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CONCLUSION

Because Watkins did not allege that the competency-related issues he raised in his second motion for postconviction relief were not available previously or could not have been raised either on direct appeal or in his first postconviction proceeding, the claims are procedurally barred. We affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RYAN L. POE, APPELLANT.

822 N.W.2d 831

Filed November 30, 2012. No. S-12-141.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.
3. ____: ____. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error.
4. ____: ____. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision.
5. **Postconviction: Constitutional Law: Judgments: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable.
6. **Postconviction.** An evidentiary hearing is not required when a motion for postconviction relief alleges only conclusions of fact or law.
7. **Postconviction: Constitutional Law: Judgments: Proof.** If a defendant makes sufficient allegations of a constitutional violation which would render a judgment void or voidable, an evidentiary hearing on a motion for postconviction relief may be denied only when the records and files affirmatively show that the defendant is entitled to no relief.
8. **Constitutional Law: Trial: Due Process.** The Due Process Clause of the U.S. Constitution guarantees every defendant the right to a trial comporting with basic tenets of fundamental fairness.

9. **Trial: Prosecuting Attorneys: Due Process.** Prosecutorial misconduct may so infect the trial with unfairness as to make the resulting conviction a denial of due process.
10. ____: ____: ____. To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of a defendant's right to a fair trial.
11. **Effectiveness of Counsel: Proof.** The two prongs of the ineffective assistance test, deficient performance and prejudice, may be addressed in either order.
12. **Effectiveness of Counsel: Presumptions.** When considering whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.
13. **Trial: Attorneys at Law.** Trial counsel is afforded due deference to formulate trial strategy and tactics.
14. **Trial: Attorneys at Law: Effectiveness of Counsel: Appeal and Error.** An appellate court will not second-guess reasonable strategic decisions by counsel.
15. **Effectiveness of Counsel: Proof.** To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
16. **Proof: Words and Phrases.** A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed in part, and in part reversed and remanded with directions.

Michael J. Wilson, of Schaefer Shapiro, L.L.P., for appellant.

Jon Bruning, Attorney General, and Stacy M. Foust for appellee.

WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, MILLER-LERMAN, and CASSEL, JJ., and MOORE, Judge.

MCCORMACK, J.

NATURE OF CASE

Ryan L. Poe was convicted of first degree felony murder and use of a deadly weapon to commit a felony. His convictions were affirmed on direct appeal to this court.[1] He now appeals from the dismissal of his motion for postconviction relief without an evidentiary hearing. Poe claims he was prejudiced by prosecutorial misconduct stemming from the presentation of inconsistent theories as to a key witness' involvement

[1] *State v. Poe*, 276 Neb. 258, 754 N.W.2d 393 (2008).

in the crimes. He also claims that he was deprived of his right to effective assistance of counsel because counsel did not present certain evidence concerning Poe's financial situation, a telephone call made near the time of the crimes, a leg injury affecting his ability to carry out the crimes, and an inconsistent statement allegedly made by the State's key witness. We affirm as to all matters except the alleged inconsistent statement.

BACKGROUND

Poe was charged with first degree felony murder and use of a deadly weapon in connection with the killing of Trever Lee during a robbery of Lee's townhouse on November 11, 2004. Lee lived with two roommates who survived, one of whom called the 911 emergency dispatch service at 10:57 a.m. They testified that the robbery was committed by three masked individuals.

One of the roommates, Jeff Connely, supplied marijuana to a friend of Poe's, Antwine Harper. Harper was a key witness against Poe at trial. Harper testified that Poe had asked him for permission to rob Connely and that Poe had confessed to the crimes in great detail a few days after they were committed. There was no physical evidence linking Poe to the crime.

Opening Statements

During opening statements, defense counsel introduced the theory that Harper, not Poe, was one of the perpetrators of the robbery and murder. Defense counsel also pointed out that Harper implicated Poe only after the investigators interrogated him for hours and threatened him with criminal charges of conspiracy to deliver marijuana.

The State emphasized for the jury that Harper was not the robber. When Poe suggested the robbery to Harper, Harper had told Poe it was "completely out of the question." Harper relied on his supplier for his livelihood. Several weeks after that conversation, Poe called Harper and told him he had "sent your boy to Texas." Harper had been at the hospital all day for the birth of his child. The State explained to the jury that "Harper will tell you he immediately doesn't recognize what that means

until he sees the news later that day and sees there's been a shooting in the area [where his supplier lives]."

Antwine Harper

Harper testified at trial that Poe had once driven him to Lee's townhouse and waited in the car while he purchased marijuana from Connely. Thus, Poe became aware of the location of a potential robbery victim. Several weeks before the robbery and murder, Poe asked Harper if he could rob Connely. Harper testified that he emphatically told Poe he could not, because Harper paid his bills and supported his family by selling the marijuana he obtained from Connely.

Harper testified that the morning of the robbery and murder, he was at the hospital with his wife for the birth of their second child. Harper's wife had been scheduled to be induced the morning of November 11, 2004, but she went into labor the night before. While at the hospital on November 11, shortly before noon, Poe called Harper and said, "I just sent your dude to Texas." Harper testified that that was a street term for having killed somebody. Harper testified that he was not "fully aware," however, that a homicide had occurred until he saw it on the 5 o'clock news.

According to Harper, 2 or 3 days later, when he and his wife arrived home from the hospital, Poe visited Harper and described how Poe, Kashaun Lockett, and Donte Reed, who is Harper's cousin, had carried out the robbery. Poe said that he had kicked in the front door of the townhouse and that they went directly upstairs, where Poe kicked open the first bedroom door they encountered. After asking the resident of that bedroom where "the bud" was at, they moved on to another bedroom where Lee was sleeping. A struggle ensued with Lee in the hallway. In the course of that struggle, Poe, Lockett, and Reed all fired shots at Lee, killing him. During the struggle, Lockett lost a shoe and Poe dropped a magazine clip from his gun.

On cross-examination, defense counsel emphasized Harper's familiarity with the layout of the townhouse and with the schedule of its tenants—a familiarity Poe, Lockett, and Reed lacked. Defense counsel also questioned how Harper could

know certain details about the crime that were not released to the public.

Harper's wife confirmed Harper's alibi that Harper was at the hospital at the time of the robbery. Their child was born at approximately 7 a.m. On cross-examination, however, Harper's wife admitted that Harper was not in the room at all times; he would occasionally leave to go down to the cafeteria or talk on the telephone.

Evidence From Scene

Police officers discovered a shoe at the townhouse that matched the DNA profile of Lockett. They also found a discarded magazine clip, but the guns used in the robbery were never found. The witnesses' descriptions of each robber's height, weight, and skin color generally matched the physical characteristics of Poe, Lockett, and Reed.

Motive

The State adduced evidence that Poe did not have a job at the time of the robbery and was experiencing some financial difficulty. Harper testified that Poe did not own his own vehicle. Other evidence demonstrated that the apartment where Poe lived was sparsely furnished. The State introduced receipts showing that Poe pawned and repawned several items from October 18 to December 14, 2004.

Michelle Hayes

Michelle Hayes was Poe's live-in girlfriend and the mother of his child. She testified that when she woke up around 11 or 12 o'clock on the morning of November 11, 2004, she saw Poe walking in. On cross-examination, Hayes confirmed her and Poe's home telephone number and the number of Poe's father and explained that Poe often spoke with his father on the telephone. Telephone records demonstrated that at 10:19 a.m., a call approximately 3 minutes in duration was made from Poe and Hayes' landline to Poe's father's landline. Other evidence showed it took about 20 minutes to drive from Poe and Hayes' residence to the townhouse where Lee was killed. Hayes also testified on cross-examination that Poe received Social Security benefits because of an injury to his leg.

Interview Videotape and Cross-Examination

The trial court denied defense counsel's motion to introduce the videotaped portion of Harper's interview with investigators wherein he implicated Poe. The videotape was not transcribed. In his direct appeal to this court, Poe asserted that the trial court denied his right to a complete defense by refusing to allow him to play the 2-hour videotape for the jury.[2] Poe further asserted that the trial court violated his right to confrontation by limiting defense counsel's cross-examination of Harper and of the police officers who interviewed him.

We rejected both arguments. We explained that defense counsel had viewed the videotape and repeatedly asked the witnesses about its contents. We said that defense counsel was permitted "extensive cross-examination of all witnesses concerning the police interview of Harper"[3] and that the jury heard the evidence concerning "all aspects of Harper's interview with the officers."[4]

For example, Harper admitted on cross-examination that he implicated Poe only after the officers told him he had an arrest warrant for marijuana charges. In previous communications with the police and during the first few hours of the last interview, Harper had said he knew nothing about the robbery. But when threatened with arrest, Harper broke down and cried because the officers "'tried to take me away from my family.'"[5]

Harper testified he believed he was only being threatened with drug-related charges. But Harper admitted on cross-examination that he was getting the feeling the officers were putting him "'in the mix'"[6] for the robbery and murder. One of the interviewing officers told Harper that Lee's murder could have the death penalty associated with it and that people can get 50 years in prison on drug charges. Defense counsel was

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[2] *Id.*

[3] *Id.* at 268, 754 N.W.2d at 402.

[4] *Id.* at 270, 754 N.W.2d at 403.

[5] *Id.* at 265, 754 N.W.2d at 400.

[6] *Id.* at 265, 754 N.W.2d at 399.

even able to elicit Harper's interview statement that he would tell the officers "'what [they] want[ed] to hear.'"[7]

Defense counsel again obtained Harper's admission that he "'told [the officers] what they wanted to hear so [he] wouldn't have to go to jail.'"[8] And one of the interviewing officers testified on cross-examination that they told Harper they would "'go to bat'" for Harper if he cooperated.[9] Harper testified it was his understanding that the charges against him would be dismissed if he cooperated.

Closing Arguments

During closing arguments, the State told the jury that it "boil[ed] down to" whether the jury believed Harper was "being honest about his involvement and what he knows and how he knows it." The State spoke about Harper's lack of motive to rob his only supplier and the fact that Harper did not remotely fit the weight and height descriptions of the assailants. The State argued that the idea that Harper planned a robbery the same day his wife was scheduled to deliver their baby was "ridiculous." The State argued instead that this was that "exceptional" gang-related case where someone "despite his fears, his trepidation, [came] forward, helped officers to solve this crime."

Defense counsel in closing arguments suggested that Harper was the perpetrator and pointed out "the irony" that "the person who is responsible is [the State's] witness." Defense counsel also argued that Harper's testimony could not be trusted because it was obtained by threats and as a "trad[e]" for dropping charges that could have resulted in 50 years in prison and even the death penalty.

Defense counsel pointed out that Poe, because of his injured leg, would not be able to efficiently kick through doors. Finally, defense counsel argued it was almost impossible for Poe to have rushed to the townhouse to commit the robbery and murder right after speaking with his father on the telephone from

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[7] *Id.* at 266, 754 N.W.2d at 400.

[8] *Id.* at 269, 754 N.W.2d at 402.

[9] *Id.*

his landline. Defense counsel explained that it had to have been Poe on the telephone shortly before the robbery because Hayes could not have been speaking with Poe's father while she was asleep. The jury found Poe guilty.

Harper as Coconspirator?

Before Poe's trial, the parties had discussed whether Poe and Lockett would be tried jointly. Both Poe's attorney and Lockett's attorney opposed joinder, and the court ultimately ruled against joinder. One of the issues discussed in the pretrial hearing was whether Harper's testimony concerning Poe's hearsay statements would be admissible in Lockett's trial. The State indicated it would attempt to show the statements by Poe were in furtherance of a conspiracy and thus would be allowed as nonhearsay.

After Poe's trial, during pretrial proceedings for the State's case against Lockett, the State filed a brief in opposition to Lockett's motion to suppress Poe's statements to Harper as inadmissible hearsay. The State asserted that the statements should be allowed under Neb. Rev. Stat. § 27-801(4)(b)(v) (Reissue 2008). The State argued that Harper participated in a conspiracy with Poe, Lockett, and Reed. It explained Harper had numerous contacts with the perpetrators and knew what was being planned. The State explained that a person who acts in "'confederation'" with others to violate the law "may be liable as a principal under the theory of conspiracy." And "Harper's involvement in the robbery and murder in question is more than a passive observer." The State also emphasized that Harper did nothing to stop the robbery. Then, after the robbery, when Poe called Harper at the hospital and said he "sent your dude to Texas," Harper knew that meant they had killed someone. But Harper did nothing to report the crime, and he initially "aided in the cover-up by not being forthright with the police." Lockett's case was dismissed before trial.

Motion for Postconviction Relief

Poe filed a petition for postconviction relief. Simultaneously, Poe filed a 57-page "Verified Motion to Vacate and Set Aside Judgment of Conviction and Sentence," elaborating on his postconviction claims. Poe alleged that the State had engaged

in prosecutorial misconduct by presenting inconsistent and irreconcilable theories as to Harper's involvement in the crimes. Poe focused on inconsistencies as to whether Harper was involved in planning the robbery or instead tried to stop it, whether Harper immediately understood what Poe meant when he said he "sent your dude to Texas," and whether Harper was an innocent and cooperative witness versus a coconspirator in a coverup. Poe argued, among other things, that our decision on direct appeal concerning the admissibility of the videotape and the confrontation of witnesses against him should be reconsidered in light of this newly discovered evidence of prosecutorial misconduct. Poe further alleged that the State's successful objections to defense counsel's cross-examination of Harper and to the admission of the videotape constituted a manipulation of the evidence in furtherance of its inconsistent theories.

Poe alleged that his trial counsel was ineffective in failing to contact and interview witnesses, investigate all the facts, fully develop proper trial strategy, and call Poe as a witness. In support of these allegations, Poe attached the affidavit of Hayes, wherein she stated that Harper had told her Poe did not commit the robbery and murder. Hayes stated that Harper told her he was being pressured to lie at Poe's trial. Hayes averred that she relayed this conversation to Poe's trial counsel.

Poe also presented the affidavit of Poe's father, who averred that Poe was not in need of money at the time of the robbery because he provided Poe with money whenever Poe needed it. Poe's father further stated that he was willing to testify at Poe's trial and would have testified that he spoke with Poe on the telephone shortly before the robbery.

Finally, Poe submitted his own affidavit in which he asserted that trial counsel failed to sufficiently consult with him. Poe claimed, among other things, that trial counsel was ineffective in advising Poe not to testify. If Poe would have testified, Poe would have told the jury that he spoke with his father on the telephone from his landline shortly before the robbery and murder. He would have also testified that the injury to his right leg made it impossible for him to kick open a locked door. Finally, Poe averred he would have testified

that his father gave him all that he needed financially and that his father had purchased furniture which had not yet been moved into Poe and Hayes' apartment at the time of the robbery and murder.

The trial court granted the State's motion to dismiss Poe's motion for postconviction relief without an evidentiary hearing. Poe appeals.

ASSIGNMENTS OF ERROR

Poe asserts that the trial court erred in dismissing his motion for postconviction relief without an evidentiary hearing because Poe alleged facts that, if proved, would show (1) prosecutorial misconduct, (2) a violation of his right to present a complete defense, and (3) ineffective assistance of counsel.

STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.[10]

[2-4] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.[11] When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*,[12] an appellate court reviews such legal determinations independently of the lower court's decision.[13]

ANALYSIS

[5-7] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution,

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[10] *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002).

[11] *State v. Davlin*, 277 Neb. 972, 766 N.W.2d 370 (2009).

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

[13] *State v. Davlin, supra* note 11.

causing the judgment against the defendant to be void or voidable.[14] An evidentiary hearing is not required when the motion alleges only conclusions of fact or law.[15] If the defendant makes sufficient allegations of a constitutional violation which would render the judgment void or voidable, an evidentiary hearing may be denied only when the records and files affirmatively show that the defendant is entitled to no relief.[16]

Prosecutorial Misconduct

Poe first alleges that the trial court erred in dismissing his claim for postconviction relief because he raised sufficient allegations of prosecutorial misconduct stemming from the use of inconsistent theories in two different proceedings for different defendants charged with the same crimes.

[8-10] The Due Process Clause of the U.S. Constitution guarantees every defendant the right to a trial comporting with basic tenets of fundamental fairness.[17] The U.S. Supreme Court has recognized that prosecutorial misconduct may so infect the trial with unfairness as to make the resulting conviction a denial of due process.[18] To constitute a due process violation, the prosecutorial misconduct must be of sufficient significance to result in the denial of the defendant's right to a fair trial.[19]

Thus, the U.S. Supreme Court has said that the prosecution violates due process by knowingly or recklessly presenting false testimony.[20] The prosecution also violates due process by failing to disclose evidence favorable to the accused.[21] But

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[14] See, *State v. Marshall*, 269 Neb. 56, 690 N.W.2d 593 (2005); *State v. Dean, supra* note 10.

[15] *State v. Dean, supra* note 10.

[16] See *State v. Marshall, supra* note 14.

[17] *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

[18] *Greer v. Miller*, 483 U.S. 756, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987).

[19] *Id.*

[20] *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959).

[21] *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

the U.S. Supreme Court has declined to squarely address the issue of whether a prosecutor's use of inconsistent theories can violate due process. We likewise have never addressed this issue.

In *Calderon v. Thompson* (*Thompson II*),[22] the U.S. Supreme Court reversed a Ninth Circuit opinion, *Thompson v. Calderon* (*Thompson I*),[23] that had recalled its previous mandate denying habeas relief. In a plurality opinion, the court in *Thompson I* had concluded that the prosecutor pursued "fundamentally inconsistent theories"[24] which violated Thomas Martin Thompson's due process rights and prejudiced Thompson because the inconsistent theory formed the basis for the special circumstance justifying the imposition of the death penalty.[25]

The prosecution had presented different witnesses in each trial of separately convicted accomplices concerning the extent of each defendant's involvement in the murder. In the trial of Thompson, the prosecution argued that Thompson alone committed the murder, which he committed to cover up a rape, and that his accomplice only assisted in hiding the body when he discovered the murder thereafter. The prosecution called two jailhouse informants who testified as to Thompson's confession consistent with that theory. But in a subsequent trial of the codefendant, the prosecution argued that the codefendant, not Thompson, was the mastermind of the murder. The victim was getting in the way of the codefendant's efforts to reconcile with his ex-wife. Thompson had merely assisted in carrying out the murder. In support of this new theory in the trial of the codefendant, the prosecution called numerous *defense* witnesses from Thompson's trial, including jailhouse informants who testified as to entirely different confessions than the confessions testified to by the jailhouse informants in Thompson's trial. When defense counsel in the codefendant's

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[22] *Calderon v. Thompson*, 523 U.S. 538, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998).

[23] *Thompson v. Calderon*, 120 F.3d 1045 (9th Cir. 1997).

[24] *Id.* at 1056.

[25] *Thompson I, supra* note 23.

trial attempted to argue Thompson had murdered the victim by himself, the prosecution characterized this theory as "absurd and incredible."[26]

The Ninth Circuit concluded that the prosecution's manipulation of evidence and witnesses and its argument of inconsistent motives, which essentially ridiculed the prosecution's theory used to obtain a conviction and death sentence at Thompson's trial, violated due process.[27] The U.S. Supreme Court reversed, holding that the Ninth Circuit abused its discretion in recalling the mandate in which it had previously denied habeas relief.[28] The Court explained that finality is essential to the law. Absent clerical error, fraud, or a stay, a court that sua sponte recalls its mandate abuses its direction unless there has been a miscarriage of justice concerning "'actual as compared to legal innocence.'"[29] In terms of a petitioner who challenges his death sentence, the petitioner must show by clear and convincing evidence that no reasonable juror would have found him eligible for the death penalty in light of the new evidence.[30] This standard was not met by Thompson.[31]

In *Bradshaw v. Stumpf* (*Stumpf II*),[32] the U.S. Supreme Court came a bit closer to opining on the viability of prosecutorial misconduct claims based on inconsistent theories. The Court granted certiorari to address a claim that was primarily concerned with whether the defendant's plea was knowing, voluntary, and intelligent.[33] After reversing habeas relief on that issue, the Court stated it would be "premature" to resolve the merits of the defendant's sentencing claim based

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[26] *Id.* at 1057.

[27] *Thompson I, supra* note 23.

[28] *Thompson II, supra* note 22.

[29] *Id.*, 523 U.S. at 559.

[30] *Thompson II, supra* note 22.

[31] *Id.*

[32] *Bradshaw v. Stumpf*, 545 U.S. 175, 125 S. Ct. 2398, 162 L. Ed. 2d 143 (2005).

[33] See *Stumpf v. Mitchell*, 367 F.3d 594 (6th Cir. 2004).

on prosecutorial misconduct.[34] It remanded that claim to the lower court.

The prosecutorial misconduct claim was premised on the fact that the panel which sentenced John David Stumpf to death specifically found that he was the "'principal offender'" in the aggravated murder.[35] This was founded on the prosecution's argument during the penalty phase of Stumpf's trial that Stumpf had shot and killed the victim. In the subsequent trial of the accomplice, however, the prosecution argued the opposite—that it was the accomplice who fired the fatal shots. Apparently, a new jailhouse informant had come forward. After the accomplice's trial, the State went back to its original theory and argued in a hearing on Stumpf's motion to withdraw his plea that Stumpf was the primary shooter. At that hearing, the prosecution discredited the very testimony which the prosecution had presented in the accomplice's trial. Throughout these three proceedings, the prosecution argued as an alternative basis for the death penalty that the defendants acted as accomplices with a specific intent to cause death.

The U.S. Supreme Court explained that the Court of Appeals' opinion had been unclear as to whether it had addressed this prosecutorial misconduct claim. The Court of Appeals should have the opportunity to consider the question in the first instance before the U.S. Supreme Court considered it.[36] Justice Souter concurred, with Justice Ginsburg joining, to clarify that the matter remanded was the question of whether Stumpf's "death sentence may not be allowed to stand when it was imposed in response to a factual claim that the State necessarily contradicted in subsequently arguing for a death sentence in the case of a codefendant."[37] Justice Souter summarized that "[a]t the end of the day, the State was on record as maintaining that Stumpf and [the accomplice] should both be executed on the ground that each was the triggerman, when it was undisputed

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[34] *Stumpf II, supra* note 32, 545 U.S. at 187.

[35] *Id.*, 545 U.S. at 180.

[36] *Stumpf II, supra* note 32.

[37] *Id.*, 545 U.S. at 189 (Souter, J., concurring; Ginsburg, J., joins).

that only one of them could have been."[38] Justice Souter noted "'[t]he heightened need for reliability in capital cases.'"[39] He wrote that at some point in a given case, the state's interest is transcended by its interest that justice shall be done.[40] Thus, Stumpf's argument to be considered on remand was whether "sustaining a death sentence in circumstances like those here results in a sentencing system that invites the death penalty 'to be . . . wantonly and . . . freakishly imposed.'"[41]

Justice Thomas wrote a concurring opinion, joined by Justice Scalia, questioning whether a due process claim can arise from inconsistent theories as opposed to the use of evidence known to be false. Justice Thomas opined that the U.S. Supreme Court "has never hinted, much less held, that the Due Process Clause prevents a State from prosecuting defendants based on inconsistent theories."[42] Rather, the guarantee of "vigorous adversarial testing of guilt and innocence" and the requirement of "conviction only by proof beyond a reasonable doubt" "are more than sufficient to deter the State from taking inconsistent positions; a prosecutor who argues inconsistently risks undermining his case, for opposing counsel will bring the conflict to the factfinder's attention."[43]

On remand, the Sixth Circuit held in *Stumpf v. Houk* (*Stumpf III*)[44] that the defendant's due process rights were violated and that the sentencing panel likely would not have sentenced the defendant to death "had the state not persisted in its efforts at duplicity." The court said:

> If we are to take seriously the responsibility of ensuring reliable sentencing determinations in capital cases, we cannot allow the prosecution to play so fast and

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[38] *Id.*

[39] *Id.*

[40] *Stumpf II*, *supra* note 32, citing *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).

[41] *Id.*, 545 U.S. at 190.

[42] *Id.*, 545 U.S. at 190 (Thomas J., concurring; Scalia, J., joins).

[43] *Id.*, 545 U.S. at 191-92.

[44] *Stumpf v. Houk*, 653 F.3d 426, 439 (6th Cir. 2011).

> loose with the facts and with its theories. To allow a prosecutor to advance irreconcilable theories without adequate explanation undermines confidence in the fairness and reliability of the trial and the punishment imposed and thus infringes upon the petitioner's right to due process.[45]

The court concluded that the prosecutor had played "a flippant, macabre game of chance with people's lives."[46] And while a prosecutor must prosecute with "'earnestness and vigor and "may strike hard blows, he is not at liberty to strike foul ones."'"[47] The dissent in *Stumpf III* argued, however, that the substantive right relied on by the majority was one "of [its] own invention."[48]

In addition to the Sixth Circuit and Ninth Circuit decisions in *Stumpf III* and *Thompson I*, other state and federal courts have recognized that inconsistent prosecutorial theories can, in certain circumstances, violate due process. Those cases almost exclusively involve the death penalty, although at least one involves a sentence of life imprisonment.[49] The kind of inconsistencies courts have found in violation of due process concern "the core of the State's case"[50] and often are "essential in order to prosecute the individual in question."[51] "In other words, the Government in those subsequent cases could not have prosecuted the remaining individual for the same crime had the Government maintained the theory or facts argued in the earlier trial."[52] In addition, inconsistencies which courts have found to rise to the level of the denial of a fundamentally

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[45] *Id.* at 437.

[46] *Id.* at 438.

[47] *Id.* at 439. See, also, *Berger v. United States, supra* note 40; *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).

[48] *Stumpf III, supra* note 44, 653 F.3d at 440 (Boggs, Judge, dissenting).

[49] See *Smith v. Groose*, 205 F.3d 1045 (8th Cir. 2000).

[50] *E. Sifrit v. State*, 383 Md. 77, 106, 857 A.2d 65, 82 (2004). See, also, *Clay v. Bowersox*, 367 F.3d 993 (8th Cir. 2004).

[51] *U.S. v. Dickerson*, 248 F.3d 1036, 1043-44 (11th Cir. 2001).

[52] *Id.* at 1044.

fair trial have involved a manipulation of the evidence in order to support the different theories.

For instance, in *In re Sakarias*,[53] the prosecution argued in two separate trials that each defendant struck all the particularly gruesome hatchet blows to the victim's head and that the other used a knife. Apparently, the scenario "best supported by all the evidence"[54] was that Peter Sakarias used the knife in the initial attack and only struck the victim with the hatchet after the victim was already dead and had been dragged into another room. Each defendant was sentenced to death. In order to support the theory in Sakarias' trial that Sakarias struck all the hatchet blows, including the fatal one, the prosecution intentionally avoided eliciting certain testimony which the prosecution had presented in the accomplice's trial.

The court held that the prosecution violated Sakarias' due process rights by "intentionally and without good faith justification arguing inconsistent and irreconcilable factual theories in the two trials, attributing to each [defendant] in turn culpable acts that could have been committed by only one person."[55] The court reasoned that, when prejudicial, the prosecution achieves through such tactics a false conviction or increased punishment on a "false factual basis" for one of the accused.[56]

For similar reasons, in *Smith v. Groose*,[57] the Eighth Circuit granted habeas relief by vacating the conviction and sentence of five life terms of imprisonment for Jon Keith Smith, who had been a juvenile at the time of the alleged crimes. The case involved the unfortunate and unusual circumstance in which the victims' home was the object of two different gangs of robbers that had entered the home at separate, but overlapping times. Smith's gang had arrived while the robbery of the other gang was in progress. A member of Smith's

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[53] *In re Sakarias*, 35 Cal. 4th 140, 106 P.3d 931, 25 Cal. Rptr. 3d 265 (2005).

[54] *Id.* at 147, 106 P.3d at 936, 25 Cal. Rptr. 3d at 272.

[55] *Id.* at 145, 106 P.3d at 934, 25 Cal. Rptr. 3d at 270.

[56] *Id.* at 156, 106 P.3d at 942, 25 Cal. Rptr. 3d at 278.

[57] *Smith v. Groose, supra* note 49.

gang had told police that the victims were already dead when they arrived. But he had briefly changed his story to the police and later said he saw a member of Smith's gang killing the victims.

The prosecution asserted in Smith's trial that a member of Smith's gang had killed the victims. The witness from Smith's gang testified for the defense that the victims had been killed by the other gang before they arrived. The prosecution successfully impeached this testimony and obtained a conviction against Smith for felony murder by using the witness' second statement to the police. In the subsequent trial of a robber from the other gang, however, the prosecution relied on the witness' first statement to police that the other gang had killed the victims before Smith's gang arrived.

The Eighth Circuit explained, "In short, what the State claimed to be true in Smith's case it rejected in [the other] case, and vice versa," successfully proving beyond a reasonable doubt in two different trials that the victims were murdered at two different times.[58] The court said that prosecutors are not bound to present precisely the same evidence and theories in trials for different defendants.[59] But "diametrically opposed testimony" "at the core of the prosecutor's cases against defendants for the same crime," renders the convictions infirm.[60]

In contrast to diametrically opposed inconsistencies at the core of the case accompanied by manipulation of the evidence, courts have found that "[d]iscrepancies based on rational inferences from ambiguous evidence will not support a due process violation provided the two theories are supported by consistent underlying facts."[61] Courts have also held that the use of inconsistent theories will not rise to a due process violation when those theories concern a tangential issue.[62] It is acceptable that

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[58] *Id.* at 1050.

[59] *Smith v. Groose*, *supra* note 49.

[60] *Id.* at 1052.

[61] *E. Sifrit v. State*, *supra* note 50, 383 Md. at 106, 857 A.2d at 82.

[62] *State v. Bodden*, 190 N.C. App. 505, 661 S.E.2d 23 (2008).

"evidence presented at multiple trials is going to change to an extent based on relevancy to the particular defendant and other practical matters."[63]

Courts have accordingly found no due process violation stemming from inconsistent arguments as to who was the killer in the relatively common circumstance where each defendant can be held equally guilty as an aider and abettor upon the same inconclusive evidence.[64] In a case decided the same year as *Smith*, the Eighth Circuit found no due process violation when, at two separate trials, the prosecution argued that the death penalty was appropriate for each defendant because each was the killer in the jointly executed armed robbery.[65] Although the prosecution made inconsistent arguments, the court noted that the evidence presented to the trier of fact was the same. It was impossible to determine from the evidence which gun caused the fatal wound. The prosecution thus did not use evidence that was "factually inconsistent and irreconcilable."[66]

Similarly, in *State v. Bodden*,[67] where the underlying theory of guilt remained the same, the court held that the prosecution did not violate the defendant's due process rights by arguing in the defendant's trial that the victim knew he was dying when he identified the defendant, and in the accomplice's trial arguing that the victim did not know he was dying. The court noted that the evidence of the victim's hearsay statements was admitted and was identical in both trials. The prosecution merely adopted differing "permissible inferences interpreting the same evidence."[68] The court observed that in each case, whatever the prosecution's theory, the trial court would have

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[63] *E. Sifrit v. State, supra* note 50, 383 Md. at 106, 857 A.2d at 82.

[64] See, *Drake v. Francis*, 727 F.2d 990 (11th Cir. 1984); *Council v. Commissioner of Correction*, 114 Conn. App. 99, 968 A.2d 483 (2009). See, also, *Nguyen v. Lindsey*, 232 F.3d 1236 (9th Cir. 2000).

[65] *U.S. v. Paul*, 217 F.3d 989 (8th Cir. 2000).

[66] *Id.* at 998.

[67] *State v. Bodden, supra* note 62.

[68] *Id.* at 516, 661 S.E.2d at 30.

been free, upon that same evidence, to make a different inference.[69] Furthermore, a due process violation would not stem from inconsistencies pertaining to "a tangential issue such as admission of a hearsay statement."[70]

In *State v. Pearce*,[71] the court found no due process violation after the prosecution changed its position about the credibility of a key witness when the underlying factual allegations remained the same. The witness was one of a group of three men and one woman who kidnapped, robbed, and attempted to kill the victim. In the first trial, the witness identified the defendant, who was another of the three men, as one of the perpetrators and stated that Sarah Kathleen Pearce was not the woman involved. In a retrial of that defendant, the witness again incriminated the defendant, but this time said he did not know whether Pearce was the woman involved. At both trials, the prosecution vouched for the witness' credibility and discredited defense counsel's attempt to impeach the witness due to his inconsistent testimony.

But at Pearce's trial, when the witness testified that he did not think Pearce was the woman involved, the prosecution impeached the witness' credibility. In doing so, the prosecution used essentially the same instances of dishonesty relied on by the defense in the other defendant's trial.

The court explained that not every prosecutorial variance amounts to a due process violation.[72] Merely changing position about the credibility of a witness—even a key witness—is fundamentally distinct from inconsistencies which rise to a due process violation. The underlying theory of guilt in the trial of Pearce and her coconspirators remained the same. The court said that forcing the prosecution to accept the witness' testimony at Pearce's trial "and abstain from impeachment, simply because it had bolstered his credibility when it previously used a different portion of his testimony,

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[69] See *id*.

[70] *Id*. at 517, 661 S.E.2d at 30.

[71] *State v. Pearce*, 146 Idaho 241, 192 P.3d 1065 (2008).

[72] *Id*.

would essentially strip the State of an important tool in its trial arsenal."[73]

The Supreme Court of Iowa has said that there is only a "narrow exception to the right of the prosecution to rely on alternative theories in criminal prosecutions albeit that they may be inconsistent."[74] That narrow exception it limited to the "selective use of evidence by the prosecution in order to establish inconsistent factual contentions in separate criminal prosecutions for the same crime [which is] so egregious and lacking in good faith as to constitute a denial of due process."[75] The court explained: "There is, after all, a safeguard against abuse as a result of the prosecution's burden to prove any theory it asserts by evidence beyond a reasonable doubt."[76]

In this appeal from Poe's denial of postconviction relief, we find it unnecessary to precisely define the kind of inconsistencies that perhaps could, in different circumstances, violate the defendant's right to a fundamentally fair trial. The inconsistencies alleged in Poe's motion for postconviction relief clearly do not give rise to a due process claim.

Poe and the State seem to disagree as to what level of coconspirator involvement the State actually alleged in the Lockett brief. The State argues that it only asserted Harper was part of the coverup, while Poe reads the Lockett brief as alleging more. Regardless, the State does not fundamentally contradict the *evidence* it presented in Poe's trial. And, because the Lockett prosecution never went to trial, there could be no manipulation of the underlying evidence presented to support the inconsistent theories.

Harper testified at Poe's trial that he asked Poe not to rob his supplier. The State did not later argue this was untrue. Harper testified at Poe's trial that he did not otherwise try to stop the robbery and did not report the crime. The State said in Poe's trial this was because Harper was scared for his family's safety.

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[73] *Id.* at 249, 192 P.2d at 1073.

[74] *State v. Watkins*, 659 N.W.2d 526, 532 (Iowa 2003).

[75] *Id.*

[76] *Id.*

In the Lockett proceedings, however, this failure to act was evidence of a conspiracy.

Harper testified at Poe's trial that he knew that "sen[ding] your dude to Texas" was street talk for having killed someone, but that he did not fully understand what had happened until he saw the news. The State in Poe's trial emphasized that Harper was surprised and confused when he received that message, thereby emphasizing his innocence. In the Lockett brief this was instead further evidence of Harper's "collaboration, cooperation, and failure to act on the information that he had."

The State drew different inferences from the evidence and emphasized the same evidence in different ways. But either view of Harper's involvement as innocent or somewhat less so is consistent with the evidence and may be reasonably inferred therefrom. These are not irreconcilable or diametrically opposed theories. Furthermore, the extent of Harper's involvement in the crime is tangential to the underlying theory of Poe's involvement in the crime. The State did not take an inconsistent view as to Harper's credibility and did not contest the core facts of Poe's alleged confession to Harper.

We also note that before Poe's trial, the prosecution had told defense counsel it would be pursuing a coconspirator exception to the hearsay rule if Lockett were tried separately. Although the details of the conspiracy theory were not entirely clear, to that extent, the prosecution did not change its theory at all.

Poe argues that, like in *Thompson I*,[77] the prosecution ridiculed the very theory the prosecution later used in the Lockett hearing. The State said in closing arguments that it would be "ridiculous" for Harper to have planned the robbery the same day his wife was scheduled to give birth. But the State was attempting to address Poe's theory of defense that Harper, not Poe, was one of the robbers. It was not ridiculing the idea later proposed in the Lockett proceeding that Harper was acting in "confederation" with Poe from the safety of his wife's hospital room. And the State's critique of Poe's theory of defense was

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[77] *Thompson I, supra* note 23.

professional in tone. Standing alone, such critique will not form the basis for a due process claim.

In conclusion, the prosecution did not strike "foul blows"[78] in its pursuit of Poe's convictions. The State did not present different evidence and theories in order to wantonly manipulate the criminal justice system. The prosecution merely presented different permissible inferences based on the same evidence. It did so in order to account for the different circumstances of the different proceedings—in this case, for different evidentiary hurdles. Such a change in arguments and strategy "based on relevancy to the particular defendant and other practical matters"[79] is permissible and does not violate due process. Whatever inconsistencies the State pursued in the short-lived proceedings against Lockett, they certainly do not call into question the truth or falsity of the core facts upon which Poe's convictions rest.

The facts alleged by Poe's motion for postconviction relief pertaining to prosecutorial misconduct do not undermine our confidence in the fairness and reliability of Poe's trial or the punishment imposed. We therefore affirm the trial court's denial of Poe's motion for postconviction relief relating to those allegations.

Ineffective Assistance of Counsel

We next address Poe's ineffective assistance of counsel claims. Poe alleged trial counsel failed to present testimony that counsel was aware of before trial and which would have strengthened Poe's defense in several respects. Poe alleged that but for this deficient performance, the result of the trial would have been different.

First, Poe asserts that had he and his father been called to testify, they would have undermined the State's case for motive. The State presented evidence that the apartment was sparsely furnished and that Poe was in need of cash. Poe and his father allegedly would have testified that Poe had furniture

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[78] See *Stumpf III, supra* note 44, 653 F.3d at 439. See, also, *Berger v. United States, supra* note 40; *United States v. Agurs, supra* note 47.

[79] *E. Sifrit v. State, supra* note 50, 383 Md. at 106, 857 A.2d at 82.

ready to be transported to the apartment and that Poe's father provided for all of Poe's financial needs.

Second, Poe asserts that had he and his father been called to testify, they would have lent more concrete support to the theory that Poe was on the telephone with his father shortly before the murder, by testifying as such. Otherwise, the telephone records and Hayes' testimony that she was asleep at the time was the only evidence that Poe and his father were speaking from their respective landlines at the time reflected in the telephone records.

Third, had Poe been advised to testify, he would have explained that he was physically incapable of kicking in the front door and the bedroom door, as Harper claimed Poe described in his confession. Without Poe's testimony, there was only Hayes' testimony that Poe was receiving disability benefits for an injury to his leg. Hayes did not describe with specificity the nature of that injury.

Finally, Poe asserts that trial counsel failed to impeach Harper's testimony by presenting him with his prior statement to Hayes that Poe did not commit the crimes. Harper also had allegedly told Hayes that "the police were trying to get him to say something that was not true."

The trial court reviewed the files and records of Poe's case and denied Poe's motion without conducting an evidentiary hearing. Under the postconviction statutes, a court is not obligated to hold an evidentiary hearing if the files and records of the case affirmatively show that the prisoner is entitled to no relief.[80] While we agree with the trial court with respect to most of Poe's allegations, we conclude that the trial court erred in denying Poe an evidentiary hearing concerning Harper's alleged statement to Hayes.

[11] To prevail on a claim of ineffective assistance of counsel under *Strickland*,[81] the defendant must first show that counsel's performance was deficient and second, that this deficient performance actually prejudiced his or her

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[80] *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011).

[81] *Strickland v. Washington, supra* note 12.

defense.[82] The two prongs of the ineffective assistance test, deficient performance and prejudice, may be addressed in either order.[83]

[12-14] When considering whether trial counsel's performance was deficient, there is a strong presumption that counsel acted reasonably.[84] Trial counsel is afforded due deference to formulate trial strategy and tactics.[85] An appellate court will not second-guess reasonable strategic decisions by counsel.[86] But, in this case, there was no evidentiary hearing. We have no evidence concerning trial counsel's strategy. Under these circumstances, trial counsel's strategy is a matter of conjecture. We conclude that the records and files in this case are insufficient to determine whether trial counsel's performance was deficient.

[15,16] To show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.[87] A reasonable probability is a probability sufficient to undermine confidence in the outcome.[88] We follow the approach to the prejudice inquiry outlined by the U.S. Supreme Court in *Strickland*:

> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion

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[82] *State v. Nelson*, 274 Neb. 304, 739 N.W.2d 199 (2007).

[83] *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002).

[84] *State v. Timmens*, 282 Neb. 787, 805 N.W.2d 704 (2011).

[85] See *id.*

[86] See *id.*

[87] See *State v. Davlin, supra* note 11.

[88] *State v. Jackson*, 275 Neb. 434, 747 N.W.2d 418 (2008).

> only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.[89]

The testimony of Poe and his father would have had, at most, an isolated effect on relatively trivial matters. The averred statements do not involve facts negating Poe's guilt or culpability.

As to the proposed testimony that Poe's father provided for Poe's financial needs, robberies are not necessarily motivated by financial need. Furthermore, financial need is emphasized rather than minimized by showing financial dependence on someone else. Thus, the evidence would have done little to negate the State's case for motive.

As to the proposed testimony that Poe's father was talking to Poe on the telephone shortly before the murder, defense counsel emphasized at closing arguments the reasons why this must have been the case. The proposed testimony would have added little to that argument. More importantly, the telephone call was indisputably ended with ample time to reach the townhouse before the robbery and murder occurred. The call ended 38 minutes before the 911 call from the townhouse, and officers testified it took about 20 minutes to get from Poe's house to the townhouse. The State did attempt to argue Poe was not on the telephone, but rested its case instead on the fact that Poe had time to reach the townhouse after the call. The telephone call was a relatively trivial matter.

Either of the other two accomplices could have kicked down the doors instead of Poe. Defense counsel adequately argued that because of the injury to Poe's leg, it would have been difficult for Poe to have kicked down the doors. And, again, the State did not dispute that point. Thus, additional evidence of

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[89] *Strickland v. Washington*, *supra* note 12, 466 U.S. at 695-96. Accord *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002).

whether Poe could kick down doors would have had a trivial effect on any conclusion as to this issue, and the question of who kicked down the doors was of trivial significance to the outcome of the trial.

But the allegations concerning the unrealized impeachment of Harper are neither of trivial effect nor of a trivial matter. In denying postconviction relief without an evidentiary hearing, the trial court focused on the fact that Harper had been heavily cross-examined. The court also concluded that the hearsay statement would have been inadmissible. While Poe did not address the hearsay rule as such, Poe asserted that the statement could have come in for impeachment purposes. We agree that it would have been admissible as a prior, inconsistent statement.[90] And, although Harper may have been heavily cross-examined, he was not confronted with an inconsistent statement of this nature. Harper's alleged prior statement was that Poe did not commit the crimes and that Harper was being coerced to lie and say otherwise.

It bears repeating that the State's case against Poe was entirely based on circumstantial evidence. As the State indicated in closing arguments, its case against Poe depended on whether the jury believed Harper was telling the truth. Harper explained how Poe had once driven Harper to the townhouse and thereby knew of its location. Harper testified that Poe asked him if he could rob his "plug." Harper testified as to Poe's statement that he had "sent [his] dude to Texas." Harper gave the details of Poe's alleged confession to him. We cannot say, as a matter of law, that had defense counsel confronted Harper with his inconsistent assertion that Poe was completely innocent of the crimes and Harper was being asked to lie, the result would not have been different.

It is, of course, entirely possible that defense counsel had a reason for not pursuing this avenue of impeachment of Harper's testimony. As stated, trial strategy is given great deference. We therefore remand the matter for the limited purpose of conducting an evidentiary hearing on Poe's claim of

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[90] See Neb. Rev. Stat. § 27-806 (Reissue 2008). See, also, e.g., *State v. Rodriguez*, 272 Neb. 930, 726 N.W.2d 157 (2007).

ineffective assistance of trial counsel relating to the allegation that counsel failed to utilize Harper's alleged inconsistent statement to Hayes that Poe was innocent.

CONCLUSION

We affirm the judgment of the trial court in all respects except for the denial of an evidentiary hearing on the issue of whether defense counsel was ineffective for failing to pursue impeachment of Harper with his alleged inconsistent statement. We reverse in part, and remand with directions to conduct an evidentiary hearing on this issue.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

HEAVICAN, C.J., not participating.