

No. \_\_\_\_\_

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# In the Supreme Court of the United States

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KIMBERLEE SZEWCZYK,

*Petitioner,*

Versus

STATE OF FLORIDA,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA  
SECOND DISTRICT COURT OF APPEAL

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## PETITION FOR A WRIT OF CERTIORARI

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## **QUESTION PRESENTED**

Kimberlee Szewczyk was on probation for unrelated charges when she was arrested on drug charges, ultimately resulting in her conviction at issue. She was only arrested because of evidence found as a result of an illegal search of her residence, which then led to her making incriminating statements to law enforcement. Both the evidence found and her statement was used against her at trial and was the State's strongest argument. After arguing that her counsel violated her Sixth Amendment right to effective assistance of counsel by failing to file a motion to suppress said evidence, and the state court agreeing that counsel was deficient, Ms. Szewczyk raises the following questions for this Court:

Does the standard for assessing ineffective assistance of counsel claims, announced in Strickland v. Washington, fail to protect the Sixth Amendment right to a fair trial and the Fourteenth Amendment right to due process when a trial court finds grounds of unconstitutional performance of counsel, but that same court can deny relief following a “no prejudice” analysis that relies on a trial record shaped by trial counsel’s ineffective representation and the consequences of said representation?

## **PARTIES TO THE PROCEEDING**

All the parties to this proceeding are named in the caption.

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**PETITION FOR WRIT OF CERTIORARI**

Kimberlee Szewczyk respectfully petitions for a writ of certiorari to review the opinion of the Florida Second District Court of Appeal entered in this matter on October 21, 2022, affirming the judgment of the Twentieth Judicial Circuit, in and for Collier County, State of Florida.

**OPINIONS BELOW**

The opinion of the Florida Second District Court of Appeal appears at Szewczyk v. State, 349 So.3d 936 (Fla. 2d DCA 2022). It is attached as **Appendix A**.

The judgment/order appealed to said appellate court, entered by the Twentieth Judicial Circuit, in and for Collier County, State of Florida, is attached at **Appendix B**.

**JURISDICTION**

After the Petitioner filed a timely Motion for Rehearing, Motion for Rehearing *En Banc*, and a Request for Written Opinion following the initial affirmance of the state trial court's judgment denying her relief, the Second District Court of Appeal granted that motion in part, and denied it in part, entering a new judgment and written opinion on October 21, 2022. Even though there was a written opinion filed by said court, the Petitioner still lacked jurisdiction to file a petition seeking discretionary review by the Florida Supreme Court, due to a lack of jurisdiction or good faith basis to seek said petition pursuant to Florida Rule of Appellate Procedure 9.030(2)(A). See, Fla. Const. art. V, Section 3(b). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## **RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS**

This case involves application of two separate constitutional provisions.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## **STATEMENT OF THE CASE**

This case presents important constitutional questions concerning how state courts review and analyze a claim raised under the Sixth Amendment of the United States Constitution and Strickland v. Washington, 466 U.S. 668 (1984). The state court decided an important federal question below in a way that conflicts with this Court's decision in Strickland, and raises the question of whether the analysis being applied in cases similar to that of the Petitioner, by the state courts, are ultimately violating the due process rights of those defendants when they deny relief because they are only looking at a record that constitutionally deficient counsel shaped. This is not only a question of great importance, but ultimately has and will continue to produce results that conflict with the underlying principles established carefully by this Court in Strickland.

### ***A. Factual Background.***

This case involved allegations of scheming to procure oxycodone from two pharmacies through the use of forged prescriptions. The Petitioner was an employee of Luxor Pain Clinic in North Fort Myers. Luxor was exposed as being a “pill mill”, and was subsequently closed for improperly dispensing prescriptions for pain medications. The State alleged that the Petitioner obtained a prescription pad from the clinic. The State further alleged that she would complete oxycodone prescriptions for the co-defendants, and then forge a doctor’s signature thereon. The co-defendants would next attempt to fill the prescriptions at a pharmacy. The prescription pills would then be given by the co-defendants to the Petitioner who would sell the pills.

The Petitioner was charged with one count of conspiracy to traffic in oxycodone, eighteen counts of trafficking in oxycodone, and eighteen counts of obtaining a controlled substance by fraud. She was convicted as charged on all counts following a jury trial. At trial, the State presented the testimony of four co-defendants; Susan Kelley, Jason Eastwood, Carol Bear, and Bonnie Chisholm. Each co-defendant admitted that they were charged as a result of their activities in this alleged conspiracy, and were serving a sentence as a result of a plea bargain. Kelley testified that her plea bargain included her personal testimony in this proceeding. The others stated that there was no agreement for their testimony. Trial counsel was not allowed to explore the maximum amount of time the co-defendants were exposed to as compared to sentences they received in exchange for their cooperation in this cause.

The primary investigating officer, Mark Willis, Special Agent for FDLE, became involved in the case based on two suspicious prescriptions from Walgreens filled for Susan Kelley and Bonnie Chisholm. After receiving that report, he responded the next day to Walgreens on a separate call regarding a potentially fraudulent prescription. At Walgreens, he made contact with Noah Ledoux, who was arrested, and the Petitioner with another female, who were both released on scene. Willis later took the statement of the Petitioner. The audiotape of this statement was played for the jury. In the taped statement, the Petitioner denied taking the prescription pad from Luxor. She also denied forging the doctor's signatures on any prescriptions. The Petitioner did state that she had been authorized to handwrite the patients' information on the unsigned prescriptions at Luxor. She explained that patients would go to Luxor to get prescriptions if they paid for them, furthermore other employees at Luxor would supply these. Petitioner admitted that she told Ledoux of the practice, and that she ultimately assisted him in receiving a prescription. The Petitioner also conceded that she went with Ledoux to fill the prescription, but was unaware that it was fake. When she was asked about a piece of paper which appeared to show practice signatures of one of the doctors, the Petitioner admitted that she had done that, but that she never signed a prescription.

In light of the admissions presented by the State, the Petitioner had no choice but to testify and defend her innocence. She later testified at the evidentiary hearing postconviction that she would not have taken the stand, had those statements not been presented by the State. The Petitioner testified that she had been employed at

Luxor, primarily as the assistant to one of the owners as well as actually taking the vitals for patients before they were seen by the doctor. She also helped in recruiting new doctors for the clinic, and was a liaison with local pharmacies; verifying prescriptions and informing them of new doctors. Furthermore, she was authorized to prewrite the prescriptions which would be signed by the doctor after the patient saw him. Luxor would have 100 to 200 patients a day. She explained that anyone who went there got a pain prescription. The Petitioner was also a patient at Luxor because of an auto accident. No doctor or person from Luxor testified to rebut Petitioner's testimony as to her Luxor duties.

The Petitioner said she went to a pharmacy once with Kelley to fill her prescription. She stated that she never went to a pharmacy with Carol Bear. The Petitioner did prewrite prescriptions for her, but the doctor signed those. The Petitioner prewrote prescriptions for six to seven months. She completed a prescription for Patrick Bear seven times, however the doctor actually signed each one of these. She never went to the pharmacy with him. The Petitioner further acknowledged that she had prepared some of Carol Bear's prescriptions, which were signed by the doctor. The Petitioner completed two prescriptions for Kathy Eastwood, both signed by the doctor. For Jason Eastwood, she prewrote one prescription. She testified that she does not know who signed that one.

The Petitioner conceded that she accompanied Bonnie Chisholm to the Walgreens pharmacy because Carol Bear had asked her to do so. She prewrote that prescription, which was signed by the doctor. In regard to Noah Ledoux, she admitted

that she assisted him in getting a signed prescription. The Petitioner completed the prescription, handed it to another employee, Matt, and it came back signed. She also went with Ledoux to fill the prescription. The Petitioner explained that oxycodone prescriptions are sometimes hard to fill. She was familiar with that Walgreens, and thought she could help him get that prescription filled. The Petitioner testified that she did not know about the blank prescription pad found on her refrigerator, and denied that it was ever in her possession. Finally, she acknowledged that she had practiced the doctor's signature several times but it was just "doodling." She never forged the signature on any prescriptions.

After filing a postconviction motion, an evidentiary hearing was held and testimony about the initial illegal search and seizure of the Petitioner's residence was presented. Annemarie White, the Petitioner's probation officer in 2011, was the first witness to testify. The Petitioner was on probation for a driving offense that had nothing to do with controlled substances. Ms. White did a search of the Petitioner's residence on October 12, 2011 and did not see anything that stood out as being in violation of the rules of probation. The following day Ms. White returned to the Petitioner's residence to conduct a second search, based on information she had gathered the day before. Ms. White had received a call from Special Agent Willis, who had had contact with the Petitioner, and informed Ms. White that a friend of the Petitioner's was being placed under arrest for prescription fraud. Ms. White advised Agent Willis that she was going to be doing a second search of the Petitioner's residence the following morning. Agent Willis agreed to meet her at the residence.

The following morning, at approximately 8:00a.m., Ms. White arrived at the Petitioner's residence with Probation Officer Scott White, Detective Ralph Sobrey and FDLE Agent Willis. There was no search warrant for the Petitioner's residence at that time. On October 15, 2011, a violation of probation affidavit was filed that alleged four different violations: (1) leaving the county of residence without permission; (2) failing to live or remain at liberty without violating the law (based on the search of Petitioner's bedroom); (3) using intoxicants (based on the search of Petitioner's bedroom); and (4) associating with persons engaged in criminal activity. (R-934-38). Ms. White couldn't remember that several other officers were also present during the search of the Petitioner's residence. She believed they had just shown up, but were not involved in any way.

Deputy Sheriff Jose Vitale was the next witness called to testify. In 2011, Deputy Vitale became involved with a joint investigation with the FDLE that dealt with the distribution of Oxycodone. The first interaction that was had with the Petitioner was on October 12, 2011, when Noah Lodo was arrested. The Petitioner was not taken into custody, but was briefly detained. The following day, Deputy Vitale went to the Petitioner's residence after being contacted by the Petitioner's probation officer with the purpose of wanting to interview the Petitioner about things Noah Lodo advised him of. At the time they made arrangements to go to the Petitioner's residence, Deputy Vitale did not believe, in his professional opinion, that they had enough information to obtain a search warrant.

Supervisor Mark Willis with the Florida Department of Law Enforcement also testified at the hearing. Willis described the events at Walgreens on October 12, 2011 and testified that later that day, Mr. Lodo made incriminating statements that implicated the Petitioner. At some point that same day, the Petitioner's probation officer reached out to Willis and asked about his reason for making contact with the Petitioner. Willis could not recall the specifics of the conversation, but he was sure that he told Ms. White that Luxor (where the Petitioner worked) was the focus of a criminal investigation. When asked how it came to be that they would go to the Petitioner's residence the following day, Willis testified:

Mrs. White told me that she would be going to [the Petitioner's] residence the next morning, and [Mrs. White] asked us to come up there, because we wanted to talk to [the Petitioner] again, based on information we got from Mr. Lodo. Some of the stories she told us, or told me in the parking lot, did not match what Mr. Lodo told me.

Willis clarified that Ms. White invited them to the residence to specifically speak with the Petitioner; nothing was discussed about them assisting with the search. "My intent was to talk to her." Willis recalled approximately nine officers being present at the time of the search the following day. Willis did not believe there was probable cause for a search warrant. After two pieces of incriminating evidence were found, Willis spoke with the Petitioner and she incriminated herself. The evidence found was important to Willis's investigation, per his opinion.

The Petitioner was the next witness to testify. The Petitioner testified about her initial encounter with Ms. White, the incident at Walgreens and then the search of her residence. The Petitioner ultimately made incriminating statements after the

search of her residence, that were later used against her at her trial. There was also critical pieces of evidence found during the search that were also used against her.

Adam Oosterbaan, trial counsel for the Petitioner, was the final witness to testify at the evidentiary hearing. Counsel agreed that the most critical pieces of evidence at trial were (1) the co-defendants' testimony, (2) the prescription pad, and (3) the piece of paper that had practice signatures on it. Counsel testified that pursuant to his research, he believed the officers had reasonable suspicion to be involved with the warrantless search of the Petitioner's residence. Counsel testified that he reviewed the statements of Eastwood and Chisholm before trial, noted their inconsistencies and would have impeached them on those because their testimony was important to the State's case

***B. Procedural History and the State Court Ruling on Review.***

After the appeal of her judgment and sentence was affirmed, the Petitioner later timely filed a Motion for Postconviction Relief with the state court, arguing therein numerous claims of ineffective counsel. Of importance to the instant petition was her claim that counsel was constitutionally ineffective for failing to file a motion to suppress the evidence obtained during the warrantless search. She asserted that law enforcement had neither a warrant nor reasonable suspicion of any criminal activity, rendering the search of her residence a violation of the Fourth Amendment.

After an evidentiary hearing addressing this claim, the postconviction court determined that the Petitioner's trial counsel had performed deficiently in failing

to file a motion to suppress the evidence found during the warrantless search. However, the court denied her claim because it determined that she had failed to establish that she was prejudiced by counsel's deficient performance. The court came to this conclusion by reviewing the trial record made by deficient counsel, which included evidence that would not have otherwise been relevant or admissible if counsel had acted constitutionally reasonable to begin with. The court found

[n]otwithstanding that the practice signature page was a feature of the State's evidence against the Defendant, it was far from the only evidence.

...

Hence, there was overwhelming evidence of the Defendant's guilt even in the absence of the drug paraphernalia and a piece of paper with practice signatures on it found during the warrantless probationary search and the statements related thereto later made by the Defendant. This Court finds that there is not a reasonable probability that the jury verdict would have been affected by the absence of said drug paraphernalia or practice signatures or statements related thereto considering all of the other evidence of guilt.

A35. The Petitioner filed a motion for rehearing, but as denied relief by the trial court. She then appealed from the judgment entered against her to the Second District Court of Appeal.

After the pleadings had been filed, and oral argument had been entertained, an initial opinion was issued that affirmed the trial court's denial without any explanation whatsoever. The Petitioner filed a timely Motion for Rehearing, Rehearing *En Banc* and Request for Written Opinion which was later granted on October 21, 2022, in part, and an opinion was issued explaining why she was not entitled to relief.

We agree that Szewczyk failed to establish that she was prejudiced by counsel's purportedly deficient performance. The postconviction court correctly determined that although one piece of evidence found during the warrantless search was heavily relied upon in the State's case against Szewczyk, the totality of the evidence against her precludes a reasonable probability that the outcome of the trial would have been different had the evidence in question been suppressed. [ ] In addition to the three codefendants who testified that Szewczyk actively participated in obtaining fraudulent prescriptions and trafficking in oxycodone, Szewczyk testified that she and a codefendant had an agreement whereby she would receive oxycodone in exchange for finding a pharmacy that would fill a fraudulent prescription for the codefendant and that she had inserted a codefendant's name on a prescription that had already been written and signed. This testimony supports the convictions without consideration of the evidence obtained in the warrantless search.

A6-A7. (Internal citations omitted).

## REASONS FOR GRANTING THE PETITION

### I. THE COURT SHOULD GRANT THIS PETITION TO CONSIDER WHETHER THE LAST STATE COURT TO CONSIDER THE ALLEGATION THAT THE PETITIONER'S SIXTH AMENDMENT RIGHTS WERE VIOLATED UNDER STRICKLAND V. WASHINGTON, RENDERED AN OPINION THAT CONFLICTS WITH THE UNDERLYING PRINCIPLES CAREFULLY ESTABLISHED BY THIS COURT IN STRICKLAND, AND AS A RESULT, FURTHER VIOLATED THE PETITIONER'S DUE PROCESS RIGHTS

The Florida Court of Appeals rejected the Petitioner's claim that she was entitled to relief because even though she had deficient counsel under Strickland, she had not established prejudice. In coming to that finding, the court reviewed the very record that ineffective counsel created, that included several pieces of evidence that would not have otherwise been considered by a jury if the Petitioner's rights had not been violated.

This Court established the now well-known principle for examining claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984). In order to obtain relief on such a claim, the petitioner must show that her counsel's performance was deficient and that deficiency prejudiced his defense. Id. at 687. Deficient performance is that which falls below an objective standard of reasonableness. Id. at 688. The petitioner must also show that she was prejudiced as a result of counsel's deficient performance. In order to establish this second prong, this Court found that “[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Id. at 694.

The State of Florida has taken this Court's precedent and applied it to different factual and legal scenarios, including a claim that counsel was ineffective for failing to file a motion to suppress – as argued in the instant case. In that context, if a defendant successfully shows that counsel was constitutionally ineffective, in order to prove that counsel's failure to file a motion to suppress resulted in prejudice to the defendant, it must be shown that the motion to suppress would have been granted and there was a reasonable probability that the outcome of the trial would have been different if the suppressed evidence was not admitted. See, Cormier v. State, 253 So.3d 75 (Fla. 1st DCA 2018); Booker v. State, 301 So.3d 432 (Fla. 2d DCA 2020) (finding that counsel's failure to file a motion to suppress fentanyl found as a result of a warrantless search was deficient and resulted in prejudice when there was more than just a mere reasonable probability that a motion would have been granted and the outcome of the case would have been different).

This Court should grant the instant petition and consider the merits of the proposed question, because the decision rendered by the state court below establishes a pattern that state courts, as well as federal courts, will likely continue to follow and that pattern is one that continues to further violate the constitutional rights of defendants. As applied currently, when analyzing the prejudice prong of a claim under Strickland, the courts review the trial record that trial counsel, who in this case specifically was found to be constitutionally ineffective, created. In doing so, the court looks at evidence that would not otherwise have come in consideration for a jury, had counsel been effective. For example,, in the instant case, the main reason

that the court denied the Petitioner relief was because she testified at trial. however, as explained by the Petitioner, she only exercised that right because her attorney was ineffective, failed to file a motion to suppress her incriminating statement, and she had no choice but to explain what she meant when she spoke to law enforcement. In other words, had counsel filed the motion to suppress, her statement would not have been admissible at trial and she would not have testified. But the state court does not look at the issue in that context. In conducting its evaluation, it looks solely at the plain reading of the transcripts, as the jury considered them. This goes against the original principles used by this Court when deciding Strickland. It not only further violates the constitutional rights of the Petitioner by going against those principles, but it answers the federal question concerning the right to counsel under the Sixth Amendment in a way that conflicts with the relevant decision of Strickland.

Although the Petitioner is merely one person who has been knowingly affected by this issue, this type of analysis occurs every day in the fifty states of this country. It is going to continue to further violate the rights of those that this Court sought to protect when it published the opinion of Strickland and as a result, the Petitioner requests that this Court exercise its discretion and entertain this case accordingly.

## CONCLUSION

For the reasons stated above, the Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Kimberlee Szewczyk, Petitioner

Date: January 19, 2023

  
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