To Be Argued By: BRIAN D. GINSBERG
Time Requested: 15 MINUTES

Supreme Court of the State of New York
Appellate Division – Fourth Department

IN THE MATTER OF JUN WANG, M.D.,

Petitioner-Appellant,

v.

Case No. CA 21-01301

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

Respondent-Respondent.

BRIEF FOR RESPONDENT

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MISCELLANEOUS

PRELIMINARY STATEMENT

During the time period relevant to this case, petitioner Dr. Jun Wang worked as a pathologist at Cortland Regional Medical Center. In the ordinary course of that work, he was assigned to review a specimen taken from a mass on the right armpit of Omar Alvarez, a New York State Department of Corrections and Community Supervision ("DOCCS") inmate. Petitioner diagnosed the mass as benign, but it was later found to be malignant. Alvarez brought a medical malpractice suit.

Petitioner submitted a request to respondent Letitia James, the New York State Attorney General, for the State to provide for his legal defense in the *Alvarez* case and indemnify him in the event of an adverse judgment, claiming that he was entitled to such defense and indemnification under Correction Law § 24-a. Respondent issued a determination denying the request, finding no evidence that petitioner undertook his review of the Alvarez specimen "while acting at the request of [DOCCS] or a facility of [DOCCS]" as the statute requires. Petitioner filed a C.P.L.R. article 78 petition in Supreme Court, Onondaga County challenging the determination, but the court (Greenwood, J.) denied relief. Petitioner then initiated the present appeal.

This Court should affirm. As Supreme Court observed, deference is due respondent's determination that petitioner is not entitled to defense and indemnification at state expense in *Alvarez* under Correction Law § 24-a because the determination entailed the application, to a specific set of facts, of a term in a statute that respondent is charged with administering. The determination therefore should be upheld so long as it is rational. Supreme Court correctly found that the determination is indeed rational. And in any event, as the court further concluded, the determination is fully correct and thus would be properly upheld under the legal standard that would apply were deference not due. Namely, there is no possible factual or legal basis upon which petitioner could be found to have performed his pathology review of the Alvarez underarm mass "while acting at the request of [DOCCS] or a facility of [DOCCS]," as § 24-a requires.

QUESTION PRESENTED

Did Supreme Court properly uphold respondent's determination that petitioner is not entitled to defense and indemnification at state expense in *Alvarez* under Correction Law § 24-a?

STATEMENT OF THE CASE

A. The Legislature Enacts Correction Law § 24-a, Entitling Certain Persons Who Perform Work For DOCCS To Defense And Indemnification At State Expense In Lawsuits Filed Against Them.

At common law, when people who work for the State of New York are sued for damages based upon acts they performed while doing that work, they must provide for their own legal defense and must pay any ultimate judgment out of their own pocket. *See Olmstead v. Britton*, 48 A.D.2d 536, 538 (4th Dept. 1975). Over time, the Legislature has enacted a variety of exceptions to this common-law rule. In 1978, the Legislature overhauled the exceptions then on the books and consolidated them into a handful of statutes, including two that are particularly relevant here: Public Officers Law § 17, L. 1978, ch. 466, sec. 1, and Correction Law § 24-a, L. 1978, ch. 466, sec. 4.

Public Officers Law § 17 applies to state workers who are "employees" of the State within the meaning of the statute. If a state employee is sued for damages based upon allegedly negligent conduct in which the employee engaged while acting within the scope of employment, then the State shall provide for the employee's legal defense, either by causing the Attorney General to handle the defense or

by paying outside counsel to do so. *Id.* § 17(2). Further, if the employee is found liable for the alleged negligence, the State shall indemnify him or her for any damages awarded. *Id.* § 17(3). Requests for defense and indemnification are to be made to the Attorney General and must satisfy various procedural requirements. *Id.* § 17(4).

Contemporaneously with Public Officers Law § 17, the Legislature enacted Correction Law § 24-a. Correction Law § 24-a makes the framework of Public Officers Law § 17 applicable to certain persons who perform work for DOCCS without regard to whether their relationship with the State is one of employee-employer. Specifically, under Correction Law § 24-a:

> The provisions of section seventeen of the public officers law shall apply to any person holding a license to practice a profession pursuant to [one or more of several articles of the Education Law covering healthcare professionals, including the article covering physicians], 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 . . . without regard to whether such health care and treatment or professional consultation is provided within or without a correctional facility.

The legislation that created Public Officers Law § 17 and Correction Law § 24-a was sponsored in the Senate by Senator H. Douglas Barclay and in the Assembly by that body's Rules Committee.

In a supporting memorandum, Senator Barclay observed that "[t]he performance of public responsibilities often involves exposure to risks which involve major loss or damage due to accidental circumstances." Senate Introducer's Mem. in Support at 2, Bill Jacket, L. 1978, ch. 466. "The public interest is served if officers and employees are free to carry out their official duties without fear that a claim or cause of action for negligence may arise which threatens to impair or destroy their individual security and solvency." *Id.* at 2-3. The defense and indemnification obligations contained in the subject legislation would "afford[] this kind of protection," the Senator's memorandum advised. *Id.*

Senator Barclay did not deny—and the Assembly sponsor's memorandum expressly acknowledged—that affording such protection could have "indeterminable additional fiscal implications" for the State. Assembly Introducer's Mem. in Support at 1, Bill Jacket, L. 1978, ch. 466. As one of the agencies urging passage of the legislation cautioned: "The program [of mandatory defense and indemnification at state expense]

may be costly" and "could have significant budgetary implications." Letter from Office of General Services at 1, Bill Jacket, L. 1978, ch. 466.

B. Petitioner Diagnoses As Benign A Mass Under DOCCS Inmate Alvarez's Arm That Is Later Found To Be Malignant.

Omar Alvarez has been incarcerated in DOCCS custody since 1996. (R. 29.) In May 2012, while housed at Auburn Correctional Facility, he complained to a nurse there about a mass on his right armpit. (R. 43, 378-381.) The nurse referred Alvarez to one of the facility's doctors, who performed a physical examination. (R. 43, 381-382.) Following the examination, the doctor opined that Alvarez needed a surgical evaluation and arranged for him to attend a surgical clinic held once a month at Auburn by Dr. Robert Wayne Cotie. (R. 43, 45, 75.)

Dr. Cotie was a general surgeon in private practice. (R. 56, 78-79.) Pursuant to a contract with DOCCS, he agreed to provide general surgical services to persons incarcerated at Auburn (via the aforementioned monthly clinic) as well as persons incarcerated at several other correctional facilities in Central New York. (R. 73-75, 658-660.) Dr. Cotie would submit to DOCCS invoices for services rendered, and would receive reimbursement accordingly. (R. 659.) Dr. Cotie obtained his contractual agreement with DOCCS by submitting an application that

set forth, among other things, his qualifications for the work. (R. 73.) Under the contract, Dr. Cotie was required to "at all times . . . remain responsible." (R. 660.) DOCCS reserved the right to suspend the agreement if it found evidence calling Dr. Cotie's "responsibility" into question, and to terminate the agreement if it determined he was "non-responsible." (R. 660.)

In August 2012, during an Auburn clinic session, Dr. Cotie examined Alvarez and concluded that he should undergo a biopsy, *i.e.*, that the underarm mass or a portion thereof should be removed. (R. 45, 95-96.) Dr. Cotie submitted a recommendation to that effect to Dr. Pang Kooi, Auburn's health service director. (R. 45, 81-83, 209, 397.) Dr. Kooi approved the recommendation and forwarded it to the DOCCS central office in Albany. (R. 223-224.) Central office personnel gave the requisite final approval and scheduled the procedure for September 2012 at Cortland Regional Medical Center, an outside hospital. (R. 44, 74, 224-225, 409.)

On the scheduled date, Dr. Cotie performed the operation. (R. 44, 456-457.) He removed a portion of the mass and sent the specimen to the hospital's pathology laboratory for review. (R. 113-115.)

The pathology laboratory was run by Cortland Pathology—a corporation that employed two pathologists, including petitioner—on a contract basis. (R. 684, 754-756, 871-884.) Under the contract, Cortland Pathology was responsible for providing pathology services that included histopathology, the diagnosis and study of diseases of the body's tissues. (R. 872.) The company was required to make at least one of its pathologists available and on duty at any given time. (R. 872-873.) In return for its services, the company was paid a flat monthly fee. (R. 813, 877.) There is no evidence that DOCCS had any input regarding the formation of Cortland Pathology's contract with the hospital or the corporation's performance thereunder.

Cortland Pathology's custom and practice was to have each incoming specimen routed to one of its two pathologists—either petitioner or his co-employee—for review. (R. 763-764.) When the specimen removed from under Alvarez's right arm arrived at the pathology laboratory, it was routed to petitioner. (R. 869-870.) As far as the record indicates, this assignment was random. In particular, there is no evidence that Dr. Cotie, anyone affiliated with Auburn Correctional

Facility, or anyone affiliated with DOCCS asked for petitioner in particular to be the reviewer.[1]

Petitioner studied the specimen, as well as the results of specialized tests he ordered performed on the specimen at another hospital. (R. 737-738, 772, 869-870.) Based upon that review, petitioner concluded that Alvarez was suffering from lymphoid hyperplasia, a condition characterized by an unusually large number of normal, healthy cells in the lymph nodes. (R. 869.) Lymphoid hyperplasia is benign. (R. 120.)

Cortland Regional Medical Center sent DOCCS a bill for the services rendered to Alvarez, including the pathology review of the specimen removed from Alvarez's underarm mass. (R. 506-507.) DOCCS paid the bill accordingly. (R. 509-510.)

In 2013, just over a year after Alvarez underwent the biopsy, the mass under his right arm had grown back. (R. 181-183.) Alvarez made another visit to the Auburn Correctional Facility on-site surgery clinic

[1] In the answer filed in Supreme Court, respondent asserted that Dr. Cotie affirmatively testified that he did not ask for petitioner to be the reviewing pathologist. (*See* R. 650.) That assertion was incorrect. Although there is no testimony from Dr. Cotie that he *did* ask for petitioner's involvement, there is also no testimony from Dr. Cotie that he *did not* ask for it. Respondent regrets the error.

held by Dr. Cotie, who recommended another biopsy. (R. 183.) Ultimately, Alvarez was admitted to the State University of New York Upstate Medical Center, where he was diagnosed with lymphoma, a malignant condition. (R. 185-186.)

C. Alvarez Files A Medical Practice Suit, And Respondent Issues A Determination That Petitioner Is Not Entitled To State-Provided Defense And Indemnification Under Correction Law § 24-a.

In 2015, Alvarez filed a complaint against Dr. Kooi, Dr. Cotie, and Cortland Regional Medical Center in Supreme Court, New York County. (R. 28-38.) In that case, styled *Alvarez v. Kooi*, Index No. 805085/2015, Alvarez alleged that Dr. Kooi, Dr. Cotie, and Cortland Regional Medical Center (through its agents, servants, and employees) negligently failed to detect his lymphoma in a timely fashion and likewise failed to treat it properly. (R. 31-35.) Alvarez sought compensatory damages in an amount to be determined by a jury. (R. 35.)

In March 2021, Cortland Regional Medical Center filed a third-party complaint in *Alvarez* against petitioner and Cortland Pathology. (R. 514-526.) In the complaint, the hospital alleged that any failure to timely diagnose Alvarez's lymphoma was the fault of petitioner and Cortland Pathology. (R. 519-524.) The hospital asserted that any

damages awarded against the hospital should therefore be assigned, in full, to petitioner and Cortland Pathology. (R. 519-524.)

Later in March 2021, petitioner wrote to respondent requesting that the State provide for his legal defense in the *Alvarez* action and indemnify him for any damages ultimately assessed against him. (R. 633-634, 637-638.) Petitioner claimed that defense and indemnification at state expense were statutorily required. He did not contend that he was an "employee" to whom the provisions of Public Officers Law § 17 applied, however. Rather, he asserted that those provisions nevertheless applied to him by virtue of Correction Law § 24-a, because, in his view, he performed the pathology review of Alvarez's underarm mass "while acting at the request of [DOCCS] or a facility of [DOCCS]" within the meaning of that statute. (R. 637-638.) Thus, according to petitioner, by virtue of Correction Law § 24-a the provisions of Public Officers Law § 17 applied to him, and those provisions were satisfied. (R. 633.)

Respondent issued a determination denying petitioner's request. (R. 639-640.) She concluded that petitioner was not entitled to defense and indemnification at state expense because, as a threshold matter, he did not undertake his review of Alvarez's underarm mass "while acting

at the request of [DOCCS] or a facility of [DOCCS]" as Correction Law § 24-a requires. (R. 639.) Respondent explained: "The plain language of the statute makes clear that DOCCS has to directly request a physician to undertake an act or service in order to activate the extraordinary protections, and [s]tate monies and resources, afforded under Corrections Law 24-a and POL 17." (R. 639.) But, according to respondent's records, "DOCCS had no such communication with [petitioner], ever." (R. 639.) In particular, "DOCCS never hired [petitioner] or asked [him] to review the inmate's biopsy specimen at Cortland Hospital." (R. 639.) "The mere fact that the patient from whom the specimen originated was an inmate, does not render [petitioner] . . . entitled to State defense or indemnification for that pathology interpretation." (R. 639.)

D. Supreme Court Upholds Respondent's Determination Denying Petitioner State-Provided Defense And Indemnification In The *Alvarez* Action.

In May 2021, petitioner commenced this case by filing a C.P.L.R. article 78 petition against respondent in Supreme Court, Onondaga County, seeking to annul the determination denying state-provided defense and indemnification in the *Alvarez* medical malpractice case. (R. 14-25.) Petitioner contended that the determination was legally

erroneous, arbitrary and capricious, and an abuse of discretion.[2] (R. 15.) Supreme Court (Greenwood, J.) issued a decision and order denying relief. (R. 5-13.)

Supreme Court held that respondent's determination was deserving of deference. (R. 12.) Respondent is responsible for determining whether the State is required under Correction Law § 24-a to provide for a person's defense in a civil suit and to indemnify the person in the event of an adverse damages judgment, the court observed. (R. 12.) Accordingly, deference was appropriate because, in this case, respondent's determination hinged on the application, to a specific set of facts, of a term in that statute: the phrase "while acting at the request of [DOCCS] or a facility of [DOCCS]." (R. 12.) The court observed that the determination therefore had to be upheld so long as it was rational, which, the court found, it was. (R. 12.)

Supreme Court further concluded that, in any event, the determination was properly upheld under the legal standard that would apply were deference not due, because there was no possible factual or

[2] Petitioner also sought a declaratory judgment that he was entitled to state-provided defense and indemnification in *Alvarez*. (R. 15, 24.) However, he subsequently withdrew this request. (R. 6.)

legal basis upon which the State might be obligated to provide for petitioner's defense, or to indemnify him, in the *Alvarez* case. (R. 11-12.) By making the provisions of Public Officers Law § 17 applicable to licensed healthcare professionals performing authorized services "while acting at the request of [DOCCS] or a facility of [DOCCS]," Correction Law § 24-a extends coverage to persons who work for DOCCS as independent contractors, the court stated. (R. 11-12.) But petitioner did not fit that description. (R. 12.) The court further opined that holding Correction Law § 24-a applicable to petitioner "would extend section 17 coverage to any medical provider who provides services to any inmate in any capacity"—an unacceptable result. (R. 12.)

This appeal followed. (R. 2-3.1.)

ARGUMENT

SUPREME COURT PROPERLY UPHELD RESPONDENT'S DETERMINATION THAT PETITIONER IS NOT ENTITLED TO DEFENSE AND INDEMNIFICATION AT STATE EXPENSE IN *ALVAREZ* UNDER CORRECTION LAW § 24-A

Respondent agrees with petitioner (Br. 6-9) that Supreme Court's decision and order, though not denominated a judgment, nevertheless is a judgment insofar as it fully and with prejudice disposed of petitioner's

C.P.L.R. article 78 petition. Specifically, the court "ORDERED that the relief sought in the petition is denied." (R. 13.) Thus, the present appeal has been properly taken. However, as explained in more detail below, the appeal is without merit. Supreme Court's judgment should be affirmed.

A. Respondent's Determination Is Entitled To Deference.

Supreme Court properly recognized that respondent's determination denying petitioner's request under Correction Law § 24-a for defense and indemnification at state expense in the *Alvarez* medical malpractice action is entitled to deference. Supreme Court's decision and order upholding the determination should therefore be affirmed so long as this Court finds the determination rational.

Not all administrative agency determinations are entitled to deference on judicial review. For example, "as a general rule courts will not defer to administrative agencies in matters of 'pure statutory interpretation.'" *Matter of O'Brien v. Spitzer*, 7 N.Y.3d 239, 242 (2006) (quoting *Matter of KSLM-Columbus Apts., Inc. v. New York State Div. of Hous. & Community Renewal*, 5 N.Y.3d 303, 312 (2005)). However, "deference is appropriate 'where the question is one of specific application of a broad statutory term'" in a statute that the relevant agency is

charged with administering. *Id.* (quoting *Matter of American Telephone & Telegraph Co. v. State Tax Commn.*, 61 N.Y.2d 393, 400 (1984)); *accord Matter of Nearpass v. Seneca County Indus. Dev. Agency*, 152 A.D.3d 1192, 1193 (4th Dept. 2017).

As Supreme Court correctly concluded, that is the type of question presented here. There is no dispute that respondent is the governmental official responsible for determining whether, under Correction Law § 24-a, an individual sued in a civil action is entitled to a state-provided legal defense and to indemnification by the State in the event of an adverse damages judgment. And the particular determination here, in which respondent found that petitioner was not entitled to defense and indemnification at state expense in *Alvarez*, hinged on the application, to the specific facts at hand, of a term in that statute: the phrase "while acting at the request of [DOCCS] or a facility of [DOCCS]." (R. 639-640.) Deference is therefore warranted.

Contrary to petitioner's contention (Br. 15-16), this case is directly analogous to *Matter of O'Brien*, cited above, in which the Court of Appeals deferred to a similar Attorney General determination. There, an attorney was appointed by a New York state court to serve as a referee supervising

the sale of property in foreclosure. 7 N.Y.3d at 241. The owner of the property sued the attorney for damages, alleging that the foreclosure and sale violated his constitutional rights. *Id.* The attorney requested defense and indemnification at state expense under Public Officers Law § 17, but the Attorney General denied the request. *Id.* The Attorney General determined that, as a threshold matter, the attorney was not an "employee" within the meaning of the statute so the statute's defense-and-indemnification rubric did not apply. *Id.* The Court of Appeals upheld the determination, finding it entitled to deference because it entailed the "specific application of a broad statutory term" in a statute that the Attorney General was charged with administering. *Id.* at 242.

The same rationale applies here. As in *Matter of O'Brien*, the Attorney General determined that petitioner was not entitled to defense and indemnification at state expense. As in *Matter of O'Brien*, that determination hinged upon what the Attorney General found was a failure to satisfy the relevant threshold prerequisite for the rubric of Public Officers Law § 17 to apply. As in *Matter of O'Brien*, that threshold finding entailed the application, to the facts at hand, of a specific statutory term—here, the phrase "while acting at the request of [DOCCS]

or a facility of [DOCCS]" in Correction Law § 24-a, and there, the word "employee" in Public Officers Law § 17 itself. Thus, as in *Matter of O'Brien*, deference is due.

Matter of O'Brien controls notwithstanding that respondent does not claim any institutional "expertise" (Br. 16) in determining whether licensed healthcare professionals are doing their work "while acting at the request of [DOCCS] or a facility of [DOCCS]" under Correction Law § 24-a. There was no analogous expertise involved in *Matter of O'Brien*, either. The Court of Appeals did not tie the deference it gave the Attorney General's determination in that case to any institutional expertise the Attorney General may have had in determining whether a state worker was an "employee" under Public Officers Law § 17. Deference was given in *Matter of O'Brien* because the Attorney General's determination entailed the application, to a specific set of facts, of a term in a statute the Attorney General was charged with administering. *See* 7 N.Y.3d at 242. So, too, here.

B. Respondent's Determination Is Rational And Correct: Petitioner Is Not Entitled To Defense And Indemnification At State Expense In *Alvarez* Under Correction Law § 24-a.

Supreme Court's decision and order upholding respondent's determination should be affirmed because, as Supreme Court rightly held, that determination is rational. Indeed, as the court further recognized, respondent's determination is fully correct and should be upheld even under the legal standard that would apply were deference not due. Namely, "as a matter of law there is no possible factual or legal basis" on which Correction Law § 24-a could apply to petitioner in connection with the *Alvarez* case, *see Matter of Sharrow v. State of New York*, 216 A.D.2d 844, 846 (3d Dept.) (ellipsis and alteration marks omitted), *lv. denied*, 87 N.Y.2d 801 (1995), because there is no evidence that petitioner performed his review of the specimen taken from Alvarez's underarm mass "while acting at the request of [DOCCS] or a facility of [DOCCS]" as § 24-a requires. Thus, regardless of whether deference is due, this Court should affirm.

1. The Determination Follows From Correction Law § 24-a's Plain Language.

"It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature." *People ex rel. Negron*

v. Superintendent, Woodbourne Corr. Facility, 36 N.Y.3d 32, 36 (2020) (quoting *Patrolmen's Benevolent Assn. of City of New York v. City of New York*, 41 N.Y.2d 205, 208 (1976)); *accord Matter of Level 3 Communications., LLC v. Chautauqua County*, 148 A.D.3d 1702, 1703, *lv. and rearg. denied*, 153 A.D.3d 1675 (4th Dept. 2017), *lv. denied*, 30 N.Y.3d 913 (2018). Courts are to "look first to the statutory text, which is the clearest indicator of legislative intent." *Negron*, 36 N.Y.3d at 36 (quoting *Matter of New York County Lawyers' Assn. v. Bloomberg*, 19 N.Y.3d 712, 721 (2012)); *accord Matter of Level-3 Communications*, 148 A.D.3d at 1703. And, at least absent the most compelling of countervailing concerns, "[w]here the language of a statute is clear and unambiguous, courts must give effect to its plain meaning." *Negron*, 36 N.Y.3d at 36; *accord Matter of Nearpass*, 152 A.D.3d at 1193.

The Legislature did not define the circumstances under which licensed healthcare professionals working within the authorization of their licenses do so "while acting at the request of [DOCCS] or a facility of [DOCCS]" for purposes of Correction Law § 24-a. Accordingly, the best evidence of the legislative intent behind those "words of ordinary import" is their "usual and commonly understood meaning." *Matter of Level 3*

Communications, 148 A.D.3d at 1704 (quoting *Yaniveth R. v. LTD Realty Co.*, 27 N.Y.3d 186, 192 (2016)). Dictionary definitions are "useful guideposts" in that inquiry. *Id.* (quoting *Yaniveth R.*, 27 N.Y.3d at 192). And to that end, the dictionary definition of the phrase "at someone's request" is "on being asked by someone." *McGraw-Hill's Dictionary of American Idioms and Phrasal Verbs* 25 (2005). Thus, a licensed healthcare professional is working within the authorization of his or her license "while acting at the request of [DOCCS] or a facility of [DOCCS]" only if the person is performing healthcare work that DOCCS or a DOCCS facility has asked that person to perform.

The Seventh Circuit's decision in *Common Cause Indiana v. Lawson*, 937 F.3d 944 (7th Cir. 2019), is illustrative. There, the court ruled that the State of Indiana does not remove a registrant from its voter rolls "at the request of the registrant" within the meaning of the National Voter Registration Act ("NVRA") when removal occurs in response to the State's having received an alert from a third-party database that the registrant has registered to vote in another jurisdiction. "The ordinary meaning of 'removal at the request of the registrant' is that *the registrant requests removal*," the court explained. *Id.* at 960 (alteration marks

omitted, ellipsis omitted). Indeed: "The only straightforward reading of the phrase 'at the request *of the registrant*' is that the registrant herself makes the request to the state." *Id.* at 961.

To find for NVRA purposes that removal "at the request of the registrant" occurred on the basis of the alert sent by the third-party database service would be to impermissibly "twist that language," the Seventh Circuit held. 937 F.3d at 961. It would improperly countenance the notion "that *indirect* contact with the voter or the possession of third-party information is the equivalent of *direct* contact with the voter" on the State's part, as the statute requires. *Id.* at 959. The State of Indiana cannot be said to remove voters from the rolls "at their request" without first "hearing from them directly." *Id.* at 959.

Moreover, in addition to the requisite direct contact, the solicitation itself must be explicit, as explained by the Connecticut Supreme Court in *Connecticut v. Winer*, 286 Conn. 666 (Conn. 2008). The court there held that a criminal trial was not "continued at the request of the prosecuting attorney" within the meaning of a speedy-trial statute when a prosecutor made a statement in court that merely "had the *effect* of a continuance." *Id.* at 677. The statute would have been satisfied only if a continuance

had been granted in response to an "overt act of asking for a continuance." *Id.* at 678. That is, the ask itself "must be explicit." *Id.*

Thus, under the plain text of Correction Law § 24-a, a licensed healthcare professional is working within the authorization of his or her license "while acting at the request of [DOCCS] or a facility of [DOCCS]" only if the person is performing authorized healthcare work that DOCCS or a DOCCS facility has specifically asked that person in particular to perform. There is no such evidence regarding the pathology review that petitioner performed here.

Petitioner performed his review of the Alvarez mass while working as a pathologist at Cortland Regional Medical Center. (R. 869-870.) Petitioner engaged in that work pursuant to a contract between the hospital and Cortland Pathology, the corporation of which he was an employee. (R. 754-756, 871-884.) There is no evidence that petitioner was ever asked by anyone affiliated with DOCCS or a DOCCS facility to do that job. Indeed, there is no evidence that anyone affiliated with DOCCS or any DOCCS facility even knew petitioner was doing that job.

Nor is there any evidence that anyone affiliated with DOCCS or a DOCCS facility asked petitioner to perform the specific pathology work

at issue in *Alvarez*, *i.e.*, the review of the specimen taken from the mass on Alvarez's right armpit. Insofar as it scheduled the procedure, DOCCS gave its approval for Dr. Cotie to perform a biopsy of the mass at Cortland Regional Medical Center. (R. 44, 74, 224-225, 409.) Dr. Cotie performed the biopsy, removed a portion of the mass, and sent the specimen to the hospital's pathology laboratory for review. (R. 44, 113-115, 456-457.) Thereafter, the specimen was routed to petitioner who conducted a pathology review. (R. 869-870.) The record does not suggest that the routing was anything other than a random assignment. There is no evidence that Dr. Cotie, anyone affiliated with Auburn Correctional Facility, or anyone affiliated with DOCCS asked for petitioner in particular to be the reviewer.

Petitioner's arguments for the applicability of Correction Law § 24-a are unavailing. Petitioner asserts (Br. 12-13) that, as a matter of plain text, § 24-a is not limited to licensed healthcare professionals who perform work for DOCCS as independent contractors. But this assertion is beside the point. The Court need opine one way or the other on this "independent contractor" issue in order to affirm Supreme Court's decision and order.

This is because respondent did not rest her determination denying petitioner defense and indemnification at state expense under Correction Law § 24-a upon a finding that, at the time he performed his pathology review of the Alvarez specimen, petitioner was working in a capacity other than as a DOCCS independent contractor. Respondent denied state-provided defense and indemnification because "[t]he plain language of the statute makes clear that DOCCS has to directly request a physician to undertake an act or service in order to activate the extraordinary protections, and State monies and resources, afforded under Corrections Law 24-a and POL 17," but, according to respondent's records, "DOCCS had no such communication with [petitioner], ever." (R. 639.) Respondent indicated that a contract in which DOCCS asked petitioner to perform the pathology services at issue would have been *sufficient* to invoke Correction Law § 24-a (*see* R. 639), but she did not conclude that such a contract was *necessary* in order to do so.

True, Supreme Court in its decision and order appears to have added an additional gloss on Correction Law § 24-a requiring

"independent contractor" status.[3] (*See* R. 11-12.) But this Court need not bless that additional gloss in order to affirm. Appellate courts "review judgments, not opinions," *United States v. Bergrin*, 885 F.3d 416, 419 (6th Cir.) (Sutton, J.), *cert. denied*, 139 S. Ct. 435 (2018), and strictly speaking Supreme Court's bottom-line judgment is the only item this appeal brings up for review. In sum, the "independent contractor" issue is not implicated.

Likewise unavailing is petitioner's theory for why his request for state-provided defense and indemnification supposedly does come within Correction Law § 24-a's plain language. Petitioner asserts that a biopsy of the sort that DOCCS approved in this case "necessarily involves . . . examination of the specimen by a pathologist," such that "the surgeon's work is worthless without the pathological interpretation." (Br. 14.) "Thus, the excision and the pathology review cannot be severed into distinct parts but are indivisible," petitioner continues. (Br. 14.) Petitioner's conclusion: "As such, the fact that DOCCS approved the

[3] Contrary to petitioner's apparent understanding, however Supreme Court did not purport to require "a contract *with an indemnification and defense clause*." (Br. 12-13 [emphasis added].)

biopsy must be read as an approval of the pathology review which necessarily followed." (Br. 14.)

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.

In conclusion, respondent's determination was proper, and Supreme Court's decision and order should be affirmed, on the basis of Correction Law § 24-a's plain meaning.

2. The Determination Is Further Supported By The Purpose And History Of Correction Law § 24-a.

As shown above, applying the plain meaning of Correction Law § 24-a does not give rise to any absurdity or contradiction, leaving no need for an examination of additional indicia of legislative intent. *See People v. Roberts*, 31 N.Y.3d 406, 418 (2018); *Matter of Clover/Allen's Creek Neighborhood Assn. LLC v. M&F, LLC*, 173 A.D.3d 1828, 1832 (4th Dept. 2019). It should be noted, however, that a consideration of legislative purpose and history strongly supports respondent's plain-

language approach, and with it the propriety of her determination that petitioner is not entitled to defense and indemnification at state expense in the *Alvarez* case.

"The purpose of Public Officers Law § 17 is, in essence, to provide insurance against litigation," *Matter of O'Brien*, 7 N.Y.3d at 242, with the State functioning as the insurer and its employees as the insureds, *Matter of Garcia v. Abrams*, 98 A.D.2d 871, 873 (3d Dept. 1983). The same purpose therefore underlies Correction Law § 24-a, with the State serving as the insurer of certain specified categories of licensed healthcare professionals performing authorized healthcare work "while acting at the request of [DOCCS] or a facility of [DOCCS]." The 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. This core precept underscores that the persons covered by Correction Law § 24-a must be those that the State, via DOCCS and its various facilities, has (presumably after evaluation of relevant credentials, experience, and other factors) specifically asked to perform the sort of healthcare work they perform.

The history of the legislation that enacted Correction Law § 24-a reinforces this reading by emphasizing the magnitude of the risk that the State, as insurer, would be underwriting. The Assembly sponsor's memorandum expressly acknowledged that the defense and indemnification obligations could have "indeterminable additional fiscal implications" for the State. Assembly Introducer's Mem. in Support at 1. One of the agencies urging passage of the legislation cautioned: "The program [of mandatory defense and indemnification at state expense] may be costly" and "could have significant budgetary implications." Letter from Office of General Services at 1. The significant scale of potential payouts is further evidence that the Legislature intended Correction Law § 24-a to apply only to those individuals whom DOCCS or a DOCCS facility, after presumably having had the opportunity to vet them and assess their risk profile, specifically solicit to perform authorized healthcare work. The record contains no evidence, however, that anyone affiliated with DOCCS or a DOCCS facility even knew who petitioner was, let alone formed the judgment that he was a sufficiently capable pathologist.

Contrast petitioner's circumstances with those of Dr. Cotie, whom respondent determined *is* entitled to defense and indemnification at state expense in the *Alvarez* action. (R. 637.) Dr. Cotie had a contract under which he provided surgical services to persons incarcerated in DOCCS custody. He obtained that contract by submitting an application that set forth, among other things, his qualifications for the work. (R. 73.) And the contract itself indicates that DOCCS assessed those qualifications, found Dr. Cotie to be a "responsible" surgeon, and reserved the right to terminate the arrangement were it ever to find otherwise. (R. 660.)

There is no support for petitioner's broad view (Br. 17-18) that "the purpose of Correction Law § 24-a is to protect physicians (among other licensed professionals) who are not employees of the State but are nonetheless rendering health care and treatment to incarcerated individuals and have concerns about possible liability arising out of the services performed with respect to those individuals." That would encompass *all physicians* delivering healthcare services to persons they know or have reason to believe are inmates; the limiting phrase "while acting at the request of [DOCCS] or a facility of [DOCCS]" would be rendered meaningless. Moreover, petitioner still would not be covered

even under that broad statement of purpose, insofar as there is no evidence that he knew Alvarez was an inmate at the time he reviewed the specimen taken from Alvarez's underarm mass.

CONCLUSION

Supreme Court's judgment should be affirmed.

February 14, 2022

Respectfully submitted,

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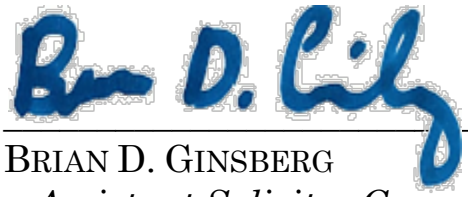
By: 

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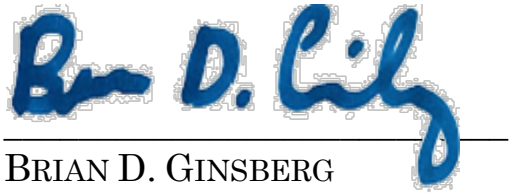

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