APPENDIX

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DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

KIMBERLEE SZEWCZYK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D21-10

October 21, 2022

BY ORDER OF THE COURT:

Kimberlee Szewczyk's motion for rehearing, motion for rehearing en banc, and request for written opinion is granted in part and denied in part. The prior opinion dated April 8, 2022, is withdrawn, and the attached opinion is issued in its place. No further motions for rehearing will be entertained.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

MARY ELIZABETH KUENZEL
CLERK

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

KIMBERLEE SZEWCZYK,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D21-10

October 21, 2022

Appeal from the Circuit Court for Charlotte County; Donald H. Mason, Judge.

Rachael E. Reese of O'Brien Hatfield Reese, P.A., Tampa, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and William C. Shelhart, Assistant Attorney General, Tampa for Appellee.

BLACK, Judge.

Kimberlee Szewczyk challenges the denial of her motion for postconviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850. We affirm but write to address Szewczyk's

argument that the postconviction court erred in denying her claim regarding trial counsel's failure to file a motion to suppress evidence found during a warrantless search of her home.

Szewczyk 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 the time Szewczyk was arrested on the drug charges, she was on probation for an unrelated conviction. The terms of her probation did *not* include warrantless searches of her home. However, Szewczyk's probation officer, accompanied by at least nine law enforcement officers, entered her residence and conducted a search without a warrant. Szewczyk's trial counsel did not move to suppress the evidence obtained during the warrantless search, and that evidence was introduced at the trial on the drug charges.

In her postconviction motion, Szewczyk argued that her trial counsel's failure to file a motion to suppress the evidence obtained during the warrantless search constituted ineffective assistance of counsel. 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 Szewczyk's trial counsel had performed deficiently in failing to file a motion to suppress the evidence found during the warrantless search. In reaching that determination, the court considered the facts of Szewczyk's case, including a concession by law enforcement officers that they had no reasonable suspicion to believe Szewczyk was engaged in criminal activity, and precedent from the Florida Supreme Court, Florida District Courts of Appeal, and the United States Supreme Court on the issue of probationary versus investigatory searches.[1] However,

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[1] The court cited *Grubbs v. State*, 373 So. 2d 905, 909-10 (Fla. 1979), for its holding that a warrantless search of a probationer's residence by law enforcement officers—rather than a probation supervisor—"is not permissible under the search and seizure provisions of the Florida or United States Constitutions . . . in the absence of one of the traditional exceptions to the warrant requirement." The court also cited *United States v. Knights*, 534 U.S. 112, 122 (2001), for its holding that a "warrantless search of [the probationer's home], supported by reasonable suspicion *and* authorized by a condition of probation, was reasonable within the meaning of the Fourth Amendment." (Emphasis added.) Although the court cited additional cases, *Grubbs* and *Knights* are the principal cases addressing warrantless searches of probationers' homes. We agree with the postconviction court that the facts of

the postconviction court denied Szewczyk's claim because it determined that she had failed to establish that she was prejudiced by counsel's deficient performance. *See Abdool v. State*, 220 So. 3d 1106, 1112 (Fla. 2017) (reiterating that both deficient performance and prejudice must be shown in order for a motion for postconviction relief alleging ineffective assistance of counsel to be granted and that "when a defendant fails to make a showing as to one prong, it is not necessary to delve into whether he has made a showing as to the other prong" (quoting *Zakrzewski v. State*, 866 So. 2d 688, 692 (Fla. 2003))).

We agree that Szewczyk failed to establish that she was prejudiced by counsel's purportedly deficient performance.[2] The

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each case must be considered in determining whether and how *Grubbs* and *Knights* apply, and we note that none of the cases relied upon by Szewczyk and the State address a warrantless search by law enforcement officers without reasonable suspicion and where the probation order does not include a provision authorizing warrantless searches.

[2] We decline to address the deficient performance determination by the postconviction court. *See Gonzalez v. State*, 249 So. 3d 1269, 1276 (Fla. 1st DCA 2018) ("Because the defendant must prove both deficient performance and prejudice, we address this case without deciding whether the [postconviction] court's findings as to any deficient performance by defense counsel are supported by competent, substantial evidence.").

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. *See Cannon v. State*, 310 So. 3d 1259, 1264 (Fla. 2020) (stating that the totality of the evidence is considered when determining whether prejudice has been shown in a claim of ineffective assistance of counsel). 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. *Cf. id.* ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record

support." (quoting *Williamson v. State*, 123 So. 3d 1060, 1066 (Fla. 2013))).

The order denying Szewczyk's motion for postconviction relief is affirmed.

Affirmed.

ATKINSON, J., Concurs.
LUCAS, J., Concurs in result only.

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IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR CHARLOTTE COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA,
Plaintiff,

vs. **Case No. 13-482F**

KIMBERLEE SZEWCZYK,
Defendant.
_____/

ORDER DENYING 3.850 MOTION AFTER EVIDENTIARY HEARING

THIS CAUSE comes before the Court on Defendant's "Motion for Post-Conviction Relief" (the "Motion"), pursuant to Fla. R. Crim. P. 3.850, filed September 5, 2018. Having reviewed the Motion, the State's Response, the movant's Reply thereto, related filings, the case file, the evidence and argument presented at a hearing commenced October 25, 2019 and completed February 5, 2020, and the applicable law, the Court finds as follows:

1. By order rendered May 23, 2019, the Court indicated it would be denying Grounds #1, #6 and #8 of the Motion. That order is hereby incorporated by reference. Grounds #1, #6 and #8 are **DENIED**.

2. An evidentiary hearing was ordered on Grounds #2, #3, #4, #5, #7, #9 and #10. All such grounds alleged ineffective assistance of counsel. That evidentiary hearing was held on October 25, 2019 at which time Defendant was present with her post-conviction counsel. The following persons testified at the hearing: Adam Oosterbaan (one of Defendant's trial counsel), Anne Marie White (Defendant's probation officer), Jose Vitaly (Charlotte County Sheriff's Office), Mark Willis (Florida Department of Law Enforcement), and the Defendant.

3. To prevail on a claim of ineffective assistance of counsel, Defendant must demonstrate that: (1) counsel's performance was deficient, and (2) there is a reasonable probability that the

outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *Williamson v. Dugger*, 651 So. 2d 84 (Fla. 1994).

4. The Court notes that in reviewing claims of ineffective assistance of counsel, it must apply a strong presumption that counsel's conduct falls within the range of reasonable professional assistance and must avoid the distorting effects of hindsight. The standard is reasonably effective counsel, not perfect or error-free counsel. *Coleman v. State*, 718 So. 2d 827 (Fla. 4th DCA 1998); *Schofield v. State*, 681 So. 2d 736 (Fla. 2d DCA 1996). It is further noted that, in general, tactical or strategic decisions of counsel do not constitute ineffective assistance of counsel. *Gonzales v. State*, 691 So. 2d 602 (Fla. 4th DCA 1997).

5. **As to Ground 2:** Defendant argued that counsel was ineffective by failing to adequately represent the Defendant during the plea process. The Defendant unquestionably received two plea offers prior to trial: The first offer being 15 years in the Department of Corrections ("DOC"), and the second being an offer of 12 years in DOC[1]. The Motion alleged: "Specifically, trial counsel failed to provide and effectively advise the Movant..." (Further undescribed) and "failed to inform the Movant of the maximum penalties she was facing" if convicted at trial. (The Motion, p. 16.) Further, the Motion alleges that her attorney "failed to offer any advice or guidance to the Movant as to whether or not to accept the plea and her maximum exposure in proceeding to trial. In light of the facts available, the Court finds this argument specious to say the least.

The "maximum penalty" allegation is clearly refuted by the Record. In State's Exhibit #2A, a letter to the Defendant from her trial counsel, her attorney recommends a plea bargain and clearly points out that she has three 1st degree felonies carrying a maximum penalty of 30 years

[1] It should be noted here that the Defendant was represented by one attorney when the 15 year offer was extended and a different attorney when the 12 year offer was made - the latter counsel being the attorney who ultimately tried the case.

each with a 25 year minimum mandatory. It further states that the Defendant scores a total of 1195.5 points on her scoresheet and that anything in excess of 363 points carries a life sentence. In State's Exhibit #4A, also a letter to the Defendant from her trial counsel, he again recommends the 12 year offer, calling it very good offer and reminds her that a life sentence could be the result if the offer is rejected. **In reality, the evidence presented by the State was more than sufficient to convict the Movant and had counsel advised her as such, she would have accepted the plea." (The Motion, p. 18.)**

6. With respect to the 15 year offer the Defendant testified that the attorney only met with her over a computerized video transmission and never in person. She said that while that attorney did send her a copy of the discovery in her case, he never reviewed it with her. She said that she was interested in the offer but that she wanted to discuss the evidence against her with her attorney before taking the plea. As that did not happen, she rejected the offer.

7. This Court finds that any deficiency in the first trial counsel's performance (vis-à-vis the 15 year offer) and its resulting prejudice, assuming *arguendo* that both exist, were rendered moot when the State extended the subsequent 12 year offer, a better offer. Alternatively, the Court finds that the Defendant has failed in her burden with respect to the 15 year offer. It is unknown when the offer was made or how much discovery had been accomplished at that time. It is unknown how long the offer was available. The Defendant testified that while she had been given a copy of discovery at that time, she did not have any deposition transcripts. On the other hand, it is unknown whether any depositions had been taken or delayed or for what reason(s). In other words, there is a lack of evidence to show deficiency in the attorney's performance vis-à-vis the 15 year offer.

8. With respect to the 12 year offer, the Defendant testified that (as with the 15 year offer) she was interested but "needed more information". This contention is not supported by the record

or by the evidence presented at the hearing. State's Exhibit #2A is dated February 26, 2015 and advises the Defendant of the 12 year offer. The Defendant was clearly not interested in that offer and, in fact, signed a rejection affidavit the next day. State's Exhibit #4A is dated March 11, 2015 and recommends that the Defendant take the 12 year deal which was still on the table. It further states that the offer will lapse if not accepted by her next court date of April 16, 2015. It cannot be plausibly contended that the Defendant would have taken that offer but-for a lack of needed information given the fact she (a) rejected the offer a day after receiving it, and (b) rejected it a second time after receiving the recommendation from her attorney that she accept it and why it was in her best interest to do so.

9. Moreover, approximately two weeks later, the Defendant files a Motion to Dismiss Counsel alleging that her counsel "*has made statements aimed at detering [sic] this cause to be tried by jury and the consequences of doing so.*" (State's Exhibit #1.) This, she continues, caused her to feel that her attorney will not render effective assistance of counsel at trial. Stated differently, the Defendant wanted to go to trial and felt her attorney was not going to fight for her because he was recommending she take the offer. This exhibit, written in the Defendant's own hand, actually supports her trial counsel's testimony that the Defendant was never interested in accepting the offer and was always adamant about going to trial. The State also elicited testimony from the Defendant that at her Nelson Hearing she told the judge that if she got a new attorney and that attorney also recommended a plea bargain, she would just have to take that chance because it is her life and her choice.

10. The offer, however, apparently remained open or was re-opened as evinced in the April 22, 2015 letter that trial counsel wrote to the Defendant in which he noted that the offer will lapse on her next court date of May 19, 2015. (Defendant's Exhibit #B.) Again it was not accepted.

11. Then again, just before trial, the State put the 12 year offer back on the table. The attorney was able to arrange a telephone call to the jail approximately 1 week before trial. He advised that the State was about to fly in a witness from New Jersey and so she must give an answer now. In her motion, the Defendant alleges that she had questions about "her [cooperating] co-defendants and what they would testify to at her trial." (The Motion, p. 19.) She said her lawyer began yelling at her and so she hung up on him.

12. There was evidence and argument presented at the hearing that the attorney never explained "why" he was recommending the offer. However, in State's Exhibit #5 (emphasis added), a letter to the Defendant written on September 11, 2015, trial counsel wrote very plainly to the Defendant that she is *simply refusing to understand what he has been explaining* to her "about the evidence against [her] and how it will be supported at trial." He repeats that the evidence is overwhelming and growing by the day. He reminds her that there are "several witnesses who will testify to your active participation in a conspiracy to fraudulently obtain prescription pills." He writes in **all capital letters** that her defense, i.e., that everyone else is lying, is not a defense and will not be believed. Significantly, he also reminds her that while there are inconsistencies in some of the witnesses' testimony, "they consistently say that you were the organizer of this fraudulent scheme" and he reiterates about the "tons of corroborating evidence to support that."

13. Finally, with respect to which witnesses would be called by the prosecution and what those witnesses would say at trial, it is clear that the Defendant was copied on discovery. She was given deposition transcripts. She was well aware of all of the potential evidence against her. It is impossible for any defense lawyer to advise any client with 100% certainty what witnesses will be called by the prosecution or exactly what those witnesses will say on the day of trial. The

Defendant's contention is essentially that she expected her attorney to be able to predict the future with more precision than what was provided in the discovery and deposition transcripts before she was able to decide whether to accept an offer. This is an unrealistic expectation and the failure to fulfill that unreasonable expectation in no way, shape or form constitutes deficient performance.

Conclusion: The Defendant has failed to demonstrate deficiency in trial counsel's performance. Ground # 2 is **DENIED**.

14. **As to Ground 3**, the Defendant alleges deficient performance in that trial counsel failed to retain a handwriting expert to opine that the Defendant did not write the forged prescriptions. The Motion states that the "Movant reserves the right to present testimony from necessary experts at an evidentiary hearing to substantiate this claim." (The Motion, p. 22.) At the evidentiary hearing held on this ground, counsel for the defense advised that it was relying on the Motion and would be presenting no further evidence in support of this ground.

15. As this Court noted in its May 23, 2019 order, handwriting analysis experts usually will compare contemporaneous true exemplars to a writing of questionable origin so as to determine if the questionable writing is genuine or a forgery of the person supplying the true exemplars. Defendant claims that an expert would have been able to opine that it was not the Defendant who forged the prescriptions at issue in this cause. The Defendant presented no expert at the hearing. The Defendant presented no testimony as to whether any expert can exclude a particular person from being the forger of a signature known to have been forged.

16. In *Carmona v. State*, 814 So.2d 481 (Fla. 5th DCA 2002), the 5th District Court of Appeal noted that in considering effective vs. ineffective assistance in not calling an expert witness, three facts should be considered. First, the reasons for not pursuing the expert. Here, counsel testified that the Defendant had admitted to a police officer that she had been doodling the

doctors signature and later admitted she had practiced it but did not answer why she did so. Moreover, there was eyewitness testimony presented that the Defendant forged signatures on prescriptions in order to get pills. The second factor was whether the State's expert was cross examined and whether that cross examination exposed any weaknesses in the opinion testimony to the jury. Here, the State did not bring in a handwriting analysis expert. Instead it offered eyewitness testimony and the Defendant's own admissions. The final factor is whether an expert was available to opine in the manner in which the Defendant has suggested. Here, the Defendant presented no evidence that any handwriting expert could opine that a particular person was not the forger of a known forgery, much less that such an expert was available to so testify.

Conclusion: The Defendant has failed to demonstrate any deficiency in counsel's performance in failing to retain a handwriting analysis expert and any prejudice resulting therefrom. Grounds #3 is **DENIED**.

17. **As to Ground #4**, the Defendant alleges that her counsel failed to investigate potential evidence found in a dumpster behind a North Fort Myers strip mall that could have been beneficial in supporting her theory of the case, i.e., that someone else had forged the prescriptions and was trafficking in pills – not the Defendant. The potential evidence included records and computers from Luxor Industries, a suspected "pill mill" and former employer of the Defendant. A local merchant had found the items on December 11, 2012 and called a media outlet who sent a reporter down to cover the finding. The reporter is alleged to have viewed at least some of the records and interviewed the merchant finding them. Local law enforcement then arrived, collected the evidence and turned it over the Florida Department of Law Enforcement ("FDLE") who subsequently turned it over to the Drug Enforcement Administration ("DEA"). I should be noted that Attorney Osterbahn was not counsel of record at the time these medical records. He entered

his appearance on February 5, 2015, some twenty-six months after discovery. (See: Filing # 23438617 E-Filed 02/05/2015 05:20:31 PM)

18. The Defendant has acknowledged in her motion that trial counsel filed a demand for supplemental discovery pertaining to the dumpster material and that a hearing was held on that motion. Counsel had argued at the hearing, as the Defendant does in her motion, that the material may provide support for the defense theory of the case. The State had argued, however, that they were not in possession of said records and were unable to provide a summary or report on the contents of the records. The Court also noted the privacy requirements of the Health Insurance Portability and Accountability Act ("HIPAA") which prevented the Court from ordering the wholesale disclosure of medical records without consent of the patients and/or other compliance with HIPAA procedures.

19. The Motion then alleges that trial counsel failed to take any further action on the issue. It continues that the merchant and the reporter "would have been able to testify, or to provide information, about pertinent records that were found dumped in the dumpster." The Court finds this statement purely speculative and/or conclusory. This allegation is unsupported by testimony or affidavit. Moreover, trial counsel testified at the post-conviction hearing that he did investigate such evidence and did make some telephone calls and believes that he called the reporter who offered no information on records found over two years prior. There are entries in his time sheets reflecting activity on this issue in the form of investigation and telephoning a reporter. (State's Exhibit #6.)

20. The Defendant offered no evidence, testimonial or otherwise, at the post-conviction hearing that would have constituted relevant evidence concerning the content of the dumpster records or even evidence likely to lead to the discovery of admissible evidence on this issue. It is

significant that the Defendant was the office manager at Luxor Industries but did not identify exactly how a reporter or other person unfamiliar with Luxor's medical records could look at them briefly and conclude that the patient or an employee of Luxor was trafficking in prescription medications. The Defendant further failed to offer any proof on how the medical records of Luxor would or could show that one or more other persons were trafficking but that the Defendant was not. The Defendant has failed to demonstrate any deficiency in trial counsel's performance vis-à-vis the dumpster records and any prejudice resulting therefrom. Ground #4 is **DENIED**.

21. **As to Ground 5,** the Defendant asserts an ineffective assistance claim based on the failure to properly impeach two co-defendants who testified against her using prior inconsistent statements made by said co-defendants and Defense Exhibit A for Identification (a document date July 24, 2012 that lists the witness as a patient of Luxor Industries). The State argued alternatively that (a) the statements were not truly inconsistent and (b) the inconsistency was not material. The State further argued that any failure in the impeachment could, at best, be directed at Counts 14 (Chisholm) and 15 (Eastwood) only.[2] The Defendant alleges 6 prior statements by co-defendant Bonnie Chisholm that were inconsistent with her trial testimony. The Defendant alleged 9 available prior statements by co-defendant Jason Eastwood that were inconsistent with his trial testimony. (Defendant's Notice of Inconsistent Statements for Purposes of 3.850 Evidentiary Hearing, pp. 7-9 and 2-7, respectively.) As written by the Florida Supreme Court: "To be inconsistent, a prior statement must either *directly contradict* or *materially differ* from the expected testimony at trial." *State v. Hoggins*, 718 So.2d 761, 771 (Fla. 1998).

19. **As to Bonnie Chisholm**, the defense raises the following alleged inconsistencies: (1) meeting up with the Defendant; (2) filling the prescription at Walgreens; (3) what happened after

[2] This contention fails to take into account Jason Eastwood's alleged prior inconsistent statement (b), *infra*.

leaving the pharmacy; (4) what Chisholm received for filling prescription; (5) whether Chisholm communicated with Defendant after filling prescription; and (6) whether the witness was a patient at Luxor Industries - where the Defendant worked.[3] With respect to (1), this Court finds that the witness's testimony at trial does not directly contradict her testimony at deposition or materially differ therefrom. That co-defendant Susan Kelly was driving the Defendant's car does not mean that the Defendant did not "pick up" the witness to go to fill the fraudulent prescription. That the witness had earlier told a police officer that the Defendant met her at a store in the witness's neighborhood (as opposed to coming to her house to pick her up) before going to fill the fraudulent prescription is also not material to the charge.[4] Alternatively, "proper impeachment" of the witness would likely have had no effect on the juror's verdict in light of the clear testimony of the Defendant's active participation in the filling of this fraudulent prescription and considering the similar testimonies of the other cooperating co-defendants.

20. With respect to (2) this Court also finds the statements do not directly contradict and/or are not materially different. Both statements were that the Defendant and the witness went to the pharmacy counter to turn in the fraudulent prescription. Whether the Defendant wandered around the store as the witness waited for the fraudulent prescription in the pharmacy area and whether the Defendant "stayed right there" can be the same questions in the sense that the Defendant did not leave the store but rather "stayed right there" while waiting for the fraudulent prescription to be filled. In either scenario, the Defendant went with the witness to not only the store but the pharmacy counter to submit a fraudulent prescription and obtain pills. Where the Defendant

[3] Subparts (1), (3), (4) and (6) were raised in the Motion. Subparts (2) and (5) were added in the Defendant's November 4, 2019 filing after the evidentiary hearing. This is more than two years after the Judgment and Sentence became final (July 13, 2019) making their inclusion as added subparts untimely.
[4] The State correctly pointed out that had trial counsel properly impeached the witness concerning her prior inconsistent statement to the police officer, the State would have been allowed to bring in the deposition testimony as a prior consistent statement under Fla. Stat. §90.80(2)(b).

waited was a mere detail especially if her wait included both the pharmacy area and elsewhere in the store. Here, the trial testimony was given during the publication of a video recording of what happened in the pharmacy with the witness pointing out that the Defendant first waited with her and then walked around the store. (Trial Transcript, Vol. IV, pp. 689-691.) Moreover, the slight difference on this minor detail is immaterial to the central issue. Alternatively, "proper impeachment" of the witness would likely have had no effect on the juror's verdict in light of the clear testimony of the Defendant's active participation in the filling of this fraudulent prescription and considering the similar testimonies of the other cooperating co-defendants. And this deficiency allegation was untimely raised.

21. With respect to (3), the difference between riding together back to the witness's house (trial) and being abandoned by the Defendant after the fraudulent prescription was filled (statement to police) does make the prior statement inconsistent. On the other hand, had trial counsel elicited this prior inconsistency the jury would have heard not only that the Defendant was a conspiring trafficker in prescription pills but that she was willing to abandon her co-conspirator after getting the object of that conspiracy. This would most likely have led the State to argue flight/consciousness of guilt. Tactically, trial counsel could have been seen as ineffective by pursuing this alleged inconsistency as it is not clear that the import of the impeachment (assuming *arguendo* it was properly accomplished) would have outweighed the negative impact on the Defendant. Further, how she got back from the pharmacy was not material to the trafficking charge. The alleged "proper impeachment" of the witness would likely have had no effect on the juror's verdict in light of the clear testimony of the Defendant's active participation in the filling of this fraudulent prescription and considering the similar testimonies of the other cooperating co-defendants. Moreover, it could have provided the State with a strong argument of consciousness

of guilt, much to the Defendant's detriment.

22. With respect to (4), the inconsistency surrounds compensation for participating in the filling of the fraudulent prescription (pretrial - no pills vs. at trial - a few pills so as "not to be sick"). The statements are do not directly contradict each other and are not materially different in the context in which they were made. The trial testimony was that the witness was given a few pills so as not to be sick but that she was not "paid" for participating. The prior statement included that the witness's interest in participating was to get pills, i.e., pills were her intended compensation. Under both statements, therefore, she did not receive her compensation. Additionally, "proper impeachment" of the witness would likely have had no effect on the juror's verdict in light of the clear testimony of the Defendant's active participation in the filling of this fraudulent prescription and considering the similar testimonies of the other cooperating co-defendants.

23. With respect to (5), the defense contends that the witness's trial testimony that she had no dealings with the Defendant "ever since" and her prior statement to the police that afterward she "tried to" call the Defendant (without more) were inconsistent. This Court disagrees both under the *Huggins* definition, *supra*, and under the plain and ordinary meaning of the word. Moreover, "proper impeachment" of the witness would likely have had no effect on the juror's verdict in light of the clear testimony of the Defendant's active participation in the filling of this fraudulent prescription and considering the similar testimonies of the other cooperating co-defendants. And this alleged deficiency was raised untimely.

24. With respect to (6), this Court finds that whether the witness was a patient at Luxor Industries is a collateral matter as it is immaterial to whether the Defendant engaged in a conspiracy to traffic in controlled substances, actually trafficked in prescription pills, or obtained a controlled

substance by false prescription. It is "well established that if a witness is cross-examined concerning a collateral or irrelevant matter, the cross-examiner must 'take' the answer, is bound by it, and may not subsequently impeach the witness by introducing extrinsic evidence to contradict the witness on that point." *Caruso v. State*, 645 So.2d 389, 394 (Fla. 1994).

25. **As to Jason Eastwood**, the defense alleges the following prior inconsistent statements with which the witness could be impeached: (a) compensation for staying at the Eastwood residence; (b) things Eastwood saw at his residence; (c) prescription pad at the residence; (d) where/how Eastwood received the prescription he had filled; (e) who provided Eastwood with directions about getting the prescription filled; (f) what happened after Eastwood received the pills; (g) how Eastwood paid for the prescriptions; (h) what Eastwood received from having the prescriptions filled; and, (i) motivation for testifying against the Defendant.

26. With respect to (a), this Court finds any inconsistency to be immaterial. The examiner was also bound by the answer to this collateral matter. *Caruso, supra.* Additionally, "proper impeachment" of the witness would likely have had no effect on the juror's verdict in light of the clear testimony of the Defendant's active participation in the filling of this fraudulent prescription and considering the similar testimonies of the other cooperating co-defendants.

27. With respect to (b), the trial testimony was that the witness did observe something in his home (shared with the Defendant) that made him think that the Defendant was involved in a pill situation, to-wit: "counting pills at the table and stuff." The prior deposition testimony was that he did see the Defendant *and Susan Kelly* (a cooperating co-defendant) doing "a lot of stuff or activity" when asked if he witnessed them do business *together*. Hence, his seemingly inconsistent statements were really given in response to different questions. As noted by the defense, the next question in deposition, however, was if the witness saw what kind of activity

and, curiously, he said "No, sir." Because the deposition testimony itself was somewhat inherently inconsistent, "proper impeachment" would have been at best a "close cross examination" which was not likely to have affected the jury's verdict. This is especially so considering that the witness had also just discussed overhearing the Defendant ask one or more persons to "make a run" for her with pills involved. (T.T. Vol. III, pp. 457-458) and considering the clear testimony of the Defendant's active participation in the filling of this fraudulent prescription and in light of the similar testimonies of the other cooperating co-defendants.

28. With respect to (c), the trial testimony was that the witness saw the Defendant with a prescription pad in her possession. In deposition the witness testified that he only saw the prescription pad in his house (shared with the Defendant) after the Defendant got arrested. This claim was not raised in the Motion (which was timely filed) as were multiple other specific examples of trial counsel's failure to impeach. This subpart was raised in the Defendant's November, 2019 filing after the evidentiary hearing making it untimely. Alternatively, and setting aside for the moment whether the witness meant constructive or actual possession (thereby calling into question a direct contradiction or a material difference), any difference in the statements is immaterial. Although the pad was a central feature of the State's case-in-chief, the Defendant was not charged with theft of the stolen prescription pad. More significantly, multiple other cooperating co-defendants also testified that the Defendant possessed the pad as she forged a physician's signature and the Defendant herself made statements about doodling the physician's name and/or practicing the physician's signature and a reasonable inference to be drawn was that she did so in order to forge signatures on the stolen prescription pad.

29. With respect to (d), and as correctly pointed out by the State, trial counsel did in fact cross examine the witness using the prior inconsistent statement and put before the jury the prior

inconsistency that Defendant did not give him the fraudulent prescription. (T.T., Vol. III, p. 473.) The State objected and the objection was overruled. Hence, the jury had the benefit of knowing the witness's prior inconsistent statement. Moreover, trial counsel did impeach the witness's direct testimony that the Defendant had given him the fraudulent prescription by getting him to admit on cross examination that he received the prescription at the pharmacy and that the Defendant was not there – that the Defendant had given it to Susan Kelly who gave it to the witness. (T.T., Vol. III, p. 487.) Finally, the witness on re-cross admitted to the Court's question that he testified in deposition that it was not the Defendant who gave him the fraudulent prescription. (T.T., Vol. III, p. 490.)

30. With respect to (e), and again as correctly pointed out by the State, the Defendant has not cited by volume and page number any specific trial testimony concerning instructions on filling the fraudulent prescription with which a prior deposition statement was inconsistent but has made a generalized statement that such testimony was "consistently" provided. (Defendant's Notice of Inconsistent Statements for Purposes of 3.850 Evidentiary Hearing, p. 4.) This Court, however, can find no express testimony of instructions in filling the fraudulent prescription from anyone during direct examination. As such, there was no impeachment available using a prior inconsistent statement.

31. With respect to (f), the Court does see an inconsistency in the witness's trial testimony that he delivered the pills to the Defendant and his deposition testimony that he handed the pills off to Susan Kelly but finds that the difference is not material or is not a direct contradiction. In his deposition the witness testified essentially that he handed the pills off to Susan Kelly knowing that she would hand them off to the Defendant as that is how the Defendant preferred to handle matters. If impeached with the prior inconsistent statement from his deposition, it is likely that the

State would have elicited additional testimony from the Defendant that he passed them to Susan Kelly knowing that the Defendant preferred it to work that way and would get the pills from Susan Kelly. As such, "proper impeachment" of the witness would likely have had no effect on the juror's verdict in light of the clear testimony of the Defendant's active participation in the filling of this fraudulent prescription and considering the similar testimonies of the other cooperating co-defendants.

32. With respect to (g), the crux lies in trial testimony that the witness received the buy money directly from the Defendant but had earlier testified that he received it from Susan Kelly. However, as with delivering the pills, the inconsistency is one subject to an explanation already given, i.e., that the Defendant likes to operate through "her people." (Defendant's Notice of Prior Inconsistent Statements for Purposes of 3.850 Evidentiary Hearing, p. 5; Deposition Transcript at p. 29, ll. 2-13.) This explanation coupled with the clear testimony of the Defendant's active participation in the filling of this fraudulent prescription and considered in light of the similar testimonies of the other cooperating co-defendants makes any error unlikely to have affected the jury's verdict.

33. With respect to (h), the witness's testimony at trial (in October, 2015) that the Defendant never paid the money she had agreed to pay him for getting the fraudulent prescription filled was inconsistent with the witness's prior statement given to law enforcement (in March, 2013) in which he admitted getting paid the amount promised after he delivered the pills (in August, 2011). This Court, however, finds that "proper impeachment" of the witness would likely have had no effect on the juror's verdict in light of the clear testimony of the Defendant's active participation in the filling of this fraudulent prescription and considering the similar testimonies of the other cooperating co-defendants.

34. With respect to (i) this Court does not find the several statements to directly contradict each other or even differ in a material way. "She did wrong" and "she did us wrong" and "she needs to be taught a lesson" are not materially different and do not directly contradict each other. Alternatively, this Court finds that "proper impeachment" of the witness would likely have had no effect on the juror's verdict in light of the clear testimony of the Defendant's active participation in the filling of this fraudulent prescription and considering the similar testimonies of the other cooperating co-defendants.

35. The Defendant has failed to demonstrate deficiency in counsel's performance in failing to properly impeach Bonnie Chisholm and Jason Eastwood as well as any prejudice resulting therefrom. Grounds #5 is **DENIED**.

36. **As to Ground #7**, the failure to file and prosecute a suppression motion, the burden on the Defendant is high: "To establish prejudice as a result of trial counsel's failure to file a motion to suppress, a defendant must demonstrate that the motion would have been successful, and the evidence in question would have been excluded." *Lebron v. State*, 135 So.3d 1040, 1053 (Fla. 2014). The evidence that the Defendant argues should have been suppressed was collected during a warrantless search lead by Anne Marie White, the Defendant's probation officer on an unrelated case, but also present and participating were various members of law enforcement.[5] The search resulted in the discovery of various items (the Defendant's prescription pill bottles with less than the number of pills each should contain vis-à-vis its fill date and the Defendant's dosage and/or frequency instructions; a spoon with residue; containers with new and used needles; and, a

[5] The various witnesses testified as to which law enforcement officers were present and whether, and if so to what degree, each participated, e.g., the garbage or curtilage versus inside the residence. The testimony was consistent however that two probation officers, including her supervising officer, led the search.

piece of paper bearing numerous "signatures" of her former employer, Dr. Rothenberg).[6] The page of signatures was discovered by one of the law enforcement officers. Though it was made clear to this Court that the Defendant was on probation at the time of the search, there was no evidence before the Court that the Defendant, as a condition or term of her supervision, was required to submit herself, her residence or her property to warrantless searches by probation officers or by law enforcement officers.

37. The Defendant contends in the Motion that officers from at least three law enforcement agencies in addition to the probation officers searched the Defendant's residence and that the law enforcement officers (as opposed to probation officers) lacked "reasonable suspicion" of any criminal activity by the Defendant or involving her residence. (The Motion, p. 40.) In the "Defendant's Memorandum of Law in Support of Motion for Post-Conviction Relief" (the "Memorandum") she "maintains her position" that "the entire search of [the Defendant's residence] by law enforcement officers (as opposed to probation officers) was illegal <u>because</u> there was no term included in the Order of Probation from the unrelated case that the Defendant submit to a warrantless search by anyone. (The Memorandum, p. 1.) Stated differently, the Defendant argues that the because law enforcement officers who lacked both a warrant and reasonable suspicion were present for and participated in a probation officer's warrantless search of her residence, all evidence produced by the search was tainted and is inadmissible in a prosecution for any new offense(s). Hence, a suppression motion would have been successful.

38. In 1976 the Florida Supreme Court handed down its opinion in *Croteau v. State*, 334 SDo.2d 577 (Fla. 1976). In *Croteau* that defendant was on probation from another state but being

[6] The Defendant later admitted to have made the signatures as she was "doodling" and/or "practicing" (further undescribed) as well as having made other incriminating statements about the evidence discovered during the search.

supervised in Florida. For reasons not expressed in the opinion his probation officer decided to visit his home with other probation officers. There was an evidentiary dispute whether Croteau gave consent, or revoked it, but the probation officers search the residence and found cannabis. Croteau was then prosecuted on a new charge of cannabis possession (as opposed to simply having his probation revoked). The Florida Supreme Court held that while a probation officer "has authority to enter upon the living quarters of his probationer to observe his life-style and any material evidence thereby discovered is admissible in proceedings for revocation of [supervision]..." one who faces a new and discrete criminal offense must be given the full protection and benefit of the Fourth Amendment. The probationary status and search does make an otherwise unlawful search valid for purposes of a prosecution for a new offense. *Ibid*, 334 at 580.

39. This holding was re-affirmed a few years later the Florida Supreme Court was again called upon to consider the search and seizure requirements for probationary searches as it relates to new criminal offense prosecutions. In *Grubbs v. State*, 373 So.2d 905 (Fla. 1979) the court was presented with a certified question about whether a term of probation requiring the probationer to submit to unilateral and warrantless searches by supervision officers and by law enforcement officers violated constitutional protections. The *Grubbs* Court answered the question in the affirmative but did so in relative terms as it made the following holdings:

> (1) the authority **of law enforcement officers and** probation supervisors to conduct a warrantless search of a probationer is not dependent upon the presence of an express search condition in an order of probation; (2) a warrantless search of a probationer's person or residence by a probation supervisor is valid to the extent that the evidence discovered is used only in probation violation proceedings; (3) the use of seized evidence in a new criminal proceeding requires compliance with customary fourth amendment requirements although the opportunity to meet those requirements may be easier because the defendant is a probationer; (4) **to the extent it intends**

> **to grant greater authority to law enforcement officers** to conduct a warrantless search, a unilateral search condition set forth in an order of probation requiring a probationer to consent at any time to a warrantless search is a violation of the fourth amendment to the United States Constitution and article I, section 12, of the Florida Constitution.

Grubbs, 373 So.2d at 907 (emphasis added). The *Grubbs* Court thus continued to recognize a distinction between those being prosecuted in supervision revocation proceedings and those charged with new offenses: "a probationer should not enjoy the same status as an ordinary citizen. A probationer has been convicted of a criminal offense but has been granted the privilege of being free on probation conditioned on his supervision." *Ibid.* While one does not forfeit his constitutional search and seizure protections when he is placed on probation, these rights become qualified rights. Moreover, inherent in the duty to properly supervise as imposed by Chapter 947 of the Florida Statutes is both the authority to enter the living quarters to make lifestyle observations and to make reasonable searches of the probationer and his quarters. *Ibid*, 373 So.2d at 908.

40. *Grubbs* was re-affirmed in *Soca v. State*, 673 So.2d 24 (Fla. 1996). In *Soca*, an investigator with the State Attorney's Office advised a probation supervisor that one of her probationers was believed to be dealing cocaine. The supervisor directed the probationer officer assigned to that case to conduct a search and that officer went to the probationer's residence with the investigator. It is clear from the opinion that the probation officer conducted the search. It is equally clear that the investigator was present at the search.[7] The *Soca* Court, however, seemed to

[7] Of course, the courts have been presented with different factual variations over the years when considering such cases: (1) only probation revocation proceedings versus only new offense prosecutions versus both; (2) searches by only probation officers versus searches by probation officers and law enforcement officers versus searches by only law enforcement officers; or, (3) the presence of probation orders for unilateral warrantless searches versus not. It is important to remember here that a prior opinion has precedential value only to the extent that it is possible to determine from the opinion that the material facts are sufficiently similar. [ ] Moreover, it is elementary that the holding in an appellate decision is limited to the facts recited in that opinion." *Shaw v. Jain*, 914 So.2d 458 (Fla. 1st DCA

rest at least part of its reasoning on the underlying purpose of the search noting that the investigator testified that he consciously decided not to seek a warrant and instead decided to pursue a probationary search as authorized in *Grubbs*. *Soca*, 673 So.2d at 25.

41. In *Gordon v. State*, 1 So.3d 1117 (Fla. 1st DCA 2009), probation officers searched the home of probationer Gordon in response to an anonymous tip that illegal drugs were inside. Law enforcement officers from the narcotics unit were also present for security reasons and to identify controlled substances. After the probation officers entered the residence and secured the probationer, the law enforcement officers entered the residence and seized contraband resulting in both revocation proceedings and a new trafficking offense. Focusing on the involvement of the law enforcement officers and almost suggesting a pretextual search, Gordon argued that under *U.S. v. Knights*, 534 U.S. 112, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001) the search, even by probation officers, was unlawful for purposes of a new criminal offense prosecution as it was not supported by reasonable suspicion in addition to the probation condition that he submit for warrantless searches. *Gordon*, 1 So.3d at 1118. The *Gordon* Court, however, focused more so on the nature of the proceedings and quickly held that while the probation revocation was proper (which had been conceded by that defendant) the new convictions for trafficking and possession must be reversed.

42. The opinion in *Gordon* also guides this Court vis-à-vis the presence and involvement of law enforcement officers during probationary searches. In *Gordon*, narcotics unit officers were on scene and participated in the search after an anonymous tip accused the probationer of possessing narcotics. The court wrote:

2005)(quotations omitted)(citing: *Cusick v. City of Neptune Beach*, 765 So.2d 175 (Fla. 1st DCA 2000); *Forman v. Fla. Land Holding Corp.*, 102 So.2d 596 (Fla. 1958); *Adelman Steel Corp. v. Winter*, 600 So.2d 494 (Fla. 1st DCA 1992); *Adams v. Aetna Cas. & Ins. Co.*, 574 So.2d 1142 (Fla. 1st DCA 1991), *rev. dism.*, 581 So.2d 1307 (Fla. 1991)).

> The law permits deputies to accompany probation officers during a search in circumstances like the ones here, for the Fourth Amendment does not require probation officers to choose between endangering themselves by searching alone and foregoing the search because they lacked the resources and expertise necessary to search alone safely.

Ibid, 1 So.3d at 1119. Here, the probation officer testified that they always have law enforcement on scene for probationary searches in case an arrest is made – the probation officers are unable to transport an arrestee to jail. While there was no mention of safety concerns as justifying the presence and/or involvement of law enforcement officers in the case *sub judice*, this Court recognizes the continuing need for safety, i.e., other officers, when probation officers or law enforcement officers are focusing more on what is being searched and less on the probationer.

43. The Defendant contends herein that under *Knights, supra*, the instant search was unlawful as the officers lacked reasonable suspicion and a probation order authorizing warrantless searches. In *Knights*, the defendant was on probation for a drug offense and was subject to an order for warrantless searches by probation and law enforcement officers - the kind found violative of the state and federal constitutions in *Grubbs* (as they pertain to new offense prosecutions). Knights was later being investigated in an arson case. The arson investigator developed "reasonable suspicion" (as conceded by Knights and as found by the trial court) against the probationer and believed a warrant was unnecessary due to the probation condition. The investigator searched the probationer's residence and discovered evidence leading to his arson conviction. The Supreme Court found it unnecessary to consider the true or underlying purpose of the search, i.e., probationary or investigatory, because it concluded "that the search...was reasonable under [the] general Fourth Amendment approach of examining the totality of the circumstances." *Knights*, 534 U.S. at 591.

44. In other words, where law enforcement officers have reasonable suspicion (as opposed

to probable cause) and a probationary order authorizes warrantless searches, the Fourth Amendment is satisfied due to the reduced protections afforded probationers. The Fourth Amendment "approves" using in a prosecution for a new criminal offense the evidence discovered in a warrantless search by a law enforcement officer (only) of a probationer subject to warrantless searches because the search was reasonable. This is not to say, however, that the Fourth Amendment requires such things in all cases with probationary searches. This conclusion is supported by the fact that the *Knights* Court expressly stated it was not deciding a situation wherein the warrantless searches order was present *without* reasonable suspicion. *Knights*, 534 U.S. at 120 n. 6.[8]

45. The defense herein also offers the case styled *Bamberg v. State*, 953 So.2d 649 (Fla. 2d DCA 2007) - a case wherein law enforcement officers on a narcotics investigation relied on a probation order authorizing warrantless searches and searched (without a probation officer even being present) the residence of a probationer they suspected of selling methamphetamine. That case is factually distinguishable and involved a different issue. The *Bamberg* Court considered only one properly preserved issue: whether "the search was unreasonable because it was made for an investigatory purpose." *Ibid*, 649 So.2d at 654. It then quickly cited *Knights* for holding the underlying purpose of the search to be irrelevant to the issue of constitutionality. As in *Knights* the Second District Court held that where there is a warrantless search probation order and there is reasonable suspicion, contraband found by a law enforcement is admissible. *Knights*, however, was a new criminal offense conviction whereas *Bamberg* was a revocation proceeding. Also curiously, the court then wrote that *Knights* overrules *Grubbs* and *Soca* "to the extent that [they]

[8] Moreover, the 11th Circuit Court of Appeals wrote in 2016 that it had twice approved a warrantless search of a probationer where there was reasonable suspicion *in the absence* of a warrantless search order. *U.S. v. Williams*, 650 Fed.Appx. 977 (11th Cir. 2016)(citations omitted).

suggest a different result." *Bamberg*, 953 So.2d at 654.

46. Any confusion with respect to *Grubbs* and *Bamberg* was compounded even further when the Second District Court handed down its opinion in *Hanania v. State*, 264 So.3d 317 (Fla. 2d DCCA 2019). The *Hanania* Court, in a review stemming from a revocation proceeding, cited *Grubbs* for the general proposition that while a probation officer may conduct searches of probationers and their residences without a warrant and without reasonable suspicion, law enforcement officers do not enjoy the same freedom of action.[9] The Second District Court reversed a summary denial of a post-conviction relief claim noting that there was no evidence in the record that the probationer in that case was subject to a warrantless search provision. If that allegation is proven on remand then the search would have had to have complied with the Fourth Amendment.

47. This Court finds that *Grubbs* remains valid law in the State of Florida. In Florida, law enforcement officers and probation supervisors have inherent authority to conduct a warrantless search of a probationer and are dependent neither upon the presence of an express search condition in an order of probation or the presence of reasonable suspicion. Any contraband or other evidence of criminality discovered, however, may only be used in revocation proceedings unless the search comports with customary Fourth Amendment requirements although the opportunity to meet those requirements may be easier because the defendant is a probationer.

48. As applied to the instant case, the search of the Defendant's residence by probation officers (assisted by law enforcement officers) without a warrant does not violate either the State or the federal constitutions. To use the evidence found during said search in a prosecution for a new criminal offense, however, requires that one of the following apply (as applied to the instant

[9] *Hanania* involved a law enforcement officer encountering a person at a motel and being verbally told by that person that he had recently been placed on probation. Without a probation officer and without reasonable suspicion the officer immediately executes a search of the motel room over the protest of the person and finds drug paraphernalia.

facts): consent, incident to arrest, valid stop and frisk, hot pursuit, or reasonable suspicion (not probable cause) and exigent circumstances. *Gnann v. State*, 662 So.2d 406 (Fla. 2d DCA 1995). This Court finds that the instant search was supported by reasonable suspicion but also finds that there is insufficient evidence to find exigent circumstances.

> There is no exhaustive, all-encompassing list of factors that qualify a situation as exigent circumstances. However, the kinds of exigencies or emergencies that may support a warrantless entry include those related to the safety of persons or property, as well as the safety of police. The most urgent emergency situation excusing police compliance with the warrant requirement is, of course, the need to protect or preserve life. The exigent-circumstances exception encompasses an emergency situation which requires the police to assist or render aid. Entering a home to investigate a suspected burglary or to check on the safety of its residents, for example, can constitute exigent circumstances sufficient to permit a warrantless search. In order to rebut the presumed illegality of warrantless entry by police officers, the exigent circumstance must involve a threat to the safety of the public, property, or police which required immediate action by officers with no time to obtain a warrant. To justify an emergency entry into a home by police officers, the State must demonstrate that an objectively reasonable basis existed for the officer to believe that there is an immediate need for police assistance for the protection of life.

State v. M.B.W., 276 So.3d 501, 510-511 (Fla. 2d DCA 2019) (quotations and citations omitted).

49. Having found a deficiency in trial counsel's performance, this Court will consider whether the deficiency prejudiced the Defendant. Notwithstanding that the practice signature page was a feature of the State's evidence against the Defendant, it was far from the only evidence. As noted in this Court's Order of May 23, 2019:

> Co-defendant Susan Kelly testified: that she bought pills from the Defendant (State Exhibit 6, p. 360 at ll. 13-14; p. 361 at ll. 14-15); that she was given five (5) oxycodone pills from the Defendant each time in exchange for driving her to work (*Ibid*, p. 361 at ll. 16-17; p. 363 at l. 3 through p. 364 at l. 21; p. 367 at ll. 24-25; p. 368, ll. 5-9); and, that this went on for about three months (*Id.*, p. 362 at ll. 17-19). She also testified that the Defendant approached her about

submitting prescriptions in exchange for pills and that she agreed and did so on four (4) occasions. (*Id.*, p. 368 at ll. 15-23.)

She identified the prescription pad at issue herein (State's trial exhibit 24) and testified that she had seen it in the Defendant's home, in the Defendant's possession and that the Defendant told her she had gotten it from the Luxor Clinic. (*Id.*, p. 368 at l. 24 through p. 371 at l. 6.) She testified that she witnessed the Defendant write out, while at her home, a prescription for Susan Kelley to have filled and that the Defendant forged the name of the doctor on the prescription. (*Id.*, p. 383 at ll. 8-19). This witness saw the Defendant write out and/or forge other prescriptions for the witness or for other participants. (*Id.*, p.386 at ll. 4-20; p. 388 at ll. 1-5; p. 393 at ll. 9-18; p. 396 at ll. 7-10; p. 397 at ll. 1-6; p. 398 at ll. 16-24; p. 406 at l. 20 through p. 407 at l. 12; p. 408 at ll. 22 through p. 409 at l. 4; p. 411 at ll. 2-7; and, p. 412 at ll. 18-25.) Her testimony was that she was not a patient of the Luxor Clinic. (*Id.*, p. 370 at ll. 24-25.)

Co-defendant Carol Bear testified that she had filled forged prescriptions and that she watched the Defendant write the prescriptions out and give it to her to have filled. (State's Exhibit 7; p. 657 at ll. 6-22; p. 662 at ll. 12). She identified the prescription pad (State's trial exhibit 24) and stated that she saw it in the Defendant's possession in the Defendant's residence and that the Defendant wrote Ms. Bear's prescriptions from it. (*Id.*, p. 658 at l.17 through p. 369 at l. 8.) While she was a Luxor Clinic patient, the prescriptions admitted at trial bearing her name were said to come from the Defendant and not in response to a doctor's visit. (*Id.*, p. 665 at l. 5 through p. 666 at l. 7.)

Co-defendant Jason Eastwood testified that the Defendant approached him about having prescriptions filled in exchange for pills, that he agreed to do so and that he received a prescription from the Defendant that was already filled out in his name. (*Id.*, p. 460 at l. 12 through p. 461 at l. 16.) He identified the subject prescription pad (State's trial exhibit 24) as the pad he saw in the Defendant's possession in the residence they shared. (*Id.*, p. 465 at l. 23 through -. 466 at l. 10.) Mr. Eastwood's testimony was that he was not a Luxor Clinic patient. (*Id.*, p. 467 at ll. 15-17.)

The Defendant indicated that she knew how to write prescriptions as she did so at her job. (State's Exhibit 8, p. 837 at ll. 10-15.) She testified that she did so for all of her co-defendants. (*Id.*, p. 840 at ll. 7-13; p. 844 at ll. 11-23; p. 845 at ll. 11-16; p. 846 at ll. 1-5; p. 847 at ll. 6-11; p. 849 at ll. 1-11; p. 888 at ll. 1-12.) [ ] The Defendant

> admitted that she had told the investigator that on one occasion she inserted Noah Ledoux's name on a prescription that had already been written out and signed. (*Id.*, p. 874 at l. 11.) The Defendant testified that her agreement with Ledoux was for her to get 100 pills from Ledoux for finding a pharmacy that would fill the prescription. (*Id.*, p. 847 at ll. 13-20.)

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. The Defendant has failed to demonstrate prejudice resulting from the deficiency of failing to file a Motion to Suppress. Ground #7 is **DENIED**.

37. **As to Ground #9**, failing to object to the Court's response to a jury question on whether they were performing the math calculation properly, the Defendant did not offer any additional evidence at the evidentiary hearing and chose instead to rest upon the Motion for evidence and argument. This Court wrote previously:

> The legal issue(s) surrounding this question must be examined in light of the jury's second question (also directed at Counts 3 and 10): "how do we change the verdict form for over 28 grams or do we? Over 28 grams is not an option." It is clear to this Court that the jury, having found over 14 grams and less than 28 on all of the other "over 14 grams" counts here found over 28 grams and so suspected that the factors used in performing the multiplication may not have been correct as the counts only charged "over 14 grams" and not "over 28 grams" as did three other trafficking counts.

(Order Directing that an Evidentiary Hearing be Held on Ground Numbers Two, Three, Four, Five, Seven, Nine and Ten of the Defendant's Post Conviction Motion, May 23, 2019.)

38. The Defendant has failed to demonstrate deficiency in counsel's performance in failing to object to the Court's response to a jury question as well as any prejudice resulting therefrom.

Grounds #9 is **DENIED**.

39. **As to Ground #10**, the cumulative impact of the various errors alleged, this Court finds that as noted individually *supra*, trial counsel committed no significant error resulting in a reasonable probability that the jury's verdict would have been affected by any claimed deficiency. Stated differently, there was no error that would have had any impact on the jury's verdict in light of the overwhelming nature of the evidence against this Defendant on her 29 counts of conspiracy, drug trafficking and other drug-related offenses.

Accordingly, it is **ORDERED** that Defendant's "Motion for Post-Conviction Relief" filed September 5, 2018 is **DENIED**. Defendant may file a written notice of appeal within 30 days of the date this order is rendered.

Signed by JUDGE DONALD MANCUSO IN 13000482F
on 07/08/2020 10:58:21 IC3+OjTO

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IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR CHARLOTTE COUNTY
STATE OF FLORIDA

STATE OF FLORIDA

CASE NUMBER: 2013-CF-482

v.

KIMBERLEE SZEWCZYK
_____/

DEFENDANT'S MOTION FOR REHEARING OF THE DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

COMES NOW, the undersigned counsel on behalf of the Defendant, KIMBERLEE SZEWCZYK, and hereby files this Motion for Rehearing of the Defendant's Motion for Postconviction Relief pursuant to Florida Rule of Criminal Procedure 3.850 that was denied on July. 8, 2020, and in support states the following:

Procedural Statement

1. On September 5, 2018, the Defendant filed a Motion for Postconviction Relief.
2. On October 25, 2019, the Defendant's motion was entertained at an evidentiary hearing.
3. On July 8, 2020, the Court entered a written order, denying the Defendant's motion.
4. Pursuant to Florida Rule of Criminal Procedure 3.850(j), any party may file a motion for rehearing of any order addressing a motion under this rule within 15 days of the date of the service of the order. Thus, pursuant to Rule 3.850(j), the Defendant files his Motion for Rehearing contained herein.
5. Although the Defendant argued numerous claims at the evidentiary hearing, and the Court addressed each claim in its order, the Defendant focuses this motion on ground seven.

6. In denying the Defendant's motion, specifically as to the claim that counsel was ineffective for failing to file a motion to suppress, the Court found that counsel was deficient. However, the Court found that the Defendant could not establish prejudice and as a result, denied the claim.

7. The Court based its reason for denying the claim on the fact that 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." (Order at 27). The Defendant respectfully requests that this Court reconsider its denial for the following reasons.

8. The Court relies on specific testimony from the trial as its reason for finding that there was overwhelming evidence of the Defendant's guilt. However, that testimony was of three admittedly incredible witnesses and the testimony of the Defendant. As identified by the State, the Defendant only took the stand because she had to "minimize" her incriminating statements she made to law enforcement. Regardless, the State did not focus or center its case around the testimony of Susan Kelly, Carol Bear or Jason Eastwood. Instead, the State centered its case around the two things that could not be "impeached" or "discredited" – the scribble pad and the Defendant's incriminating statements – both of which were illegally obtained.

9. During the State's initial closing argument, the illegally obtained evidence was the first thing that was mentioned and then discussed numerous times.

> Now later, you heard what the statement was that Ms. Szewczyk made regarding the interview the day after the situation with Noah Ledoux. Those were the two recorded statements that you heard when Special Agent Willis testified, and we heard in her first statement that she denied responsibility

> for anything. She didn't do anything. She didn't know what they were talking about. She had nothing to provide. The clinic was dirty. Nothing else to provide. You also heard the second statement that she made, the second statement where she says that she wrote Noah's name on the prescription, that when she testified, she said she wasn't charged with that count. Ladies and gentlemen, she was charged with conspiracy to traffic in Oxycodone from a date range of July 2011 to October 31st, 2011. The count in which she writes Noah Ledoux's name on that prescription which caused him to obtain -- … She is charged with conspiracy to traffic in Oxycodone, July of 2011 to October 31st of 2011. Noah Ledoux's prescription which Kimberlee Szewczyk admitted that she wrote his name on after the prescription had been signed which caused him to illegally obtain a controlled substance is within that time frame, ladies and gentlemen. You heard the defendant's admission. You heard her say, "I wasn't charged with that," and you heard the taped statement. You also heard that Sergeant, I'm sorry, Lieutenant Vitali went to Ms. Szewczyk's residence. At Ms. Szewczyk's residence, a search was conducted, and during that search, State's evidence 23 was obtained. This is a document with signatures on, signatures that Ms. Szewczyk herself both on the stand right here and in her taped statement said were copies of the doctor's signature. She wants you to believe that she was doodling, doodling an exact copy of a doctor's signature when she has admitted to writing a fake prescription for Noah Ledoux. She's doodling.
>
> (T-952-53).

10. The illegally obtained items became the centerpiece of the State's entire case. This is further shown in the rebuttal closing argument, when the State relied solely on the incriminating statements made by the Defendant to support the charge of conspiracy.

> Special Agent Willis actually said, "Were you going to get something?" Her exact response, if you remember, was, "Well, yeah, of course I was. Why would I go if I wasn't?" Shes actually admitting to, confessing to being guilty of a conspiracy right then and there. Black and white. The defendant's own words.

(T-1014).

> In her statement that you heard, you could hear again if you want to, she talked about how it was a zoo, and there was all sort of wrongdoing, and you could buy prescriptions or you could buy pills outside or you could pay to get ahead of it. This is all coming from the defendant, the personal assistant to the CEO of Luxor Medical Group. They talked about Ralph Soberay. He was the Charlotte County deputy that impounded the evidence. The evidence in that scenario was the Sharpie page and the practice page,

> and that was the one that Jose Vitali and Mark Willis questioned her about during her statement. And that's the one she said, "Yeah, I was scribbling on it. Yes, I was scribbling the doctor's signature. I was just doodling. I don't know why I did that. I guess it was stupid." Yeah, very stupid. Ladies and gentlemen, I submit to you when someone doodles, they draw flowers of they draw boxes. They do not try to perfect the signature of a doctor. When she took the stand, she was shown that exact document, and she said, "Well, you know, I was shown it quickly. I'm not sure if that's the exact document."

(T-1016-17).

> In and of itself, the Noah Ledoux scenario where she helped him get the pills and she was going to get a hundred pills for a deal is a full confession to conspiracy.

(T-1027).

11. The Court's order fails to consider how much weight the State placed on the items found at the Defendant's residence during the illegal search and seizure. The State used the prescription pad signatures to tie every other piece of their case together. The State used the statements of the Defendant to (1) argue they had proved the conspiracy charge and (2) impeach the Defendant's trial testimony and argue that she was offering a poor attempt to minimize what she had already confessed to. The State admitted time and again during closing arguments that the eyewitnesses were not the most credible. Thus, the Court's reliance on those eyewitnesses as proof that the outcome of the case would not have been different without the suppressed evidence is erroneous.

12. The reality before this Court is that in order to prove prejudice, a defendant bears the burden to show that there is a reasonable probability of a different outcome. Meaning, there is a reasonable probability that the jury would find reasonable doubt.

13. At the very least, the suppression of the illegal evidence would have created a reasonable probability that the Defendant would have been acquitted of the conspiracy charge, which

was the most serious count and ultimately resulted in the longest sentence. it is the Defendant's position that the remaining evidence, which was impeached and incredible, would not have been enough to establish all the elements of the State's case beyond a reasonable doubt. The fact that the State relied on this evidence so heavily is proof of that.

14. As a result, the Defendant respectfully requests that the Court reconsider its denial of claim seven because the order failed to consider how critical these pieces of evidence were to the State's case.

CONCLUSION

WHEREFORE, the Defendant, KIMBERLEE SZEWCZYK, by and through his undersigned counsel, respectfully prays that this Honorable Court will grant this Motion for Rehearing.

Respectfully submitted,

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By: /s/ Rachael E. Reese
Rachael E. Reese, Esquire
Florida Bar No.: 0111396

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically with the Clerk of Court and emailed to the Office of the State Attorney on this the 13th day of July 2020.

By: /s/ Rachael E. Reese
Rachael E. Reese, Esquire
Florida Bar No.: 0111396

Filing # 117416576 E-Filed 12/01/2020 10:10:27 AM

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR CHARLOTTE COUNTY, FLORIDA CRIMINAL ACTION

STATE OF FLORIDA,
Plaintiff,
vs. **Case No. 13-482 F**

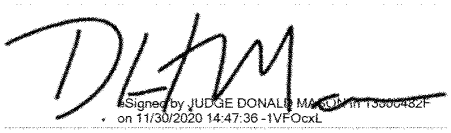
KIMBERLEE SZEWCZYK,
Defendant.
_____/

ORDER DENYING DEFENDANT'S MOTION FOR REHEARING

THIS CAUSE comes before the Court on "Defendant's Motion for Rehearing on The Defendant's Motion for Postconviction Relief," filed July 13, 2020, in which the Defendant seeks reconsideration of the Court's denial of her post-conviction relief motion which was rendered July 8, 2020. Having reviewed the motion, and the applicable case law, the Court finds that the Defendant has not demonstrated a point of law or a fact that this Court overlooked or misapprehended. *See Whipple v. State*, 431 So. 2d 1011 (Fla. 2d DCA 1983). As such, the Court is not inclined to recede from its prior rulings.

Further, to address Fla. R. Crim. P. 3.850(j) - Rehearing, and the time period requirements listed within, the Court's notes that the July 8, 2020, Order and the subsequent July 13, 2020, Defendant's Motion, at hand, were filed during the COVID-19 court shutdown period. As such, some orders were delayed from being rendered under the normal time periods.

Accordingly, it is **ORDERED** that Defendant's ""Defendant's Motion for Rehearing on The Defendant's Motion for Postconviction Relief" filed December 11, 2019 is **DENIED**.



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