provided a statement of facts in his initial brief on appeal and respectfully refers the Court to that statement of facts for purposes of this Reply Brief. It is emphasized that there is no dispute that Dr. Cotie, in his capacity as a DOCCS-contracted physician, requested the subject biopsy of the mass on Mr. Alvarez's underarm, which DOCCS approved (*see* R. at 44-45, 74, 82-83, 109, 408-409). Additionally, DOCCS paid the invoice for the services rendered to Mr. Alvarez at Cortland Regional Medical Center in September 2012, including the pathology review at issue in this petition (R. at 505-510).

ARGUMENT

As an initial matter, the State has conceded that the trial court's decision denying Dr. Wang's petition is a judgment that "fully and with prejudice disposed of petitioner's C.P.L.R. article 78 petition" and that the instant appeal has been properly taken (Resp Br at 14-15). Thus, the only issue for this Court to consider is the merits of Dr. Wang's appeal.

To that end, the State has seemingly narrowed its focus on appeal. In rendering its determination on Dr. Wang's tender letter for defense and indemnification, the State discussed both the professional relationship and request elements of Correction Law § 24-a (*see* R. at 636, 639-640). However, on appeal, the State has essentially limited its focus primarily to whether Dr. Wang acted at the request of DOCCS or a DOCCS facility in reviewing the biopsy specimen at issue (*see* Resp Br at 14-31). It has been, and remains, Dr. Wang's position that, based on DOCCS approval of the biopsy Dr. Cotie requested, he performed the pathology review at the request of DOCCS.

Therefore, the analysis in this reply brief stems from the State's response to Dr. Wang's argument that the biopsy is indivisible, and cannot be separated, from the pathology review,

"Not so. The most this line of reasoning shows is that DOCCS arguably can be said to have requested that the specimen taken from Alvarez's arm be reviewed by *some* pathologist. It does not show that DOCCS requested that

the specimen be reviewed by *petitioner in particular*, as Correction Law § 24-a requires in order for petitioner to be eligible for state-provided defense and indemnification” (Resp Br at 27 [emphasis in original]).

Thus, the State does not really dispute Dr. Wang’s contention that the biopsy and pathology review are indivisible (*see* App Br at 14; Resp Br at 26). Rather, the State side-steps Dr. Wang’s argument on this point by offering only that Correction Law § 24-a is inapplicable because DOCCS did not specifically ask Dr. Wang to perform the pathology review. For the reasons that follow, such an interpretation is unreasonable.

I. THE STATE’S DETERMINATION DENYING DEFENSE AND INDEMNIFICATION TO DR. WANG UNDER CORRECTION LAW § 24-a IS NOT ENTITLED TO DEFERENCE BECAUSE THE STATE’S INTERPRETATION OF THE STATUTE IS UNREASONABLE.

Contrary to the State’s position (Resp Br at 14-31), the State’s determination is not entitled to deference because it is undisputed that DOCCS approved Dr. Cotie’s request for a biopsy of Mr. Alvarez’s underarm mass to determine the presence or absence of malignancy. That biopsy is meaningless without a pathology review. Therefore, the State’s interpretation of Correction Law § 24-a is unreasonable and must be disregarded by this Court.

A. Undisputed Facts

The following relevant facts are undisputed:

1. Mr. Alvarez was an incarcerated individual in DOCCS custody at the time of the events in question (*see generally* R. at 40-45);
2. Dr. Cotie, who treated Mr. Alvarez in his capacity as a DOCCS-contracted physician, exercised his medical judgment in determining that a biopsy of Mr. Alvarez's underarm was warranted, and requested the biopsy (R. at 45, 63-64, 658-660);
3. DOCCS approved the biopsy (*see* R. at 44, 74, 109, 224-225, 409);
4. A biopsy cannot be completed without a pathology review (*see* R. at 188-189 [Dr. Cotie noted that the purpose of the biopsy was to obtain a specimen to be examined for the presence or absence of a malignancy and that he would rely on the pathologists to inform him of the histological and hepatological findings from the specimen]); and
5. DOCCS paid the invoice for the subject pathology services provided by Dr. Wang at Cortland Regional Medical Center (*see* R. at 505-510).

B. The State's determination denying defense and indemnification should not be accorded any deference because it lacks a sound basis in reason.

The State's determination denying defense and indemnification to Dr. Wang is not entitled to deference because it involves a matter of pure statutory interpretation, is unreasonable, and amounts to elevating form over substance.

Generally, “[j]udicial review of an administrative determination is limited to whether the administrative action is arbitrary and capricious or lacks a rational basis” (*Matter of Walker v State Univ. of N.Y.*, 19 AD3d 1058, 1059 [4th Dept 2005] [citations and internal quotation marks omitted], *lv denied* 5 NY3d 713 [2005]; *see generally* CPLR 7803 [3]). Concerning issues of statutory interpretation, courts generally do not defer to administrative agencies in matters of “pure statutory interpretation” unless the question is one involving “specific application of a broad statutory term” (*Matter of O’Brien v Spitzer*, 7 NY3d 239, 242 [2006] [citations and internal quotation marks omitted])

Furthermore, “the correct interpretation of a statute is ordinarily an issue of law for the courts to decide” unless “the statutory language suffers from some fundamental ambiguity” in which case “courts should defer to the interpretation of the agency charged with administering the statute” (*Matter of Chin v New York City Bd. of Stds. & Appeals*, 97 AD3d 485, 487 [1st Dept 2012], *lv denied* 19 NY3d 815 [2012]). In cases where there is such room for ambiguity in the interpretation of a statute, the administrative agency’s determination is entitled to great deference, “and must be upheld as long as it is reasonable” (*Matter of Nearpass v Seneca County Indus. Dev. Agency*, 152 AD3d 1192, 1193 [4th Dept 2017] [citations and internal quotation marks omitted]; *see generally* *Matter of*

O'Brien, 7 NY3d at 242). Put differently, if the agency’s determination is not reasonable, it should not be upheld (*cf. Matter of Nearpass*, 152 AD3d at 1193).

Although dictionaries may be “useful guideposts” in determining the meaning of a word or phrase in a statute when the interpretation of the statute turns on the definitions of words not defined in the statute itself (*see Matter of Level 3 Communications, LLC v Chautauqua County*, 148 AD3d 1702, 1704 [4th Dept 2017] [citations and internal quotation marks omitted], *rearg denied* 153 AD3d 1675 [4th Dept 2017], *lv denied* 30 NY3d 913 [2018]), a court must still afford a “reasonable interpretation” of the statutory language (*Matter of Rowles v Orsini*, 309 AD2d 1307, 1308 [4th Dept 2003]; *see* Statutes § 143 [noting that “(g)enerally, statutes will be given a reasonable construction, it being presumed that a reasonable result was intended by the Legislature”]). To that end, form should not be elevated over substance in interpreting a statute (*see generally Matter of Am. Tr. Ins. Co. v Corcoran*, 105 AD2d 30, 31-32 [1st Dept 1984], *affd* 65 NY2d 828 [1985]; *Blitstein v Capital Dist. Transp. Auth.*, 81 AD2d 981, 981 [3d Dept 1981]).

1. Interpretation of Correction Law § 24-a is not ambiguous and does not lend itself to conflicting interpretations.

Here, this case involves a matter of pure statutory interpretation and the phrase “at the request of [DOCCS] or a facility of [DOCCS]” (Correction Law § 24-a) does not suffer from ambiguity or lend itself to conflicting interpretations

(see *Matter of Nearpass*, 152 AD3d at 1193; *Matter of Chin*, 97 AD3d at 487).

Even if this provision in Correction Law § 24-a is considered to lend itself to conflicting interpretations and therefore, involves a specific application of a broad statutory term such that the State would typically be afforded deference (see generally *Matter of O'Brien*, 7 NY3d at 242; *Matter of Nearpass*, 152 AD3d at 1193), the State's determination is nevertheless unreasonable and amounts to elevating form over substance for the reasons that follow.

As an initial matter, the interpretation of Correction Law § 24-a is a matter of simple logic and therefore, is a matter of pure statutory interpretation for this Court. To illustrate, a physician cannot be acting at the request of DOCCS or a DOCCS facility if DOCCS (or the facility) has not requested or approved the medical procedure or service for an incarcerated individual. By extension, where a physician's services are a necessary component of a DOCCS-requested or approved medical procedure or service (e.g., pathology and radiology), then the physician performing that necessary component of the medical procedure or service must be considered as acting at the request of DOCCS. To consider otherwise is illogical because the physician would not have become involved in the treatment of the incarcerated individual had DOCCS not requested or approved the procedure or service in the first instance.

Here, Dr. Wang should be considered as acting at the request of DOCCS when he reviewed Mr. Alvarez's biopsy specimen that Dr. Cotie removed on September 10, 2012. There is no dispute that DOCCS—through its contracted surgeon Dr. Cotie whom the State represented in the medical malpractice action—requested the biopsy to investigate the nature of the mass in Mr. Alvarez's underarm (*see* R. at 45, 114). The biopsy is meaningless without a pathology review as confirmed by Dr. Cotie when he testified that the purpose of the biopsy was to determine the presence or absence of malignancy, which requires a pathology review to complete (*see* R. at 188-189).

Based on DOCCS' undisputed approval of the biopsy, Dr. Cotie excised the mass at Cortland Regional Medical Center and sent it to the pathology laboratory to determine the presence or absence of malignancy (*see* R. at 44-45, 74, 109, 113-115, 224-225, 409, 480-481s). Indeed, Dr. Wang would not have performed the pathology review if Dr. Cotie had not sent the biopsy specimen to the pathology laboratory and therefore, there can be no dispute that, had DOCCS not requested and/or approved the biopsy, Dr. Wang would not have performed the subject pathology review. Thus, when DOCCS approved Dr. Cotie's request for the biopsy, it must be said to have requested and approved the accompanying pathology review because the biopsy and pathology review are indivisible, a point which the State arguably concedes on appeal (*see* Resp Br at 26-27).

In fact, the State's response to Dr. Wang's argument regarding the indivisibility of the biopsy and pathology review highlights that the State is elevating form over substance in denying defense and indemnification to Dr. Wang. The State acknowledges that, while DOCCS arguably can be said to have requested that the specimen taken from Mr. Alvarez's arm be reviewed by some pathologist, Dr. Wang is not entitled to defense and indemnification since DOCCS did not ask him specifically to perform the pathology review (*see id.* at 27). Indeed, to reach this conclusion creates an inconsistent result where DOCCS has requested and approved a medical service or procedure for the incarcerated individual, but simultaneously holds that the professional is not entitled to defense and indemnification unless DOCCS had asked the specific professional to perform the service. That result is, quite simply, unreasonable. It would allow the State to avoid liability for DOCCS-approved services by simply not asking a specific professional to perform the service. As such, the State's interpretation of Correction Law § 24-a should not be given deference by this Court.

Further lending credence to Dr. Wang's position is the fact that DOCCS paid the invoice for Dr. Wang's pathology review (*see R.* at 505-510). That amounts to ratification of the pathology review performed by Dr. Wang (*see generally Mulitex USA, Inc. v Marvin Knitting Mills, Inc.*, 12 AD3d 169, 170 [1st Dept 2004] [in applying principles of contract law, partial payment of invoices constituted

ratification of the subject agreements]). Ratification is defined in pertinent part, as “[a]doption or enactment, esp. where the act is the last in a series of necessary steps or consents” and “[c]onfirmation and acceptance of a previous act, thereby making the act valid from the moment it was done” (Black’s Law Dictionary [11th ed 2019]). Therefore, DOCCS’ act of paying the invoice for the subject pathology review must be seen as an adoption or acceptance of Dr. Wang’s review of the biopsy specimen.

Based on the foregoing, the only reasonable interpretation of Correction Law § 24-a is that Dr. Wang was acting at the request of DOCCS in performing Mr. Alvarez’s pathology review and is therefore entitled to defense and indemnification from the State. Accordingly, the State’s interpretation of Correction Law § 24-a—no matter how much deference is given—is unreasonable and this Court should annul the trial court’s determination.

2. Even considering the State’s understanding of Correction Law § 24-a, the State’s proposed “two-part test” for determining whether a physician performs a medical service at the request of DOCCS does not justify denying defense and indemnification to Dr. Wang.

Even considering the State’s interpretation of Correction Law § 24-a, the State’s proposed “two-part test” to determine whether a physician performs a medical service at the request of DOCCS does not reasonably lead to the State’s (and trial court’s) decision denying defense and indemnification. Therefore, this Court should decline to uphold the State’s interpretation of Correction Law § 24-a.

In applying its definition that “at someone’s request” means “upon being asked by someone,” the State essentially adopts a two-part test based on law outside New York State to justify its determination that Dr. Wang’s pathology review was not performed at the request of DOCCS as required under Correction Law § 24-a (*see* Resp Br at 21-24; *Common Cause Indiana v Lawson*, 937 F3d 944 [7th Cir 2019]; *Connecticut v Winer*, 286 Conn 666, 945 A2d 430 [2008]). The State’s proposed test requires the following elements: (1) that the request must be made to the specific individual whose services are sought; and (2) that the ask must be explicit (*see* Resp Br at 21-24). Aside from the fact that these cases are not binding on this Court and are not based on New York law, this test fails to justify the State’s determination that Dr. Wang is not entitled to defense and indemnification under Correction Law § 24-a.

In *Common Cause*, the Seventh Circuit upheld a preliminary injunction preventing enforcement of Indiana’s attempt to remove a registrant from the voter rolls based on information from which it can infer that the registrant has become ineligible (*see* 937 F3d at 962-963). However, the National Voter Registration Act (NVRA) requires removal from the voter rolls to be made at the request of the registrant (*see* 52 USC § 20507 [a] [3] [A]; *Common Cause*, 937 F3d at 960-961). In fact, the NVRA provides detailed and specific instructions on how a registrant is removed from the voter rolls, including among other requirements, either a written

request from the registrant or a notice from the state to the registrant (52 USC § 20507 [d]). Despite the detailed instructions on how to establish “at the request of the registrant,” Indiana promulgated a statute allowing a removal of a voter from the state’s voting rolls based on a third-party database notice of a voter’s registration in another jurisdiction (*see* Indiana Code § 3-7-38.2-5 [d]-[e]; *Common Cause*, 937 F3d at 946). The court held that drawing an inference of voter ineligibility based on a third-party notice fails to comply with the NVRA because it is “neither a request for removal nor is it from the registrant” (*Common Cause*, 937 F3d at 960).

Contrary to the State’s argument, *Common Cause* is distinguishable from the instant matter. The court’s determination in *Common Cause* that “at the request of the registrant” entailed a direct contact with the voter, was not a stand-alone requirement but was based on the specific provisions in the NVRA that require direct contact with the voter to remove one’s name from the voting rolls.

Here, unlike the NVRA in *Common Cause*, the plain language of Correction Law § 24-a does not require that DOCCS communicate directly and/or personally with the professional to determine that the professional is acting at DOCCS’ request in providing services to an incarcerated individual. Rather, the statute simply extends the protections of Public Officers Law § 17 to

“any person holding a license to practice [medicine] . . . ,
who is rendering or has rendered professional services

authorized under such license while acting at the request of [DOCCS] or a facility of [DOCCS] in providing health care and treatment or professional consultation to incarcerated individuals of state correctional facilities” (Correction Law § 24-a).

Furthermore, to conclude otherwise, as the State does, creates an inconsistent result and amounts to elevating form over substance as discussed in Point I.B.1 above.

Therefore, the first prong of the State’s purported two-prong test—based on *Common Cause*—is inapplicable to Correction Law § 24-a.

Turning to the second prong of the State’s proposed test, it is arguable that DOCCS overtly asked for the pathology review as the State alleges is required by the *Winer* case. In *Winer*, the Supreme Court of Connecticut reversed the mid-level appellate court’s decision and determined that the prosecuting attorney’s statement that the case was “going to remain on the firm trial list” was not an overt act of asking for a continuance as required by the relevant Connecticut statute (*see* 286 Conn at 677-678, 687). The court also reasoned that the attorney’s statement was not a request because there was no affirmative action taken by the court in granting a continuance of the case (*see id.* at 678).

Here, Dr. Cotie—who was undisputedly treating Mr. Alvarez as a DOCCS-contracted surgeon—requested and performed the DOCCS-approved biopsy of Mr. Alvarez’s underarm and sent the excised specimen to the pathology laboratory for review. Thus, although there is no evidence that DOCCS communicated directly

with Dr. Wang, the delivery of the specimen to the pathology laboratory was an overt act of asking for the review without which Dr. Wang would not have provided the service (*see* R. at 115-116, 188-189).

Therefore, based on the foregoing analysis and for the reasons stated in Point I.B.1 above, this Court should reverse the trial court's determination and determine that Dr. Wang is entitled to defense and indemnification from the State pursuant to Correction Law § 24-a.

II. THE STATE'S CONSIDERATION OF THE LEGISLATIVE PURPOSE AND HISTORY OF CORRECTION LAW § 24-a IS UNAVAILING.

The State's contention that the legislative purpose and history of Correction Law § 24-a supports its interpretation of the statute is unavailing.

It is true that, per the Court of Appeals, "[t]he purpose of Public Officers Law § 17 is, in essence, to provide insurance against litigation" (*Matter of O'Brien*, 7 NY3d at 243). Based on that principle, the State argues that "[t]he concept of insurance presupposes that the insurer has had the opportunity to vet its potential insureds and determine whether they present a tolerable risk from a cost-benefit standpoint" (Resp Br at 28). However, that argument is misleading and unavailing because, unless the State is suggesting that it vets all of its employees as potential insureds upon hire, the State under Public Officers Law § 17 has no choice but to defend and indemnify its employees regardless of risk.

Furthermore, the State's argument that the scale of potential payouts is further evidence that the legislature intended Correction Law § 24-a to apply only to those individuals who provide professional healthcare services after being vetted by the State, is also unavailing (Resp Br at 29). If the Legislature was truly concerned about the "indeterminable additional fiscal implications" for the State in defending and indemnifying a physician in Dr. Wang's position, it could have limited Correction Law § 24-a to those professionals who maintained a formal contractual relationship with DOCCS or those professionals specifically identified and selected by DOCCS to treat incarcerated individuals. Instead, the Legislature chose to use the term "any person," licensed to practice medicine (among other professions) who provide professional services to incarcerated individuals at the request of DOCCS or a DOCCS facility, to describe the individuals entitled to defense and indemnification from the State. As such, the Legislature's concern about the potential cost in promulgating Correction Law § 24-a should not be persuasive for this Court.

In any event, contrary to the State's position (*see* Resp Br at 30-31), Dr. Wang's interpretation of Correction Law § 24-a would not encompass all physicians who provide medical services to incarcerated individuals. Dr. Wang's argument is simply that, where the physician's services are a necessary, indivisible component for a DOCCS-employed or affiliated physician to diagnose and treat an

incarcerated individual (e.g., pathology and radiology), then the State should defend and indemnify that physician who provided those indivisible ancillary services. To determine otherwise would unreasonably and unfairly expose these ancillary medical providers (e.g., pathologist and radiologists) to liability based on DOCCS-approved treatment.

Finally, whether Dr. Wang was aware of Mr. Alvarez's status as DOCCS inmate (*see id.*) is irrelevant because there is nothing in the plain language of Correction Law § 24-a that suggests a physician must have personal knowledge that the person he or she is treating is a DOCCS inmate. Instead, the language, as relevant here, simply requires that the individual receiving the physician's services be an inmate. There is no dispute that Mr. Alvarez meets that requirement here.

Therefore, the legislative purpose and history of Correction Law § 24-a does not support the State's interpretation of the statute and this Court should not defer to the State's determination.

CONCLUSION

In light of the foregoing, this Court should reverse the trial court's decision denying Dr. Wang's petition, annul the New York State Attorney General's determination, and find that Dr. Wang is entitled to defense and indemnification from New York State in the Supreme Court medical malpractice action.

Dated: February 22, 2022
Fayetteville, New York

Respectfully submitted,

A handwritten signature in cursive script that reads "Andrew R. Borelli". The signature is written in black ink and is positioned above a horizontal line.

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PRINTING SPECIFICATIONS STATEMENT

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