

1999

# Utah v. Wayne S. Tippet : Petition for Rehearing

Utah Court of Appeals

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Scott Keith Wilson; Assistant Attorney General; Jan Graham; Attorney General; Attorney for Appellee.

Wayne S. Tippet; Pro Se .

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**IN THE UTAH COURT OF APPEALS**

<b>STATES OH UTAH,</b> <b>Appellee/Respondent,</b>  <b>vs.</b>  <b>WAYNE S. TIPPETT,</b> <b>Appellant/Petitioner,</b>	<b>Case No: 990178-CA</b>   <b>Priority: 2</b>
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**PETITION FOR REHEARING**

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**IN THE UTAH COURT OF APPEALS**

**STATES OH UTAH,**  
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**vs.**

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**Case No: 990178-CA**

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# IN THE UTAH COURT OF APPEALS

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WAYNE S. TIPPETT,  
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Priority:

## PETITION FOR REHEARING

### STATEMENT OF ISSUES PRESENTED ON PETITION FOR REHEARING

Did this Court err in denying the defendants appeal, and in concluding that attorney Williams provided effective assistance of counsel on appeal?

### CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

All relevant provisions, statutes and rules are incorporated in the text of this petition

### STATEMENT OF THE CASE

Mr Tippet was originally charged on February 18, 1986, with two counts of aggravated kidnapping 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 kidnapping 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 a 15 years to life sentence for the aggravated kidnapping conviction along with a 5 to 10 year consecutive term 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 defective. 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 the claim that the trial court had offered an inadequate and misleading explanation of the firearm enhancement offense. 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 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 failed 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 and alleging a conflict of interest. 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 in the Utah Supreme Court 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 with the motion 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 stating that defendant had no right to complain of or select his own attorney in the case 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 (See Notice of Dismissal on file with this court) 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.

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(1) The prison where Mr. Tippet is housed does not allow inmates access to a copy machine except through the services of the contract attorney. However to make copies through the contract attorneys takes around two weeks and therefore Mr. Tippet did not have the needed time to make copies of the stated exhibits and attach them to this petition. Therefore Mr. Tippet requests this court to examine the exhibits already on file with this court. Documents that are not on file will not be cited.

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 copy of Ruling dated February 8, 1999 on file with this court). Thereafter the case was set for decision by the Utah Court of Appeals with a final decision being entered on May 18, with the court denying the appeal and stating that attorney Williams provided effective assistance on appeal. (See memorandum decision on file).

### SUMMARY OF ARGUMENT

The Utah court of Appeals choose to reach the issue of attorney Williams adequacy and concluded that "For the foregoing reasons, we cannot say that Tippet's appellate counsel was ineffective." However in reaching that decision the failed to consider several relevant facts and issues. The Appeal's Court failed to reach the issue of the trial court and appeals court failing to conduct the required evidentiary hearing before reappointing Williams back onto the case. Additionally the court in reaching the decision to affirm failed to consider Williams inadequate presentation of the trial courts failure to explain the elements of the aggravating kidnapping charge. Moreover the appeals court did not consider all the facts in concluding that Williams had adequately presented the factual basis issue.

### ARGUMENT

#### POINT I

**THE APPEALS COURT REACHED AN INCORRECT DECISION  
IN CONCLUDING THAT APPELLATE COUNSEL ALAN WILLIAMS  
ADEQUATELY PRESENTED THE ISSUE THAT THE TRIAL COURT  
FAILED TO ADVISE DEFENDANT OF THE ELEMENTS OF THE**

## AGGRAVATE KIDNAPPING OFFENSE.

The issue that the trial court failed to advise Mr Tippet of the elements of the aggravated kidnapping offense is a valid and meriterous issue that attorney Williams failed to properly present The facts and arguments of this issue were presented in the appeal brief and the Appeals Court erred in failing to reach the claim when concluding that Williams had provided effective assistance In all probability Mr Tippet's conviction would have been reversed if attorney Williams had properly presented the issue on appeal The issue as stated claims that during the trial process the court offered an incomplete and incorrect explanation of the elements of the aggravated kidnaping offense During proceedings the Court stated

Q (By the Court) You understand Mr Tippet that you are charged with the crime of aggravated kidnapping 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 Transcript of Arraignment on file with this court)

That description offered by the trial court is not a legally correct or constitutionally adequate description of the offense of aggravated kidnapping In fact, the Court's description more accurately describes the offense of kidnapping rather than aggravated kidnapping The Court's explanation of the offense of aggravating kidnapping defines the charge of kidnapping but makes no mention of the circumstances that must be present to elevate a charge of kidnapping to that of aggravated kidnapping Without the element of intent to commit one of the aggravating factors the petitioner would only have been guilty of simple kidnapping *Utah Code* §76-5-302, Aggravated Kidnaping, states in pertinent part,

- (1) A person commits aggravated kidnapping 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,
  - (1) 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 kidnapping as offered by the trial court was substantially

different from that set forth in the statute and states charging document, and failed to include the element of intent to commit one of the aggravating factors. The trial court completely confused the explanation of the crime of aggravated kidnapping and in effect forced Mr. Tippet to pick which of two explanations constituted the offense. Appellate attorney Williams was clearly ineffective in not properly presenting the issue as stated above. Moreover, the Appeal's Court erred in reaching the decision to affirm without first addressing the issue that Williams failed to properly present the issue as stated above.

**POINT II**  
**THIS COURT ERRED IN CONCLUDING THAT ATTORNEY WILLIAMS HAD EFFECTIVELY PRESENTED THE ISSUE OF THE TRIAL COURT'S FAILURE TO ESTABLISH A FACTUAL BASIS FOR THE ENTRY OF THE GUILTY PLEA.**

The Appeal's Court erred in concluding that Williams had adequately presented the issue of a failure to establish a factual basis for the entry of a guilty plea. The issue is valid and meritorious and if properly presented would in all probability result in a reversal of Mr. Tippet's conviction. The issue is stated below for review by this court.

The trial court failed in establishing the factual basis necessary to accept the Petitioner'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 the Petitioner, the trial court simply recited the statutory description of the crime. The trial court stated:

Q (By the Court) You understand Mr. Tippet that you are charged with the crime of aggravated kidnapping 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 Transcript of Arraignment on file with this court)

That's all that was offered concerning the alleged crime. At no time did the court set forth any specific facts surrounding the incident for which the Petitioner 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. In short "nothing" was offered by the trial court that would support the entry of the guilty plea.

Without establishing a factual basis for the Petitioner's guilty plea, the court may not accept a plea of guilty Mr Williams failed to properly present this issue Based on the facts and evidence of the trial court's failure to establish a factual basis for the guilty plea it can be clearly seen that Williams performance was ineffective for failing to properly present the claim

Therefore, based on the facts and evidence of this issue as presented above Mr Tippet moves this court to reconsider the issue of Williams effectiveness

**POINT III**  
**THIS APPEAL'S COURT FAILED TO CONSIDER THE  
ISSUE OF THE TRIAL COURT REAPPOINTING ATTORNEY  
WILLIAMS BACK ONTO THE CASE AFTER NOTIFICATION  
OF A POTENTIAL CONFLICT OF INTEREST.**

This Appeal's Court failed to reach the issue that ineffective assistance must be presumed in this case because a potential conflict of interest was alleged and the court reappointed Williams back onto the case without conducting the required review The issue as presented in the appeals brief will be restated here for the court to determine the matter

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 Cuvler 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 The Petitioner 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, petitioner 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, Petitioner 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 Petitioner to the courts outlining the conflict of interest that had arisen and which was preventing Mr. Williams from effectively representing the Petitioner in his appeal.

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

From the evidence and facts of this issues it is clear that Petitioner alerted both the trial court and the Court of Appeals to the potential conflict of interest involving Mr. Williams representation of Petitioner on appeal. Neither court conducted a proper inquiry before the trial court reassigned Mr. Williams to Petitioner's case simply because there was a shortage of other local attorneys available to represent Petitioner. Therefore this reviewing court has no option but to presume a violation of Petitioner's Sixth Amendment right to the effective assistance of counsel. See Cuyler v. Sullivan, 446 U.S. 335, 347. Petitioner moves this court to conduct a rehearing in this matter and decide the merits of this claim.

### **CONCLUSION**

Based on the above, the defendant requests that the Court schedule a rehearing to consider the issues of, trial courts failure to conduct the required evidentiary hearing before reappointing Williams back onto the case, Williams ineffectiveness in failing to properly present the issue that the trial court failed to properly offer the intent elements of the aggravated kidnapping offense and that attorney Williams failed to properly present the factual basis claim.

Dated this 25th day of May, 2000,

Respectfully submitted,

Wayne S Tippet  
Wayne S Tippet #17780

**GOOD FAITH CERTIFICATE**

As required by Rule 35(a), Utah Rules of Appellate Procedure, pro se counsel certifies that he has filed this petition in good faith and not for the purpose of delay

RESPECTFULLY SUBMITTED this 25th day of May, 2000

Wayne S Tippet  
WAYNE S TIPPETT #17780  
Attorney Pro Se

# CERTIFICATE OF MAILING

I hereby certify that I mailed by postage prepaid mail, two true and correct copies of the foregoing Petition for Rehearing to the following:

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Assistant Attorney General

JAN GRAHAM (1231)

Attorney General

160 East 300 South, 6th Floor

Salt Lake City, Utah 84114

Telephone: (801) 366-0180

Attorney for Appellee

Dated this 25th day of May 2000;

signed

A handwritten signature in black ink, appearing to read "James M. Wells", written over a horizontal line.