

IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
VOLUSIA COUNTY, FLORIDA

CASE NO.:

JESSICA LONG,
and
MICHAEL SCHOENBROD,
Petitioners

vs.

R.J. LARIZZA, STATE ATTORNEY
SEVENTH JUDICIAL CIRCUIT
Respondent.

_____ /

PETITION FOR WRIT OF MANDAMUS

Pursuant to Fla.R.Civ.P., rule 1.630(a), your Petitioners, Jessica Long and Michael Schoenbrod, respectfully request this Honorable Court to enter a Writ of Mandamus directing the State Attorney, R.J. Larizza, through one of his Assistant State Attorneys, to fulfill his ministerial mandatory portion of your Petitioners' Florida Statute §943.0585 Application for Certificate of Eligibility for the expunction of records of a criminal investigation alleging the first degree felony offense of Aggravated Child Abuse, in violation of Florida Statute §827.03(1)(a)(2). As grounds therefore, the Petitioners would allege:

1. Your Petitioner, Jessica Long, is a [REDACTED]

[REDACTED]

2. Your Petitioner, Michael Schoenbrod, is a [REDACTED]

3. In October 2022 an anonymous complaint alleging Aggravated Child Abuse against each of your Petitioners was lodged with the Florida Department of Children and Families (DCF).

4. The child alleged to be abused [REDACTED] is the natural child of your Petitioners. There is another minor child also in the household.

5. DCF conducted part of its investigation, with assistance of the Volusia County Sheriff's Office (VCSO) and the Child Protection Team (CPT).

6. After its investigation was complete, DCF determined that the allegations were unfounded.

7. According to FDLE Special Agent Gundrum, on October 27, 2022, the Volusia County Sheriff's Office requested the Florida Department of Law Enforcement (FDLE) to investigate the allegations of aggravated child abuse in violation of Florida Statute §827.03(1)(a)(2), a first degree felony against your Petitioners. That FDLE investigation was assigned to Special Agent Lisa Gundrum, bearing FDLE No. OR-20-0561.

8. From late October 2022 through January 11, 2023, FDLE Special Agent Gundrum conducted her investigation.

9. On January 11, 2023, FDLE Special Agent Gundrum completed her investigation which she documented in a 74 page report. The first part is a 7 page Summary, including her affidavit of finding probable cause to charge each of your Petitioners with the first degree felony offense of Aggravated Child Abuse in violation of Florida Statute §827.03(1)(a)(2). (Appendix A)

10. Special Agent Gundrum submitted her 74 page report, including her affidavit finding probable cause which included a separate count offense narrative for each of the Petitioners, and in prosecutorial style, with the State Attorney's Office, Seventh Judicial Circuit.

11. The FDLE investigative report and a probable cause affidavit was assigned to Assistant State Attorney Ashley Terwilleger.

12. Assistant State Attorney Terwilleger completed her investigation of the Aggravated Child Abuse allegations on February 7, 2023.

13. Assistant State Attorney Terwilleger documented her determination in a two-page Memorandum which concluded, "Evidence shows there is no physical or mental injury to the child. As such, no further action is warranted by this office." (Appendix B)

14. Prosecutor Terwilleger returned the submitted case file to the Daytona Beach Shores Police Department for administrative review and action.

15. Both of your Petitioners were, and remain [REDACTED]

16. Based upon the initial anonymous complaint to DCF, and the subsequent FDLE report and affidavits, an Internal Affairs investigation (IA) had begun at the Daytona Beach Shores Police Department, and against your Petitioners prior to the State Attorney's review.

17. That stopped the Daytona Beach Shores Police Department investigation, awaiting that State Attorney's Office's determination.

18. Once the State Attorney made his determination, DBSPD reopened the IA on each.

19. Succinctly, your Petitioner Schoenbrod was provided notice of two alleged policy violations: committing a felony offense whether or not a prosecution was initiated, and secondly, "Conduct ... which has the tendency to destroy public respect for the employee and/or the department and/or destroy confidence in the operation of the municipal service".

20. Your Petitioner Long, as well, was charged with the same two policy violations.

21. On March 25, 2023, the IA was concluded on each. The outcome was identical for each, i.e., the allegation of committing a felony offense whether or not it was prosecuted was unfounded; whereas, an employee shall not a conduct

oneself on or off duty in any manner that could engender a lack of respect for the employee, the City or the Department was sustained.

22. Immediately upon receipt of the written IA results, each of your Petitioners began, with the assistance of undersigned counsel, the process of getting of the retained records of the First Degree Felony Aggravated Child Abuse allegations generated by:

- (a) Florida Department of Law Enforcement (FDLE);
- (b) State Attorney's Office (SAO);
- (c) Volusia County Sheriff's Office (VCSO); and
- (d) City of Daytona Beach Shores

Expunged, pursuant to Florida Statute §943.0585.

23. The initial acts undertaken to expunge alleged criminal activity records requires the ultimate movant to have a set of fingerprints taken on a form provided by FDLE. The next step, through the utilization of FDLE form – FDLE 40-021, is to have the State Attorney's Office complete the written certified statement on the second page of that form. Page 2 of 2 states at the top: “Page 1 and 2 of this application must be submitted to the State Attorney...” Thereafter, enhanced due to its black background is, “The section below must be completed by the state attorney's/statewide prosecutor.” (Composite Appendix C)

24. With the completion of these tasks, the completed forms are then sent to the Florida Department of Law Enforcement seeking its Certificate of Eligibility to have the alleged criminal activity documents expunged.

25. Each of your Petitioners had her/his fingerprints taken, as well as each filling out her/his respective pages of FDLE 40-021.

26. Through undersigned counsel, the partially completed forms were delivered to the State Attorney's Office, attention Assistant State Attorney Terwilleger, on March 29, 2023.

27. Not receiving the form back from the SAO, numerous emails were sent to determine its status. Initially they were unanswered.

28. Thereafter, Assistant State Attorney Terwilleger informed undersigned counsel's office that she was not the proper person to fill out the form.

29. Thereafter, the Petitioners' applications were provided to another assistant state attorney.

30. Anxious to get the alleged criminal activity records expunged, your Petitioners contacted the SAO.

31. The Chief Assistant State Attorney stated that the effort to get these records expunged, and the method by which it was sought was flawed; therefore, the Office would not comply.

32. Thereafter a third assistant state attorney informed your Petitioners on Friday, May 12, 2023, that FDLE told her the records were not subject to expunction because your Petitioners were never arrested, informed against, or prosecuted.

33. The SAO has willfully refused to fulfill its mandated, ministerial obligation to complete page 2 of its portion of FDLE 40-021.

34. By the SAO shirking its responsibility of completing page 2, your Petitioners' entitlement to have FDLE issue its certificate of eligibility is now in limbo, leaving each no other alternative than to seek a writ of mandamus directing the State Attorney's Office complete is required portion of the application.

35. The ministerial function of the SAO is to check box #1 on the second page of the form,

“1. An indictment, information, or other charging document was not filed or
issued in this case.”

36. As the DCF records are confidential, they are public record exceptions/exclusions.

37. However, the records generated by: (a) VCSO of the alleged first degree felony Aggravated Child Abuse are currently under a temporary injunction seal; (b) the entire 74 page “Child Abuse Investigation” OR-20-0561 produced by

FDLE Special Agent Gundrum also is currently under a temporary injunction seal; and (c) a copy of the entire file held at DBSPD also is included in the temporary injunction order.

38. Though currently temporarily under injunction seal, FDLE's criminal complaint which incorporated information from DCF's investigation could, and has been alleged to be a public record, though it is currently under seal.

39. If/when your Petitioners obtain their certificates of eligibility, and eventually receive an order expunging these records, FDLE need not comply; however, the investigative report it produced would then become an exception to any public records request, foreclosing its divulgence.

40. Though the State Attorney's Office may have but a minimal file, as a result of its investigation, it too has documents relating to the allegations of criminal activity by your Petitioners it is subject to expunction.

41. DBSPD, whether its overall city, or its police department, has the entire FDLE "Child Abuse Investigative Report" which also is subject to expunction.

42. A sworn criminal complaint alleging the first degree felony offense of Aggravated Child Abuse in violation of Florida Statute §827.03(1)(a)(2), was leveled against each of your Petitioners by FDLE.

43. The criminal complaint, with its extensive content, was provided to the State Attorney's Office for review and disposition. The disposition sought by FDLE was the criminal prosecution of each of your Petitioners for Aggravated Child Abuse. However, the SAO review decided the evidence was totally deficient, declining to prosecute.

44. Though issued as a memorandum, that determination is akin to a "No Information".

45. The FDLE expunction certificate of eligibility application requires the State Attorney to undertake a simple ministerial task of: (a) writing his/her name, the county within which that prosecutor works, the offense's title, along with the statutory number assigned, and then the outcome.

46. Thereafter, the assigned prosecutor must check the applicable box or boxes, sign his or her name, forwarding the application back to the Petitioners counsel who then sends the completed form to FDLE for its determination of each's eligibility.

47. Neither of your Petitioners have a prior criminal history which would impede either's ability to continue with the process of having these allegations expunged pursuant to Florida statute §943.585.

48. The role of the prosecutor in an expunction process is to confirm a criminal complaint/accusation, here authored by FDLE Special Agent Gundrum, the nature the offense, and its disposition.

49. By willfully failing to fulfill its mandated portion of the expunction certificate of eligibility applications, your Petitioners are being denied due process and equal protection.

50. Additionally, Article 1, Section 23, of the Florida Constitution guarantees to its citizens a right to privacy free from government intrusion. Here, that would be willfully refusing to comply with its mandated portion of Florida Statute §943.585 and through Form 40-021. The SAO's referral to comply is the intrusion.

51. Each of your Petitioners is without any prior criminal history; therefore, each's application would result in receiving a certificate of eligibility.

52. The certificate of eligibility does not result in your Petitioners' alleged criminal activity records getting expunged.

53. Rather, FDLE's issuance of the certificate of eligibility is your Petitioners affirmation that each may now file a motion to expunge of these nonjudicial records alleging criminal activity.

54. Upon the filing of a Petition to Expunge, a court of competent jurisdiction reviews it, a hearing set where the State may argue against, or for, it. Thereafter, the court has the discretion to either grant or deny it.

55. The State Attorney's Office is mandated to complete page 2 of FDLE 40-021 when a person seeking to have records of alleged criminal activity expunged wherein it determined those allegations to be baseless.

56. Your Petitioners have a clear legal right for the State Attorney's Office to complete page 2 of FDLE 40-021.

57. In fact, the State Attorney has a duty to perform the task of completing page 2.

58. Other than mandamus, your Petitioners have no other legal rights available to them.

RELIEF SOUGHT

59. Each of your Petitioners seek this Court's issuance of a Writ of Mandamus ordering the Respondent, R.J. Larizza, State Attorney, or through any of his designated prosecutors, to complete page 2 of FDLE 40-021 so your Petitioners' efforts to get their records expunged may proceed to FDLE for its issuance of the certificate of eligibility.

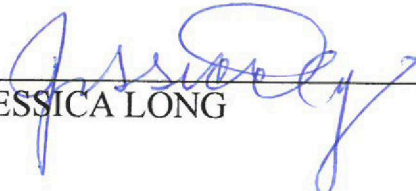
60. With that directed compliance, each of your Petitioners then would be able to seek a court ordered expunction of these records, reports, warrants, applications, etc., of the alleged criminal activity currently possessed by:

- (i) State Attorney's Office, Seventh Judicial Circuit;
- (ii) Volusia County Sheriff's Office;
- (iii) Florida Department of Law Enforcement Child Abuse Investigative Report OR-20-0561; and
- (iv) Daytona Beach Shores Police Department.

61. Your Petitioners understand and appreciate the court order expunging each's alleged criminal activity records maintained by the State Attorney's Office, the Volusia County Sheriff's Office, and the Daytona Beach Shores Police Department, would result their utter destruction and obliteration; however, such an order sent to FDLE, permits it to maintain its record/investigative reports. But upon receipt of the court order expunging these criminal activity allegations, the report then becomes confidential and exempt from Florida Statute §119.07(1).

I, Jessica Long, the Petitioner herein, have reviewed the facts within this Petition and they are true and correct.

Dated this 18 day of May, 2023.



JESSICA LONG

State of Florida
County of Volusia

Sworn to and Subscribed before me this 18th day of May, A.D., 2023.

Proof of Identification:

personally known

Stacy Nicole Dees
NOTARY PUBLIC



STACY NICOLE DEES
Notary Public
State of Florida
Comm# HH367696
Expires 6/23/2027

I, Michael Schoenbrod, the Petitioner herein, have reviewed the facts within this Petition and they are true and correct.

Michael Schoenbrod
MICHAEL SCHOENBROD

State of Florida
County of Volusia

Sworn to and Subscribed before me this 18 day of May, A.D., 2023.

Proof of Identification:

personally known

Stacy Nicole Dees
NOTARY PUBLIC



STACY NICOLE DEES
Notary Public
State of Florida
Comm# HH367696
Expires 6/23/2027

MEMORANDUM OF LAW

62. This Court's jurisdiction over this matter, i.e., Petition for Writ of Mandamus, is contained within Article 5, Section 5(b), of the Florida Constitution.

63. “When a Court receives a Petition for Writ of Mandamus, its task is assessing the petition to determine whether it is facially sufficient. If it is not facially sufficient, the Court may dismiss the Petition.” *Davis v. State*, 861 So.2d 1214, 1215 (Fla. 2nd DCA 2003)

64. If the petition is facially sufficient, the Court must issue an alternative Writ of Mandamus requiring the respondent to show cause why the Writ should not be issued. *Moore v. Ake*, 693 So.2d 697, 698 (Fla. 2nd DCA 1997)

65. To be facially sufficient the petition must allege facts that establish three elements: (1) the Petitioner possesses a legal right to performance of the requested action, (2) Respondent has an indisputable legal duty to perform the requested action, and (3) the Petitioner otherwise lacks an adequate legal remedy. *Smith v. State*, 696 So.2d 814, 815 (Fla. 2nd DCA 1997)

66. If there is a factual dispute, the Court must resolve it by taking evidence at a hearing. *DeGregorio v. State*, 205 So.3d 841, 842 (Fla. 2nd DCA 2016).

67. Mandamus is an appropriate remedy when it is used to compel an official to perform his legal duties.

68. Each of your Petitioners has the clear legal right to have the State Attorney, or his designated assistant, complete page 2 of FDLE's Form 40-021. The State Attorney, or his designate, has an indisputable legal duty to fill out page 2 of FDLE Form 40-021. Your Petitioners have no other adequate legal remedy to compel the State Attorney, or his designate, to complete page 2 of FDLE Form 40-021.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by electronic delivery to the State Attorney's Office, on this 18th day of May, A.D., 2023.

LAMBERT LAW

/s/ Michael H. Lambert

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