

IN THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN MATEO

IN THE MATTER OF [INSERT NAME],) Hearing Date:

Petitioner,) Time:

) Department:

_____)

**PETITION FOR DECLARATION OF FACTUAL INNOCENCE
AND DESTRUCTION OF ARREST RECORDS**

(Cal. Penal Code, § 851.8)

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Introduction

[INSERT NAME] has been practicing chiropractic medicine for ten years. He graduated with honors and has distinction in his field having taught and published a book teaching chiropractic clinical procedures. He has never had a complaint filed against him in connection with his practice, except for the complaint by [INSERT NAME] which resulted in his wrongful arrest for sexual battery in 2003. Ms. Ruiz was a Spanish speaking immigrant who was fraudulently using the social security number of another individual to secure employment and other benefits. She claimed to have suffered a work related injury at the Boston Market restaurant which rendered her completely disabled and eligible for workman's compensation benefits. [INSERT NAME] came to [INSERT NAME] after her previous chiropractor observed that she was exaggerating

her symptoms and that she should go back to work. [INSERT NAME] treated [INSERT NAME] on several occasions, then advised her that he could not support her claim of disability and that she should return to work. Her complaint that he sexually molested her came soon after this advisement.

[INSERT NAME]'s allegation of sexual abuse is so inherently improbable and lacking in credibility that it fails to supply any cause, much less reasonable cause, to believe that [INSERT NAME] committed a criminal offense. [INSERT NAME] told a defense investigator that on the day of the incident, [INSERT NAME] placed his hand over her breast on three separate occasions and that each time she told him not to touch her in that manner. It is inconceivable that a woman sexually battered by a doctor would not have removed herself from the examination room after the first offense, much less three offenses. However, [INSERT NAME] remained at the office and used the phone behind the desk to call the police. [INSERT NAME] claimed that she could not leave the office because the front door was locked and [INSERT NAME] would not open it.. The door could be opened by anyone from the inside without a key.

The record indicates that [INSERT NAME] falsely accused [INSERT NAME] of sexual abuse so that she would appear as the victim rather than an illegal immigrant who was defrauding her employers and the work comp carrier. [INSERT NAME] was unwillingly caught in this web when his actions in discontinuing treatment of [INSERT NAME] would have exposed her fraud. The arresting officers were not Spanish-speaking (they used a telephone translator), so they likely could not verify the inaccuracy of her claims. The District Attorney declined to file charges in the case. This court should find [INSERT NAME] factually innocent and enter an order to have his arrest records sealed and destroyed.

Statement of Facts

[INSERT NAME], graduated with honors from [PLACE NAME] in 1996. He obtained post-graduate-certificates in myofascial manipulation, and has taught chiropractic medicine. He was awarded a partial scholarship for excellence by the school myofascial organization. [INSERT NAME] treated well over a thousand patients at his clinic on [ADDRESS] in San Mateo,

California. Excepting the allegation of this one patient that resulted in [INSERT NAME]'s arrest, he has never in his career been accused of unprofessional behavior. His staff uniformly report that they have never seen any patient appear to be unsatisfied or disturbed upon leaving [INSERT NAME]'s office.

The ostensible victim,[INSERT NAME], was employed at the Boston Market restaurant in Daly City where on August 8, 2002, she fell while carrying a 10-pound container of lemonade stubbing her toe in the process. She was treated at Seton Medical Center. She was not excused from work at that time. She returned to the medical center the following day, received a pain killer, and was excused from work for one week. She returned to Seton Medical Center a week later, was told to take Advil, and was put on light duty for two weeks. She did not return to work. Instead, she went into treatment with [INSERT NAME], who works as a consultant for State Fund, the quasi-governmental entity that is the largest worker's compensation insurer in California. She was treated by [INSERT NAME] for over nine months and received regular workers compensation payments.

[INSERT NAME] had discharged Ms. [INSERT NAME] from further treatment on May 2, 2003. In his final report, he found that [INSERT NAME]'s continuing complaints of pain were "inaccurate" and her responses to superficial palpation were "overactive." He concluded that she should return to modified work.

[INSERT NAME]'s attorney referred her to [INSERT NAME] on May 15, 2003. Despite [INSERT NAME] recommendation that she return to work, [INSERT NAME] insisted she could not go back to work due to incapacitating pain and wanted to continue on total temporary disability. [INSERT NAME] saw [INSERT NAME] a total of five times. She was receiving myofascial treatments to her right shoulder area. She said she was feeling better from her right shoulder pain after the treatments. [INSERT NAME] told her that if she was feeling better she should return to work on a modified basis. [INSERT NAME] was not happy about this.

[INSERT NAME] told her that the previous doctor was well known and had done a pretty thorough job, and that if she did not improve he would declare her permanent and stationary,

which meant that her total temporary disability payments would end.

[INSERT NAME]'s accusation against [INSERT NAME] occurred a couple of days later.

[INSERT NAME] asked to be treated over the weekend and [INSERT NAME] agreed to treat her on a Saturday morning. The office would be closed the following Monday due to a holiday, so the Saturday visit meant not having to wait several days for another treatment. He asked his office staff to come to work that Saturday, but the staff did not show up for work. (Exhibit __; Letters from Office Staff.) A couple of other patients had also requested to drop in that Saturday. (Exhibit __; Letter from [INSERT NAME].) [INSERT NAME] arrived around 11:00 a.m. She went into the examination room alone and put on a gown that was open in the back so the [INSERT NAME] could work on her shoulder. She had been gowned during earlier visits as well. [INSERT NAME] told [INSERT NAME] that he was going to go deeper, and if it was uncomfortable to tell him to stop. He utilized a "scapular release" method. [INSERT NAME] had her arm down at her side which required [INSERT NAME] to put one hand under her armpit to work the shoulder in an up and down motion. [INSERT NAME] was gowned and face down on the table. [INSERT NAME] stood on the opposite side of the shoulder area he was working on. [INSERT NAME] was responding favorably to the procedure but then stated, "stop it. I didn't like that." [INSERT NAME] stopped immediately. [INSERT NAME] stated, "you touched me, you touched my breast, that was wrong." [INSERT NAME] did not believe he touched [INSERT NAME]'s breast, but she was a petite woman (5'3" tall with small breasts), so it could have happened. Although incidental touching of the side of the breast is normal during this procedure, [INSERT NAME] nevertheless apologized and offered to change the treatment if that upset her. Following additional allegations from [INSERT NAME] that he was trying to take advantage of her, [INSERT NAME] asked [INSERT NAME] to dress and come out to the waiting room. Despite [INSERT NAME]'s assurances that the touching was not sexual, [INSERT NAME] continued to assert that the touching was sexual and wanted to call the police. [INSERT NAME] showed her the business phone located behind the receptionist's desk. (Exhibit __; picture of phone.) [INSERT NAME] did not attempt to leave the building. [INSERT NAME] asked her if

she would be more comfortable if he waited outside but she did not ask him to leave. They both waited in the office fifteen to twenty minutes for the police to arrive. [INSERT NAME]'s demeanor changed abruptly when the police arrived. She was calm before the police arrived, but began to cry when the police showed up. Two officers arrived at the scene, a police sergeant and a patrolman. [INSERT NAME] told the police that the patient had accused him of touching her. Neither of the police officers spoke Spanish, so [INSERT NAME] translated for them. They asked [INSERT NAME] for identification, but she did not provide any. The patrolman then took [INSERT NAME] outside for questioning and the Sergeant questioned [INSERT NAME]. The Sergeant asked no questions of [INSERT NAME] concerning [INSERT NAME]'s allegation. [INSERT NAME] was asked how the patient had come to him, how long he was in practice, and whether he touched the patient on the skin or the gown. The patrolman came in and said that [INSERT NAME] was very upset. He asked to see the schedule for patients that day. The officers did not ask if [INSERT NAME] had employees that were to come in that day. The officers did not ask if he had treated female patients on Saturday in the past. [INSERT NAME] told the officers that he had expected a couple of drop in patients in addition to [INSERT NAME]. [INSERT NAME] was then brought in to make a citizen's arrest. On June 13, 2003, private investigator [INSERT NAME] interviewed [INSERT NAME] relative to her complaint against [INSERT NAME]. She told the investigator that [INSERT NAME] put his hand over her breast on three separate occasions and that each time she told him not to touch her in that manner. After the third time, she supposedly fled the examination room and attempted to leave by the front door but the door was locked. According to Ms. [INSERT NAME], [INSERT NAME] refused to open the door. He then supposedly offered her money if she would not call the police. [INSERT NAME] denied that [INSERT NAME] translated for her when the police arrived. She tried to communicate in her limited English with the responding officer and was then put in touch with someone at the police department who was Spanish speaking.

(Exhibit __; Investigation Report.)

San Mateo Police Officer [INSERT NAME] writes that he has been inside the office complex at

[ADDRESS] numerous times. “The office has a single tempered glass door entrance at both the main entrance on the west side of [the] structure, and at the east side of the structure (two doors total). Both are secured with a standard exterior key lock dead bolt mechanism, with the interior portion of the lock accessible with a simple thumb-knob.” (Exhibit __; Exhibit __; pictures of front and rear doors to office.) The prior tenant, [INSERT NAME], writes that he sold the practice to [INSERT NAME] in August 2000, and that the front door was the same as it had been when he practiced: “the door swings in and out and locks with [a] bolt from the inside.” (Exhibit __.) The owner of the building confirmed these descriptions of the doors to the office. (Exhibit __.) A locksmith who examined the lock mechanism writes that the locking mechanism is such that “anyone inside can open and exit” the doors because of the thumb-turn on the dead bolt. (Exhibit __.)

Shortly after his arrest, [INSERT NAME] retained attorney [INSERT NAME] to represent him. In looking into Ms. [INSERT NAME]’s background, attorney’s investigator, [INSERT NAME], discovered that she had used a false social security number to obtain employment and work comp benefits. The number she was using actually belonged to a woman named [INSERT NAME]. (Exhibit __; investigation report.)

Other information turned up casting [INSERT NAME]’s credibility into further doubt. The report of [INSERT NAME]’s primary treating physician, [INSERT NAME], was reviewed by [INSERT NAME], a partner in the San Mateo law firm of [LAW FIRM] and a certified specialist in Worker’s Compensation law who has practiced worker’s compensation law exclusively for over twenty years. He has reviewed hundreds, if not thousands, of Primary Treating Physician’s Progress Reports like that prepared by [INSERT NAME] and is familiar with his work.[INSERT NAME] opined that in the community of work comp practitioners, [INSERT NAME] is well known for giving patients the benefit of the doubt regarding their subjective complaints of pain. [INSERT NAME] was of the opinion that the language used by [INSERT NAME] in his final report would signal anyone in the field that Ms. [INSERT NAME] was grossly exaggerating, if not lying, about her complaints. (Exhibit __; Letter from [INSERT NAME] to DDA [NAME].)

Specifically, [INSERT NAME] believed that [INSERT NAME] statement at the conclusion of his discussion of the Thoracolumbar Spine on Page 2 of the report that “[t]hroughout the spine, the patient has expressed overactive responses to superficial palpation” casted severe doubt on her credibility. Further, [INSERT NAME] decision to release Ms. [INSERT NAME] from treatment, which appears in the Treatment Plan on Page 3 of the report, despite her ongoing subjective complaints of pain because he found those complaints “inaccurate” again indicates that [INSERT NAME] did not believe Ms. [INSERT NAME]. This is borne out by his statement in the first paragraph of the Treatment Plan that “[i]t has been my impression that she could have returned to employee [sic] at Boston Market on a modified basis.” The doctor also wrote that “it is somewhat of a mystery that her symptomatology [sic] remains as it is” given that she had a “nearly normal full range of motion” “which is somewhat contradictory to her level of subjective complaints.” In [INSETR NAME] opinion, anyone in the worker’s compensation field reading this report would believe that [INSERT NAME] was not being truthful in reporting ongoing complaints of pain. (*Ibid.*)

[INSERT NAME] found another chiropractor to treat her after she made the accusations against [INSERT NAME]. Having made an allegation of sexual abuse by a treating physician, [INSERT NAME] would be able to claim compensation for psychological injury. In work comp any treatment by a doctor for the industrial injury that somehow adds or creates to pathology or psychological problems becomes part of the work comp claim.

The information regarding [INSERT NAME]’s questionable credibility was forwarded to Deputy District Attorney [NAME]. Deputy [NAME] decided not to file the case.

ARGUMENT

I.

THE INHERENTLY IMPROBABLE ALLEGATIONS OF A WOMAN WHO WAS FRAUDULENTLY OBTAINING WORKMEN’S COMPENSATION BENEFITS OFFERED NO REASONABLE CAUSE FOR [INSERT NAME]’S ARREST.

A. Introduction

An arrested person is entitled to a finding of factual innocence and to have his arrest record destroyed if the court finds no reasonable cause to believe the arrestee committed the offense for which he was arrested. The circumstances of [INSERT NAME]'s arrest more than satisfy the legal standard for the destruction of arrest records.

B. Standard of Review and Applicable Law

Penal Code Section 851.8 allows a finding of factual innocence and an order for the sealing and destruction of arrest records if the trial court finds "that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made." (§ 851.8, subd. (b).) The arrestee bears the preliminary burden of establishing that no reasonable cause exists to believe the arrestee committed the offenses. (§ 851.8, subd. (b); *People v. Chagoyan* (2003) 107 Cal.App.4th 810, 816-818.) The question whether "no reasonable cause exists" is an objective question measured by an external standard--whether a person of ordinary care and prudence would believe or conscientiously entertain an honest and strong suspicion that the person arrested is guilty of the crimes charged. (*People v. Adair* (2003) 29 Cal.4th 895, 904-906.) To satisfy this burden of proof, the defendant is entitled to present evidence, including live testimony by percipient witnesses. (*People v. Chagoyan, supra*, at pp. 817-818.) Facts disclosed subsequent to arrest may establish factual innocence. (*Id.* at p. 905, fn. 4.)

C. No objective factors justified the official action in arresting [INSERT NAME].

The investigation of the incident by the police was inadequate. Had the police bothered to ask [INSERT NAME] to provide his side of the story and the justification for the touching, they would have learned that the touching was medically appropriate. The only body area in question was one where treatment was applied. [INSERT NAME]'s touching of the patient underneath her armpit to treat her shoulder was within accepted medical practice. [INSERT NAME]'s counsel, [INSERT NAME], consulted [INSERT NAME], a qualified medical examiner (QME) for the State of California, and consultant for the State Board of Chiropractic complaints to review the

facts of the case and offer an opinion. [INSERT NAME] reviewed a training tape of the techniques that [INSERT NAME] was using for [INSERT NAME] and reviewed his medical file for the patient. He also interviewed [INSERT NAME] to determine the specific use of this technique on Ms. [INSERT NAME]. He states that

“[i]n light of my knowledge, experience, and expertise as an instructor of chiropractic methods and my 21 years of private practice, I do not believe that the instantaneous contact with a patients lateral aspect of her breast constitutes inappropriate contact. In fact, this specific type of contact cannot be avoided with many hands-on myofascial and adjustive techniques. Within this group of techniques, the myofascial and adjustive work that [INSERT NAME] was providing for this patient, along with shoulder manipulations, some thoracic manipulations, etc., often lead to breast contact with a body part of the doctor, and typically it is with the doctor’s hand or arm.”

(Exhibit __; May 29, 2003 Letter from [INSERT NAME] to [ATTORNEY].)

Additionally, if [INSERT NAME] had wanted to fondle the patient, he would have asked her to lay face up instead of face down on the table. The technique he was using can be administered with the patient laying face up on the table with contact points on the chest area. (Exhibit __; articles on myofascial manipulation.) [INSERT NAME] chose a face down technique, and treated from the opposite side of the table.

Moreover, the police had no justification to arrest [INSERT NAME] based upon [INSERT NAME]’s fanciful complaint of sexual abuse. [INSERT NAME] claimed that [INSERT NAME] put his hand over her breast three times against her will while she was laying on the table. Any female in [INSERT NAME]’s position who had a doctor reach under her body to touch her breast more than once without her consent would have risen from the table and left the premises immediately. A woman in these circumstances would have tried to protect herself from further violations. She would not have been sitting calmly with the doctor in his office waiting for the police to arrive to arrest the doctor.

Moreover, [INSERT NAME] claimed that the front door was locked and that [INSERT NAME] refused her request to open the door. (Exhibit __; Investigator's Report.) On this point, [INSERT NAME] was obviously lying. The door could be readily opened by anyone inside the office without a key. The dead-bolt, which was the only locking mechanism on the tempered glass door, was accessible from the inside with a simple thumb-knob. (See Exhibit __; Letter from SWAT Team police officer regarding door; Exhibit __; Letter from Owner of Building; Exhibit __; colored photographs of door knob.) In determining whether there were grounds to arrest [INSERT NAME] for false imprisonment, any reasonable police officer would have checked out [INSERT NAME]'s story concerning the door and discovered that a key element of her story was a fabrication.

D. Facts disclosed subsequent to [INSERT NAME]'s arrest show that [INSERT NAME] was lying

Subsequent investigation revealed that [INSERT NAME] was guilty of the felony offense of using a false Social Security number to secure her employment at Boston Market and other benefits in violation of 42 U.S.C. § 408(a)(7)(B). The attached report of Investigator [NAME] establishes that the Social Security number [INSERT NAME] was using, 555-79-XXXX, was actually issued to a [INSERT NAME] in 1984. [INSERT NAME] had been receiving benefits fraudulently from the worker's compensation carrier who issued her a medical card based on the Social Security number she provided.

Additionally, [INSERT NAME]'s credibility was also questioned by her primary treating physician, [INSERT NAME], who thought she was exaggerating her symptoms. Regardless of whether [INSERT NAME] was lying about her symptoms or is simply overly sensitive to touch, she is not an individual who can be trusted when it comes to defining a doctor's contact with a body part during treatment as sexual or not. [INSERT NAME]'s story of sexual abuse by [INSERT NAME] has been completely discredited and offers no objectively reasonable basis for official state action subjecting him to criminal charges.

II.

**GOOD CAUSE EXISTS FOR GRANTING RELIEF UNDER THIS SECTION
THOUGH THE PETITION WAS FILED MORE THAN TWO YEARS FROM THE
DATE OF ARREST.**

Penal Code section 851.8, subdivision (l) provides in pertinent part that “. . . petitions for relief under this section may be filed up to two years from the date of the arrest or filing of the accusatory pleading, whichever is later. . . . *Any time restrictions on filing for relief under this section may be waived upon a showing of good cause by the petitioner and in the absence of prejudice.*” (*Italics added.*) Although the instant petition is being filed beyond the two-year period specified by statute, good cause exists for this court to consider the petition.

According to the declarations of petitioner and attorney [INSERT NAME], when petitioner got notice via mail that the District Attorney would not pursue the case, he contacted attorney [NAME] immediately to initiate the legal process to expunge the arrest from his record. His request to [NAME] to initiate the process occurred no more than two or three months after his arrest in May 2003. Attorney [NAME] advised that it was a better idea to wait a year before pursuing the matter. Petitioner waited then called [NAME] around Aug-Sept 2004, but was told to call back at the end of the year because [NAME] was busy with cases. Petitioner called [NAME] in December 2004 but was told that [NAME] was still busy and to call in a couple of months. He called him again around early March 2005. [NAME] said he was freeing up and that he needed a retainer for \$2500 and a contract to be signed. Petitioner immediately sent [NAME] the check without having received a contract, and waited for the contract but it took quite some time on [NAME]’s part. When [NAME] did send the contract, petitioner signed it and mailed it back within twenty-four hours. Petitioner then waited. Later [NAME] sent petitioner a form to sign beyond the two-year statutory time limit for filing the petition.

Up to this time, [NAME] never mentioned that there was a time limit on filing. Petitioner received a call from [NAME] in October 2005 while he was in Miami, FL, and [NAME] said

that he got a response that we were too late. [NAME] explains in his declaration that he was unaware of the time limit for filing the petition for a declaration of innocence. [NAME] told [INSERT NAME] he could no longer represent him, and advised him to contact the Law Offices of [NAME]. Petitioner called [NAME] a couple of days after receiving this call and sent a retainer to [NAME].

Attorney [NAME]'s actions in failing to file the petition in a timely manner constituted an abandonment of his client. In an analogous situation, the California Supreme Court has held that abandonment by appellate counsel may constitute good cause for a substantial delay in the filing of a petition for writ of habeas corpus. In *In re Sanders* (1999) 21 Cal.4th 697, at page 708, the Supreme Court held that an appellate counsel's failure to investigate or inadequate investigation of a habeas claim for capital case effectively renders the petitioner *unrepresented* by counsel, and the court cannot conclude that the petitioner should have filed a habeas claim sooner when he was unrepresented. Likewise in this case, petitioner's abandonment by counsel constitutes good cause for the delay in the filing of this petition to expunge his record.

CONCLUSION

The police arrested the wrong individual in this matter. The putative victim, [INSERT NAME], should have been arrested and prosecuted for using a false social security number to obtain workmen's compensation benefits. Even now she may be continuing to receive undeserved benefits on the pretense that she has a continuing industrial injury and a psychological injury. The arrest of petitioner was without objective reasonable cause as there are no facts to support a strong suspicion that he committed a criminal offense. [INSERT NAME]'s description of the incident is inconsistent with the physical evidence and defies common sense. [INSERT NAME] is a respected medical practitioner who was wrongfully accused of a crime when his patient determined he was a threat to her fraudulent behavior. The court should find

that the petition is meritorious and that there is no reasonable cause to believe that the petitioner committed a crime against [INSERT NAME], and that petitioner is factually innocent.

DATED: February 28, 2006

Respectfully submitted,

[INSERT NAME]

Attorney for Petitioner