

**IN THE CIRCUIT COURT OF TENNESSEE  
SIXTEENTH JUDICIAL DISTRICT AT MURFREESBORO**

<b>CANDANCE CAROL BUSH,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	<b>NO. 68965</b>
<b>v.</b>	)	
	)	<b>(POST-CONVICTION)</b>
<b>STATE OF TENNESSEE,</b>	)	
	)	
<b>Respondent.</b>	)	

**ORDER DENYING POST-CONVICTION RELIEF**

This matter came on to be heard on January 8 and March 4, 2014, upon the Petition for Relief from Conviction or Sentence filed by CANDANCE CAROL BUSH on November 13, 2012, as amended on December 4, 2012. After examining the Petitions and other records relating to Petitioner’s conviction in Case No. F-61320A, and further considering the testimony of the Petitioner, trial counsel, co-defendant at trial, co-defendant’s trial counsel, and arguments of counsel, the Court hereby DENIES post-conviction relief in accordance with the following findings of fact and conclusions of law:

**I. LAW**

The Sixth Amendment of the U.S. Constitution and Art. I, Section 9 of the Tennessee Constitution both guarantee the right to “reasonably effective” assistance of counsel, which is assistance that falls “within the range of competence demanded of attorneys in criminal cases.” Strickland v. Washington, 466 U.S. 668, 687 (1984); *see also* Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975).

In order to prevail on a claim of ineffective assistance of counsel, the petitioner must establish two prongs: (1) that counsel’s performance was deficient; and (2) that the deficient performance prejudiced the defense. Strickland, *supra*, at 687. The petitioner’s failure to

establish either prong is fatal to a claim of ineffective assistance of counsel. Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

To establish the first prong of deficient performance, the petitioner must demonstrate that the attorney's "acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Vaughn v. State, 202 S.W.3d 106, 116 (Tenn. 2006) (internal quotation marks and citation omitted). Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law. Baxter, supra, at 934-35. A reviewing court "must be highly deferential and must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." State v. Honeycutt, 54 S.W.3d 762, 767 (Tenn. 2001) (internal quotations and citation omitted). Counsel will not be deemed ineffective merely because a different strategy or procedure might have produced a more favorable result. Rhoden v. State, 816 S.W.2d 56, 60 (Tenn. Crim. App. 1991).

To establish the second prong of prejudice, the petitioner must prove a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Vaughn, supra, at 116. A "reasonable probability" is a probability that is sufficient to undermine confidence in the outcome. Strickland, supra, at 694.

In a post-conviction relief evidentiary hearing, the petitioner has the burden of proving the allegations of fact by "clear and convincing evidence." T.C.A. § 40-30-110(f). Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. Grindstaff v. State, 297 S.W.2d 208, 216 (Tenn. 2009). There is a rebuttable presumption that a ground for relief not raised before a Court of competent jurisdiction in which the ground could have been presented is waived. Id.

## II. FACTS

In the case at bar, the Petitioner alleges that her trial attorney, John Norton, rendered ineffective assistance in connection with her trial by jury. The Petitioner was found guilty of first-degree murder on September 16, 2008, and was sentenced to life imprisonment. The Petitioner alleges<sup>1</sup> that her trial counsel: (1) failed to investigate alternate theories of defense and/or call all essential witnesses at trial; (2) failed to investigate the “drug addiction” of Kevin Patterson at the time of Mr. Patterson’s confession to the shooting at issue; (3) failed to clarify for the jury that she worked at Gem-Top during two separate time periods; (4) failed to call the Petitioner to testify in her own defense; (5) failed to challenge the Indictment on the grounds that it listed a *Tennessee Code Annotated* section that was not in effect at the time of the offense; and (6) failed to “poll the jury” after the verdict was reached.

### *Petitioner’s Testimony*

The Petitioner, Candance Bush, testified that she had a good relationship with Mr. Norton, and believes that he is a good attorney. However, Mrs. Bush testified that Mr. Norton was “in charge” of all decisions in her case, and that when he told her to do certain things, she followed his advice.

The Petitioner maintains her innocence, and testified that she does not believe that her brother, Kevin Patterson, killed her husband (the victim herein). However, the Petitioner does not know why Mr. Patterson confessed or agreed to serve a 25-year sentence. Although the

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<sup>1</sup> The allegations as set forth herein constitute those allegations which were both raised in the post-conviction Petitions and subsequently presented at the hearings in this cause. The initial and amended Petitions were both filed *pro se*, prior to the appointment of counsel; these Petitions contained voluminous allegations, many of which were not addressed at the hearings in this cause. The Court considers all allegations that were not presented at the hearings to have been waived by the Petitioner. See Birdwell v. State, 2013 WL 6405733 at \*4 (Tenn. Crim. App. 2013). Similarly, the Petitioner raised one additional issue at the hearing, but failed to include it in either of her Petitions: that her trial counsel failed to call a forensics expert regarding the shoe size of the killer. Under Birdwell, this issue was not properly before the Court, and is therefore waived.

Petitioner alleged in her pleadings that Mr. Patterson had a drug addiction, she testified that she actually has no basis to believe that he was on drugs at the time of his confession. The Petitioner never saw, or asked to see, the video recording of her brother's confession.

The Petitioner further asserts that Mr. Norton should have called additional witnesses, and investigated other avenues of defense. Although the Petitioner's pleadings contained voluminous allegations in this area, her testimony was limited to complaints that Mr. Norton: (1) failed to call Randy Galloway to testify as to his theory that John Martin might have been involved in the murder; and (2) failed to investigate the "Frasier Boys," who allegedly had some sort of a feud with her husband, as possible alternate suspects.

With regard to her employment at Gem-Top (where her co-defendant was also employed), the Petitioner testified that she worked there twice, and that her romantic relationship with Mr. Bush did not begin until her second stint (1988-1991) with the company. According to the Petitioner, the witnesses called by the State "blurred" these two time periods, and Mr. Norton did not sufficiently clarify this point for the jury. Petitioner acknowledged, however, that she did not provide Mr. Norton with the names of any co-workers who could come testify that no affair was going on between herself and Mr. Bush. Petitioner further acknowledged that she has no witnesses from Gem-Top to support her case today.

With regard to testifying at trial, the Petitioner testified that Mr. Norton initially led her to believe that she was going to testify, and that he prepared her to testify prior to the trial. However, Petitioner stated that, during the trial, Mr. Norton told her -- to her surprise -- that she would not be put on the stand, "because it was a murder case." The Petitioner insists that no other explanation was given by Mr. Norton. The Petitioner asserts that she wanted to testify, to clarify that she and Mr. Bush were not having an affair, and that they did not kill Mr. Patterson. The Petitioner does not recall participating in a *Momon* hearing during the trial.

With regard to the *Tennessee Code Annotated* section being incorrectly cited in the Indictment, the Petitioner alleged that the Indictment charged her with violating T.C.A. § 39-2-202, a statute that was not in existence in 1982 (the year of the offense). Petitioner believes that her trial counsel should have sought dismissal of the Indictment due to this defect.

With regard to Mr. Norton's failure to "poll the jury" after the verdict was announced, the Petitioner offered no testimony to explain how this was relevant to her post-conviction claims. It appears from a review of Mrs. Bush's original Petition that she believes that Mr. Norton's failure to interview members of the jury after the trial undermined his ability to prepare and argue an adequate Motion for New Trial. *See* Petition for Relief from Conviction or Sentence, p. 20.

#### *Trial Counsel's Testimony*

John Norton testified that he has practiced law for 38 years, and has conducted over 100 jury trials. Mr. Norton further testified that he met with the Petitioner "a lot more than eight" times before the trial, and that his investigator, Larry Shavers, also met with the Petitioner on numerous occasions. According to Mr. Norton, he and the Petitioner interacted well with each other during his representation. Mr. Norton disagreed with the Petitioner's characterization of the attorney-client relationship as one where he was in charge of all decisions, pointing out that the Petitioner refused his recommendation that she pursue severance of her case from that of Mr. Bush; rather, the Petitioner insisted that her case be tried along with Mr. Bush's case, even after Mr. Norton warned her that "her freedom was on the line" unless she agreed to a severance.

With regard to Kevin Patterson's confession, Mr. Norton testified that Mr. Patterson was represented by attorney Ray White at the time of his plea. Mr. Norton further testified that he had no reason to think that Mr. Patterson was on drugs. Additionally, Mr. Norton noted that he vigorously cross-examined Mr. Patterson at the trial of this case. Mr. Norton believes that he

“destroyed” Mr. Patterson on cross-examination, but that the jury nonetheless believed Mr. Patterson’s testimony.

With regard to the additional witnesses and other possible avenues of defense, Mr. Norton testified that his investigator, Larry Shavers, met with Randy Galloway and spoke with him about the “Frasier Boys” and John Martin. Additionally, Mr. Norton testified that he looked into possible alternate theories of death in this case, such as accidental death, and the possible involvement of the “Frasier Boys” and John Martin. Ultimately, after investigating these other possibilities, Mr. Norton built his defense strategy on attacking Kevin Patterson’s testimony, and attacking the State’s evidence regarding the existence of the National Guard Armory at the time the murder was committed.

With regard to the Petitioner’s dates of employment at Gem-Top, Mr. Norton testified that the employment records were no longer available at the time of the trial,<sup>2</sup> and that the Petitioner never gave him the names of any witnesses from Gem-Top who could back her up. Mr. Norton testified that he vigorously cross-examined all of the State’s witnesses at trial.

With regard to not calling the Petitioner to testify at trial, Mr. Norton testified that he took “great pains” to prepare his client to testify. However, Mr. Norton asserted that the Petitioner would not have made a good witness, and that the prosecutor “would have eaten her alive.” Furthermore, Mr. Norton pointed out that if the Petitioner had testified, she would have had to identify the voice on an audio recording that was played by the State at trial, which the State contended was Gary Bush’s voice. Mr. Norton also testified that the Petitioner would have had to “call her own mother a liar” regarding her romantic affair with Mr. Bush if she had taken the stand. Ultimately, according to Mr. Norton, the Petitioner made the decision not to testify

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<sup>2</sup> Gem-Top apparently went out of business sometime between the date of the offense and the date of the trial in this case. This was a “cold case” that went to trial some 26 years after the crime was committed.

after he explained the pros and cons to her. The trial transcript reflects that a *Momon* hearing was conducted by the Trial Court. See Trial Transcript, pp. 1193-94. During that hearing, the Petitioner acknowledged that she understood that she had the right to testify, and that such had been explained to her by Mr. Norton on multiple occasions; the Petitioner then informed the Trial Judge that it was her desire not to testify. See *Id.* at 1194.

With regard to the *Tennessee Code Annotated* section being incorrectly cited in the Indictment, Mr. Norton, along with Jack and John Mitchell (the co-defendant's trial attorneys), testified that the Administrative Office of the Courts provided the Trial Judge with a consultant who was present during the trial; according to Jack Mitchell, the consultant assisted the Trial Judge with the jury instructions, and in determining that the statute was properly charged. Mr. Norton opined that the statute number was surplusage, and that the elements of the crime control; further, Mr. Norton opined that the elements in the Petitioner's case fit the statute that was in effect at the time of the murder.

With regard to his failure to "poll the jury" after the verdict was announced, Mr. Norton testified that he did not do so, but that the Trial Judge did.

### III. ANALYSIS

This Court finds that the Petitioner has failed to meet her burden of showing, by clear and convincing evidence, that her trial counsel's performance was deficient. This Court finds that Mr. Norton met and exceeded all standards of competency for criminal defense attorneys in Tennessee and any other state. Additionally, the Court finds that Mr. Norton fully apprised himself of the facts and law applicable to the Petitioner's case, and explored all potential strategies and defenses.

With regard to Petitioner's assertion that Mr. Norton should have called additional witnesses and presented alternative defenses, the Court finds that counsel thoroughly

investigated all potential witnesses and defenses; if Mr. Norton decided not to call certain witnesses or present certain defenses, such were calculated strategic decisions made in an effort to procure the Petitioner's acquittal. Counsel will not be deemed ineffective merely because a different strategy or procedure might have produced a more favorable result. See Rhoden, *supra*, at 60.

With regard to Kevin Patterson's confession, the Petitioner's unsupported assertion that Mr. Patterson had a drug addiction is insufficient to meet the "clear and convincing" burden of challenging Mr. Norton's actions. It is undisputed that Mr. Norton had no reason to suspect that Mr. Patterson was on drugs. It is further undisputed that Mr. Norton vigorously cross-examined Mr. Patterson at trial. Furthermore, the Petitioner admitted that she actually has no basis to believe that her brother was on drugs at the time of his confession. The Petitioner never saw, or asked to see, the video recording of her brother's confession. This issue is without merit.

With regard to the Petitioner's employment with Gem-Top, the Petitioner has failed to carry her burden of showing, by clear and convincing evidence, how trial counsel's conduct fell below the applicable standard of competency. Petitioner acknowledged that she did not provide Mr. Norton with the names of any co-workers who could come testify that no affair was going on between herself and Mr. Bush. Petitioner further acknowledged that she has no witnesses from Gem-Top to support her case today. Mr. Norton vigorously cross-examined the witnesses called by the State regarding this issue. This issue is likewise without merit.

With regard to the Petitioner's decision not to testify at trial, the Court finds that this decision was made solely by the Petitioner after consultation with and advice from trial counsel. The Petitioner acknowledged that Mr. Norton had prepared her to testify. The Petitioner participated in a *Momon* hearing during the trial, further demonstrating her understanding of her right to testify, and documenting her decision not to do so. The Court finds that Petitioner's

testimony regarding Mr. Norton abruptly telling her, during the trial, without further elaboration, that she would not be put on the stand “because it was a murder case” is not credible.

With regard to the Indictment listing an incorrect *Tennessee Code Annotated* section, it is well-settled that an Indictment need not contain a reference to a statute, and that any such reference is merely surplusage. See State v. McCracken, 489 S.W.2d 48, 51 (Tenn. Crim. App. 1972), *cert. denied* 12/4/72. The facts constituting the offense of First Degree Murder were adequately set forth in the Petitioner’s Indictment, and that is all that is required under the law. Id. Moreover, the substantive language of the two statutes in question is virtually identical. This Court finds no deficiency in trial counsel’s failure to challenge the Indictment on this ground.

Finally, with regard to Mr. Norton’s failure to “poll the jury” after the verdict was reached, the Court is unclear as to whether the Petitioner is referring to the polling of the jury pursuant to Tenn. R. Crim. P. 31(e) or to the interviewing of jury members after their discharge from jury duty pursuant to Tenn. Sup. Ct. R. 8, RPC 3.5. The phrase “poll the jury” was used throughout the hearing, but the Petition contains the phrase “interview the jury.” See Petition for Relief from Conviction or Sentence, p. 20. Either way, the Petitioner has failed to carry her burden of showing how Mr. Norton’s conduct (or lack thereof) fell below the applicable range of competence demanded of attorneys in criminal cases.

As the Petitioner has failed to meet her burden under the first prong of the Strickland test, it is unnecessary to examine the second prong, and the Petitioner’s claim must fail. See Goad, *supra*, at 370.

**IV. CONCLUSION**

For the foregoing reasons, the Petition for post-conviction relief in the above-captioned cause is not well-taken, and the same is hereby DENIED.

**IT IS SO ORDERED.**

  
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M. KEITH SISKIN  
CIRCUIT JUDGE

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that a true and correct copy of the foregoing Order has been mailed, postage prepaid, to the following:

J. Paul Newman, Esq.  
Assistant District Attorney General  
320 West Main Street, Suite 100  
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John Drake, Esq.  
Attorney for Petitioner  
120 East Main Street, 3<sup>rd</sup> Floor  
Murfreesboro, TN 37130

This the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Deputy Clerk