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the supersedeas bond is taxed as an expense, and the cost is payable by Shields.

## CONCLUSION

In the case at bar, the real estate should be partitioned in kind. Partition is an equitable action, and this court has the authority to grant complete relief. Accordingly, we reverse the judgment of the county court directing sale of the real estate and remand the cause with directions that the court award tracts 1 and 2 to one sister, tract 3 and $174,000 to another, and tract 4 and $155,000 to the third in accordance with our opinion.

The county court did not err in appointing a referee to determine if partition was required. However, the court did not have jurisdiction to order payment of referee fees after the appeal was perfected. Therefore, the October 14, 2011, order awarding fees is vacated.

The county court did not err in requiring McConville to post a supersedeas bond. Since McConville has prevailed in this appeal, the cost of the bond is taxed to Shields.

The judgment of the county court is reversed, and the cause is remanded thereto with directions for further proceedings consistent with this court's opinion.

REVERSED IN PART, AND IN PART VACATED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., participating on briefs.

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## STATE OF NEBRASKA, APPELLEE, V. CHRISTOPHER A. EDWARDS, APPELLANT.

821 N.W.2d 680

Filed September 28, 2012. No. S-11-723.

1. **Constitutional Law: Due Process.** Whether the procedures given an individual comport with constitutional requirements for procedural due process presents a question of law.
2. **Effectiveness of Counsel: Appeal and Error.** A petitioner's claim that his or her defense counsel provided ineffective assistance presents a mixed question of law and fact. An appellate court reviews factual findings for clear error. Whether the defense counsel's performance was deficient and whether the petitioner was

prejudiced by that performance are questions of law that the appellate court reviews independently of the lower court's decision.

3. **Postconviction: Constitutional Law: Proof.** A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.
4. **Postconviction: Proof.** If a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.
5. **Postconviction: Appeal and Error.** In appeals from postconviction proceedings, an appellate court independently resolves questions of law.
6. **Postconviction: Constitutional Law.** A trial court's ruling that the petitioner's allegations are refuted by the record or are too conclusory to demonstrate a violation of the petitioner's constitutional rights is not a finding of fact—it is a determination, as a matter of law, that the petitioner has failed to state a claim for postconviction relief.
7. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.
8. **Effectiveness of Counsel: Appeal and Error.** When a case presents layered claims of ineffective assistance of counsel, an appellate court determines whether the petitioner was prejudiced by his or her appellate counsel's failure to raise issues related to his or her trial counsel's performance. If the trial counsel did not provide ineffective assistance, then the petitioner cannot show prejudice from the appellate counsel's alleged ineffectiveness in failing to raise the issue on appeal.
9. **Constitutional Law: Effectiveness of Counsel.** An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.
10. **Effectiveness of Counsel: Proof: Appeal and Error.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that his or her counsel's performance was deficient and that this deficient performance actually prejudiced the defendant's defense. An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.
11. **Criminal Law: Effectiveness of Counsel.** A trial counsel's performance was deficient if it did not equal that of a lawyer with ordinary training and skill in criminal law.
12. **Effectiveness of Counsel: Presumptions.** In determining whether a trial counsel's performance was deficient, courts give his or her acts a strong presumption of reasonableness.
13. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** When reviewing claims of ineffective assistance, an appellate court will not second-guess a trial counsel's reasonable strategic decisions. And an appellate court must

assess the trial counsel's performance from the counsel's perspective when the counsel provided the assistance.

14. **Effectiveness of Counsel: Appeal and Error.** In addressing the "prejudice" component of the test under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court focuses on whether a trial counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.
15. **Effectiveness of Counsel: Proof: Words and Phrases.** To show prejudice under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the petitioner must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
16. **Venue.** Under Neb. Rev. Stat. § 29-1301 (Reissue 2008), a change of venue is mandated when a defendant cannot receive a fair and impartial trial in the county where the offense was committed.
17. **Venue: Appeal and Error.** An appellate court evaluates a court's change of venue ruling under eight factors unless the defendant claims that the pretrial publicity was so pervasive and prejudicial that the appellate court should presume the unconstitutional partiality of the prospective jurors.
18. **Venue: Juror Qualifications.** Under most circumstances, voir dire examination provides the best opportunity to determine whether a court should change venue.
19. **Venue: Juror Qualifications: Presumptions.** Two circumstances exist when the prospective jurors' claims of impartiality are presumptively unreliable. First, pervasive pretrial publicity that is sufficiently inflammatory can create a presumption of prejudice in a community and require a change of venue to a location untainted by the publicity. Second, if most of the prospective jurors admit to a disqualifying prejudice, the reliability of the others' claims of impartiality is called into question.
20. **Venue: Due Process.** Mere exposure to news accounts of a crime does not presumptively deprive a defendant of due process. Even the community's extensive knowledge about the crime or the defendant through pretrial publicity is insufficient in itself to render a trial constitutionally unfair if the media coverage consists of merely factual accounts that do not reflect animus or hostility toward the defendant.
21. **Venue: Presumptions: Courts.** In determining whether the pretrial publicity created a presumption of prejudice, a court should consider whether the media coverage was (1) invidious or inflammatory, as distinguished from factual, and (2) pervasive.
22. **Constitutional Law: Trial: Due Process.** A fair trial before a fair and impartial jury is a basic requirement of constitutional due process guaranteed by the Constitutions of the United States and the State of Nebraska.
23. **Postconviction: Constitutional Law: Trial: Due Process: Public Officers and Employees.** Short of claiming actual innocence, to establish a violation of the Due Process Clause based on the State's use of false evidence at trial, the defendant in a postconviction proceeding must allege that state action was involved. The

conduct of state officials must have rendered his or her conviction inconsistent with the due process guarantee of a fair trial in which the truth-seeking process has not been corrupted.

24. **Trial: Due Process: Police Officers and Sheriffs: Witnesses.** A due process violation occurs when a law enforcement officer who participated in the investigation or preparation of the prosecution's case fabricates evidence or gives false testimony against the defendant at trial on an issue material to guilt or innocence.
25. **Due Process: Convictions: Evidence.** The State's knowing use of false evidence to secure a conviction violates a defendant's due process rights. A conviction is tainted and must be set aside if there is any reasonable likelihood that the false evidence could have affected the jury's verdict.
26. **Jurisdiction: Appeal and Error: Words and Phrases.** "Appellate jurisdiction" is the power vested in a superior court to review and revise a decision that has been tried in an inferior court.
27. **Effectiveness of Counsel: Conflict of Interest.** A conflict of interest must be actual rather than speculative or hypothetical before a court will overturn a conviction because of ineffective assistance of counsel.
28. ____: ____. The right to effective assistance of counsel entitles the accused to his or her counsel's undivided loyalties, free from conflicting interests.
29. **Constitutional Law: Effectiveness of Counsel: Conflict of Interest: Proof.** A defendant who raised no objection at trial must show that an actual conflict of interest existed and that the conflict adversely affected his lawyer's performance. If the defendant satisfies this requirement, the defendant is not required to show that the Sixth Amendment violation had a probable effect on the outcome of the trial to obtain relief.
30. **Trial: Witnesses: Attorney and Client: Conflict of Interest.** Although not common, a defense counsel's close personal relationship with a material prosecution witness can create a conflict of interest if the evidence shows that the defense counsel's desire to protect the witness outweighed his or her duty to represent the defendant's interests.
31. **Attorneys at Law: Conflict of Interest.** Conflicts of interests resulting from successive representations can occur when a defendant's trial counsel previously represented a codefendant, trial witness, or victim.
32. **Trial: Attorney and Client: Conflict of Interest.** If a defense counsel acts or refrains from acting at trial in loyalty to a former client in a manner that is inconsistent with the defendant's interests, the defense counsel actively represents conflicting interests no less than a defense counsel who does the same during concurrent representations.
33. **Trial: Attorneys at Law.** A defense counsel is entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies.
34. **Postconviction: Effectiveness of Counsel: Proof.** A petitioner's postconviction claims that his or her defense counsel was ineffective in failing to investigate possible defenses are too speculative to warrant relief if the petitioner fails to allege what exculpatory evidence that the investigation would have procured and how it would have affected the outcome of the case.

Appeal from the District Court for Douglas County: J Russell Derr, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Brian S. Munnelly for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, and Miller-Lerman, JJ.

Connolly, J.

## I. SUMMARY

Christopher A. Edwards appeals from the district court's order overruling his motion for postconviction relief without an evidentiary hearing. We reverse in part. We conclude that the following two claims require an evidentiary hearing: (1) that the State presented fabricated forensic evidence at his trial and (2) that his trial counsel had a conflict of interest because of his relationship with the officer accused of fabricating the evidence.

## II. BACKGROUND

In March 2007, a jury convicted Edwards of second degree murder and use of a deadly weapon to commit a felony. In 2009, we affirmed his convictions in *State v. Edwards*.[1] We summarize the factual background for his convictions from *Edwards*.

### 1. Evidence at Edwards' Trial

Jessica O'Grady was last seen on May 10, 2006. Investigators never found her body. But they found blood matching O'Grady's DNA profile in Edwards' bedroom in many places: on his nightstand, bedding, chair, bookcase, laundry baskets, headboard, clock radio, and ceiling. They also found a large amount of her blood soaked into the underside of his mattress. In addition, investigators found her blood on a sword in

[1] *State v. Edwards*, 278 Neb. 55, 767 N.W.2d 784 (2009).

Edwards' closet. In his vehicle, investigators found a shovel and garden shears. They found blood on the garden shears, on the underside of Edwards' trunk lid, and on a trunk gasket. The blood on the vehicle items produced full or partial DNA profiles that matched O'Grady's profile.

Investigators also found a trash bag in the garage where Edwards lived that contained bloodstained towels and a drugstore receipt. O'Grady's DNA profile matched the blood found on the towels. And on May 11, 2006, the drugstore's video camera recorded Edwards purchasing poster paint, white shoe polish, and correction fluid. The blood on his bedroom ceiling was covered over in paint that chemically matched the poster paint. An expert testified that the bloodstains on the ceiling over Edwards' bed were consistent with a "cast-off" pattern, i.e., blood splattered from seven individual swings of an object wet with blood.

In affirming the convictions, we rejected Edwards' argument that the evidence was insufficient to prove that O'Grady had been murdered because her body had not been found. We stated, "[I]t does not take much imagination to see how bloodstains on a weapon, garden shears, towels, and the trunk of a car suggest both criminal activity and an explanation for the absence of the victim's body."[2] From that evidence, we concluded that a jury could have found beyond a reasonable doubt that O'Grady had been murdered and that Edwards had killed her.

### 2. Postconviction Allegations

Edwards claimed that the State violated his due process rights by presenting fabricated evidence during his trial. Edwards alleged that while investigating O'Grady's murder, David Kofoed, a supervisor of Douglas County's Crime Scene Investigation (CSI) Division, planted blood evidence to be used against Edwards. Edwards' allegations and attachments set out a history of Kofoed's unlawful conduct during other murder investigations. Edwards alleged that the State's introduction of forensic evidence at his trial that had been falsified by law

[2] *Id.* at 68, 767 N.W.2d at 797.

enforcement officials constituted outrageous government conduct that violated his right to due process.

In addition to his due process claim, Edwards alleged claims of ineffective assistance of counsel. Edwards was represented by the same three attorneys at trial and on appeal. First, he alleged that although his lead attorney, Steven Lefler, should have known that Kofoed was suspected of planting evidence during the 2006 murder investigation, Lefler did not investigate this information or effectively impeach Kofoed at trial. Edwards alleged that Lefler was ineffective because he was a friend of Kofoed.

Edwards also claimed that his trial counsel was ineffective in failing to retain a DNA expert to testify at trial. He alleged that an expert could have testified that the blood on his mattress came from two contributors—neither of which was Edwards. He claimed that such testimony would have supported his theory that O'Grady had experienced a miscarriage, which would have explained the blood on his mattress. He also claimed that his counsel should have obtained additional DNA testing after learning that mixed DNA samples had been found. He alleged that this evidence could have opened the door to other possible theories about the blood on the mattress. Finally, Edwards alleged that his trial counsel failed to effectively investigate (1) calls made to O'Grady's aunt after O'Grady's disappearance, concerning the location of O'Grady's car; (2) whether O'Grady had contacted an online travel agency around the time of her disappearance; and (3) whether an "'alternate suspect'" existed.

Regarding his direct appeal, Edwards alleged that his appellate counsel was ineffective in failing to raise (1) the trial court's denial of his motion to change venue, (2) the due process violation related to his claim of falsified evidence, and (3) his other claims of his trial counsel's ineffective assistance.

### 3. District Court's Order

As noted, the court overruled Edwards' postconviction motion without an evidentiary hearing. Regarding Edwards' appellate counsel's failure to raise the change of venue issue, the court concluded that Edwards had alleged insufficient

facts to show that a challenge to the change of venue ruling would have been successful. It concluded that the trial record refuted this claim. It stated that the voir dire of potential jurors had taken 3 days. It concluded that prospective jurors' mere exposure to pretrial publicity is insufficient to presume that a defendant did not receive a fair trial.

On Edwards' due process claim, the court concluded that he failed to show a violation because his factual allegations of falsified evidence were insufficient and conclusory. Because the court concluded that Edwards' due process claim failed, it also concluded his claim of falsified evidence was procedurally barred. The court concluded that Edwards failed to seek a new trial for newly discovered evidence[3] within the 3-year time limit for such claims.[4] Alternatively, the court determined that even if a due process violation had occurred, Edwards' convictions were not void because other blood evidence overwhelmingly established that he committed the crimes.

The court also concluded that Edwards' allegations of his trial counsel's conflict of interest based on his friendship with Kofoed were conclusory. And it stated that Edwards did not allege how his trial counsel should have conducted the cross-examination of Kofoed or how it would have changed the outcome. So the court concluded that Edwards' conflict of interest allegations did not warrant an evidentiary hearing.

The court rejected Edwards' allegations regarding the necessity of retaining a DNA expert. It disagreed that Edwards' trial counsel was ineffective in failing to retain a DNA expert to support Edwards' claim that O'Grady could have suffered a miscarriage. Relying on a recent U.S. Supreme Court decision, it concluded that a trial counsel is entitled to balance limited resources with effective trial strategies. The court concluded that the existence of two contributors to the DNA found in the blood on the mattress would not have changed the outcome and that not presenting an expert witness may have been a deliberate trial strategy.

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[3] See Neb. Rev. Stat. § 29-2101 (Reissue 2008).

[4] See Neb. Rev. Stat. § 29-2103(4) (Reissue 2008).

Regarding Edwards' allegations that his trial counsel had not conducted a reasonable pretrial investigation, the court concluded that Edwards had failed to allege sufficient facts to warrant an evidentiary hearing. It stated that Edwards had failed to allege what evidence that his counsel's further investigation would have procured or how any of that evidence would have changed the outcome, considering the overwhelming evidence of his guilt.

## III. ASSIGNMENTS OF ERROR

Edwards assigns that the court erred in failing to order an evidentiary hearing to resolve his claims for the following reasons:

(1) Edwards sufficiently alleged that his appellate counsel provided ineffective assistance in failing to argue on direct appeal that the trial court erred in denying Edwards' motion for a change of venue.

(2) Edwards sufficiently alleged that his appellate counsel was ineffective in failing to argue that his right to due process was violated when the State introduced forensic evidence at his trial that a state investigator had falsified.

(3) Edwards' other factual allegations, if proved, would constitute a violation of his Sixth Amendment right to effective assistance of counsel.

## IV. STANDARD OF REVIEW

[1,2] Whether the procedures given an individual comport with constitutional requirements for procedural due process presents a question of law, which we independently review.[5] A petitioner's claim that his or her defense counsel provided ineffective assistance presents a mixed question of law and fact.[6] We review factual findings for clear error.[7] Whether the defense counsel's performance was deficient and whether the petitioner was prejudiced by that performance are

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[5] See *State v. Boppre*, 280 Neb. 774, 790 N.W.2d 417 (2010).

[6] *State v. Reinhart*, 283 Neb. 710, 811 N.W.2d 258 (2012).

[7] See *State v. Nolan*, 283 Neb. 50, 807 N.W.2d 520 (2012).

questions of law that we review independently of the lower court's decision.[8]

[3,4] We pause here to clarify our standard for reviewing a trial court's determination that a defendant's allegations in a postconviction motion are refuted by the record or too conclusory to warrant an evidentiary hearing. A court must grant an evidentiary hearing to resolve the claims in a postconviction motion when the motion contains factual allegations which, if proved, constitute an infringement of the defendant's rights under the Nebraska or federal Constitution.[9] But if a postconviction motion alleges only conclusions of fact or law, or if the records and files in the case affirmatively show that the defendant is entitled to no relief, the court is not required to grant an evidentiary hearing.[10]

[5,6] In appeals from postconviction proceedings, we independently resolve questions of law.[11] A trial court's ruling that the petitioner's allegations are refuted by the record or are too conclusory to demonstrate a violation of the petitioner's constitutional rights is not a finding of fact—it is a determination, as a matter of law, that the petitioner has failed to state a claim for postconviction relief.

[7] This conclusion is implied by our adoption of de novo standards of review in postconviction appeals for claims of ineffective assistance of counsel and due process violations.[12] It is also consistent with the way that we actually review postconviction appeals. Most notably, in postconviction appeals raising ineffective assistance claims, we have independently reviewed whether the facts alleged presented a constitutional violation and whether the record affirmatively refuted the defendant's claim.[13] So to clarify our review procedures in postconviction appeals, we expressly state the standard that

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[8] See *State v. Dunkin*, 283 Neb. 30, 807 N.W.2d 744 (2012).

[9] See *State v. Iromuanya*, 282 Neb. 798, 806 N.W.2d 404 (2011).

[10] See *id.*

[11] See *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011).

[12] See, e.g., *Boppre, supra* note 5.

[13] See, e.g., *Iromuanya, supra* note 9.

we have implicitly applied: In appeals from postconviction proceedings, we review de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.

## V. ANALYSIS

[8] Except for his due process claim based on the State's alleged presentation of fabricated evidence, Edwards' postconviction claims all rest on an alleged violation of his constitutional right to effective assistance of counsel. Because Edwards' trial counsel was also his appellate counsel, this is his first opportunity to assert claims that his trial counsel provided ineffective assistance.[14] Most of these claims are layered ineffective claims—i.e., a claim that his appellate counsel was ineffective in failing to raise claims of his trial counsel's ineffective assistance. When a case presents layered claims of ineffective assistance of counsel, we determine whether the petitioner was prejudiced by his or her appellate counsel's failure to raise issues related to his or her trial counsel's performance. If the trial counsel did not provide ineffective assistance, then the petitioner cannot show prejudice from the appellate counsel's alleged ineffectiveness in failing to raise the issue on appeal.[15]

### 1. Governing Principles for Ineffective Assistance Claims

[9,10] An ineffective assistance of counsel claim alleges a violation of the fundamental constitutional right to a fair trial.[16] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*,[17] the defendant must show that his or her counsel's performance was deficient and that this deficient

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[14] See *State v. Hessler*, 282 Neb. 935, 807 N.W.2d 504 (2011).

[15] See *Iromuanya, supra* note 9.

[16] *Id.*

[17] *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

performance actually prejudiced the defendant's defense.[18] An appellate court may address the two prongs of this test, deficient performance and prejudice, in either order.[19]

[11-13] A trial counsel's performance was deficient if it did not equal that of a lawyer with ordinary training and skill in criminal law.[20] In determining whether a trial counsel's performance was deficient, courts give his or her acts a strong presumption of reasonableness.[21] When reviewing claims of ineffective assistance, we will not second-guess a trial counsel's reasonable strategic decisions.[22] And we must assess the trial counsel's performance from the counsel's perspective when the counsel provided the assistance.[23]

[14,15] In addressing the "prejudice" component of the *Strickland* test, we focus on whether a trial counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.[24] To show prejudice, the petitioner must demonstrate a reasonable probability that but for his or her counsel's deficient performance, the result of the proceeding would have been different.[25] A reasonable probability is a probability sufficient to undermine confidence in the outcome.[26]

### 2. Change of Venue Claim Did Not Merit Postconviction Relief

Edwards contends that his appellate counsel was ineffective in failing to raise the trial court's overruling of his motion for a change of venue. He argues that it was impossible for him to obtain a fair trial in Douglas County because of pervasive and

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[18] *Reinhart, supra* note 6.

[19] See *id.*

[20] *Iromuanya, supra* note 9.

[21] *Id.*

[22] *Id.*

[23] See *id.*

[24] *Id.*

[25] See *Reinhart, supra* note 6.

[26] *Id.*

inflammatory pretrial publicity. The State argues that Edwards pleaded no facts that supported his claim that his appellate counsel was ineffective.

Edwards alleged that a barrage of inflammatory media coverage before his trial created a presumption of impartiality among prospective jurors. He mentioned two television broadcasts as examples of the inflammatory coverage. He also alleged that the answers to the questionnaires sent to the prospective jurors showed a public passion against him. He alleged that 31 of the 62 prospective jurors reported that they could not set aside their opinion of Edwards' guilt. But the State contends that the alleged facts were nonetheless insufficient to show an inflammatory courtroom atmosphere, so that the change of venue argument on direct appeal would not have been successful. We conclude that the record refutes Edwards' allegations.

[16,17] Under Neb. Rev. Stat. § 29-1301 (Reissue 2008), a change of venue is mandated when a defendant cannot receive a fair and impartial trial in the county where the offense was committed.[27] We evaluate a court's change of venue ruling under eight factors unless the defendant claims that we should presume the unconstitutional partiality of the prospective jurors.[28] Although Edwards cites the eight factors in his brief, he does not argue their application. Instead, his argument is that we should presume the prejudice of the prospective jurors.

[18,19] Under most circumstances, voir dire examination provides the best opportunity to determine whether a court should change venue.[29] But we have recognized two circumstances when the prospective jurors' claims of impartiality are presumptively unreliable.[30] First, under the U.S. Supreme Court's decision in *Irvin v. Dowd*,[31] pervasive pretrial publicity

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[27] *State v. Dixon*, 282 Neb. 274, 802 N.W.2d 866 (2011).

[28] See, *id.*; *State v. Galindo*, 278 Neb. 599, 774 N.W.2d 190 (2009).

[29] *State v. Erickson*, 281 Neb. 31, 793 N.W.2d 155 (2011).

[30] See, e.g., *Galindo, supra* note 28.

[31] *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961).

that is sufficiently inflammatory can create a presumption of prejudice in a community and require a change of venue to a location untainted by the publicity.[32] Second, under the U.S. Supreme Court's decision in *Murphy v. Florida*,[33] if most of the prospective jurors admit to a disqualifying prejudice, the reliability of the others' claims of impartiality is called into question. But neither of these circumstances was present here.

(a) Pretrial Publicity

[20,21] Mere exposure to news accounts of a crime does not presumptively deprive a defendant of due process.[34] Even the community's extensive knowledge about the crime or the defendant through pretrial publicity is insufficient in itself to render a trial constitutionally unfair if the media coverage consists of merely factual accounts that do not reflect animus or hostility toward the defendant.[35] And a court will not presume unconstitutional partiality because of media coverage unless the record shows a barrage of inflammatory publicity immediately before trial. The pretrial publicity must amount to a huge wave of public passion or result in a trial atmosphere utterly corrupted by press coverage.[36] In sum, in determining whether the pretrial publicity created a presumption of prejudice, a court should consider whether the media coverage was (1) "'invidious or inflammatory,'" as distinguished from factual, and (2) pervasive.[37]

Edwards focuses on two "inflammatory" televised news stories. First, he alleged that 4 months before trial, a television station broadcasted a news segment featuring Kofoed. Kofoed used a dummy to demonstrate how blood splatters occur when a victim is shot in the head or hit in the head with a blunt instrument. The demonstration showed how CSI investigators could

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[32] See *State v. Schroeder*, 279 Neb. 199, 777 N.W.2d 793 (2010).

[33] *Murphy v. Florida*, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975).

[34] *Dixon, supra* note 27.

[35] *Galindo, supra* note 28.

[36] *Schroeder, supra* note 32.

[37] *Id.* at 209, 777 N.W.2d at 803, quoting *Murphy, supra* note 33.

determine from blood splatters that O'Grady had been murdered even if her body was missing. Second, Edwards argues that 3 months before trial, the same station broadcasted a news story reporting that a private investigator claimed Edwards had confessed to a cellmate that he had killed O'Grady and dumped her body along a creek. Edwards argues that this claim was false, inflammatory, and slanted toward a conviction.

As for the news segment featuring Kofoed's show-and-tell demonstration, we obviously do not condone investigators demonstrating to the public why or how they believe a victim has been murdered before the suspect's trial. But our concern is with media coverage that renders a trial fundamentally unfair under the Constitution. We need not determine whether this publicity was invidious or inflammatory because Edwards has not alleged facts showing that the reports were pervasive. Instead, the record shows that Kofoed's demonstration was broadcast on a single television station at 10 p.m. on November 6, 2006, and at 5 a.m. and 6 a.m. on November 7. During voir dire, none of the prospective jurors reported seeing this news segment, and Edwards did not offer into evidence their questionnaires, which asked them to describe any reports in the media that they had seen. We conclude that the record refutes any claim that the news report featuring Kofoed was pervasive.

Second, we disagree that the news story about the private investigator's claim was inflammatory. The evidence presented at Edwards' trial to support his change of venue motion shows that the television station reported the investigator's claim to explain why investigators were searching the same pond for O'Grady's body after several months. Reporting the source of a tip did not constitute a false statement when presented to explain why a new search was taking place. More important, standing alone, it did not reflect an animus or hostility toward Edwards.

The vast majority of evidence submitted at Edwards' trial shows only that the media broadcasted or printed extensive factual accounts of the searches for O'Grady's body, the murder investigation, and the trial proceedings. But this is not

surprising for a murder of this nature. We conclude that the record refutes Edwards' claim that a barrage of inflammatory publicity immediately before his trial amounted to a wave of public passion against him.

(b) Jurors' Statements on Questionnaires and During Voir Dire Did Not Show That the Majority Were Biased

Edwards argues that the prospective jurors' pretrial questionnaires showed that 39 percent of them could not be impartial jurors. The record shows that pretrial questionnaires were sent to "approximately 100 prospective jurors" who had been summoned by the court for the venire. Ninety-eight of them returned the questionnaires. According to his trial counsel's affidavit, 37 percent of them "indicated" that they believed Edwards was guilty and that they could not set aside their opinion. His trial counsel believed an additional 5 percent of them had made conflicting statements whether they could set aside an initial opinion of guilt. He concluded that the questionnaires showed 39 percent of the prospective jurors could not be impartial.

Edwards repeated this claim in the postconviction proceeding, but the record shows that the jurors were not asked about their ability to be impartial. A sample questionnaire in the record shows that the jurors were asked to report (1) what they had heard about the case in the media, (2) whether they had formed an opinion as to Edwards' guilt or innocence based on the media coverage, and (3) what they had heard that had caused them to form an opinion. The questionnaires did not ask the jurors whether they could set aside any opinions that they had formed or whether they could be impartial jurors. As stated, the completed questionnaires are not part of the record, and the court disagreed with Edwards' trial counsel's characterization of the prospective jurors' responses. We conclude that the record refutes Edwards' claim that the questionnaires showed the prospective jurors' bias.

We have reviewed the voir dire proceedings and disagree with Edwards that the record shows widespread bias among

the prospective jurors. The parties conducted individual, sequestered interviews of 66 prospective jurors to obtain 42 venire members, upon which each party could exercise peremptory challenges. Each prospective juror was asked (1) what they knew about the case; (2) the source of their information; (3) whether they had formed an opinion of Edwards' guilt; (4) whether they could set aside their opinion, if they had formed any, and give Edwards a presumption of innocence; and (5) whether they could set aside any information that they had heard and base their decision solely upon the evidence presented at trial.

Of the 66 prospective jurors, half had (1) heard little about the case and formed no opinion of Edwards' guilt or (2) heard about the case but formed no opinion. The other half had formed an initial opinion of Edwards' guilt based on media coverage or what they had heard from people in the community, or they were leaning toward an opinion of guilt if what the media reported was true. But 13 of those prospective jurors with an initial opinion (39 percent) stated that they could set aside their initial opinion and what they had heard and base their decision solely upon the trial evidence. In total, the court dismissed 22 of the prospective jurors (33 percent) because they could not set aside their opinion of Edwards' guilt or had doubts about their ability to do so.

To summarize, the record refutes Edwards' claim that so many of the prospective jurors were biased that the court should have presumed that all the prospective jurors could not be impartial and set aside their initial opinion. The 33 percent of prospective jurors who stated that they could not be impartial is considerably less than the 62 percent of prospective jurors who were dismissed for cause in *Irvin*.[38] And we have rejected due process arguments under similar facts.[39] So the court did not err in finding that Edwards was not entitled to postconviction relief based on his venue claim.

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[38] See *Murphy, supra* note 33 (distinguishing *Irvin, supra* note 31).

[39] See, *Erickson, supra* note 29; *Galindo, supra* note 28.

### 3. Due Process Claim Based on Falsified Evidence Requires an Evidentiary Hearing

As explained, the court rejected Edwards' allegations that Kofoed had fabricated evidence during the investigation as conclusory: Because Kofoed had falsified evidence in other investigations, he did so while investigating O'Grady's murder. It also concluded that even if a due process violation occurred, Edwards' convictions were not void because other blood evidence overwhelmingly established that he committed the crimes.

#### (a) Additional Background

As mentioned, in dismissing Edwards' allegations of a due process violation, the court primarily reasoned that the allegations were conclusory. Edwards generally alleged that Kofoed planted blood evidence to be used against Edwards. But Edwards' allegations and attachments set out a detailed history of Kofoed's unlawful conduct during two other murder investigations.

In April 2009, a U.S. Attorney and a Nebraska special prosecutor separately charged Kofoed with planting false evidence in late April or early May 2006 during an investigation into the murders of Wayne and Sharmon Stock. In June 2010, the Cass County District Court convicted Kofoed of tampering with evidence during that 2006 investigation. Specifically, he planted Wayne Stock's blood in a suspect's vehicle. We affirmed Kofoed's tampering conviction.[40] As part of the prosecution, the State also proved that in a separate 2003 murder investigation, Kofoed similarly planted a victim's blood in a trash container to corroborate the suspect's confession that he had placed the victim's body in the container.[41]

Edwards alleged that because of Kofoed's proven history of falsifying evidence, his involvement in Edwards' case rendered the State's forensic evidence against him inherently suspect

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[40] See *State v. Kofoed*, 283 Neb. 767, 817 N.W.2d 225 (2012).

[41] See *id.*

and presumptively inadmissible. And he alleged that Kofoed's previous activities were strikingly similar to what had occurred in his case.

Specifically, he alleged that like the earlier investigations, investigators collected O'Grady's blood at the crime scene and stored it at the CSI facility. After investigators had searched Edwards' car and failed to find blood evidence, Kofoed conducted a second search in which O'Grady's blood was found in an obscure part of the vehicle. Edwards attached copies of CSI reports supporting his claim that Kofoed ordered a different CSI investigator to assist him in a "follow-up" search of Edwards' car.

Additionally, Edwards alleged that after analysts swabbed the garden shears for blood tests at a separate DNA laboratory, Kofoed took the shears back to the CSI facility. Two days later, Kofoed requested that the DNA laboratory test the shears again. About a week later, Kofoed took additional swabs of the shears into the DNA laboratory for testing. Finally, Edwards alleged that 5 days after the initial search of his apartment, investigators returned to look for a sword in a sheath, which they found. He alleged that a CSI investigator found a speck of blood on the tip of the sword 9 days after it was transported to the CSI facility despite not finding any blood on the inside of the sheath.

The court determined that Edwards' allegations were conclusory because he pled no facts that established Kofoed had planted evidence. It stated that the record refuted Edwards' claim that blood on the sword had been falsified. It determined that the record affirmatively showed that Kofoed was not involved in the recovery or the processing of the sword and that the trial evidence failed to establish that the sword was even the murder weapon.

The court concluded that the issue was whether a jury would have found Edwards innocent but for Kofoed's alleged fabrication of blood evidence on the sword, the garden shears, and the trunk gasket. It concluded that because of the overwhelming evidence against Edwards, an evidentiary hearing was not required even if Kofoed had fabricated evidence as Edwards alleged.

(b) Analysis

Edwards argues that the State's presentation of, and the jury's reliance on, evidence that a state agent has fabricated violates the Due Process Clause of the 14th Amendment—regardless whether the prosecutor knew that the evidence was fabricated. The State contends that the claim is pure conjecture and that Edwards cannot show that the result would have been different even if this evidence had not been presented.

*(i) Due Process Right to a Fair Trial*

[22] A fair trial before a fair and impartial jury is a basic requirement of constitutional due process guaranteed by the Constitutions of the United States and the State of Nebraska.[42] We have left open the possibility that even if the State did not violate the petitioner's right to a fair trial, a persuasive claim of actual innocence in a postconviction proceeding might show a constitutional violation: i.e., that the State's continued incarceration of such a petitioner without an opportunity to present newly discovered evidence is a denial of procedural or substantive due process.[43] A strong demonstration of actual innocence is required because after a fair trial and conviction, a defendant's presumption of innocence disappears.[44]

[23] But Edwards does not claim actual innocence. And the Due Process Clause generally restricts unfair *state* action.[45] So, short of claiming actual innocence, to establish a violation of the Due Process Clause based on the State's use of false evidence at trial, the defendant in a postconviction proceeding must allege that *state* action was involved. The conduct of state officials must have rendered his or her conviction inconsistent with the due process guarantee of a fair trial in which the truth-seeking process has not been corrupted.[46]

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[42] *State v. Lotter*, 278 Neb. 466, 771 N.W.2d 551 (2009).

[43] See *id.*

[44] See *id.*, citing *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993).

[45] See, U.S. Const. amend. XIV, § 1; *Brown v. Mississippi*, 297 U.S. 278, 56 S. Ct. 461, 80 L. Ed. 682 (1936).

[46] See *Lotter, supra* note 42.

[24] The U.S. Supreme Court has long held that the Due Process Clause will not tolerate a criminal conviction obtained through the prosecutor's knowing use of false evidence or perjured testimony.[47] It has also held that a due process violation occurs if other state officers involved in a prosecution deliberately violated the defendant's right to a fair trial without the prosecutor's knowledge.[48] Thus, a due process violation occurs when a law enforcement officer who participated in the investigation or preparation of the prosecution's case fabricates evidence or gives false testimony against the defendant at trial on an issue material to guilt or innocence. Such conduct passes "the line of tolerable imperfection and fall[s] into the field of fundamental unfairness."[49] That is exactly the police conduct that Edwards claims occurred.

*(ii) Court Applied Wrong Standard of Materiality in Rejecting Edwards' Due Process Claim*

As mentioned, the court concluded that even if Edwards' allegations were true, he could not show prejudice from Kofoed's fabrication of evidence. The court reasoned that during the other murder investigations in which Kofoed planted DNA evidence, the fabricated evidence was the only evidence linking the suspect to the crime. In contrast, it concluded that in Edwards' case, there was overwhelming evidence—the collection of which did not involve Kofoed—that supported Edwards' convictions.

To the extent the court reasoned that Kofoed would not have fabricated evidence in Edwards' case because he had

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[47] See, *Miller v. Pate*, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959); *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935).

[48] See *Pyle v. Kansas*, 317 U.S. 213, 63 S. Ct. 177, 87 L. Ed. 214 (1942). See, also, *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

[49] *Curran v. State of Delaware*, 259 F.2d 707, 713 (3d Cir. 1958). Accord, *United States v. Rosner*, 516 F.2d 269 (2d Cir. 1975); *Smith v. State of Florida*, 410 F.2d 1349 (5th Cir. 1969); *Rivers v. Martin*, 484 F. Supp. 162 (W.D. Va. 1980); *Chamberlain v. Mantello*, No. 95-CV-1050, 1996 WL 521062 (N.D.N.Y. Sept. 11, 1996) (unpublished judgment).

previously done so only when the State was desperate for evidence, we disagree. Particularly in the 2003 investigation, other evidence connected the suspect to the crime. The suspect confessed to the murder and led investigators to the place where he had disposed of the body.

More important, the court incorrectly required Edwards to show that a jury would have acquitted him without the fabricated evidence. The court stated the issue as whether a jury would have found Edwards innocent but for Kofoed's alleged falsification of blood evidence found on the sword, the garden shears, and the trunk gasket. It concluded that Edwards could not satisfy that standard. But this standard of materiality is incorrect.

[25] The State's knowing use of false evidence to secure a conviction violates a defendant's due process rights.[50] At an evidentiary hearing, it is Edwards' burden to establish that state officers involved in the investigation or prosecution knowingly used false evidence to secure his conviction.[51] But contrary to the materiality standard that the court applied, a conviction is tainted and must be set aside if there is any reasonable likelihood that the false evidence could have affected the jury's verdict.[52]

Under this standard, we disagree with the court that even if Edwards proved his allegations, he could not show that the fabricated evidence prejudiced him. The evidence that Kofoed allegedly fabricated would have strengthened the State's case by explaining why O'Grady had been murdered even though her body had not been found. As noted, in Edwards' direct appeal, we specifically relied on this evidence in rejecting his claim that the evidence was insufficient to show that he had murdered O'Grady. So the court incorrectly dismissed Edwards' petition because he could not show prejudice even if his allegations were true.

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[50] See *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003).

[51] See *id.*

[52] See, *Giglio, supra* note 48; *Napue, supra* note 47; *Brooks v. Tennessee*, 626 F.3d 878 (6th Cir. 2010), *cert. denied* 563 U.S. 976, 131 S. Ct. 2876, 179 L. Ed. 2d 1191 (2011); *Bonin v. Calderon*, 59 F.3d 815 (9th Cir. 1995).

*(iii) Claims Warranted an Evidentiary Hearing*

We also disagree with the court's ruling that Edwards' allegations were too conclusory to warrant an evidentiary hearing. Under the district court's reasoning, Edwards' claim would be sufficient only if he could allege specific acts of Kofoed's fabricating evidence in the O'Grady investigation. We conclude that this pleading requirement is an unreasonable burden for alleging a crime of deceit. Such crimes are usually proved by circumstantial evidence.

We agree that Edwards' allegations would be too conclusory if he had simply alleged in a vacuum that a law enforcement officer fabricated evidence to be used against him at trial without any factual allegations upon which to base such a claim. But Edwards alleged that Kofoed had fabricated specific evidence and that the circumstances under which Kofoed found this evidence were very similar to his unlawful conduct in the two other investigations.

To recap, Edwards alleged that as in the 2006 investigation of the Stocks' murders, Kofoed found blood in an obscure part of Edwards' car after other CSI investigators had examined the car and failed to find this evidence. The facts alleged in Edwards' petition also appear similar to the 2003 investigation in that Kofoed allegedly submitted swabs of evidence for DNA testing instead of submitting the evidence itself. And the allegations suggest that Kofoed may have held physical evidence for several days before having another investigator test it, a pattern that is similar to his conduct during the 2006 investigation in which he fabricated evidence.

Reasonable explanations for these actions may exist. But we believe that Edwards has alleged Kofoed's finding of evidence under circumstances similar enough to those in the earlier investigations when Kofoed fabricated evidence to raise concerns of fabricated evidence here. Although the court concluded that the record showed that Kofoed was not involved in the discovery or processing of the murder weapon, this record cannot rule out Kofoed's participation in the processing of any evidence during the investigation. And we cannot require Edwards to produce evidence that Kofoed was in fact involved

or that the evidence was fabricated before he has had an opportunity to gather evidence.

Given Kofoed's history of fabricating evidence during the same time that he was involved in investigating O'Grady's murder, we conclude that Edwards' allegations are specific enough that we cannot assume that they are without merit. To affirm the court's dismissal of Edwards' petition without a hearing would erode public confidence in the impartiality and fairness of the judicial process.[53] We conclude that the court erred in denying Edwards' request for an evidentiary hearing on his due process claim.

[26] We note that Edwards requests that we direct the formation of an independent committee to investigate the actions of Kofoed and the CSI in other criminal investigations. But "appellate jurisdiction" is the power vested in a superior court to review and revise a decision that has been tried in an inferior court.[54] Edwards' request that we initiate investigative action in other criminal cases is beyond the scope of our appellate jurisdiction in deciding his appeal.

### 4. Edwards' Allegations of His Trial Counsel's Conflict of Interest Require an Evidentiary Hearing

Edwards alleged that by the time of his trial, his trial counsel, Lefler, knew that Kofoed was suspected of planting blood evidence during the investigation of the Stocks' murders. He alleged that Lefler nonetheless failed to investigate the information and failed to attack Kofoed's credibility at Edwards' trial. He alleged that Lefler failed to provide a meaningful defense because of his friendship with Kofoed, which created a conflict of interest in his representation of Edwards.

The court concluded that Edwards had alleged nothing but a speculative conflict of interest: "Any allegation arising against Kofoed involving evidence [of] tampering or fabrication occurred well after the trial in this case." It concluded

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[53] See *State v. Gookins*, 135 N.J. 42, 637 A.2d 1255 (1994).

[54] See *In re Application of Burlington Northern RR. Co.*, 249 Neb. 821, 545 N.W.2d 749 (1996).

that Edwards' allegations were conclusory because he had not specified how Lefler should have cross-examined Kofoed and how effective cross-examination would have affected the trial. The court also concluded that Edwards had not specified how or when Lefler had learned of allegations against Kofoed.

[27] It is true that a conflict of interest must be actual rather than speculative or hypothetical before a court will overturn a conviction because of ineffective assistance of counsel.[55] But before addressing the court's conclusion that the allegations were too speculative to warrant an evidentiary hearing, we set out the relevant rules for resolving this claim.

(a) Governing Principles for Conflict of Interest Claims

[28,29] The right to effective assistance of counsel entitles the accused to his or her counsel's undivided loyalties, free from conflicting interests.[56] But a defendant who raised no objection at trial must show that an actual conflict of interest existed and that the conflict adversely affected his lawyer's performance.[57] If the defendant satisfies this requirement, the defendant is not required to show that the Sixth Amendment violation had a probable effect on the outcome of the trial to obtain relief.[58]

In 2002, in *Mickens v. Taylor*,[59] the U.S Supreme Court stated that the "actual conflict" inquiry is not separate from a performance inquiry: "An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." Thus, we have stated that when an actual conflict exists, there is no need to show that the conflict resulted in actual prejudice to the defendant (meaning no need

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[55] See *State v. Sandoval*, 280 Neb. 309, 788 N.W.2d 172 (2010).

[56] See, *id.*; *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008); *State v. Narcisse*, 260 Neb. 55, 615 N.W.2d 110 (2000).

[57] See, *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); *Narcisse, supra* note 56.

[58] See, *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002). Accord, *Cuyler, supra* note 57; *Jackson, supra* note 56.

[59] See *Mickens, supra* note 58, 535 U.S. at 172 n.5 (quoted in *State v. Aldaco*, 271 Neb. 160, 710 N.W.2d 101 (2006)).

to show the outcome of the proceeding was affected).[60] But the substantive analysis is the same.[61] If the defendant shows that his or her defense counsel faced a situation in which conflicting loyalties pointed in opposite directions and that his or her counsel acted for the other client's interests and against the defendant's interests, prejudice is presumed.[62]

(b) Sufficiency of the Allegations

[30] Although not common, a defense counsel's close personal relationship with a material prosecution witness can create a conflict of interest if the evidence shows that the defense counsel's desire to protect the witness outweighed his or her duty to represent the defendant's interests.[63] Here, the issue is complicated by Lefler's representation of Kofoed in the State prosecution.[64]

Edwards alleged that by September 2006, it was clear that Kofoed had planted blood evidence while investigating the Stocks' murders. He alleged that a reasonably diligent defense attorney would have known Kofoed was suspected of planting evidence while investigating the Stocks' murders. And he alleged that Lefler knew of these allegations because of his friendship with Kofoed. He claimed that Lefler repeatedly cited his friendship with Kofoed during his representation of Kofoed in the federal and state trials.

In fact, this record supports Edwards' contention that Lefler had a personal relationship with Kofoed. Before trial, Edwards moved to exclude Kofoed's testimony because of his televised demonstration of blood splatters. In arguing for the motion, Lefler referred to his friendship with Kofoed:

> I'm going to ask the Court to prevent Dave Kofoed, who's a friend of mine and I like him a ton . . . I'm going

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[60] See *Jackson, supra* note 56.

[61] See *U.S. v. Infante*, 404 F.3d 376 (5th Cir. 2005), citing *McFarland v. Yukins*, 356 F.3d 688 (6th Cir. 2004).

[62] See, *Jackson, supra* note 56; 3 Wayne R. LaFave et al., Criminal Procedure § 11.9(d) (3d ed. 2007).

[63] See, e.g., *Com. v. Mosher*, 455 Mass. 811, 920 N.E.2d 285 (2010); 3 LaFave et al., *supra* note 62, § 11.9(a). Compare *Sandoval, supra* note 55.

[64] See *Kofoed, supra* note 40.

> to ask you to prevent him from testifying in this particular case as a consequence of the TV demonstration that he gave. . . .
>
> . . . .
>
> . . . [W]hat we are worried about for . . . Edwards is that there's going to be some juror who halfway through the trial is going to remember seeing this TV clip.
>
> And Dave Kofoed's a great — a nice man, smart guy. And so I'm just worried that halfway through the trial it clicks in some juror's mind.

The court implicitly reasoned that Edwards' allegations were without merit, in part, because Lefler did not represent Kofoed until April 2009 when Kofoed was charged with fabricating evidence. But the date that the State charged Kofoed does not resolve this issue.

We cannot know from this record whether before Edwards' trial, Kofoed had asked Lefler to represent him if he was later charged with a crime. Given allegations of their friendship and Lefler's undisputed representation of Kofoed against fabrication charges in 2009, Kofoed's possible request of representation is a prospect that the court should have considered. In addition, we cannot know from this record whether before Edwards' trial, law enforcement officers conducted an internal investigation of Kofoed's conduct in which Lefler had already represented or advised Kofoed. Finally, because of their friendship, Lefler may have learned of the allegations against Kofoed even without agreeing to represent him.

[31] Conflicts of interests resulting from successive representations can occur when a defendant's trial counsel previously represented a codefendant, trial witness, or victim.[65] "[T]he most common example of an actual conflict of interest arising from successive representation occurs where an attorney's former client serves as a government witness against the attorney's current client at trial."[66] A primary concern in this scenario is that a defense counsel will fail to cross-examine the witness in the defendant's trial about privileged information.

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[65] See, *Mickens, supra* note 58; *Moss v. U.S.*, 323 F.3d 445 (6th Cir. 2003).

[66] *Moss, supra* note 65, 323 F.3d at 460.

> In the successive representation situation, privileged information obtained from the former client might be relevant to cross-examination, thus affecting advocacy in one of two ways:
>
> (a) the attorney may be tempted to use that confidential information to impeach the former client; or
>
> (b) counsel may fail to conduct a rigorous cross-examination for fear of misusing his confidential information.
>
> . . . The second major possibility of conflict in the successive representation situation is that the attorney's pecuniary interest in possible future business may cause him to make trial decisions with a view toward avoiding prejudice to the client he formerly represented.[67]

Thus, "[w]hen an attorney attempts to represent his client free of compromising loyalties, and at the same time preserve the confidences communicated by a present or former client during representation in the same or a substantially related matter, a conflict arises."[68]

[32] We have broadly defined the phrase "actual conflict" to include any situation in which a defense attorney faces divided loyalties such that regard for one duty tends to lead to disregard of another.[69] So we conclude that if a defense counsel acts or refrains from acting at trial in loyalty to a former client in a manner that is inconsistent with the defendant's interests, the defense counsel "'actively represent[s] conflicting interests'"[70] no less than a defense counsel who does the same during concurrent representations.[71]

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[67] *United States v. Agosto*, 675 F.2d 965, 971 (8th Cir. 1982) (citation omitted), *abrogated on other grounds, Flanagan v. United States*, 465 U.S. 259, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984).

[68] *Id.*

[69] See *Jackson, supra* note 56.

[70] *Strickland, supra* note 17, 466 U.S. at 692, quoting *Cuyler, supra* note 57.

[71] See, e.g., *Alberni v. McDaniel*, 458 F.3d 860 (9th Cir. 2006); *Infante, supra* note 61; *Hall v. U.S.*, 371 F.3d 969 (7th Cir. 2004); *People v. Miera*, 183 P.3d 672 (Colo. App. 2008); *Acosta v. State*, 233 S.W.3d 349 (Tex. Crim. App. 2007).

If, as Edwards alleged, Lefler knew of the allegations against Kofoed, we believe that a reasonably diligent defense counsel, without a conflict, would have determined whether Kofoed was under investigation and questioned him about any pending investigation at trial. Such information would have obviously been relevant to Kofoed's credibility.

We have previously reversed postconviction orders and remanded the cause for an evidentiary hearing when the allegations were sufficient to raise factual issues whether a defense counsel labored under a conflict of interest that adversely affected his performance.[72] As in those cases, we cannot know, without an evidentiary hearing, whether Lefler knew of the allegations against Kofoed before Edwards' trial or whether a conflict of interest prevented him from cross-examining Kofoed about any pending investigation. But Edwards' allegations are sufficient to raise a factual issue whether a Sixth Amendment violation occurred. We conclude that the court erred in denying Edwards' request for an evidentiary hearing on his conflict of interest claim.

### 5. Edwards' Claim That His Trial Counsel Was Ineffective in Failing to Retain a DNA Expert Did Not Merit Postconviction Relief

[33] Edwards alleged that a reasonable defense attorney would have obtained additional DNA testing and retained a DNA expert. That expert would have allegedly testified about the two different sources of blood found on Edwards' mattress, to support his theory that O'Grady could have suffered a miscarriage or to develop new theories. The court concluded that these allegations were insufficient to show that his trial counsel was ineffective. The court relied on the U.S. Supreme Court's holding in *Harrington v. Richter*[73] that a defense counsel is entitled to "formulate a strategy that was reasonable at the time and to balance limited resources in

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[72] See, *Narcisse, supra* note 56; *State v. Marchese*, 245 Neb. 975, 515 N.W.2d 670 (1994).

[73] *Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

accord with effective trial tactics and strategies."[74] We agree. The record refutes Edwards' claim that his counsel could have retained an expert to support his defense theory. It affirmatively shows that his counsel's trial strategies were reasonable under the circumstances.

At trial, Edwards' counsel asked the State's two forensic experts whether any test could determine that the contributor to a bloodstain was pregnant or that the blood had been discharged from a woman's body during menstruation or a miscarriage. The experts could not say that the blood on the mattress was consistent with the characteristics of blood that had been discharged from a woman's body. They also did not know of any currently available tests that would determine that the blood sample contained vaginal cells, was menstrual blood, or showed that the contributor was pregnant. One of the experts had even asked a colleague to perform an experimental test for menstrual blood collected from a mattress, but the test was unsuccessful.

In addition, a State expert testified that in a couple of the blood samples taken from the mattress, she had found alleles (DNA variations between individuals) that suggested another person, besides O'Grady or Edwards, had contributed DNA to sample. But she stated that the samples did not contain enough alleles to draw any conclusions about another contributor.

Edwards has not specified what evidence that he believes an expert could have presented to rebut this evidence or to provide any additional information about the blood samples. But given these experts' testimony that the information Edwards now seeks was unavailable, his claim that an expert was necessary to present a meaningful defense is speculative.

Equally important, absent blood tests that could show the blood was discharged from O'Grady's body, his defense counsel used the limitations of blood testing to bolster Edwards' defense to the extent possible. The record shows that Edwards' trial counsel had previously deposed the two experts, so he likely knew the limitations of their testing. But by asking experts on cross-examination whether they could make these

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[74] *Id.*, 562 U.S. at 107.

determinations, he showed the jury that their testing could not rule out the possibility that the blood had been discharged during menstruation or a miscarriage. Nonetheless, his counsel reasonably chose not to put too much emphasis on this theory. Menstruation or a miscarriage could not account for investigators finding O'Grady's blood all over the room, including the ceiling.

Edwards' trial counsel also extensively questioned the experts about inconsistencies in their DNA test results, the subjective nature of interpreting the results, and DNA material found in the tests that suggested another person's DNA was in the blood samples. Because of the strength of the State's evidence against Edwards, planting doubts in jurors' minds about the reliability of the State's evidence—and not retaining an expert to present an improbable theory to explain O'Grady's blood on the mattress—was not an unreasonable trial strategy.

Finally, even if a defense expert had presented testimony that another person's DNA was present in a couple of the blood samples from the mattress, this evidence would not have changed the result. As stated, the State's experts conceded this possibility at trial. But because of substantial other evidence pointing to Edwards' guilt, it obviously did not persuade the jurors. The court correctly concluded that Edwards' allegations regarding the necessity of an expert did not warrant postconviction relief.

### 6. Edwards' Remaining Claims of Ineffective Assistance Did Not Merit Postconviction Relief

[34] As stated, Edwards also alleged that his trial counsel failed to effectively investigate (1) calls made to O'Grady's aunt after O'Grady's disappearance, concerning the location of O'Grady's car; (2) whether O'Grady had contacted an online travel agency around the time of her disappearance; and (3) whether an "'alternate suspect'" existed. But a petitioner's postconviction claims that his or her defense counsel was ineffective in failing to investigate possible defenses are too speculative to warrant relief if the petitioner fails to allege

what exculpatory evidence that the investigation would have procured and how it would have affected the outcome of the case.[75] Edwards did not allege these facts. Thus, the court correctly concluded that these allegations did not entitle Edwards to postconviction relief.

## VI. CONCLUSION

We conclude that the court properly denied postconviction relief on Edwards' claim that his appellate counsel was ineffective for failing to raise on appeal that the trial court erred in overruling his motion for a change of venue. The record refutes his claim that the court should have presumed the prospective jurors were biased. Edwards also failed to allege facts showing that his trial counsel was ineffective for not retaining an expert to support his defense theory of a miscarriage causing the blood found on the mattress or to assist in developing new theories. Finally, Edwards' allegations failed to show that his trial counsel unreasonably failed to investigate (1) calls made to O'Grady's aunt after O'Grady's disappearance, concerning the location of O'Grady's car; (2) whether O'Grady had contacted an online travel agency around the time of her disappearance; and (3) whether an "'alternate suspect'" existed. These allegations were too speculative to require postconviction relief.

But we conclude that Edwards' allegations require an evidentiary hearing on two claims: (1) that he was denied due process by the State's knowing use of fabricated evidence to obtain his conviction and (2) that his trial counsel labored under an actual conflict of interest. We reverse the court's ruling on these two claims and remand the cause for an evidentiary hearing.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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[75] See, e.g., *State v. McGhee*, 280 Neb. 558, 787 N.W.2d 700 (2010); *State v. Whiteley*, 234 Neb. 693, 452 N.W.2d 290 (1990), *disapproved on other grounds, State v. Pieper*, 274 Neb. 768, 743 N.W.2d 360 (2008).