

1999

Wayne S. Tippet v. Fred Vanderveur : Brief of Appellant

Utah Court of Appeals

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Recommended Citation

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IN THE UTAH COURT OF APPEALS

WAYNE S. TIPPETT,)	BRIEF OF APPELLANT
)	
Appellant,)	
)	Case # 990178-CA
v.)	
)	
FRED VANDERVEUR,)	
)	
Appellee.)	

PR2

BRIEF OF APPELLANT

AN APPEAL FROM THE EIGHTH DISTRICT COURT
DENYING THE APPELLANT'S PETITION FOR POST
CONVICTION RELIEF AND DETERMINATION OF
INEFFECTIVE ASSISTANCE OF COUNSEL

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ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED

FILED

Utah Court of Appeals

JUN 25 1999

Julia D'Alessandro

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BRIEF OF APPELLANT

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a ruling of the Eighth District Court, Uintah County, State of Utah, Hon. John R. Anderson, denying Mr. Tippet's Petition for Post Conviction Relief and Determination of Ineffective Assistance of Counsel. This court has jurisdiction to hear this appeal pursuant to Rule 26 of the Utah Rules of Criminal Procedure, Rule 3(a) of the Utah Rules Appellate Procedure, and Utah Code 77-18a-1(1998).

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARDS OF APPELLATE REVIEW

The appellant, Mr. Tippet, seeks a review of the Eighth District Court's order denying his Petition for Post Conviction Relief and Determination of Ineffective Assistance of Counsel. Mr. Tippet raises the following issues on appeal:

ISSUES

- 1) The trial court erred and abused its discretion in denying Mr. Tippet's Petition

for Post Conviction Relief and for Determination of Ineffective Assistance of Counsel.

2) The trial court erred by failing to enter written findings necessary to determination of ineffective assistance of counsel claim as required by Rule 23B of the Utah Rules of Appellate Procedure.

STANDARDS OF REVIEW

1) Issues raised should be reviewed under an abuse of discretion standard. “In most cases, [w]e review a trial court’s denial of a motion to withdraw guilty plea under an abuse of discretion standard.” State v. Blair, 868 P.2d 802, 805 (Utah 1993).

Consequently, “[T]he trial court’s findings of fact made in conjunction with its decision will not be set aside unless they are clearly erroneous.” Id. See also State v. Penman, 964 P.2d 1157, 1160 (Utah Ct.App.1998). However, “if the trial court failed to strictly comply with Rule 11 . . . in taking the defendant’s guilty plea, the trial court has exceeded its permitted range of discretion as a matter of law.” State v. Mills, 898 P.2d 819, 821 (Utah Ct.App.1995).

2) Issues raised are questions of fact and questions of law. “We review the trial court[’s] factual findings . . . for clear error, while conclusions of law are reviewed for correctness.” State v. Galli, 967 P.2d 930, 345 Utah Adv.Rep. 7,8 (Utah 1998).

“When reviewing the denial of a motion for new trial based on an ineffective assistance of counsel claim, we defer to the trial court’s findings unless clearly erroneous, but remain “free to make an independent determination of a trial court’s conclusions.”

State v. Templin, 805 P.2d 182, 186 (Utah 1990). Accord State V. Wright, 893 P.2d 1113, 1119 (Utah Ct.App.1995).

3) Issues raised are questions of law and should be reviewed for correctness. State v. Wood, 868 P.2d 70, 83 (Utah 1993).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Any relevant text of constitutions, statutory provisions, or rules referenced in this brief and pertinent to the issues now before the court on appeal are contained herein or attached to this brief.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Mr. Tippet was originally charged on February 18, 1986, with two counts of aggravated kidnaping in violation of Utah Code §76-5-302 and two counts of a firearm enhancement in violation of Utah Code §76-5-203. As part of a plea agreement and on his counsel's advice, Mr. Tippet pled guilty to one count of a aggravated kidnaping and a firearm enhancement with the stipulated dismissal of the two remaining charges. On March 26, 1986, Mr. Tippet was sentenced by Judge Boyd Bunnell to serve 15 years to life for the aggravated kidnaping conviction along with a 5 to 10 year term, to be served consecutively, for the firearm enhancement.

On June 9, 1994, Mr. Tippet filed a Motion to Withdraw Guilty Plea based on several issues including the trial court's failure to comply with Rule 11 of the Utah Rules of Criminal Procedure, ineffective assistance of trial counsel, and that the State's charging

document was fatally flawed as it failed to allege an offense. On June 29, 1994, Judge John R. Anderson of the Eighth District Court issued a summary ruling denying Mr. Tippet's Motion to Withdraw Guilty Plea on all aspects except for Mr. Tippet's claim that the trial court had offered an inadequate and misleading explanation of the firearm enhancement. The court directed the State to respond to Mr. Tippet's claim regarding this issue. The State submitted a response and without allowing Mr. Tippet a chance to respond, Judge Anderson denied the Motion to Withdraw Guilty Plea in its entirety. Mr. Tippet sought an appeal of Judge Anderson's ruling. On July 25, 1994, Mr. Tippet filed a Pro Se Notice of Appeal. Mr. Tippet then proceeded with his appeal without the assistance of counsel. On September 13, 1994, Mr. Tippet filed a Request for Appointment of Counsel. On October 26, 1994, attorney Allan Williams was appointed by the court to represent Mr. Tippet in his appeal of the denial of his Motion to Withdraw Guilty Plea. The Supreme Court set a deadline for the filing of Appellant's brief as January 5, 1995. On January 11, 1995, the Supreme Court entered an Order of Dismissal on the grounds that Mr. Tippet's counsel had failed to file Appellant's brief prior to the assigned filing deadline. On January 20, 1995, Allan Williams filed the Brief of Appellant and on January 31, 1995 the Supreme Court reinstated Mr. Tippet's appeal.

Despite having agreed to allow the Mr. Tippet to see a copy of the brief prior to filing it, Mr. Williams did not provide Mr. Tippet with a copy of the brief before he filed it and did not even inform Mr. Tippet that his brief had been filed. Mr. Tippet made

numerous calls to Mr. Williams office and wrote him letters requesting an update on his appeal and a copy of the brief but received no response. Finally, on May 8, 1995, Mr. Tippet wrote a letter to the Supreme Court setting forth his concerns regarding Mr. Williams' representation and requesting a copy of the appeal brief filed by Mr. Williams.

Upon receiving a copy of the brief from the Court of Appeals, Mr. Tippet discovered that the brief filed by Mr. Williams fail to set forth several issues he had asked Mr. Williams to include in the brief, and which Mr. Williams had agreed to include, as well as having changed the factual and theoretical substance of another issue rendering what was once a viable appellate issue to be without merit. Additionally, Mr. Williams failed to adequately brief the issues he did include in the brief he filed on Mr. Tippet's behalf. The brief filed by Mr. Williams failed to provide adequate case law in support of Mr. Tippet's claims, and failed to offer record citations or other evidence which would support Mr. Tippet's claims. As such, Mr. Tippet filed a Motion for Leave to File an Amended or Supplemental Brief and a Motion for Substitution of Counsel on May 29, 1995, along with a Memorandum in Support of each Motion. On June 15, 1995 the State filed a Response to these motions which supported Mr. Tippet's claims that Mr. Williams failed to adequately present the appellate issues and that Mr. Tippet be allowed to file a supplemental brief or that the Motion for Substitution of Counsel be granted. On June 21, 1995, the Utah Court of Appeals issued an Order denying Mr. Tippet's Motion for Leave to File a Supplemental Brief but temporarily remanded the case back to the

Eighth District Court for consideration of Mr. Tippet's Motion for Substitution of Counsel. On July 5, 1995, Mr. Tippet filed a Notice of Dismissal of Counsel, dismissing Mr. Williams as his counsel. On August 31, 1995, after reviewing Mr. Tippet's Motion for Substitution of Counsel, the State's Response to the Motion for Substitution of Counsel, and the Court of Appeal's Order denying Mr. Tippet's Motion to File a Supplemental Brief, Judge Anderson of the Eighth District Court entered a Ruling denying Mr. Tippet's Motion for Substitution of Counsel. On September 17, 1995, Mr. Tippet filed a Motion for Ineffective Assistance of Counsel Determination and Withdrawal of Appeal Brief and Memorandum in Support, alleging that Mr Williams' representation was ineffective and that Mr. Williams was laboring under a conflict of interest which prevented him from adequately representing him in his appeal.

Following the District Court's Ruling denying Mr. Tippet's Motion for Substitution of Counsel, on September 22, 1995, the Utah Court of Appeals entered an order granting Mr. Tippet permission to file a supplemental brief to supplement the brief filed earlier by Mr. Williams. Based on this Order allowing Mr. Tippet to file a supplemental brief, the Utah Court of Appeals on October 5, 1995, entered an Order denying Mr. Tippet's Motion for Ineffective Assistance of Counsel and Request to Withdraw Appeal Brief stating it was moot. On that same day Mr. Tippet filed in the Eighth District Court a Renewed Motion for Appointment of Appellate Counsel and Notice to Submit for Decision. On October 13, 1995, Judge Anderson of the Eighth

District Court issued a Ruling granting Mr. Tippet's Renewed Motion for Appointment of Counsel stating that counsel would be appointed to assist Mr. Tippet in his appeal and that counsel would be selected at random from a list of available counsel in the Salt Lake City area. The Uintah County Attorney, Joann B. Stringham, then filed a Motion for Reconsideration stating that the State did not object to the appointment of new counsel to represent Mr. Tippet but that rather than appoint counsel from Salt Lake the court should appoint attorney John Beaslin who had a contract with Uintah County to provide two appeals per year. On October 20, 1995, Judge Anderson issued a Ruling stating that the Court's Ruling of October 13, 1995, regarding the appointment of new counsel for Mr. Tippet would stand. Mr. Tippet then filed a Motion to Stay the proceedings in the Court of Appeals until new counsel had been appointed and the motion was granted by Order of the Utah Court of Appeals on October 23, 1995. Then on January 11, 1996, due to an apparent lack of available attorneys and without conducting an inquiry into the alleged conflict of interest involving Allan Williams, Judge Anderson rescinded the Court's October 13, 1995 Order granting Mr. Tippet new counsel, and reinstated the Court's original Order of August 31, 1995 denying Mr. Tippet's Motion for Substitution of Counsel and ordered that Mr. Williams continue to represent Mr. Tippet in his appeal. After being reassigned to the case, Allan Williams filed a Supplemental Brief on April 1, 1996. Once again Mr. Williams did not provide Mr. Tippet with a copy of the brief nor did he discuss the brief with him prior to filing it. Again Mr. Williams brief was deficient

in that it failed to include all of the pertinent facts, trial citations, or evidence in support of Mr. Tippet's claims. After discovering that the second brief had been filed, Mr. Tippet attempted to submit a Memorandum of Law to Supplement the Appeal Brief but the Utah Court of Appeals would not accept the memorandum.

On October 3, 1996, the Utah Court of Appeals issued a Memorandum Decision. The decision affirmed the denial of Mr. Tippet's Motion to Withdraw Guilty Plea but did recognize the trial court's error in its explanation of the firearm enhancement and failure to properly inform Mr. Tippet of the maximum sentence that could be imposed for the firearm enhancement conviction. The Court of Appeals modified Mr. Tippet's sentence for the firearm enhancement from 5 to 10 years consecutively to the 1 to 5 year term that was explained to him by the trial court prior to entering his guilty plea.

Despite the fact that the Utah Court of Appeals had rendered its decision on October 3, 1995, Mr. Tippet was totally unaware of the court's decision in his case and was under the impression that his case was set for oral argument. Mr. Tippet was notified of the court's decision only after he wrote a letter to the Court of Appeals requesting a copy of the State's Response Brief. At no time had Mr. Williams notified Mr. Tippet of the court's decision nor had he provided Mr. Tippet with a copy of the decision. In fact, Mr. Tippet had made numerous attempts to contact Mr. Williams to discuss the status of the appeal and the upcoming oral argument (it was Mr. Tippet's belief that his case was to be set for oral argument) but Mr. Williams failed to respond to

any of Mr. Tippet's communications. It was not until he received a letter from the Court of Appeals dated January 13, 1997 along with a copy of the court's Memorandum Decision that Mr. Tippet became aware that his case had been decided and that the trial court's ruling was affirmed except for the change in the firearm enhancement sentence. Again on January 29, 1997, Mr. Tippet filed a Notice of Dismissal dismissing Mr. Williams as his counsel. Mr. Tippet then filed a Pro Se Motion for Leave to File a Petition for Rehearing and a Petition for Rehearing on January 29, 1997. The State filed a response to Mr. Tippet's pro se pleadings and the Utah Court of Appeals responded by advising Mr. Tippet that the Court of Appeals no longer had jurisdiction and that a remittitur was issued transferring jurisdiction back to the Eighth District Court.

On September 23, 1997, Mr. Tippet filed a Petition for Post Conviction Relief based on numerous issues, including the fact that he had received ineffective assistance of counsel from Mr. Williams, along with a Motion for Appointment of Counsel. The Court then appointed Robert C. Lunnen to represent Mr. Tippet who has since been substituted by Mr. Tippet's current counsel, Julie George. The State filed a response to Mr. Tippet's Petition for Post Conviction relief and on April 14, 1998, Judge Anderson of the Eighth District Court issued a Ruling dismissing all of Mr. Tippet's claims except for the issue of ineffective assistance by appellate counsel, Allan Williams. Subsequent to this Ruling, the Court held an Evidentiary Hearing on September 23, 1998, at the conclusion of which the court directed both counsel to prepare a memorandum in support of their

respective positions on Mr. Tippet's Petition for Post Conviction Relief. Both parties submitted a Memorandum in Support of their respective positions and on February 8, 1999, Judge Anderson issued a two sentence Ruling denying the Appellant's Petition for Post Conviction Relief and for Determination of Ineffective Assistance of Counsel. (See attached copy of Ruling dated February 8, 1999-Exhibit A)

SUMMARY OF ARGUMENT

Appellant filed a Petition for Post Conviction Relief seeking to have his conviction for aggravated kidnaping with a firearm enhancement overturned citing numerous deficiencies in the court's acceptance of his guilty plea and subsequent sentencing, in addition to Appellant's claim that Allan Williams, court appointed appellate counsel for the Appellant, provided Appellant with ineffective assistance of counsel in his representation of Appellant in his appeal of the trial court's denial of his Motion to Withdraw Guilty Plea. A Ruling was issued by Judge Anderson of the Eighth District Court on April 14, 1998, stating that the only issue remaining for determination or disposition was the issue of whether or not Appellant's appellate counsel, Allan Williams, was ineffective. On February 8, 1999, Judge Anderson issued a two sentence Ruling denying the Appellant's Petition for Post Conviction Relief and Determination of Ineffective Assistance of Counsel. This ruling failed to set forth the specific findings necessary to a determination of ineffective assistance of counsel as required by Rule 23B of the Utah Rules of Appellate Procedure. In addition to his claim of ineffective

assistance of counsel, Mr. Tippet also claimed that Mr. Williams was laboring under a conflict of interest which adversely affected his ability to adequately represent Mr. Tippet in his appeal thus prejudicing his case and ultimately resulting in his conviction being affirmed and his appeal being dismissed. As such, it is necessary to include in this appeal argument on numerous issues not included in the Brief of Appellant filed by Allan Williams, in order to demonstrate Mr. Williams' ineffective assistance and the court's abuse of discretion in denying the Appellant's Petition for Post Conviction Relief and Determination of Ineffective Assistance of Counsel.

ARGUMENT

POINT I. THE TRIAL COURT ERRED AND ABUSE ITS DISCRETION IN DENYING THE APPELLANT'S PETITION FOR POST CONVICTION RELIEF AND FOR DETERMINATION OF INEFFECTIVE ASSISTANCE OF COUNSEL.

The trial court erred and abused its discretion in denying Mr. Tippet's Petition for Post Conviction Relief and for Determination of Ineffective Assistance of Counsel. The Appellant argues that based upon the following issues as presented to the court in Appellant's Memorandum in Support, the Petition should have been granted and the trial court abused its discretion when it denied the Petition. These issues must be reviewed by this court due to the fact that the trial court failed to enter specific findings as required by Rule 23 B of the Utah Rules of Appellate Procedure. Therefore, in order to make a determination as to whether or not the trial court abused its discretion when denying the Appellant's Petition, the Appellant requests that this court review the following issues

and “make an independent determination of [the] trial court’s conclusions” pursuant to the Supreme Court’s ruling in State v. Templin, 805 P.2d 182, 186 (Utah 1990).

1) ALLAN WILLIAMS WAS LABORING UNDER A CONFLICT OF INTEREST THAT COMPROMISED HIS REPRESENTATION OF APPELLANT AND ADVERSELY AFFECTED THE OUTCOME OF APPELLANT’S APPEAL.

It is Appellant’s claim that Allan Williams was laboring under a conflict of interest due to time constraints, his duty to his private clients, and inadequate compensation, which effectively prevented Mr. Williams from providing Mr. Tippet with the effective assistance of counsel guaranteed to him by the Sixth Amendment to the United States Constitution. During the entire course of Mr. Tippet’s appeal, in which Mr. Williams acted as his counsel for a period of nearly two years, Mr. Williams visited with Mr. Tippet in person at the prison on only two occasions for a combined total of approximately 40 to 45 minutes. In his own testimony on September 23, 1998, Mr. Williams stated when asked about his normal routine with regard to trips to the prison to visit clients that “I usually plan on an hour to an hour and-a-half is the normal visit.” (See September 23, 1998 hearing transcript page 93 (Tr. 632-727)-attached as Exhibit B) In the two visits Mr. Williams had with Mr. Tippet he spent only a fraction of his “normal visit” time with Mr. Tippet. The first visit took place shortly after Allan Williams was appointed by the court to represent Mr. Tippet. The visit lasted only 15 to 20 minutes, the majority of which was spent by Mr. Williams introducing himself, but Mr. Tippet was able to outline for Mr. Williams the issues he wanted Mr. Williams to

include in his appeal. Mr. Williams agreed to draft the brief as Mr. Tippet had requested and he further agreed that he would return to meet with Mr. Tippet for a more extended visit at which time he would allow Mr. Tippet to review the brief prior to filing it. Mr. Williams never returned to the prison nor did he communicate in any way with Mr. Tippet prior to filing the Brief of Appellant. Due to Mr. Williams' refusal to come to the prison to meet with him, Mr. Tippet made numerous attempts to contact Mr. Williams by phone, making 8 or 9 calls to Mr. Williams office over a two month period. Discouraged by the fact that he was unable to reach Mr. Williams, Mr. Tippet scheduled several phone conferences with Mr. Williams' secretary. Mr. Williams kept only one of these appointments. This was the only opportunity Mr. Tippet had to speak with Mr. Williams and he only spoke with Mr. Williams for approximately 6 to 7 minutes before Mr. Williams told him he had to go because he was busy with other clients.

Frustrated by his inability to speak with Mr. Williams in person or by phone, Mr. Tippet then resorted to sending letters to Mr. Williams. His first letter went unanswered. Then after writing a second letter Mr. Williams responded by sending Mr. Tippet a copy of the State's Brief of Appellee. Only after receiving a copy of State's Brief did Mr. Tippet discover that Mr. Williams had already filed his brief. At no time did Mr. Williams allow Mr. Tippet to review the brief prior to filing as he had agreed to do nor had he even taken the time to notify Mr. Tippet that the brief had been filed. Mr.

Williams testified during the Evidentiary Hearing held on September 23, 1998 that “I [he] directed his secretary to do it [send a copy of the brief to Mr. Tippet] within the week, within a week or so **after** it was filed.” (emphasis added) (See September 23, 1998 hearing transcript page 79 (Tr. 632-727)-attached as Exhibit C) Mr. Williams had no intention of allowing Mr. Tippet to review the brief prior to filing it despite agreeing to provide Mr. Tippet with a copy of the brief so that he may review it prior to filing.

In addition to failing to notify Mr. Tippet that the brief had been filed, Mr. Williams had failed to file the brief in a timely manner resulting in the Supreme Court’s entry of an order dismissing Mr. Tippet’s appeal for failure to file the Appellant’s brief in the time permitted by Utah Rule of Appellate Procedure 26(a). Only after Mr. Williams filed the hastily prepared Brief of Appellant, which consisted of only seven pages, did the Supreme Court reinstate Mr. Tippet’s appeal. Mr. Williams failure to file the brief on time nearly caused Mr. Tippet’s appeal to be dismissed. Surely Mr. Tippet was reasonable in his expectation that the brief would be filed in a timely manner since that is the very least that could be expected of competent appellate counsel who is aware of the strict filing guidelines that must be adhered to during the appeals process.

Mr. Williams failure to file the brief in a timely manner, his refusal to travel to the prison to meet with Mr. Tippet, and his refusal to communicate with Mr. Tippet by phone or by mail clearly demonstrates that Mr. Williams was not willing to put in the

time necessary to present an adequate appeal on Mr. Tippet's behalf. The fact that Mr. Williams filed a brief consisting of a mere 7 pages (See attached copy of First Brief of Appellant-Exhibit D), in a complex appeal with numerous viable appellate issues that were worthy of being briefed further supports Mr. Tippet's contention that Mr. Williams was more interested in spending his time working on cases involving private clients than he was in spending time on Mr. Tippet's case. After all, Mr. Williams was compensated at a much higher hourly rate for work done on his private cases than he was on the cases where he was appointed by the court and paid by the County. In contrast, the first Brief of Appellee filed by the State was of much greater length consisting of 21 pages. (See attached copy of First Brief of Appellee-Exhibit E).

Mr. Williams, during the brief conversations he had with Mr. Tippet even stated that he was extremely busy with his private caseload and he was not able to spend as much time on Mr. Tippet's case as he would have liked. Rule 1.7 of the Utah Rules of Professional Conduct states in pertinent part that:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:

(1) The lawyer reasonably believes the representation will not be adversely affected; and . . .

(See attached copy of Rule 1.7 of the Utah Rules of Professional Conduct-Exhibit F)

In the present case, it can easily be argued that Mr. Williams' responsibilities to his private clients adversely affected his representation of Mr. Tippet, an indigent client for which the hourly rate was much less than that of Mr. Williams private clients. Mr. Williams spent the majority if not nearly all of his time working on his private cases. Other than the small amount of time spent on drafting his lackluster appeal brief, Mr. Williams spent virtually no time on Mr. Tippet's case. He did not meet with him, speak to him, respond to his letters or even take the time to notify Mr. Tippet that his appeal brief had been filed. Likewise, it is impossible to believe that Mr. Williams representation of Mr. Tippet was not adversely affected by the lack of communication, lack of research, and overall lack of time spent preparing the Appellant's Brief.

It appears that the underlying reason for Mr. Williams lack of interest and effort in Mr. Tippet's case is monetary. The majority of cases decided by the Utah Courts involving an alleged conflict of interest involve cases where one attorney represents multiple defendants whose interests are contrary to one another but, the Utah Supreme Court has previously addressed the issue that minimal compensation may result in a conflict of interest. In State v. Taylor, 947 P.2d 681, the Utah Supreme Court addressed Taylor's claim that his defense was inadequate and his counsel ineffective due to the fact that his court appointed attorney received only minimal compensation under the public defender contract he had with Summit County. (See attached copy of State v. Taylor-

Exhibit G) In ruling that the public defender's minimal compensation did not constitute a conflict of interest, the Supreme Court noted that the public defender in question had outside sources of income other than the public defense contract he maintained with Summit County and that during the time he represented Taylor, this outside income provided between 80 and 90% of his gross income but that during this same time period, the public defender spent approximately 69% of his time working on Taylor's case. Nearly half of that time was spent consulting with Taylor and his parents.

Truly, the opposite has occurred in Mr. Tippet's case. Mr. Williams virtually ignored Mr. Tippet's case and spent the vast majority of his time working on his own private cases while spending very little if any time working on Mr. Tippet's appeal. It can easily be assumed, based upon the apparent lack of time spent by Mr. Williams on Mr. Tippet's case, that Mr. Williams income during the time he represented Mr. Tippet came almost entirely from the income he earned from his private clients. Likewise, it would be an extremely generous estimate to say that Mr. Williams may have spent even as much as 5% of his time on Mr. Tippet's case of which virtually no time was spent communicating or consulting with Mr. Tippet.

The right to be represented by counsel guaranteed by the Sixth Amendment to the United States Constitution encompasses "the right to counsel free from conflicts of interest." State v. Webb, 790 P.2d 65, 72 (Utah.Ct.App. 1990) (quoting Strickland v. Washington, 466 U.S. at 688, 104 S.Ct. At 2064). Defendants who claim that they

received ineffective assistance of counsel due to a conflict of interest must demonstrate that “an actual conflict of interest adversely affected his lawyer’s performance.” Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980). “In order to establish an actual conflict, [the defendant] must demonstrate ‘as a threshold matter . . . that the defense attorney was required to make a choice advancing his own interest to the detriment of his client’s interests.’” United State v. Acevedo, 891 F. 2d 607, 610 (7th Cir.1989) (ellipsis in original) (quoting United States v. Horton, 845 F.2d 1414, 1419 (7th Cir.1988)). Once a defendant demonstrates an actual conflict, there is no need to show prejudice on ineffective assistance of counsel claim based upon alleged conflict of interest. Cuyler at 349-350, 100 S.Ct. At 1718-1719.

The minimal compensation Mr. Williams received for Mr. Tippet’s case clearly affected his willingness to work on Mr. Tippet’s appeal which is reflected in his lack of communication with Mr. Tippet, his overall poor performance, nearly causing Mr. Tippet’s appeal to be dismissed by failing to file the brief on time, as well as by the inadequacies of the brief he eventually filed. Mr. Williams was forced to make a financial decision of whether to spend time working on Mr. Tippet’s case which provided very minimal compensation under the public defender contract or to spend his time working on his private cases for which the compensation was much greater. From an economic standpoint it is clearly in Mr. Williams best interest financially to focus more of his time on his private cases, which is exactly what he did. This decision

advancing his own best interests was clearly to the detriment of Mr. Tippet. It can in no way be argued that Mr. Williams lack of communication with Mr. Tippet, his lack of research, and overall lack of time spent working on Mr. Tippet's appeal could possibly have benefitted Mr. Tippet's case. Instead, Mr. Williams decision to spend most of his time working on his private cases and little time working on Mr. Tippet's case adversely affected the outcome of Mr. Tippet's appeal. In this case it is obvious that the minimal compensation provided to Mr. Williams for his representation of Mr. Tippet caused an actual conflict of interest and therefore pursuant to the Supreme Court's decision in Cuyler, it must be presumed that Mr. Williams was ineffective.

2) APPELLANT WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL.

In Evitts v. Lucey, 469 U.S. 387, 104 S.Ct. 830, 83 L.Ed.2d 821 (1985) the Supreme Court held that the Strickland¹ standard for ineffective assistance of counsel also applies to appellate counsel. An attorney, once appointed, has a duty to represent his client with zeal and loyalty. The attorney's faithful discharge of that duty is so important that it is mandated not only by the Rules of Professional Conduct but also in criminal cases by the Sixth Amendment. See United States v. Cronin, 466 U.S. 648, 656-657

¹ Strickland v. Washington, 466 U.S. 668,685, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984). This case set forth a two pronged standard for a determination of ineffective assistance of counsel. To establish ineffective assistance under this standard a defendant must first demonstrate an obvious deficiency in counsel's performance and second that the effect of this deficiency was prejudicial.

(1984). Therefore an appellant can raise an ineffectiveness claim concerning an attorney's performance on appeal. See Williams v. Lockhart, 849 F. 2d 1134, 1137-1138 (8th Cir.1988)

Mr. Tippet contends that appellate counsel Allan Williams was generally ineffective in that (1) he failed to present and adequately brief and present two major appeal issues causing them to be dismissed as being without merit, (2) he improperly and against the will of the Mr. Tippet changed the factual and theoretical substance of a viable appeal issue causing it to be dismissed as being without merit, (3) he failed to brief and present two significant and obvious appeal issues that in all probability would have resulted in Mr. Tippet's convictions being overturned, (4) he willfully failed to comply with the Utah Rules of Professional Conduct by refusing to communicate with Mr. Tippet and to keep him apprized of the status of his case and (5) he failed to inform Mr. Tippet of the Appeals Court decision in his case which caused him to be time barred from filing for post-decision review.

In Strickland v. Washington, the Supreme Court established a two prong test with which to evaluate ineffective assistance of counsel claims. To obtain reversal of a conviction based on a claim of ineffective assistance of counsel the defendant must prove (1) that counsel's performance fell below an objective standard of reasonableness and (2) that counsel's deficient performance was prejudicial resulting in an unreliable or fundamentally unfair outcome of the proceedings. The same standard set forth in

Strickland applies to guilty plea challenges based upon claims of ineffectiveness. See Hall v. Lockhart, 106 U. S., (1985). A defendant must show “that there is a reasonable probability that but for counsel’s errors, he would not have pled guilty and would have insisted on going to trial.” Id.

A. Allan Williams was ineffective due to this failure to present and adequately brief and present two major appeal issues causing them to be dismissed as being without merit.

Mr. Tippettt contends that Allan Williams failed to adequately brief and present two major appeal issues that if properly presented would have in all probability resulted in his convictions being overturned. These issues are that Mr. Tippettt’s trial counsel, Lance Wilkerson, was ineffective and that the trial court failed to ensure that Mr. Tippettt understood the nature and element of the offense to which he was to plead guilty. Mr. Williams briefly mentioned these issues in the brief he prepared but he failed to provide any trial court citations, evidence, or case law to support this claim. Instead, Mr. Williams presented these issues more or less as a statement of facts rather than properly arguing them as appeal issues. It is well established in Utah that a reviewing court will not reach an issues that is inadequately briefed and supported. See State v. Wareham 772 P.2d 960, 966 (Utah 1989) and State v. Amicone, 685 P.2d 1318, 1344 (Utah 1984).

From an examination of Part 3 of the Second Brief of Appellant prepared by Allan Williams (Please see pages 10-12 of Second Brief of Appellant-Exhibit H), it can be seen that no trial record citations are provided, no case law was included or argued and no

evidence was presented to support the issue that trial counsel Lance Wilkerson was ineffective. Likewise, the same deficiencies can be seen with regard to the issue that the trial court failed to find that the Mr. Tippettt understood the nature and the elements of the aggravating kidnaping and firearm enhancement offenses before accepting Mr. Tippettt's guilty plea. (Please see pages 8-10 of Second Brief of Appellant-Exhibit H) Mr. Tippettt contends that both of these issues are viable appeal issues that if properly presented would have resulted in the Court of Appeals overturning his conviction. The facts, evidence, record citations, and legal arguments in support of both of these issues are presented below. Mr. Tippettt requests that this court examine the following argument of the issues in order to determine whether or not Allan Williams failed to properly and adequately present these issues for review. If this Court finds that Allan Williams failed to present these viable appeal issues in a proper and effective manner, then ineffectiveness must be presumed and the conviction overturned. See Penson v. Ohio, 488 U.S. 35, 108 S. Ct. 346, 102 L.Ed.2d 300 (1988) and Dunn v. Cook 791 P.2d 873 (Utah 1990).

For the following reasons Mr. Tippettt contends that trial counsel Lance Wilkerson was ineffective. During the arraignment proceedings Mr. Wilkerson waived the reading of the charging information (See page 4, lines 18-22, of the Reporter's Transcript of Arraignment-Exhibit I) and then failed to object to a charging document that did not provide the names of or a description of the alleged victims. (See Information-Exhibit J) Utah Courts have long held that a complaint which fails to plead the names of, or at least

describe the persons injured is “fatally defective for failing to state a public offense.” See State v. Wilson, 105 Utah 516, 143 P.2d 907 (1943). Mr. Wilkerson’s failure to object to the State’s charging document for failing to name or describe the victims was ineffective.

Mr. Wilkerson’s representation again proved ineffective in that during the plea process he failed to object to or correct the court’s incomplete and incorrect explanation of the elements of the aggravated kidnaping offense. During the proceedings the Court stated;

Q. (By the Court) You understand Mr. Tippet that you are charged with the crime of aggravated kidnaping in violation of 76-5-302. That’s a first degree felony, which alleges that you at the time and date did take control of people and cause them to be transported against their will. You held them under your control against their will, and that in fact you did utilize a firearm in the commission of that offense . . .

(See page 4, lines 23-35, and page 5, lines 1-5 of Reporter’s Transcript of Arraignment-Exhibit I).

The description offered by the court is not a legally correct or constitutionally adequate description of the offense of aggravated kidnaping. In fact, the Court’s description more accurately describes the offense of kidnaping rather than aggravated kidnaping. The Court’s explanation of the offense of aggravating kidnaping defines the charge of kidnaping but makes no mention of the circumstances that must be present to elevate a charge of kidnaping to that of aggravated kidnaping. Without the of intent to commit one of the aggravating factors Petitioner would only have been guilty of simple

kidnaping. Utah Code §76-5-302, Aggravated Kidnaping, states in pertinent part;

(1) A person commits aggravated kidnaping if the person intentionally or knowingly, without the authority of law and against the will of the victims by any means and in any manner, seizes, confines, detains or transports the victim with intent,

(a) To hold for ransom or reward, or as shield or hostage, or to compel a third person to engage in particular conduct or to forebear from engaging in particular conduct, or,

(b) To facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony or,

(c) To inflict bodily injury on or to terrorize the victim or another, or,
....

The explanation of the offense of aggravated kidnaping offered by the trial court was substantially different from that set forth in the statute and the trial court failed to include any alleged intent to commit one of the aggravating factors. Due to his failure to object to or to correct the trial court's inaccurate explanation of the crime of aggravated kidnaping, Mr. Wilkerson's assistance was clearly ineffective.

In addition to his failure to object or correct the trial court's inaccurate description of the offense of aggravated kidnaping, Mr. Wilkerson also failed to assist the court in establishing the factual basis necessary for the court to accept Mr. Tippet's guilty plea. Prior to accepting a guilty plea, the trial court is required to establish a factual basis that would support a guilty plea. See State v. Breckenridge, 658 P.2d 440 (Utah 1983). The trial court failed to satisfy this requirement. Instead of establishing facts of the alleged offense committed by Mr. Tippet, the trial court simply recited the statutory description

of the crime. At no time did the court set forth any specific facts surrounding the incident for which Mr. Tippet was charged such as the date, time, and place where the alleged crime took place, nor did the trial court set forth the names of the alleged victims or provide a description of the alleged victims. Without establishing a factual basis for Mr. Tippet's guilty plea, the court may not accept a plea of guilty. Mr. Wilkerson was invested with a duty to protect the rights of his client as well as to assist the court in properly entering and accepting Mr. Tippet's guilty plea. Based on the trial court's failure to establish a factual basis for the guilty plea and Mr. Wilkerson's failure to assist the court in doing so or to object to the court's acceptance of the guilty plea without a sufficient factual basis, Mr. Wilkerson's performance fell below that of a reasonable objective standard and therefore he was ineffective.

Most importantly, Mr. Wilkerson also failed to correct or object to the inaccurate and incomplete description of the minimum and maximum sentence that could be imposed for the firearm enhancement. Pursuant to Rule 11(e) of the Utah Rules of Criminal Procedure, prior to the court accepting a guilty plea, the court must ensure that the defendant is aware of and understands the minimum and maximum sentence that can be imposed for a conviction of the crime to which the defendant is seeking to plead guilty as well as the possibility of the imposition of a consecutive sentence. In the present case the court failed to inform Mr. Tippet that the sentence for the firearm enhancement would be imposed as a consecutive sentence. In fact, at the arraignment hearing the trial

court stated that, “It also carries with it a firearm enhancement penalty of not less than one or up to five years on top of that.” (See Page 7, lines 12-14 of the Reporter’s Transcript of Arraignment-Exhibit I). The court’s statement that the sentence for the firearm enhancement would be “on top of that” can hardly be construed to mean consecutive. Most individuals not familiar with criminal law or legal terminology would interpret the phrase “on top of that” to mean that the sentence would be “piggybacked” to the 15 to life sentence or would be served at the same time as the sentence for the aggravated kidnaping conviction. The statement “on top of that” is obviously not a very precise description or definition of a consecutive sentence.

Further, at the time of sentencing, the court imposed a sentence of 5 to 10 years imprisonment to be served consecutively with the 15 to life sentence for the aggravated kidnaping conviction in direct contradiction to the 1 to 5 year enhancement described by the court at the arraignment hearing. Despite the fact that this sentence was in direct conflict with the firearm enhancement penalty described by the trial court at the arraignment hearing, Mr. Wilkerson neither attempted to correct the court or object to the imposition of the 5 to 10 year consecutive sentence. Prior to sentencing Mr. Tippet was not advised of the court’s ability or intention to sentence him to 5 to 10 years for the firearm enhancement nor was it made clear to Mr. Tippet that this sentence would be imposed consecutively, meaning that they would be served one after the other, to the sentence for the aggravated kidnaping offense. Surely such an obvious error in the

sentencing procedures should have been objected to by Mr. Wilkerson. Yet, Mr.

Wilkerson did not object or voice any concern with the sentence imposed by the court.

During the sentencing proceedings Mr. Wilkerson failed to protect Mr. Tippet's right by failing to object to or correct the court's failure to enter written findings with regard to the imposition of the maximum sentence of 15 years to life for the aggravated kidnaping conviction. Mr. Tippet was sentenced under Utah Code §76-5-302 which mandates that a minimum sentence of 5, 10, or 15 years to life be imposed. Since one of these three mandatory sentences must be imposed, sentencing must take place pursuant to Utah Code §76-3-201(5)(a) and (d) which require that the sentencing judge enter written findings in connection with the imposition of the maximum sentence. Petitioner was sentenced to the maximum term without the entry of written findings by the trial judge. The failure of the court to enter written findings is a substantial and obvious defect. See Potter v. Potter, 845 P.2d 272 (Utah App.1992). Mr. Wilkerson did not object to or attempt to correct this blatant error by the court, again demonstrating his ineffectiveness.

In addition to the obvious failure of Mr. Wilkerson to object to numerous errors by the court in both the court's acceptance of Mr. Tippet's guilty plea and the sentencing proceedings, Mr. Tippet also contends that Mr. Wilkerson provided him with false information which improperly induced him into pleading guilty. Prior to the entry of his guilty plea, Mr. Wilkerson told Mr. Tippet that if he agreed to plead guilty he would be sent back to South Carolina after sentencing to serve his time and that any time served in

South Carolina would be counted as time served on his Utah conviction. It can be clearly seen by reviewing the record that Mr. Tippet was under this impression at the time he entered his guilty plea. At the arraignment Mr. Tippet stated, "I want to get sentenced to get back to South Carolina and start getting on the time." (See page 9, lines 13-14 of the Reporter's Transcript of Arraignment-Exhibit I). Mr. Wilkerson's offering of incorrect and misleading information which affected Mr. Tippet's decision to plead guilty is a clear violation of the Rules of Professional Conduct and the attorney client relationship.

The Appellant now turns to prong two of the Strickland test. The second prong of Strickland can be met if Mr. Tippet can demonstrate that there is a reasonable probability that but for counsel errors he would not have pled guilty but instead would have insisted on going to trial. See Laylock v. State of New Mexico, 880 F.2d 1184, 1187 (10th Cir.1989). In addition, he must overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." United States v. Smith, 10 f.2d 724, 728 (10th Cir.1993). In this case the trial record is clear as to what transpired during the court proceedings. The court committed several errors, as outlined above, that rendered Mr. Tippet's guilty plea unknowing and involuntary, and not once did Mr. Wilkerson object to or attempt to correct the obvious mistakes. Both Wilkerson and the trial court allowed Mr. Tippet to plead guilty to the crime of aggravated kidnaping without establishing a factual basis to support such a plea. Moreover, when all of the errors and omissions are taken as a whole, it is obvious that Mr. Tippet did not fully

understand the nature and elements of the crime to which he pled guilty nor did he fully understand the consequences of his plea, the minimum and maximum sentence that could be imposed for his conviction, or the consecutive nature of the firearm enhancement. The record indicates that Mr. Tippet's main motivation for entering a guilty plea was his belief that he would be returned to South Carolina to serve out his sentence there. If he had been fully and properly advised by his counsel it is reasonable to believe that he would not have plead guilty but rather would have insisted that the matter go to trial. Therefore Mr. Tippet also satisfies the second prong of the Strickland test.

B. Allan Williams was ineffective due to the fact that he improperly and against the will of the Mr. Tippet changed the factual and theoretical substance of a viable appeal issue causing it to be dismissed as being without merit.

Mr. Tippet contends that Allan Williams changed the factual and theoretical substance of valid appeal issues which caused it to be dismissed as being dismissed without merit. The issue in question is Mr. Tippet's contention that the State's charging document was fatally defective for failing to allege an offense. This issue is a jurisdictional defect not waived by the defendant's guilty plea. See U.S. v Lopez, 704 F.2d 1383 N3, (5th Cir.1983) cert denied 464 U.S. 935 (1984). This issues was presented as a jurisdictional defect in Mr. Tippet's Motion to Withdraw Guilty Plea however against his instruction and without his knowledge Allan Williams changed the theoretical substance of this argument to read, "the plea was improperly taken because the

information did not adequately inform the defendant/appellant of the nature of the charges.” (See Second Brief of Appellant, Point II-Exhibit H). The argument presented by Williams is simply not viable because when entering a plea of guilty a defendant waives all legal challenges to sufficiency. On the other hand, a jurisdictional defect in the charging document is an issue that can be raised at any time during the proceedings. See U.S. v Oberski, 334 F.2d 1034, 1036 (5th Cir.) cert denied 460 U.S.(1984) and U.S. v. Esposito, 711 F.2d 283, 288 (7th Cir.1985). For some reason known only to him, Allan Williams decided to change the theoretical substance of this argument to such an extent that it had no chance in succeeding. The Appellant sets forth the factual and legal argument of this issue below and moves this court to review the issue as presented to determine whether the possibility exists that if the issue were properly presented a decision in Mr. Tippet’s favor may have resulted. If this court so determines, then ineffective assistance of counsel must be presumed. See Gray v. Green, 778 F.2d 350 (7th Cir.1985) and Griffin v. Aiken, 775 F.2d 1220, 1235-36 (4th Cir.1985).

From an examination of the State’s charging document (See Attached Information-Exhibit J) it can be seen that despite defining the crime of aggravated kidnaping, the charging document does not set forth any specific facts on which to base the charge of aggravated kidnaping, therefore the State’s charging document is defective. See State v. Topham, 41 Utah 39, 123 P.2d 388 (1912). In addition to failing to allege any specific facts that would support the charge, the State’s charging document also fails to name the

alleged victims or provide a description of the alleged victims. It has been long held in Utah that when a crime charged is against another person, the charging document must describe or plead the name of the person(s) injured, and a failure to do so renders the charging document “fatally defective” and does “not state a public offense.” See State v. Wilson, 105 Utah 516, 143 P.2d 907 (1943). In the present case, the offense for which Mr. Tippet had been charged involved an offense against another person and therefore due to the State’s failure to name the alleged victim or at least describe the victim in the State’s charging document, the charging document must be determined to be “fatally defective” for “failing to allege an offense.”

A charging document which fails to allege an offense is a jurisdictional defect that is not waived by a plea of guilty. See U.S. v Lopez, 704 F.2d 1382, 1385 N3 (5th Cir.1983) cert denied U.S. 935 (1984); U.S. v. DiFonzo, 603 F.2d 1260, 1263 (7th Cir.1979) cert denied 444 U.S. 1018 (1980), and can be challenged at any stage of the proceedings, either before or after conviction. See U.S. v Oberski, 334 F.2d 1034, 1036 (5th Cir.) cert denied 460 U.S.(1984) and U.S. v. Esposito, 711 F.2d 283, 288 (7th Cir.1985).

The issue that the State’s charging document was fatally defective for failing to allege an offense is a viable appeal issue that should be decided in Mr. Tippet’s favor. Likewise, the court should find that if this issue had been properly presented by Allan Williams in Mr. Tippet’s appeal, the court would have in all probability overturned his

conviction. As such, ineffectiveness by Mr. Williams must be presumed.

C. Allan Williams was ineffective due to his failure to brief and present two significant and obvious appeal issues that in all probability would have resulted in Mr. Tippet's convictions being overturned.

Mr. Tippet contends that Allan Williams failed to present two significant and obvious issues that were originally raised in his Motion to Withdraw Guilty Plea. These two issues that were omitted are (1) that the trial court failed to advise Mr. Tippet that the firearm enhancement penalty would be imposed as a consecutive sentence and (2) that the trial court failed to establish a factual basis as is required before the court accepted the his guilty plea. Both of these issues are viable appeal issues and if properly presented, would in all probability resulted in Mr. Tippet's conviction being overturned.

In Gray v. Green, 778 F.2d 350 (7th Cir.1985), the 7th Circuit Court held that “if appellant counsel has failed to raise a significant and obvious appeal issues, failure could be viewed as a deficient performance” and “if the issue not raised may have resulted in reversal of conviction, or an order for a new trial, the failure was prejudicial. If the appellant argues that appellate counsel failed to raise viable issues, the court must examine the trial record to determine whether appellate counsel failed to present significant and obvious issues.” Id. At 372.

Pursuant to Rule 11(e)(5) of the Utah Rules of Criminal Procedure, the trial court has an obligation to advise the defendant of the possibility of imposition of a consecutive sentence. The court's failure to do so renders the guilty plea unknowing and thus

involuntary. See State V. Vasilacopulus, 756 P.2d 92 (Utah App.1988). Rule 11(e)(5)

states in pertinent part:

(e) The court . . . shall not accept a plea of guilty until the court has made the findings:

(5) that the defendant knows the minimum and maximum sentences that may be imposed upon him for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences.

In the present case, the trial court not only stated incorrectly the minimum and maximum sentence that could be imposed for the firearm enhancement but also failed to clearly explain that the firearm enhancement penalty would be imposed consecutive to the sentence for the aggravated kidnaping conviction. In determining whether or not the trial court complied with Rule 11(e) the court must use the standard in effect at the time Mr. Tippet's guilty plea was entered. The standard at the time of the entry of the guilty plea was the Warner-Brooks standard which requires that the court record as a whole demonstrate that the trial court had substantially complied.

During the arraignment hearing, the trial court improperly stated that Mr. Tippet faced a sentence of five years to life for the aggravated kidnaping charge. Only after the prosecuting attorney made the court aware of its error did the court inform Mr. Tippet that he faced a sentence of five, ten, or fifteen years to life. The court offered no further information to explain the indeterminate nature of these sentences. This fact is of importance in this case due to the fact that the Mr. Tippet was originally from the state of South Carolina where the courts do not use an indeterminate sentence approach. Due to

the court's failure to explain the indeterminate nature of the sentence, Mr. Tippet did not fully understand the minimum and maximum sentence that could be imposed for his conviction. Thus, it should be found that the trial court did not comply with Rule 11(e) and violated Mr. Tippet's right to Due Process by failing to ensure that he fully understood the minimum and maximum sentence that could be imposed prior to accepting his guilty plea.

In addition to failing to ensure that Mr. Tippet fully understood the minimum and maximum sentence that could be imposed, the court also failed to clearly advise him as to the possibility of the imposition of a consecutive sentence for the firearm enhancement. As argued earlier, the trial court judge stated that "It also carries with it a firearm enhancement penalty of not less than one or up to five years on top of that." The court's statement is not clear in advising Mr. Tippet that the firearm enhancement penalty may be imposed "consecutively" to the sentence for the aggravated kidnaping conviction. The court's statement that the sentence for the firearm enhancement would be "on top of that" can hardly be construed to mean consecutive. This statement is misleading and confusing to say the least. The trial court failed to find that Mr. Tippet fully understood the consequences of his guilty plea and the consecutive nature of the firearm enhancement penalty. Therefore the court did not comply with Rule 11(e) in taking the Mr. Tippet's guilty plea and as such he should be allowed to withdraw his plea.

The trial court failed to establish a factual basis for Mr. Tippet's guilty plea. The

Utah Supreme Court in State v. Breckenridge established that before accepting a guilty plea, a trial court must first develop a factual basis which would support a conviction for the offense alleged. See State v. Breckenridge, 658 p.2d 440 (Utah 1983).² In Breckenridge, the court concluded that even though the plea colloquy did include a recitation of the surrounding facts, as a matter of law those facts were insufficient to support a conviction. Id. at 442-444. In the present case, the plea colloquy contains no recitation of any alleged facts surrounding the incident for which Mr. Tippet had been charged with two counts of aggravated kidnaping with a firearm enhancement. During the arraignment proceedings the trial court judge stated:

Q-(By the Court) You understand Mr. Tippet that you are charged with the crime of aggravated kidnaping in violation of §76-5-302. That's a first degree felony which alleges that at the time and place did take control of people and cause them to be transported against their will, and that in fact you did utilize a firearm in the commission of that offense.

The court's statement is nothing more than an incomplete recitation of §76-5-302. The trial court failed to provide any information of facts regarding the alleged crime. The court did not state the date, time, or location where the alleged offense occurred, nor did it state the names of or describe the alleged victims. In fact, the court does not even state how many victims were involved. In short, the trial court did not advert to any facts that could form a basis for a conviction. That failure by the trial court is both critical and

² The Rules of Practice in effect in the Utah District Courts at the time the Petitioner's guilty plea was entered also required the court to find "that there is a factual basis for the plea." Rules of Practice, Rule 3.6(c).

prejudicial because there is nothing else in the record that cures this defect.³

Before accepting a guilty plea a trial court is required to determine that there is enough evidence from which a jury could find a defendant guilty. See State v. Rhode, 56 Wash.App. 69, 782 P.2d 567, 569 (1989). The trial court in the present case did not meet this standard. The State proffered no evidence or testimony that could have supported a verdict that Mr. Tippet was guilty of the crime of aggravated kidnaping. Thus, this Court cannot be satisfied that the guilty plea was knowing and voluntary because the record when taken as a whole is insufficient to remedy the defects of the plea proceedings. Therefore, the trial court should permit Mr. Tippet to withdraw his guilty plea. See Jolivet v. Cook, 784 P.2d 1148 (Utah 1989) cert denied sub nom. Jolivet v. Barnes, 493 U.S. 1033, 110 S.Ct. 751, 107 L.Ed.2d 767 (1990).

D. Allan Williams was ineffective due to his failure to comply with the Utah Rules of Professional Conduct.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the assistance of counsel. In Utah, the Rules of Professional Conduct serve as a guideline for both the ethical standards and conduct of attorneys.

While a violation of the Rules does not “create any presumption that a legal duty has been breached” or provide a basis for civil liability, Scope, Utah R.Prof.Conduct, courts have referred to the Rules to augment legal principles

³ No plea affidavit was taken by the court and the state’s charging document failed to provide any facts surrounding the alleged offense.

involving lawyer conduct. The application of ethical standards to particular facts is a questions of law. See Hobson, 672 F.2d at 828.

Counsel's conduct may be examined in light of prevailing professional and ethical standards to determine whether defendant received effective representation. Zepp, 748 F.2d at 135.

State v. Johnson, 823 P.2d 484 (UtahCt.App. 1991)(citing United States v. Hobson, 672 F.2d 825, 828 (11th Cir.), cert. denied, 459 U.S. 906, 103 S.Ct. 208, 74 L.Ed.2d 166 (1982) and Government of Virgin Islands v. Zepp, 748 F.2d 125 (3rd Cir.1984)). (See attached copy of State v. Johnson- Exhibit K)

Thus, an attorneys performance can be judged in part by his adherence to the Rules of Professional Conduct. Allan Williams violated numerous Rules of Professional Conduct in his representation of Mr. Tippettt but most importantly he violated Rules 1.2 Scope of Representation and 1.4 Communication. Rule 1.2 states in pertinent part that:

(a) A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (b), (c), (d), and shall consult with the client as to the means by which they are pursued. . . .

(b) A lawyer may limit the objectives of representation if the client consents after consultation.

Upon being appointed to represent Mr. Tippettt in his appeal, Allan Williams met with the Petitioner at which time Mr. Tippettt outlined the issues he wanted Mr. Williams to include in his appeal brief. Mr. Williams agreed that he would draft the appeal brief to include the issues outlined by Mr. Tippettt and agreed to provide him with a copy of the brief prior to filing it so that he would have an opportunity to review the brief and make

suggestions. Despite agreeing to do so, Mr. Williams did not provide Mr. Tippet with a copy of the brief prior to filing it nor did he provide him with a copy after he filed it.

Mr. Tippet did not receive a copy of the brief until he was provided with one by the Court of Appeals. Upon reviewing the brief, the Mr. Tippet discovered that numerous issues Mr. Williams agreed to include had been omitted and the factual and theoretical basis of one appeal issue had been altered. The omissions and alterations of appeal issues was done without the knowledge or consent of Mr. Tippet. Mr. Tippet was under the impression that Mr. Williams was preparing a brief which included the issues he had discussed with Mr. Williams during their brief visit. At no time did Mr. Williams consult with Mr. Tippet after the initial visit to discuss the issues to be included or omitted from the appeal brief nor did he provide any explanation for his deviation from the issues he had originally agreed to include in the brief.

Mr. Williams violation of Rule 1.2 of the Rules of Professional Conduct for his failure to follow the directions of Mr. Tippet in preparing his appeal was further compounded by Mr. Williams' refusal to communicate with Mr. Tippet. As set forth above, in the two years that Mr. Williams acted as Mr. Tippet's appellate counsel, he visited with Mr. Tippet in person only twice and by phone on only two or three occasions. The visit and the phone conversations were very brief. Additionally, Mr. Williams also failed to keep phone conference appointments scheduled for him by his secretary and failed to respond to Mr. Tippet's letters on all but two occasions. Rule 1.4

of the Rules of Professional Conduct states that :

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(b) A lawyer shall explain a matter to the extent reasonably necessary to enable the client to make informed decisions regarding the representation.

Allan Williams clearly violated Rule 1.4 during his representation of Mr. Tippet.

Mr. Williams failed to communicate with Mr. Tippet and failed to keep him reasonably informed about the status of his case. Mr. Williams did not consult with Mr. Tippet prior to the filing of the appeal brief, and in fact did not even notify him that the brief had been filed. He did not provide Mr. Tippet with a copy of the appeal brief after it had been filed and had it not been for the Court of Appeals, Mr. Tippet may never have received a copy of the brief. Obviously it is reasonable for Mr. Tippet to expect that he would be notified when the appeal brief had been filed and his request for a copy of the brief is a reasonable request. Nonetheless, Mr. Williams failed to maintain reasonable communication with Mr. Tippet.

Even more damaging than his failure to inform Mr. Tippet of the filing of his brief or to provide him with a copy, was Mr. Williams failure to inform Mr. Tippet that a decision had been reached in his case. On October 3, 1996, the Utah Court of Appeals issued a Memorandum Decision affirming the denial of Mr. Tippet's Motion to Withdraw Guilty Plea. Despite the fact that the Utah Court of Appeals had rendered its decision on October 3, 1996, Mr. Tippet was totally unaware of the court's decision and

was under the impression that his case was set for oral argument. Mr. Tippet was notified of the court's decision only after he wrote a letter to the Court of Appeals requesting a copy of the State's Response Brief. At no time had Mr. Williams notified Mr. Tippet of the court's decision nor had he provided Mr. Tippet with a copy of the decision. In fact, Mr. Tippet had made numerous attempts to contact Mr. Williams to discuss the status of the appeal and the upcoming oral argument (it was Mr. Tippet's belief that his case was to be set for oral argument) but Mr. Williams failed to respond to any of Mr. Tippet's communications. It was not until he received a letter from the Court of Appeals dated January 13, 1997 along with a copy of the court's Memorandum Decision that Mr. Tippet became aware that his case had been decided. Mr. Williams' failure to notify the Petitioner proved to be the single most damaging effect of Mr. Williams' failure to communicate with Mr. Tippet. The fact that Mr. Williams did not notify Mr. Tippet of the court's decision caused him to be time barred from petitioning the court for a re-hearing or to Petition the Supreme Court for a Writ of Certiari since the thirty day time limit in which one must do so had already passed before Mr. Tippet was even made aware that a decision had been reached.

During his testimony at the Evidentiary hearing held on September 23, 1998, Mr. Williams testified that he had directed his secretary to send Mr. Tippet a copy of the decision along with a letter stating that he had only a certain time to respond if he wished to file a petitioner for rehearing or Petition for Certiari. Mr. Williams further testified that

he was not sure if the letter and decision were ever sent and that he did not follow up with Mr. Tippet as to whether he wished to file any such petitions. Mr. Williams also testified at that hearing that it was his opinion that the Court of Appeals had “made the wrong decision”. If Mr. Williams had such strong feelings that the Court of Appeals had erred in its decision, it would be expected that he make a diligent effort to discuss with Mr. Tippet the possibility of filing a Petition for Rehearing of Petition for Certiari. Due to the strict time constraints involved it would also be reasonable to expect that Mr. Williams make the trip to the prison to meet with Mr. Tippet personally to discuss the court’s decision and the possible remedies. But, the only effort Mr. Williams claims to have made was to direct his secretary to write Mr. Tippet a letter and to send him a copy of the decision. This request was not taken and Mr. Tippet was not provided with a copy of the decision nor was he provided notice that a decision had been reached.

Mr. Williams’ violation of the Rules of Professional Conduct clearly demonstrates that his performance fell well below the reasonable standard of representation. Further, Mr. Williams’ failure to communicate with Mr. Tippet and to keep him apprized of the status of his case was extremely prejudicial to his case and resulted in Mr. Tippet being precluded from petitioning the court for a rehearing or from seeking further review of the Court of Appeals decision by the Utah Supreme Court. Thus, both prongs of the Strickland test have been met. Therefore it must be presumed that Mr. Williams representation was ineffective.

E. Allan Williams was ineffective due to his failure to petition the Court of Appeals for a rehearing and for failing to inform the Petitioner of the Appeals Court decision in his case which caused him to be time barred from filing for post-decision review.

Mr. Tippettt contends that Mr. Williams was ineffective for failing to petition the Court of Appeals for a rehearing when it was obvious that the court had failed to consider a material point in the case, which if addressed would have drastically effected the court's decision. Additionally, Mr. Tippettt contends that he was further prejudiced by Mr. Williams' failure to inform him that the Court of Appeals had reached a decision in his case. The Utah Court of Appeals, in their memorandum decision concluded that "the trial court failed to inform the defendant of the maximum sentence that could have been imposed upon him by reason of the firearm enhancement," and that "the trial court was not in substantial compliance with Utah R.Crim.P. 11 on that point." (See Court of Appeals Decision-Exhibit L) However, in reaching that decision, the Utah Court of Appeals failed to consider the fact that the trial court had also never informed Mr. Tippettt of the possibility of the imposition of a consecutive sentence for the firearm enhancement as is required by Rule 11(e)(5) of the Utah Rules of Criminal Procedure.

That requirement is mandated by statute and required by law. See State V. Vasilacopulus, 756 P.2d 92 (Utah App.1988) and Boykin v. Alabama, 395 U.S. 238, 243-44 (1969). However, in this case the trial court failed to satisfy this requirement. At no time before sentencing did the trial court inform Mr. Tippettt that he would receive a

consecutive sentence for the firearm enhancement conviction. The arraignment court stated, “It also carries with it a firearm enhancement penalty of not less than one year or up to five on top of that.” The court failed to explain or describe the consecutive nature of the firearm enhancement penalty. At sentencing, the court sentenced Mr. Tippet to a consecutive term of 5 to 10 years for the firearm enhancement. Mr. Tippet was never given any advance notice that the firearm enhancement penalty would be imposed consecutively. In short, even after the Court of Appeals modified his sentence for the firearm enhancement the conviction is still in violation of Rule 11(e)(5) of the Utah Rules of Criminal Procedure in that the defendant was not informed of or fully understood of the consecutive nature of the firearm enhancement penalty. See State V. Vasilacopulus, 756 P.2d 92 (Utah App.1988).

The fact of the consecutive sentence issue should have been obvious to the Court of Appeals at the time of their decision to modify the sentence for the firearm enhancement conviction. This issue had been raised in Mr. Tippet’s Motion to Withdraw Guilty Plea which should have been examined by the court prior to making its decision. Moreover, the trial court’s failure in that respect is obvious on the face of the record. The trial court’s failure can be easily and clearly seen in the transcript of the arraignment hearing. The facts of this case demonstrate a clear need for a rehearing in order to allow the Court of Appeals an opportunity to correct the improper decision which resulted from the Court of Appeals failure to consider a material of fact when making its decision, that

fact being that the trial court failed to inform Mr. Tippet of the consecutive nature of the firearm enhancement and to ensure that he understood the consecutive nature of the firearm enhancement penalty prior to accepting his guilty plea.

The need for a rehearing should also have been obvious to Mr. Williams, especially in light of the fact that Mr. Williams had discussed with Mr. Tippet the possible actions the Court of Appeals could take with regard to the consecutive sentence issue. That discussion took place several months before the Appeals Court decision and covered the possibility of a sentence modification without the court addressing the consecutive sentence issue. During that discussion both Mr. Williams and Mr. Tippet agreed that if the Court of Appeals failed to consider all of the facts of the consecutive sentence issue, post-decision review would be an appropriate and needed remedy.

Upon receiving a copy of the Court of Appeals decision, Mr. Williams failed to notify Mr. Tippet of the decision or to provide him with a copy. Petitioner did not receive a copy of the court's decision until one had been provided to him by the Court of Appeals clerk nearly 3 ½ months after the decision had been issued. After reviewing a copy of the Court of Appeals decision, Mr. Tippet prepared a Pro Se Petition for Rehearing raising the issues that 1) Williams had provided ineffective assistance on appeal (2) that the Court of Appeals failed to fully consider the trial court's failure to advise Mr. Tippet of the consecutive nature of the firearm enhancement penalty when reaching the decision to modify the sentence (3) that Mr. Williams had omitted several

meritorious appeal issues from his brief, and requesting that the court accept his Petition for Rehearing despite the fact that it was filed after the thirty day time limit for filing it had lapsed due to the fact that Mr. Williams had failed to inform him of the court's decision. The Court of Appeals refused to accept the Pro Se Petition for Rehearing based on the fact that it was untimely and that jurisdiction had been returned to the trial court.

Mr. Williams failure to notify Mr. Tippet of the court's decision resulted in him losing his opportunity to petition the court for a rehearing. Mr. Williams was clearly ineffective. There is no possible tactic or strategic reason that would explain Mr. Williams' failure to petition the court for a rehearing. Mr. Williams had nothing to lose by filing a petition for rehearing and had everything to gain for his client. Mr. Williams had clearly been aware of the possibility that this issue may come up and that a petition for rehearing may be necessary. Mr. Williams violated both constitutional law and his duty to his client when he failed to file a petition for rehearing. The resulting effect of this failure is that Mr. Tippet is imprisoned under a constitutionally defective sentence.

3) THE TRIAL COURT ERRED IN REAPPOINTING ALLAN WILLIAMS DESPITE NOTIFICATION BY PETITIONER THAT A CONFLICT OF INTEREST EXISTED AND WITHOUT MAKING THE PROPER INQUIRY INTO THE POTENTIAL CONFLICT OF INTEREST.

The United States Supreme Court has declared that "[W]here a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflict's of interest." Wood v. Georgia, 450 U.S. 261,

271, 101 S.Ct. 1097, 1103, 67 L.Ed.2d. 220 (1981). A court has a limited duty to avoid potential conflicts of interest. Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d. 333 (1980). The Court must initiate an inquiry if it knows or reasonably should know that a potential conflict exists. Id. at 347. When the trial court has notice of a potential conflict but fails to make a sufficient inquiry into the alleged conflict, the reviewing court will presume a violation of the Sixth Amendment right to counsel. Id. at 348. See also Holloway v. Arkansas, 435 U.S. 475, 484-85 (1978).

The facts in this case are very clear. Mr. Tippet notified both the trial court and the Court of Appeals of the fact that Allan Williams was laboring under a conflict of interest due to the time constraints, inadequate compensation, and duty to other clients. However, neither court conducted the required inquiry and therefore a violation of the Sixth Amendment right to counsel must be presumed. On July 5, 1995, Mr. Tippet mailed to the Court of Appeals a copy of Notice of Dismissal of Counsel in which he stated that Mr. Williams was dismissed from his case due to a conflict of interest. Then on September 17, 1995, Mr. Tippet filed a Motion for Ineffective Assistance of Counsel Determination and to Withdraw Appeal Brief in which he contended that Mr. Williams's representation on appeal was ineffective due to an actual conflict of interest. In fact there are several other documents filed with both courts that raised the issue of a conflict of interest as well as numerous letters from Mr. Tippet to the courts outlining the conflict of interest that had arisen and which was preventing Mr. Williams from effectively

representing him in his appeal.

Despite having been provided notice of the conflict of interest by Mr. Tippet on numerous occasions, neither court conducted a hearing before Mr. Williams was reappointed to Mr. Tippet's case. Mr. Tippet did everything in his power to notify the courts of the potential conflict of interest but without conducting a proper inquiry the trial court in effect forced Mr. Tippet to accept Mr. Williams as his counsel. The reappointment of Mr. Williams subsequent to his dismissal by Mr. Tippet was done without his knowledge and against his will. The trial court issued a Ruling on June 26, 1996, reappointing Allan Williams as counsel for Mr. Tippet and stating that the "Petitioner/Defendant in a case like this can not complain of or select his own counsel." The trial court's Ruling in effect denied Mr. Tippet his Sixth Amendment right to the effective assistance of counsel.

From the evidence and facts of this issues it is clear that Mr. Tippet alerted both the trial court and the Court of Appeals to the potential conflict of interest involving Mr. Williams representation of Mr. Tippet on appeal. Neither court conducted a proper inquiry before the trial court reassigned Mr. Williams to Mr. Tippet's case simply because there was a shortage of other local attorneys available to represent him. Therefore this reviewing court must presume a violation of his Sixth Amendment right to the effective assistance of counsel. See Cuyler v. Sullivan, 446 U.S. 335, 347.

POINT II. THE TRIAL COURT ERRED BY FAILING TO ENTER WRITTEN

FINDINGS NECESSARY TO DETERMINATION OF INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM AS REQUIRED BY RULE 23 B OF THE UTAH RULES OF APPELLATE PROCEDURE.

Rule 23B of the Utah Rules of Appellate Procedure requires that the trial court enter written findings when making a determination with regard to a claim of ineffective assistance of counsel. In the present case, after being remanded to the trial court for a determination of ineffective assistance and after having held an evidentiary hearing on the matter, the trial court entered a two sentence Ruling denying the Appellant's Petition for Post Conviction Relief and for Determination of Ineffective Assistance of Counsel. The trial court's ruling is clearly in violation of Rule 23B in that the trial court failed to enter the necessary written findings. As such, the Appellant requests that this court "make an independent determination of [the] trial court's conclusions" pursuant to the Supreme Court's ruling in State v. Templin, 805 P.2d 182, 186 (Utah 1990).

STATEMENT REGARDING ORAL ARGUMENT

The Appellant requests that this court hear oral argument on this matter and further requests that the Appellant be transported from the Utah State Prison, where he is currently incarcerated, to the Utah Court of Appeals so that he may be present at oral arguments. The Appellant also requests that the court enter a formal written decision in this matter and that the decision be published.

CONCLUSION

Based on the evidence and argument presented above, Appellant has clearly

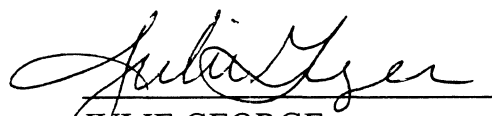
demonstrated that Mr. Williams was ineffective due to the fact that he was laboring under a conflict of interest that adversely affected his representation and prejudiced the Appellant's case. In addition to the conflict of interest, Mr. Williams was generally ineffective in that (1) he failed to present and adequately brief and present two major appeal issues causing them to be dismissed as being without merit, (2) he improperly and against the will of the Appellant changed the factual and theoretical substance of a viable appeal issue causing it to be dismissed as being without merit, (3) he failed to brief and present two significant and obvious appeal issues that in all probability would have resulted in Appellant's convictions being overturned, (4) he willfully failed to comply with the Utah Rules of Professional Conduct by refusing to communicate with the Appellant and to keep him apprized of the status of his case and (5) he failed to inform the Appellant of the Appeals Court decision in his case which caused him to be time barred from filing for post-decision review. Finally, the trial court erred in reappointing Mr. Williams to represent the Appellant. The trial court failed to conduct the necessary inquiry into the potential conflict of interest after having been notified of the conflict by the Appellant on numerous occasions.

The cumulative effect of the trial court's error and the ineffectiveness of Mr. Williams served to prejudice the Appellant's case resulting in the denial of his Appeal of his Motion to Withdraw Guilty Plea and his conviction being affirmed. To be entitled to a writ, a petitioner must show that there was an obvious injustice or a substantial and

prejudicial denial of a constitutional right. Hurst v. Cook, 777 P.2d 1029, 1034-35 (Utah 1989). “The unusual circumstances test was intended to assure fundamental fairness and to require reexamination of a conviction or habeas corpus when the nature of the alleged error was such that it would be unconscionable not to reexamine . . . and thereby to assure that substantial justice [was] done . . . ” Codianna v. Morris, 660 P.2d 1101, 1115 (Utah 1983) (Stewart, J. concurring) (quoting Martinez v. Smith, 602 P.2d 700, 702 (Utah 1979), Brown v. Turner, 21 Utah 2d 96, 99, 440 P.2d 968, 969-70 (1968)). Clearly this case involved the denial of Petitioner’s Sixth Amendment Right to the effective assistance of counsel and the trial court abused its discretion in denying the Appellant’s Petition for Post Conviction Relief and for Determination of Ineffective Assistance of Counsel.

THEREFORE based on the evidence and argument set forth above, the Petitioner respectfully requests that this court make an independent determination that Petitioner’s appellate counsel, Allan Williams, was ineffective, that counsel’s ineffectiveness prejudiced Appellant’s case, and enter written findings of the same. Appellant further requests that based upon appellate counsel’s ineffectiveness, the court enter an order reinstating his appeal of the order denying his Motion to Withdraw Guilty Plea and appoint new counsel to represent him in his appeal.

DATED this 25th day of June, 1999.

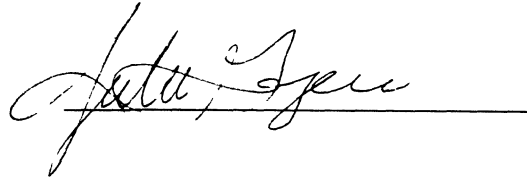

JULIE GEORGE
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that on this 35 day of June, 1999, I personally mailed, first class postage prepaid, a true and correct copy of the foregoing Brief of Appellant to:

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A handwritten signature in cursive script, appearing to read "Jeta Spence", is written over a horizontal line.