



Vernon's claim—that he was denied a fair trial because of ineffective assistance of counsel—requires discussion and relief. Because reversal is required on that claim, we do not address Vernon's prosecutorial misconduct claim.

On April 30, 2013, this Court granted Vernon's application for evidentiary hearing to investigate whether trial counsel failed to utilize crucial, and readily available, evidence at trial to Vernon's detriment. See Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013)(If this Court finds a strong possibility exists that counsel was ineffective for failing to utilize complained-of evidence, it shall remand the matter to the trial court for an evidentiary hearing.). The district court held the evidentiary hearing on May 31, 2013, and filed its Findings of Fact and Conclusions of Law on July 2, 2013.<sup>3</sup> The district court found, among other things, that defense counsel's failure to interview Beverly Harden about her knowledge of evidence potentially favorable to Vernon, namely allegations of abuse made by victim K.H. against John Harden, counsel's failure to impeach the investigating officer and the two victims (K.H. and A.K.) with available evidence, his failure to file a motion to quash the third amended information, and his failure to utilize evidence which provided a motive for K.H. not to name John Harden as a suspect, was not sound and reasonable trial strategy. The district court evaluated the evidence under the familiar two-part test for

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<sup>3</sup> We commend the district court for the manner in which the hearing was conducted, and for the thoroughness of its findings and conclusions.

ineffective assistance of counsel claims set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), and held:

The evidence Defendant's counsel had or had reasonably available to him, which was not presented at trial, was both favorable and material. The Defendant has demonstrated that had the evidence been presented, it could reasonably have placed the whole case in a different light which undermines the confidence of the trial's outcome.

In reviewing the district court's findings and conclusions, we accord them "strong deference." Rule 3.11(B)(3)(b)(iv), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013). We stated in *Fisher v. State*, 2009 OK CR 12, ¶ 10, 206 P.3d 607, 610, [t]his Court gives strong deference to the district court's findings and reviews only for an abuse of discretion." The Court in *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170 explained:

An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue. An abuse of discretion has also been described as "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented."

(citations omitted).

The judge who presided over the evidentiary hearing and who authored the Findings of Fact and Conclusions of Law concluding that defense counsel provided ineffective assistance in this case was the same judge who presided over and acted as fact finder at Vernon's bench trial. It is difficult to think of anyone better suited to assess the impact of omitted evidence on the outcome

of the trial than the judge who observed the witnesses' testimony and demeanor firsthand.

Contrary to the State's claim, not all of defense counsel's actions can be justified on the basis of trial strategy.<sup>4</sup> In particular, his decision to forgo calling Beverly Harden as a witness for the defense cannot be justified as a strategic choice because he never interviewed her to learn what information she could provide. "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. When counsel makes decisions after less than complete investigation, those choices are reasonable to the extent that reasonable professional judgments support the limitations on investigation. *Id.* at 691, 104 S.Ct. at 2066. The obligation is on counsel to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Id.* Here, defense counsel failed to investigate facts potentially favorable to plausible defense options. Moreover, there was no sound reason not to impeach the investigating officer and question him about the abuse allegations leveled by K.H. against John Harden and about why K.H. might want to protect Harden from prosecution. The evidence and testimony presented at the evidentiary hearing amply supports the district court's finding that Vernon showed defense counsel's performance was constitutionally deficient and that the deficient performance prejudiced the defense. *See*

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<sup>4</sup> The parties filed supplemental briefs on July 22, 2013, each arguing the evidence in support of their respective position.

*Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Malone v. State*, 2013 OK CR 1, ¶ 14, 293 P.3d 198, 206. Vernon's claim that he received ineffective assistance of counsel merits relief.

### DECISION

Vernon's Judgment and Sentence is **REVERSED** and the matter is **REMANDED** for a new trial. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2013), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF KINGFISHER COUNTY  
THE HONORABLE PAUL K. WOODWARD, DISTRICT JUDGE

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**OPINION BY: A. JOHNSON, J.**  
**LEWIS, P.J.: Concur**  
**SMITH, V.P.J.: Concur**  
**LUMPKIN, J.: Concur**  
**C. JOHNSON, J.: Concur**

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