

1999

# Wayne S. Tippet v. Fred Vanderveur : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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WAYNE S. TIPPETT,	:	
Petitioner/Appellant,	:	Case No. 990178-CA
vs.	:	
FRED VANDERVEUR	:	Priority No. 3
Respondent/Appellee.	:	

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BRIEF OF APPELLEE

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APPEAL FROM DISMISSAL OF A PETITION FOR POST-  
CONVICTION RELIEF, IN THE EIGHTH JUDICIAL DISTRICT IN  
AND FOR UINTAH COUNTY, STATE OF UTAH, THE  
HONORABLE JOHN R. ANDERSON, PRESIDING.

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<b>Respondent/Appellee.</b>	:	

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**BRIEF OF APPELLEE**

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**JURISDICTION AND NATURE OF PROCEEDINGS**

Petitioner appeals the trial court's dismissal of his request for post-conviction relief. This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1996).

**STATEMENT OF THE ISSUES ON APPEAL AND  
STANDARDS OF APPELLATE REVIEW**

1. Whether petitioner may make a claim for ineffective assistance of counsel in a proceeding in which no Constitutional right to counsel existed. No standard of review applies to this issue.

2. (a) Whether the trial court correctly found that no conflict of interest existed between petitioner and his appellate counsel.

(b) Whether the trial court correctly found that petitioner's appellate counsel was not ineffective in briefing the issues raised in petitioner's prior appeal.

For both of these claims, involving issues of both fact and law, the following standard of review applies:

Our standard of review for an appeal from a dismissal of a petition for post-conviction relief depends on the issue appealed. Though we review the trial court's conclusions of law for correctness, we will disturb findings of fact only if they are clearly erroneous. Further, “‘we survey the record in the light most favorable to the findings and judgment; and we will not reverse if there is a reasonable basis therein to support the trial court's refusal to be convinced that the writ should be granted.’”

*Matthews v. Galetka*, 958 P.2d 949, 950 (Utah App. 1998) (citations omitted).

## **CONSTITUTIONAL PROVISIONS, STATUTES AND RULES**

Rule 4, Utah Rules of Criminal Procedure, attached as Addendum D

### **STATEMENT OF THE CASE**

On September 29, 1997, petitioner filed a *pro se* petition for post-conviction relief (R.24). The petition was dismissed as frivolous by the trial court on October 2, 1997 (R.38). Petitioner appealed (R.42). The Utah Supreme Court summarily reversed the trial court's dismissal of the petition, remanding for further proceedings and directing the trial court to appoint new counsel for petitioner (R.62). On remand, the trial court dismissed all of petitioner's claims as procedurally barred except for his claim of ineffective assistance of appellate counsel (R.101). Following an evidentiary hearing, the trial court denied the remainder of the petition, and petitioner timely appealed (R.622).

After petitioner's opening brief had been filed, the case was remanded to the trial court for entry of findings of fact and conclusions of law. The trial court entered findings of fact and conclusions of law on September 22, 1999 (R.735). By Notice dated November 12, 1999, petitioner's counsel informed this Court that no amended brief would be filed.

### **STATEMENT OF FACTS**

On February 18, 1986, Petitioner was charged with two counts of aggravated kidnaping, both first degree felonies, in violation of Utah Code Ann. § 76-5-302 (Supp. 1986) (R.617).<sup>1</sup> Each charge included a firearm enhancement pursuant to Utah Code Ann. § 76-3-203 (Supp. 1986). At his circuit court arraignment, petitioner pled guilty to one count of aggravated kidnaping with the use of a firearm, and the second count was dismissed (R.616). Petitioner was sentenced to a prison term of 15 years to life, along with a consecutive term of five to ten years for the firearm enhancement (R.616).

**Petitioner's motion to withdraw his plea.** On June 30, 1994, more than eight years after being sentenced, petitioner filed a *pro se* motion to withdraw his guilty plea

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<sup>1</sup> Most record citations in the Statement of Facts are to the State's Memorandum in Opposition to Petition for Post-Conviction Relief (attached as Addendum A). In making its findings of fact, the trial court explicitly adopted the facts as stated in this memorandum: "In addition to the specific findings made and entered by the Court, the Court will incorporate the factual basis and references to the transcript found in the State's Memoranda . . . . The State's Memoranda is incorporated by reference in its entirety." September 22, 1999 Ruling, Finding of Fact #7 (R.736) (attached as Addendum B).

(R.616). The trial court denied most of the motion summarily, but sought a written response from the State on the sole issue of whether the sentencing court imposed a different firearm enhancement penalty than was explained to petitioner when he entered his plea. On July 12, 1994, the trial court entered a supplemental ruling denying petitioner's motion as it related to the firearm enhancement (R.616).

**Appeal from denial of the motion to withdraw plea.** Petitioner appealed the trial court's denial of his motion, and filed a request for appointment of counsel. The Utah Supreme Court remanded the matter to the trial court for a determination of petitioner's entitlement to appointed counsel, and the trial court appointed Alan Williams to represent petitioner on appeal (R.615).

On January 20, 1995, Mr. Williams filed petitioner's opening brief, arguing that the trial court failed to comply with rule 11, Utah Rules of Criminal Procedure, in accepting petitioner's guilty plea (R.615). On June 5, 1995, petitioner filed a *pro se* motion for substitution of counsel, along with a supporting memorandum and affidavit. Petitioner also filed a *pro se* motion for leave to file an amended or supplemental brief. On June 21, 1995, the court of appeals denied petitioner's motion for supplemental briefing and remanded the matter to the trial court for disposition of petitioner's request for substitution of counsel (R.615).

On August 31, 1995, the trial court denied petitioner's motion for substitution of counsel. Petitioner then filed a *pro se* "Motion for Ineffective Assistance of Counsel

Determination and to Withdrawal of Appeal Brief” in the court of appeals. The court of appeals granted petitioner permission to file a *pro se* supplemental brief, and then denied as moot petitioner’s motions regarding ineffective counsel and withdrawal of Mr. Williams’ brief (R.614).

The trial court reconsidered its ruling regarding new counsel, and on October 13, 1995, directed the court administrator’s office to select defense counsel from the Salt Lake Area. The court of appeals stayed petitioner’s appeal pending the appointment of new counsel. On January 11, 1996, the trial court reinstated its August 31, 1995 order denying petitioner’s motion for substitution of counsel and rescinded its October 13, 1995 order appointing a lawyer from Salt Lake (R.614).

On March 20, 1996, in response to petitioner’s *pro se* motion for extension of time to file a supplemental brief, the court of appeals ordered that all future filings on petitioner’s behalf must be submitted by his appointed counsel, Mr. Williams. On April 1, 1996, Mr. Williams filed a new appellate brief raising the following issues in addition to the Rule 11 issues raised in the prior brief: (1) the charging information did not adequately inform petitioner of the nature of the charges because it did not specifically identify the victims; (2) petitioner’s ineffective trial counsel impaired petitioner’s ability to comprehend the plea proceeding in that counsel failed to request discovery or a bill of particulars, failed to explain to petitioner the elements of the offenses and the nature of the firearm enhancement, and did not assist the court in

establishing a factual basis for the plea; and (3) trial counsel failed to appeal immediately after sentencing (R.613) (Addendum C).

On October 3, 1996, the court of appeals issued a memorandum decision modifying petitioner's sentence and affirming the trial court's denial of petitioner's motion to withdraw his guilty pleas (R.612) (Addendum A). The court specifically addressed petitioner's claim that the trial court failed to inform him of the maximum additional sentence for the firearm enhancement, finding that the trial court incorrectly informed petitioner that the maximum sentence for the enhancement was one-to-five years. Accordingly, the court of appeals modified petitioner's sentence for the firearm enhancement to one-to-five years. *Id.* The court acknowledged that petitioner raised other arguments, but found them to be without merit and declined to address them individually. *Id.* at n. 1.

**The relationship between petitioner and appellate counsel.** The trial court in this case found that no conflict existed between petitioner and his appellate counsel, Alan Williams (R.736). The only possible evidence that Mr. Williams had time pressures that might interfere with his ability to represent petitioner was his acknowledgment that the trip from his home in Vernal to the prison at Gunnison was "somewhat burdensome." The court found that this evidence insufficient to support a finding that a conflict of interest existed. *Id.* Further, the court found that Mr. Williams effectively communicated with petitioner and responded to petitioner's

requests in a manner fully consistent with the standards of practice for criminal appellate attorneys. *Id.*

## **SUMMARY OF THE ARGUMENT**

**Point I.** Petitioner's claim of ineffective assistance of appellate counsel was properly denied by the trial court because petitioner did not have a constitutional right to counsel for purposes of appealing the trial court's denial of his motion to withdraw his guilty plea. When a motion to withdraw a guilty plea is filed after sentencing, the motion should be considered as a petition for post-conviction relief for purposes of determining whether a right to counsel exists, and there is no right to counsel for purposes of seeking post-conviction relief. Courts have consistently held that there is no constitutional right to counsel in seeking to withdraw a guilty plea after sentencing and when no evidentiary hearing is held. Since petitioner had no constitutional right to counsel in pursuing his motion to withdraw his plea, he cannot now make a claim that he was denied a constitutional right because his counsel was ineffective.

**Point II.** Petitioner's claim that his counsel had a conflict of interest fails because it is unsupported by the record and contradicted by the trial court's findings of fact. Petitioner does not challenge the trial court's findings, which are supported by the testimony in the record.

**Point III.** Petitioner has failed to show that his appellate counsel performed inadequately. Appellate counsel argued the most significant issues on appeal, and obtained a reduction in petitioner's sentence.

In addition, petitioner has failed to show that any of the issues he asserts were omitted by his counsel would have been successful. Petitioner has not shown that any alleged mistakes by his trial counsel occurred, or that these alleged errors affected his decision to plead guilty. Petitioner has not shown that there was a jurisdictional defect in the information. The record does not support petitioner's argument that the trial court failed to accurately describe the effect of the firearm enhancement at the plea hearing, or that there was no factual basis for his plea.

There is likewise no record to support petitioner's assertion that his counsel violated the rules of professional conduct, which do not require that criminal appellate counsel raise every issue identified by the client. Petitioner has also failed to articulate any proper grounds for seeking a rehearing from the court of appeals, and therefore has failed to show that counsel was inadequate for failure to file a rehearing petition.



## ARGUMENT

### POINT I

#### **PETITIONER HAD NO CONSTITUTIONAL RIGHT TO COUNSEL FOR HIS APPEAL FROM THE COURT'S DENIAL OF HIS MOTION TO WITHDRAW HIS GUILTY PLEA, AND THEREFORE HAS NO CONSTITUTIONAL CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL**

Petitioner claims that he was denied effective assistance of counsel on appeal from his motion to withdraw his guilty plea due to an alleged conflict of interest and failure to properly brief issues on appeal. Brief of Appellant, p.11. This claim fails because it is premised upon a false assumption: that he had a constitutional right to an attorney in appealing from the trial court's denial of his motion to withdraw his guilty plea. Unless petitioner had a constitutional right to counsel in appealing the court's denial of his motion to withdraw his plea, he cannot make a claim of ineffective assistance of counsel. *Wainright v. Torna*, 455 U.S. 586, 587-88 (1982) (in proceedings where no constitutional right to counsel exists, defendant had no claim denial of effective assistance of counsel); *see also Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (deficient performance of counsel in post-conviction review case does not excuse procedural default of claims since no right to counsel exists).

In fact, there is no constitutional right to counsel for purposes of a post-sentencing motion to withdraw a guilty plea. There is a constitutional right to representation by an attorney in only limited circumstances, such as a criminal trial and

a first appeal. *See Dunn v. Cook*, 791 P.2d 873, 877 (Utah 1990) (“The constitutionally guaranteed right to counsel encompasses the right to the effective assistance of counsel both at trial and on the first direct appeal of right”) (*citing Evitts v. Lucey*, 469 U.S. 387 (1985)); *See also Parsons v. Barnes*, 871 P.2d 516, 530 (Utah 1994) (no constitutional right to counsel for defendants seeking post-conviction relief); *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (right to counsel in parole revocation proceedings dependent upon nature of issues raised).

In contrast, courts have consistently held that there is no constitutional right to counsel for purposes of filing a motion to withdraw a guilty plea following sentencing and any initial appeal. For example, in *Dankert v. Wharton*, 733 F.2d 1537 (11<sup>th</sup> Cir. 1984), after a defendant had been sentenced in state court, he sought appointment of counsel in order to file a motion to withdraw his guilty plea. When this request was denied, he filed a habeas corpus petition in federal court claiming that he had been denied the assistance of counsel in pursuing his motion. On appeal from the district court’s denial of his petition, the court noted that “this court has long held that the state need not appoint counsel for indigent defendants in post-conviction and collateral proceedings.” The court then considered the nature of a post-sentencing motion to withdraw a plea, and held that “[b]y analogy to the cases holding that there is no right to counsel in post-conviction and collateral proceedings, we hold that Dankert had no

absolute right to counsel at the post-conviction, discretionary plea withdrawal proceeding.” *Id.* at 1538.

Similarly, in *State v. Watts*, 565 N.E.2d 1282 (Ohio App. 1989), a defendant sought to withdraw his plea several years after his sentencing. His motion for appointment of counsel was denied, and the appellate court affirmed this denial. The court held that there is no right to counsel for purposes of a post-sentencing motion to withdraw a plea, which is analogous to collateral attack or discretionary appeal. *Id.* at 1283. Accordingly, a long-delayed motion to withdraw a guilty plea such as the one filed by petitioner in this case, more than eight years after his sentencing, should be considered a post-conviction proceeding for purposes of determining whether a right to counsel exists.

Current Utah law governing motions to withdraw a plea strongly supports the *Dankert* court’s equating of a post-sentencing motion to withdraw a plea and a post-conviction petition for purposes of determining the existence of a right to counsel. Utah Code Ann. § 77-13-6 (1999) provides that a motion to withdraw a guilty plea must be made within 30 days.<sup>2</sup> Under this current rule, petitioner could only have

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<sup>2</sup> Since petitioner’s guilty plea was entered three years prior to the enactment of § 77-13-6 in 1989, defendant was not informed of the thirty day time limit. Failure to inform a defendant of the time limit may constitute grounds for extending the time limit to file a motion to withdraw, and the trial court’s ability to entertain petitioner’s motion was never challenged. See Utah R. Crim. P. 11(f); *State v. Price*, 837 P.2d 578, 582 (Utah App. 1992).

challenged his plea and conviction by filing a motion pursuant to Rule 65B, Utah Rules of Civil Procedure, providing for post-conviction motions for which no right to counsel exists. *See Bruner v. Carver*, 920 P.2d 1153, 1158 (Utah 1996) (“‘neither the Due Process Clause nor the equal protection guarantee of meaningful access requires a state to provide counsel for indigent defendants seeking post-conviction relief.’”) (*quoting Parsons v. Barnes*, 871 P.2d 516, 530 (Utah 1994)). *See also* Fed. R. Crim. P. 32(e) (providing that a motion to withdraw a plea may only be made prior to sentencing; after that, a defendant must file a post-conviction motion under 28 U.S.C. § 2255). Since petitioner could not have even filed his motion under current law, and would not have been entitled to appointment of counsel in filing a post-conviction proceeding raising the same issues, it cannot be said that his right to file this motion is so fundamental that appointment of counsel is constitutionally required. *See Pennsylvania v. Finley*, 481 U.S. 551, 555-57 (1987) (“States have no obligation to provide this avenue of relief, and when they do, the fundamental fairness mandated by the Due Process Clause does not require that the State supply a lawyer as well”).

Although some courts have found that there is a right to counsel for purposes of a motion to withdraw a guilty plea, such rulings have been expressly limited to those cases in which an evidentiary hearing is necessary for resolution of the motion, and the motion is filed prior to sentencing or prior to the time for filing a notice of appeal from the original conviction, such that the issues raised by the motion would be addressed in

that first appeal. *State v. Harell*, 911 P.2d 1034, 1035 (Wash. App. 1996) (right to counsel was triggered by trial court's unchallenged decision to hold a hearing on motion to withdraw plea); *Padgett v. State*, 743 So.2d 70, 73 (Fla. App. 1999) (right to counsel exists for motion to withdraw plea filed prior to time for appeal because, under state law, the plea withdrawal issues would be addressed during the direct appeal); *Berry v. State*, 630 So.2d 127, 129 (Ala. Crim. App. 1993) (defendant has a right to counsel at a hearing on his motion to withdraw a plea filed between sentencing and appeal: "if an indigent defendant is constitutionally entitled to the assistance of counsel at sentencing and in the first appeal as a matter of right, that defendant would be entitled to the assistance of counsel in the interim period, absent a waiver.") (*quoting King v. State*, 613 So.2d 888, 891 (Ala. Crim. App. 1993)).

Accordingly, since petitioner had no constitutional right to counsel for purposes of filing his motion to withdraw his guilty plea or his appeal from the trial court's denial of his motion, he has no grounds for asserting that his appellate counsel's allegedly defective performance deprived him of any constitutional right. *Wainwright v. Torna*, 455 U.S. at 587-88. The trial court's dismissal of this case should be affirmed on this basis alone.<sup>3</sup>

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<sup>3</sup> Although this argument was not asserted in the court below, the trial court's dismissal of the petition may be affirmed on any ground supported by the record. *See State v. South*, 924 P.2d 354, 357 (Utah 1996).

## POINT II

### **THE TRIAL COURT FOUND THAT NO CONFLICT OF INTEREST EXISTED BETWEEN PETITIONER AND HIS COUNSEL, AND PETITIONER DOES NOT CHALLENGE THIS FINDING OF FACT**

Assuming *arguendo* that petitioner had a constitutional right to representation of counsel on appeal from the denial of his motion to withdraw his plea, he would have had the right to representation by conflict-free counsel. *State v. Lovell*, 984 P.2d 382 (Utah 1999). Defendant claims that his appellate attorney, Alan Williams, had a conflict of interest which deprived him of his right to counsel. Brief of Appellant, pp.12-19. In order to show this right was violated, petitioner “must establish both that [Williams] had an actual conflict of interest, and that the conflict adversely affected [Williams’] performance. To establish an actual conflict of interest, [petitioner] must show that [Williams] had to make choices that would advance his own interests to the detriment of [petitioner’s].” *Id.* at 387 (citing *State v. Taylor*, 947 P.2d 681, 686 (Utah 1997)).

Petitioner claims that his attorney had a conflict of interest based upon *State v. Taylor*, 947 P.2d at 687. In *Taylor*, the Supreme Court considered a defendant’s claim that a conflict of interest existed because his attorney’s financial interests conflicted with the attorney’s ability to represent him. *Id.* Denying the claim, the Court held that “Taylor did not introduce any evidence regarding other demands on [his attorney’s]

time or point to inadequacies in the time spent on this case. Without this information, we must accept the lower court's assessment that [the attorney's] income and resources did not affect his strategy and efforts in this case." *Id.*

In this case, the trial court denied petitioner's claim that Williams had a conflict of interest due to time or financial conflicts, finding that petitioner failed to meet his burden of showing the existence of a conflict. "The Court has not been able to deduce from the transcript or any testimony contained therein any apparent conflict of interest. The only suggestion that there was a conflict would be Mr. Williams' statement that the trip from Vernal to Gunnison was extremely long and somewhat burdensome." (R.736).

Petitioner did not file a supplemental brief following entry of the trial court's findings, and therefore has not challenged this factual finding. Instead, petitioner relies upon a variety of factual assertions contained in his opening brief which have no citations to the record, and which are entirely speculative. *See* Brief of Appellant, pp. 12-19. These factual assertions are generally to the effect that Williams was unwilling to spend more than a small amount of time on petitioner's case because he was not adequately compensated for his work on the case, and made a much higher hourly rate for his work for other clients, causing him to neglect petitioner's appeal for monetary reasons. Petitioner asserts that Williams was forced to make a financial decision,

“advancing his own best interests” to the detriment of petitioner. Brief of Appellant, pp. 18-19.

However, these factual assertions are not only made without any citations to the record, they are contradicted by the only testimony on the issue.<sup>4</sup> During Mr. Williams’ testimony, there was only one exchange regarding his compensation and the time he spent on petitioner’s appeal:

Q [by petitioner’s counsel]  
And do you feel that your monetary compensation, contract with the county, and your time constraints in any way limited your representation of Mr. Tippett?

A No.

Transcript of Hearing, p. 91 (R.636).<sup>5</sup> Petitioner has failed to present any evidence whatsoever that Williams’ financial interests or time demands created a conflict of interest. There is no evidence in the record as to the amount Williams was paid for his

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<sup>4</sup> Petitioner testified to his belief that Mr. Williams had a conflict, but based this belief on the fact that Williams told him he was busy. Transcript of hearing, p.39 (R.689). Petitioner did not offer any further evidence to support his conclusion that a conflict existed, and the trial court correctly relied upon the un rebutted testimony of Mr. Williams on this issue (R.636). *See also Id.*, p. 54 (R.674) (petitioner testified that “it’s hard to prove a conflict of interest because he knows what went on in his own mind. I would have a hard time proving it. I am more, arguing more that he was generally ineffective than anything.”)

<sup>5</sup> Petitioner’s counsel went on to ask Williams whether he ever told petitioner that the long trip from his home in Vernal to the prison in Gunnison prevented him from spending adequate time on the case. Williams responded that he only told petitioner that the distance to the prison would prevent him from visiting petitioner “frequently or often.” (R.636-37).



work on petitioner's case, what percentage of his income was generated by this case, how his compensation for petitioner's case compares to his compensation for other work, or the amount of time he spent on petitioner's case.

Williams denied that his compensation had any effect on his representation, and the trial court's finding that there was no conflict of interest is fully supported by the record.<sup>6</sup>

### **POINT III**

#### **PETITIONER'S APPELLATE COUNSEL ADEQUATELY RAISED ALL APPROPRIATE ISSUES ON APPEAL**

Again assuming *arguendo* that petitioner had a constitutional right to representation of counsel on appeal from the denial of his motion to withdraw his plea, he would have had the right to effective assistance of counsel as a matter of due process. *Bruner v. Carver*, 920 P.2d 1153, 1157 (Utah 1996). "The standard for judging ineffective assistance of appellate counsel is the same as the standard for judging ineffective assistance of trial counsel. Under that standard, a defendant must show that his counsel's representation fell below an objective standard of reasonable

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<sup>6</sup> Petitioner re-argues this same point at pp. 45-47 of his brief, asserting that the trial court erred in re-appointing Williams to represent him on appeal. "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." *Id.* However, as discussed above, the court found that, in fact, no conflict existed.

conduct and that the deficient performance prejudiced the defendant.” *Id.* at 1153 (citations omitted).

The standard for determining whether appellate counsel has performed adequately was recently addressed by the Tenth Circuit in *Boyd v. Ward*, 179 F.3d 904 (10<sup>th</sup> Cir. 1999):

When appellate counsel is alleged to be ineffective, we review with great deference counsel's decision to omit an issue on appeal, **and reverse only if counsel fails to argue a “dead-bang winner.”** The Sixth Amendment does not “require an attorney to raise every nonfrivolous issue on appeal.” Because the alleged deficiencies on appeal relate to trial counsel's conduct, we review the claims of ineffective assistance of appellate counsel on their merits, along with the claims of ineffective assistance of trial counsel. Thus, counsel frequently will “winnow out” weaker claims in order to focus effectively on those more likely to prevail.

*Id.*, 179 F.3d at 914 (citations omitted) (emphasis added) (*quoting United States v. Cook*, 45 F.3d 388, 394 (10<sup>th</sup> Cir. 1995)). The Tenth Circuit has defined the phrase ‘dead bang winner’ as “an issue which is obvious from the trial record and one which probably would have resulted in a reversal on appeal.” *Banks v. Reynolds*, 54 F.3d 1508, 1515 n.13 (10<sup>th</sup> Cir. 1995).

In this case, petitioner’s attorney effectively argued that petitioner was not properly informed of his possible sentence at the plea hearing, and was successful in obtaining a reduction in petitioner’s sentence. *See* Memorandum Decision (Addendum A). Petitioner asserts that counsel should have raised a number of other issues in the appeal, but part of appellate counsel’s task is to choose from among possible issues so

as not to distract the court from the most compelling arguments. *Butterfield v. Cook*, 817 P.2d 333, 336 (Utah App. 1991) (“‘a brief that raises every colorable issue runs the risk of burying good arguments’ . . . ‘Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible or at most on a few key issues.’”) (quoting *Jones v. Barnes*, 463 U.S. 745, 752 (1983) (“There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review.”)). *See also Smith v. Murray*, 477 U.S. 527, 535-36 (1986) (tactical decision of appellate counsel not to raise an issue, even one later shown to have been viable, did not constitute ineffective assistance).

In any event, petitioner has not identified any viable appeal issue not raised by his prior appellate counsel, let alone a ‘dead-bang winner.’ Petitioner identifies the following as issues that should have been raised by his Mr. Williams in his appeal:

**A. Ineffective assistance of trial counsel.** Although Mr. Williams’ brief raised the issue of trial counsel’s ineffectiveness, petitioner now maintains that this issue was inadequately briefed.

Specifically, petitioner asserts that Mr. Williams should have more clearly argued the following alleged errors by trial counsel: (1) counsel waived the formal reading of the information; (2) counsel did not object to the information for failure to

include victim names; (3) counsel did not assist the trial court in finding a factual basis for the plea; (4) counsel did not object to the inaccurate description of the sentence imposed for the firearm enhancement; and (5) counsel provided false information to petitioner regarding the possibility that petitioner would be sent back to South Carolina to serve his sentence.

Petitioner acknowledges that Mr. Williams raised the issue of the effectiveness of his trial counsel in the brief, and asserts only that the discussion of these issues was insufficient. Brief of Appellant, p. 21. However, in its ruling, this Court did not state that it was refusing to consider any issue because of inadequate briefing; rather, the ruling states that the Court found the arguments to be without merit. Memorandum Decision, p.1 n.1 (Addendum A).

Nevertheless, even assuming *arguendo* that the court of appeals did not properly consider the issues because they were inadequately briefed, petitioner would not have been able to show (and has still not shown) any prejudice.

First, petitioner has failed to show that the alleged omissions of his trial counsel constituted deficient performance. Petitioner does not cite to any law for the proposition that defense counsel's routine waiver of the reading of the information is improper, that defense counsel has a duty to require that victim's names are included in the information, or that defense counsel must ensure that the trial court finds a factual basis for the plea. There is also no evidence in the record regarding any advice given

by petitioner's trial counsel as to the likelihood that petitioner would be sent to South Carolina to serve his sentence, or the accuracy of any information given him on this issue.

In addition, even if these alleged acts were found to have occurred and to be constitutionally deficient, petitioner has not asserted any prejudice resulting from them. "Where a defendant challenges a guilty plea on grounds of ineffective assistance of counsel, he or she must show 'a reasonable probability that, but for counsel's errors, he [or she] would not have pleaded guilty and would have insisted on going to trial.'" *Parsons v. Barnes*, 871 P.2d 516 (Utah 1994) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

Petitioner has not cited to any evidence to support the conclusion that these issues would have changed his decision to plead guilty. Petitioner asserts in his brief that his "main motivation" for entering a guilty plea was his belief that he would be returned to South Carolina to serve his sentence. Brief of Appellant, p. 29. However, this assertion is made without any citation to the record, and no such evidence was offered to the trial court at the evidentiary hearing.

**B. Jurisdictional defect in charging document.** Petitioner argues that Mr. Williams failed to argue that the information was insufficient to provide jurisdiction. The adequacy of the information was briefed by Mr. Williams, and the argument was found to be without merit by the court. *See* April 1, 1996 Brief of Appellant, p.8

(Addendum C). Mr. Williams argued that the information was deficient for failure to identify any victim, and that petitioner therefore did not have adequate notice of the charges. *Id.*

Petitioner claims that Mr. Williams changed the substance of the argument petitioner told him to assert, arguing that this issue should have been briefed as a lack of jurisdiction rather than as a lack of notice. However, as Mr. Williams testified, his characterization of the issue was a reasonable strategy decision. Mr. Williams felt that since petitioner had clearly been misinformed of the possible length of his sentence, the best argument on appeal was for withdrawal of the plea. Mr. Williams concluded that it would be best to present the issue of the adequacy of the information as part of his challenge to the plea, further strengthening that argument by asserting that petitioner's plea was involuntary because he was not fully informed of the nature of the charges in addition to the possible sentence. (R.658-59).

In considering a claim that counsel was deficient, counsel is given wide latitude in making tactical decisions and a reviewing court should not question such decisions unless there is no reasonable basis for them. *State v. Crosby*, 927 P.2d 638, 644 (Utah 1996) (*citing Taylor v. Warden*, 905 P.2d 277, 282 (Utah 1995)); *State v. Bryant*, 965 P.2d 539, 542 (Utah App. 1998) ("we must be persuaded that there was a 'lack of any conceivable tactical basis for counsel's actions'") (*quoting State v. Moritzsky*, 771 P.2d

688, 692 (Utah App. 1989)). Accordingly, counsel's treatment of the adequacy of the information issue should be considered a reasonable tactical decision.

In any event, the jurisdictional argument based upon alleged deficiencies in the information lacks merit. Petitioner asserts that Utah law requires that an information identify victims by name in order to invoke the court's jurisdiction, citing *State v. Topham*, 123 P.2d 388 (Utah 1912) and *State v. Wilson*, 143 P.2d 907 (Utah 1943). To the extent that these cases support petitioner's jurisdictional argument, they are no longer valid law. *Wilson* held that failure to state the name of a victim (if known) is a fatal defect to a charging document, but this ruling was based upon a statute, Utah Code Ann. § 105-11-1 (1943), which required that a victim be named. However, this statute had been repealed at the time of petitioner's charge. Utah Code Ann. § 77-11-1 (1953), *repealed by* 1980 Utah Laws ch. 15, § 1; *compare* Utah Code Ann. § 77-35-4 (1982), *enacted by* 1980 Utah Laws ch.14, § 1 (current code of criminal procedure). *See also Briggs v. Wilcox*, 404 P.2d 752, 755 (Wyo. 1965) (noting that *Wilson* is based entirely upon Utah's statutory requirement that a victim be identified). At the time of petitioner's guilty plea, and currently, Utah law does not require that an information contain a victim's name in order to state an offense. Rule 4, Utah Rules of Criminal Procedure, states the requirements for an information, and provides that:

An indictment or information shall charge the offense for which the defendant is being prosecuted by using the name given to the offense by

common law or by statute or by stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge.

Utah R. Crim. P. 4(b). There is thus no jurisdictional requirement that the information state the name of the victim. *See State v. Bell*, 770 P.2d 100, 104-05 (Utah 1988) (indictment sufficient even though it merely repeated verbatim the broad, vague language of the statute: “an information or indictment is legally sufficient even if it consists of nothing more than an extremely summary statement of the charge that would not provide the accused with sufficient particulars to prepare an adequate defense”); *State v. Preece*, 971 P.2d 1, 5 (Utah App. 1998) (“What the defendant is entitled to is an information which sufficiently informs him to enable him to understand the charge against him and to prepare a defense. If it fulfills that requirement, it is sufficient. It need not serve the purpose of discovery . . . .”) (*quoting State v. Snyder*, 932 P.2d 120, 127 (Utah Ct. App. 1997)). Accordingly, the information was sufficient to state an offense, and petitioner’s appellate counsel was not ineffective for failing to challenge the information on a jurisdictional basis.

**C. Failure to advise of consecutive nature of firearm enhancement.**

Petitioner asserts that Mr. Williams failed to raise the issue of whether the trial court adequately informed him at the time of his guilty plea that the firearm enhancement would be imposed consecutively to his sentence for aggravated kidnaping. Brief of



Appellant, p. 34. There is no record support for this argument, and Mr. Williams was not ineffective in not arguing it on appeal.

At the change of plea hearing, the trial court properly informed petitioner of his possible sentence, including the nature of the firearm enhancement:

THE COURT: You understand that being a first degree felony carries with it a sentence of five years to life in the Utah State Prison?

DEFENDANT: Yes, sir.

THE COURT: It also carries with it a **firearm enhancement penalty** of not less than one or up to five years **on top of that**. Do you understand that?

DEFENDANT: Yes, sir.

Transcript of plea hearing, p. 7 (R.341) (emphasis added). Petitioner asserts that the phrase “on top of” is somehow ambiguous, but does not explain how a firearm “enhancement” imposed “on top of” his other sentence could be anything but consecutive. As the Court of Appeals noted, “[d]uring the taking of the plea, the trial court informed defendant that a one to five year firearm enhancement was possible in addition to the sentence for the underlying aggravated kidnaping charge.”

Memorandum Decision, p. 2. (Addendum A)

Petitioner also claims that the trial court did not adequately explain the indeterminate nature of the sentence. Brief of Appellant, p. 33. However, in accepting a guilty plea, the trial court is only required to inform a defendant of the maximum sentence possible and the effect of any minimum mandatory sentences applicable.

There is no requirement that the trial court explain the nature and practical effect of an indeterminate sentence under Utah law. See Utah R. Crim. P. 11(e)(5). In addition, petitioner does not cite to the record in support of his assertion that he did not, in fact, understand Utah's indeterminate sentencing, and no evidence was offered on this point.

**D. Failure to establish a factual basis for plea.** Petitioner asserts that Mr. Williams was ineffective for failing to argue that the trial court erred in accepting his guilty plea without making an explicit finding of a factual basis for the plea. Brief of Appellant, p. 35. However, petitioner did not make this argument in his motion to withdraw his plea, and Mr. Williams was therefore not ineffective for failing to raise it on appeal from the denial of that motion. See *State v. Amoroso*, 975 P.2d 505, 507 (Utah App. 1999) (“As a general rule, appellate courts will not consider an issue raised for the first time on appeal.”). Petitioner’s Motion to Withdraw Guilty Plea was not made part of the record in this case. It is attached as Addendum F to the state’s brief in petitioner’s prior appeal, Case No. 950280-CA. In a footnote in petitioner’s motion to withdraw his guilty plea, petitioner alludes to the issue of whether there was “insufficient evidence to support the guilty plea,” but explicitly states that he is not raising this claim in support of the motion, subject to a possible amendment which was never sought. Memorandum in Support of Motion to Withdraw Guilty Plea, p. 4, n. 5.

Further, petitioner’s argument is based upon an unsupported, unargued assumption regarding the record in the underlying criminal case. Petitioner asserts that

no factual basis for the plea exists, without any citation to the record, based solely on the transcript of the change of plea hearing. Brief of Appellant, p. 35. However, when determining whether there is a factual basis for a plea, the court must review the entire record of the case to determine if a factual basis can be found, regardless of whether that evidence was examined by the trial court during the plea hearing. In *State v. Stilling*, 856 P.2d 666, 674 (Utah App. 1993), the court held that although a factual basis for the plea must be found in the record, that record includes the entire record before the court.

The record we examine to determine the presence of a factual basis for Stilling's plea consists of the entire record before us on appeal, which includes all portions of the trial court record certified on appeal. Although Stilling has argued that the record as a whole should be limited to the plea hearing proceedings, we include in our review other portions of the trial court record and the affidavit of Stilling's trial counsel.

*Id.* at 674.<sup>7</sup> Likewise, in *State v. Willett*, 842 P.2d 860 (Utah 1992), the trial court failed to address the existence of a factual basis at the plea hearing, and the supreme court found nothing in the record of the plea hearing to support a finding that a factual basis existed for the plea. *Id.* at 861. However, in order to consider whether a factual basis did, in fact, exist, the court took judicial notice of a partial preliminary hearing transcript. Although the court found that the partial transcript available to it did not

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<sup>7</sup> As was the case in *Stilling*, at the time of petitioner's plea, Rule 11, Utah Rules of Criminal Procedure, did not require that the trial court find a factual basis for the plea at the plea hearing itself. *See Id.*, 856 P.2d at 673 n. 6.

provide sufficient evidence of an adequate factual basis, it remanded the case to the trial court “to permit the State an opportunity to produce a proper transcript of the preliminary hearing or to otherwise prove what occurred there.” *Willett*, 842 P.2d at 863.

Petitioner asserts on appeal, without reference to the record, that there is no factual basis in that record, but failed to offer any proof of this assertion to the trial court in this case. The entire underlying criminal trial record must be reviewed to determine the existence of a factual basis, and that record was never submitted to the trial court in this case. Thus, although petitioner’s brief alleges that the criminal trial record does not contain a factual basis, only a portion of that record– the change of plea hearing–was admitted below or included in the record on appeal. *See State v. Penman*, 964 P.2d 1157, 1162 (Utah App. 1998) (“‘When a defendant predicates error to [an appellate court], he has the duty and responsibility of supporting such allegation by an adequate record.’”) (*quoting State v. Wulffenstein*, 657 P.2d 289, 293 (Utah 1982))

Accordingly, there is no basis for petitioner’s claim that Mr. Williams was ineffective in failing to argue this issue in the original appeal: petitioner did not himself raise it in his motion, the denial of which was the subject of the appeal, and the record in this case does not support petitioner’s claim that a factual basis did not exist anywhere in the criminal trial record.

**E. Failure to comply with the Rules of Professional Conduct.** Petitioner argues that Mr. Williams was ineffective because he violated Rules 1.2 and 1.4, Utah Rules of Professional Conduct. Brief of Appellant, pp. 36-41.

With regard to Rule 1.2, Scope of Representation, petitioner asserts that Mr. Williams omitted or changed the nature of several arguments without petitioner's permission. Brief of Appellant, p.37. However, petitioner's quotation of the rule in his brief omits with ellipses the operative language for representation of a criminal defendant:

Rule 1.2. Scope of representation.

(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 to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. **In a criminal case, a lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.**

Utah Rules of Professional Conduct 1.2 (emphasis added). Thus, in a criminal case, counsel is only obligated to abide by his client's decisions on specified matters, which do not include the choice of issues to present on appeal. It is well established that an attorney in a criminal case retains the ability to choose which arguments to pursue on appeal, even over the objections of his client. *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (defendant does not have the right to compel appointed counsel to make even non-frivolous arguments "if counsel, as a matter of professional judgment, decides not

to present those points”). Accordingly, the issue is not whether Mr. Williams made or did not make arguments contrary to petitioner’s wishes; rather, the court must determine whether Williams’ performance was adequate under constitutional standards. *Butterfield*, 817 P.2d at 337.

Petitioner also cites to Rule 1.4, Utah Rules of Professional Conduct, which requires that a lawyer keep his client informed about the status of the case and allow the client to make reasonably informed decisions. Petitioner asserts that Mr. Williams violated this rule, but does not cite to the record for any facts to support this argument. Brief of Appellant, p. 39. In addition, the trial court explicitly rejected this allegation, finding that “Mr. Williams effectively communicated and in fact adequately complied with Tippet’s request for communication to the extent that would be required of Counsel generally practicing in the area of Criminal Appeals and within the standard of practice recognized as effective.” (R.736). This finding of fact is not challenged on appeal.

**F. Failure to petition for rehearing.** Petitioner asserts that Mr. Williams was ineffective in failing to seek a rehearing following the court of appeal’s decision. Petitioner argues that rehearing was appropriate because in finding that the trial court failed to accurately describe the possible length of the sentencing enhancement, the court of appeals erred in failing to also find that petitioner was not informed of the fact that the enhancement would be consecutive to his kidnaping sentence. Brief of


Appellant, p.42. However, as petitioner has pointed out, Mr. Williams did not make this argument to the court of appeals in the first place, so there would not have been any basis for a rehearing request. *See* Utah R. App. P. 35 (“The petition shall state with particularity the points of law or fact which the petitioner claims the court has overlooked or misapprehended . . .”). In any event, this argument is without merit. *See supra*, Point III.C.<sup>8</sup>

### CONCLUSION

For the reasons stated, the trial court’s denial of this petition should be affirmed.

RESPECTFULLY SUBMITTED this 19 day of January, 2000.

JAN GRAHAM  
Attorney General



SCOTT KEITH WILSON  
Assistant Attorney General

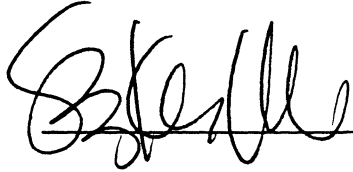
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<sup>8</sup> Petitioner argues that the trial court erred in failing to enter findings of fact pursuant to Rule 23B, Utah Rules of Appellate Procedure. Brief of Appellant, pp. 11, 47-48. However, this case was not remanded for a hearing under Rule 23B, which applies only to direct criminal appeals, and not to this civil post-conviction proceeding. Utah R. App. P. 23B(a) (“A party to an appeal in a criminal case may move the court to remand the case to the trial court for entry of findings of fact, necessary for the appellate court’s determination of a claim of ineffective assistance of counsel.”). In any event, after petitioner’s brief was filed, this matter was remanded to the trial court for entry of findings. *See* September 14, 1999 Order Granting Motion to Remand and to Stay Briefing; Ruling (R.735).

## MAILING CERTIFICATE

I hereby certify that two copies of the foregoing Brief of Appellee were mailed  
by first class mail this 19 January 2000 to the following:

JULIE GEORGE  
321 South 600 East  
Salt Lake City, UT 84102



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## **ADDENDA**

## **Addendum A**

FILED

OCT 03 1996

DEFEAS

IN THE UTAH COURT OF APPEALS

COURT OF APPEALS

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State of Utah,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	
v.	)	Case No. 950280-CA
	)	
Wayne S. Tippet,	)	
	)	F I L E D
Defendant and Appellant.	)	(October 3, 1996)

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Eighth District, Vernal Department  
The Honorable John R. Andersen

Attorneys: Alan M. Williams, Vernal, for Appellant  
Kris Leonard, Salt Lake City, for Appellee

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Before Judges Orme, Davis, and Greenwood.

ORME, Presiding Judge:

Defendant's main contention on appeal is that the trial court violated Utah R. Crim. P. 11(e) by failing to inform him, before he entered his guilty plea, of the maximum additional sentence that could be imposed upon him by reason of the firearm enhancement.<sup>1</sup>

In State v. Gibbons, 740 P.2d 1309, 1312-14 (Utah 1987), our Supreme Court held that strict compliance with the constitutional and procedural requirements for the taking of a guilty plea was required before such a plea could be taken. However, pleas taken before Gibbons<sup>2</sup> are upheld so long as the record as a whole demonstrates "substantial compliance" with Rule 11 of the Utah

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1. Although defendant raises additional arguments, they are without merit and we decline to address them further. See, e.g., State v. Carter, 776 P.2d 886, 888 (Utah 1989) ("[T]his Court need not analyze and address in writing each and every argument, issue, or claim raised and properly before us on appeal.").

2. Gibbons was a clear break with the Supreme Court's rulings in previous cases dealing with the validity of guilty pleas and, therefore, is not applied retroactively. State v. Hoff, 814 P.2d 1119, 1123 (Utah 1991).

Rules of Criminal Procedure and the Constitution. Willett v. Barnes, 842 P.2d 860, 861 (Utah 1992); State v. Hoff, 814 P.2d 1119, 1123-24 (Utah 1991). In this case, defendant's plea was taken prior to the Supreme Court's opinion in Gibbons and, therefore, must be evaluated under the substantial compliance test.

Utah R. Crim. P. 11(e) provides, in pertinent part, as follows:

(e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

. . .

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

During the taking of the plea, the trial court informed defendant that a one to five year firearm enhancement was possible in addition to the sentence for the underlying aggravated kidnaping charge. Defendant then entered his plea of guilty. However, at defendant's sentencing, following the receipt of a presentence report indicating five prior convictions for armed robbery, the court enhanced defendant's minimum mandatory term of fifteen years to life with a consecutive term of five to ten years for his use of a firearm.<sup>3</sup> Because the trial court failed to inform defendant of the maximum sentence that could have been imposed upon him by reason of the firearm enhancement, the trial court was not in substantial compliance with Utah R. Crim. P. 11 on this point.

Nonetheless, it is not necessary that defendant be allowed to withdraw his guilty plea since the problem is limited to the

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3. Of course, at the time the plea was taken, the trial court did not know of the additional convictions. Nonetheless, the point could have been adequately covered by explaining the enhancement scheme to defendant and emphasizing that the enhancement to be ultimately imposed would depend on the number and nature of his prior convictions, but could be as much as ten years. See Utah Code Ann. § 76-3-203(1) (Supp. 1996).

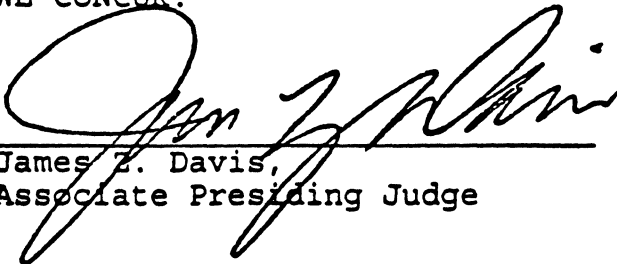
firearm enhancement. At the invitation of the State, we modify defendant's sentence by reducing the firearm enhancement to that which had been explained to him, namely, not less than one year nor more than five years. See State v. Dunn, 850 P.2d 1201, 1211 (Utah 1993) (holding that appellate courts have the authority to modify criminal judgments on appeal). The order appealed from is otherwise affirmed.



\_\_\_\_\_  
Gregory K. Orme,  
Presiding Judge

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WE CONCUR:



\_\_\_\_\_  
James Z. Davis,  
Associate Presiding Judge



\_\_\_\_\_  
Pamela T. Greenwood, Judge

## **Addendum B**

SEP 21 1999

**FILED**

SEP 24 1999

IN THE EIGHTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

COURT OF APPEALS

990778.CA

WAYNE S. TIPPETT,

)

Petitioner,

)

R U L I N G

vs.

)

Case No: 970800314

FRED VANDERVEUR,

)

Respondent,

)

This matter is again before the Court on Remand for the entry on Findings of Fact and Conclusions of Law in Support of the Court's February 8, 1999 denial of Appellant's Petition for Post-Conviction Relief.

The Court has carefully reviewed the transcript of the proceedings and will note that at the conclusion of the hearing on September 23<sup>rd</sup>, 1998 the Court requested Counsel to file Summary Memoranda giving their respective versions of what the evidence showed and the appropriate law. The Court has carefully reviewed the respective Memoranda and at the time of it's prior ruling simply intended to incorporate by reference the view of the record and the facts as set forth in the Respondent's Memorandum.

The Court upon remand will now enter it's own Findings of Fact:

1. It would appear from the record that Counsel Williams visited with the Plaintiff and Appellant, Mr. Tippet at the Gunnison Prison on two occasions.
2. That although relations became somewhat strained they were later ironed out by the testimony in the record.
3. That Attorney Williams and Defendant Tippet corresponded regularly and Williams included salient points in the brief before the Court pursuant to his own determination of what would be effective and also in a second brief the sub-issues requested by Mr. Tippet.
4. The Court has not been able to deduce from the transcript or any

- testimony contained therein any apparent conflict of interest. The only suggestion that there was a conflict would be Mr. Williams statement that the trip from Vernal to Gunnison was extremely long and somewhat burdensome.
5. The Court has no additional evidence in the record to determine an actual conflict or that the conflict existed and the burden would be on Tippet to demonstrate a conflict.
  6. The Court finds by preponderance of the evidence in the record that Mr. Williams effectively communicated and in fact adequately complied with Tippet's request for communication to the extent that would be required of Counsel generally practicing in the area of Criminal Appeals and within the standard of practice recognized as effective.
  7. After reviewing the trial record Attorney Williams briefed every issue he determined viable. In addition to the specific findings made and entered by the Court, the Court will incorporate the factual basis and references to the transcript found in the State's Memoranda and support the argument that Tippetts was given and Williams offered effective assistance. The State's Memoranda is incorporated by reference in it's entirety.

From the forgoing Findings of Fact the Court now makes and enters the following Conclusions of Law.

1. From the facts adduced in the record the Petitioner has failed to carry the burden by preponderance of the evidence that Williams acts or omissions fell outside the range of professionally competent assistance and that William's deficient performance, if any, prejudiced the outcome of the proceeding. The Trial Court will exercise it's sound discretion in leaving the lawyer on board even where the defendant voices some dissatisfaction with Court appointed Counsel where there are no facts in the record to establish that the animosity between Tippetts and Williams resulted in such a deterioration of the attorney client relationship that the right to the effective assistance of counsel was imperiled or that there was a complete breakdown in communication.

This Court will conclude that Petitioner's Request for Post-Conviction Relief will be denied and the Petition will be Dismissed with Prejudice.

Dated this 22 day of September, 1999.

  
\_\_\_\_\_  
Judge John R. Anderson



CERTIFICATE OF MAILING/HAND DELIVERY

I hereby certify that I mailed a copy of the foregoing, postage prepaid, or hand delivered to the following parties on the 22 day of September, 1999.

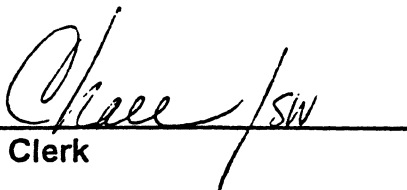
By Hand: JOANN STRINGHAM  
ATTORNEY AT LAW

By Hand: ALAN WILLIAMS  
ATTORNEY AT LAW

By Mail: UTAH COURT OF APPEALS  
PO BOX 140230  
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Clerk

## **Addendum C**

IN THE UTAH COURT OF APPEALS

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STATE OF UTAH,

Plaintiff/Appellee

vs.

WAYNE S. TIPPETT,

Defendant/Appellant.

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BRIEF OF APPELLANT

CASE NO. 95-0280

Priority No. 2

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BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

This court has jurisdiction over this appeal pursuant to Utah Code Section 78-2-3 (i).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Did the trial court abuse its discretion in denying Appellant's Motion to Withdraw Guilty Plea?

The Court should review this case using an "abuse of discretion" standard, State vs. Mildenhall, 787 P. 2d 744, (Utah, 1987).

DETERMINATIVE STATUTORY PROVISIONS

This case is governed in part by Rule 11(e), Utah Rules of Criminal Procedure, which was at the time of the plea codified as Title 77, Chapter 35, Section 11(e), Utah Code Annotated.

## STATEMENT OF THE CASE

## A. NATURE OF THE CASE

This is an appeal of the Eighth District Court's denial of a Motion to Withdraw Guilty Plea submitted by the defendant/appellant on the 9th day of June, 1994. The motion was denied by two separate rulings; one dated June 29, 1994 and a supplementary ruling dated July 12, 1994.

## B. COURSE OF THE PROCEEDINGS AND DISPOSITION BELOW

The Defendant/Appellant was charged in the Eighth District Court for Uintah County, State of Utah on the 18th of February, 1986 with two counts of Aggravated Kidnapping in violation of Section 76-5-302 Utah Code Annotated. Each count also provided a Firearms Enhancement Provision pursuant to Section 76-3-203 Utah Code. On February 26, 1986 the Defendant/Appellant plead guilty to Count One of the Information. Count Two of the information was dismissed. The record does not reveal that any affidavit was used to assist the court in an explanation of Defendant/Appellant's Rule 11(e) rights at the time of plea. After a colloquy with the Honorable Richard Davidson, the court accepted the guilty plea. The matter came before the court for sentencing on the 26th day of March, 1986, the Honorable Boyd Bunnell presiding. The Defendant/Appellant was sentenced to a minimum mandatory sentence at the Utah State Prison of 15 years to life with a firearm enhancement requiring an additional 5 to 10 years to be served consecutively

with the 15 years to life sentence. On May 20, 1987 at the request of the Chairman of the Board of Pardons, the court reviewed the Defendant/Appellant's sentence. The court, the Honorable Dennis Draney presiding, re-affirmed the sentence originally imposed. On June 9, 1994, Defendant filed a Motion to Withdraw Guilty Plea before the Eighth District Court. The plea was defective in that the elements of the offense were not explained to Defendant/Appellant. It was further defective in that the trial court did not give the Defendant/Appellant the proper maximum punishment, nor explain the nature of the Utah indeterminate sentencing. Counsel for the Defendant/Appellant's performance was inadequate in that he did not explain any of the required Pre-requisites to a valid plea. The information was defective in that it did not adequately identify any victim of the alleged crime. Counsel's performance was also deficient in that he also did pursue any information to cure the defective information. All the prior judges having retired, resigned, or being deceased, the case was re-assigned to the Honorable John R. Anderson. Judge Anderson issued a summary ruling to the motion to dismiss, the State having given no response to the motion. That ruling, dated June 29, 1994 denied all aspects of Defendant's Motion to Withdraw Guilty Plea excepting for a response by the State the issue of an inadequate explanation of the firearms enhancement. After considering the State's response, on July 12, 1994 and giving the Defendant no opportunity to

consider the State's response, Judge Anderson issued a ruling denying the Defendant's Motion to Withdraw Guilty Plea in its entirety stating that the court had substantially complied with the requirements of Rule 11(e).

#### SUMMARY OF ARGUMENT

The trial court's denial of the Motion to Withdraw Guilty Plea is in error. The court made no findings that the appellant waived his right to self incrimination. The court made no findings that the appellant understood the nature and elements of the crime and that his plea admitted each and every element. The court incorrectly advised the defendant as to the maximum sentence which could be imposed. The information was deficient in that it did not advise the Defendant/Appellant of the identity of the victims. Defendant/Appellant was deprived of key elements of effective of counsel in that no discovery was requested, discussed with Defendant/Appellant, nor were there any attempts to explain the sentencing, or cure the defective information.

#### ARGUMENT

##### POINT I

THE COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION TO WITHDRAW GUILTY PLEA BECAUSE IT FAILED TO COMPLY WITH RULE 11(e) OF THE RULES OF CRIMINAL PROCEDURE.

Rule 11(e) of the Utah Rules of Criminal Procedure in effect at the time appellant made his guilty plea as codified in 77-35-11(e) provided as follows:

The court . . . shall not accept a (plea of guilty) until the

court has made the findings:

- (1) That if the defendant is not represented by counsel he has knowingly waived his right to counsel and does not desire counsel;
- (2) That the plea is voluntarily made;
- (3) That the defendant knows he has rights against compulsory self-incrimination, to a jury trial and to confront and cross-examine in open court the witnesses against him, and that by entering the plea he waives all of those rights;
- (4) That the defendant understands the nature and elements of the offense to which he is entering the plea; that upon trial the prosecution would have the burden of proving each of those elements beyond a reasonable doubt; and that the plea is an admission of all those elements;
- (5) That the defendant knows the minimum and maximum sentence that may be imposed upon him for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences; and
- (6) Whether the tendered plea is a result of a prior plea discussion and plea agreement and if so, what agreement has been reached.

The record of the entry of pleas is very limited. From the record, it appears that no plea affidavit was used, therefore the court can only determine the trial court's compliance with rule 11(e) based on the oral representations made in open court.

That record is bereft of any discussion with the appellant on several critical points included in the rule. There is no discussion whatsoever with the appellant concerning his right against compulsory self incrimination as required by subsection (3) of the rule. There is no discussion of the nature and elements of the offense of aggravated kidnapping with a firearms enhancement as required by Subsection 4 of the rule. There is no discussion

or record that the guilty plea was an admission to each of the elements of the alleged crime as required by subsection 4 (Record, pp 4-7).

The record also reveals that the trial judge affirmative misrepresented to the appellant the maximum sentence possible as a result of the plea. Subsection 5 of the rule required a finding that the defendant understands both the minimum and maximum possible sentence. At line 12, page 7 of the record, the trial judge informed the appellant that a one to five year enhancement was possible in addition to the five years to life he originally explained. No correction of that error was made. The appellant was sentenced to a five to ten year firearm enhancement in direct contradiction to what had been explained.

The standard of review as previously stated is that of an "abuse of discretion" by the court. The companion cases of Warner vs. Morris, 709 P. 2d 309 (Utah, 1985) and Brooks vs. Morris, 709 P. 2d 310, (Utah, 1985), established the standard by which a trial court accepts guilty pleas. The Supreme Court stated that a failure of to advise a defendant of his rights concerning self-incrimination was not alone sufficient to invalidate a guilty plea provided that the record as a whole showed that the rule 11 requirements were substantially complied with. Subsequently the Supreme Court in State vs. Gibbons, 740 P. 2d 1309 (Utah, 1987) replaced the "substantial compliance" rule with a "strict compliance" standard. It has been ruled that the Gibbons rule was not retroactive, however the concepts set forth in Gibbons are



useful. In Gibbons the court stated that the trial court may not rely on defense counsel or affidavits to satisfy the specific requirements of Rule 11(e). In his case, where there is no affidavit, the court has a situation much more akin to Gibbons factually than might typically be the case.

The case most similar to this which was reached the appellate courts is that of State vs. Vasilacopulas, 756 P. 2d 92 (Utah App., 1988). The Utah Court of Appeals, using the Warner-Brooks test found that an absence of discussion concerning the possibility of consecutive sentences, and a failure to find that the defendant understood that possibility showed a failure to substantially comply with Rule 11(e). That alone was sufficient to mandate a reversal of the trial court's denial of the defendant's motion to Withdraw Guilty Plea. The court did not consider a failure to comply with Rule 11(e) (4), citing the failure to comply with the sentencing proportions of the rule as being sufficient. It can be presumed that if there had been a problem with an explanation of the elements of the offense as there was in this case, the Vasilacopulas Court should have only made its decision stronger. It is also interesting to note that one of the concurring judges in Vasilacopulos was Richard Davidson, the trial judge who took the plea in this case.

In this case, we have three major failures to even discuss rights required by the rule. While the Warner and Brooks cases state that a failure to explain the right of self incrimination was not fatal in light of the record, the record there was more

complete that here. Here as well, we have not only a failure to inform appellant of the maximum sentence, but a misrepresentation by the court as to the maximum sentence. When coupled with the failure to discuss the elements of the offense, the combination is fatal to the trial court's ruling that the requirements had been substantially complied with. Finally, even though there was some discussion of some of the Rule 11 requirements at the time the plea was entered, no findings were made except that the plea was knowingly made. (Record p 8).

## POINT II

THE PLEA WAS IMPROPERLY TAKEN BECAUSE THE INFORMATION DID NOT ADEQUATELY INFORM THE DEFENDANT/APPELLANT OF THE NATURE OF THE CHARGES.

The information to which the Defendant/Appellant alleges as follows:

Count : AGGRAVATED KIDNAPPING, in violation Section 76-5-302, Utah Code Annotated, 1953, as amended, on or about February 17, 1986, in Uintah County, Utah, a First Degree Felony;

The said defendant at the time and place aforesaid did intentionally or knowingly, without authority of law and against the will of the victim, by any means and in any manner, seized, confined, detained, or transported the victim with intent:

a. To hold for ransom or reward, or as shield of hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct; or

b. To facilitate the commission, attempted commission, or flight after commission or attempted commission of felony; or

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

There is no mention at any time in the information any name or other identification of any victim. This lack deprived the Defendant/Appellant of the opportunity of knowing what the charges effectively were against him and further complicated the inadequacy of the entry of guilty plea.

The Utah Supreme Court in State v. Wilcox, 808 P 2d. 1028, (Utah 1991), stated that a defendant is entitled to adequate notice of the proceedings being brought against him. That notice requires the prosecution to state the charge with sufficient specificity to protect the defendant from multiple prosecutions for the same crime and to give notice sufficient for the one charged to prepare a defense. See State v. Strand, 720 P 2d. 425 (Utah 1986), and State v. Bundy, 684 P 2d. 58 (Utah 1984). The Court further stated that "because of the almost infinite variety of circumstance where the question may arise, there are few ironclad rules for determining the adequacy of notice beyond the requirements that the elements of the offense be alleged." The court then stated that there should be a weighing of the completeness of the notice and its adequacy against the background of the information immediately available to the prosecution.

In this case, there were multiple victims alleged. It appears that the identity of those victims was available to the prosecutor at the time the information was filed. In order to prevent multiple prosecutions for the same offense, the name of the victim of each offense must be stated. This is mere common sense. While The Wilcox also states that the notice requirements may be waived

and that the filing of a bill of particulars is normally one of the proper remedies to an inadequate information, that statement only illustrates another issue which will be addressed later in this matter, that is, the ineffective assistance of counsel.

The lack of identity of the victims illustrates again the inadequacy of the inquiry at the time of the taking of his plea. It has already been stated that the record is bereft of any discussion of the elements of the offense charged. Because no bill of particulars was filed, the Defendant/Appellant did not have a more specific information than the original one which was filed. There is no indication that any request for discovery was ever filed nor that any discovery was given to the defendant. All of these things which might have had some curative effect upon the lack of the notice in the information did not occur. The failure to explain the elements of the crime, and to get a factual basis for the plea become even worse.

### POINT 3

THE INADEQUATE ASSISTANCE OF DEFENSE COUNSEL FURTHER IMPAIRED THE DEFENDANT/APPELLANT'S ABILITY TO UNDERSTAND THE PROCEEDINGS WHEN THE GUILTY PLEA WAS TAKEN.

The performance of defense counsel in adequately representing his client is always a difficult issue in that much of any representation is not on the record. The attorney client privilege makes it difficult for an attorney to respond to ineffective assistance accusations, nevertheless there is guidance on what constitutes ineffective assistance of counsel. In State v. Moritzsky, 771 P 2d. 689 (Utah App. 1989), Defense attorney Lance

Wilkerson, the then Uintah County Public Defender, was found to have ineffectively assisted his client by failing to explore or request any instruction concerning the defense of habitation. Citing State v. Verde, 770 P 2d. 116 (Utah 1989) the appellate court stated the following test: "Defendant's Sixth Amendment challenge to his conviction will be successful only if he can prove that (1) his counsel rendered and objectively deficient performance, demonstrated by specific acts or omissions; and (2) counsel's error prejudiced the defendant, i.e. a reasonable probability' exist that but for counsel's omissions, the verdict would have been more favorable to defendant.

While the court must not second guess tactical decisions made by counsel, the tactical analysis has little relevance in this case.

In this case, Uintah County Public Defender Lance Wilkerson failed to request discovery. He failed to request a bill of particulars to clarify or cure an information that was devoid of notice of the identity of the alleged victim. He failed to explain the elements of the charge to his client. He failed to assist the court in establishing any factual basis for the entry of this plea. He failed to explain the nature of the firearm enhancement which was charged and sentenced to his client. He failed to appeal the errors in this plea immediately upon sentencing.

The specific acts or omissions required have been shown precisely by the inadequacy of the record in this case. The second prong is harder to address because this is guilty plea case. To adequately assess whether a trial verdict would have been more

favorable to defendant/appellant than his plea is difficult. It must be noted however that since the defendant/appellant received the maximum sentence allowed by law for one count of aggravated kidnapping, and the statutory preference was for concurrent sentences at the time, it is hard to say that no better result could have been obtained for the Defendant.

#### CONCLUSION

The record in this case shows affirmative mistakes by the court and counsel in the taking of appellant's plea. It does not show strict compliance, substantial compliance, or anything approaching the required standard. The process was further complicated by defense counsel's ineffective performance in the process of the plea. Since the information was defective in notice to the defendant, the problem grew even worse. Appellant hereby prays that the court reverse the trial court's denial of his Motion to Withdraw Guilty Plea and remand the case for further proceedings.

DATED this 1<sup>st</sup> day of April, 1996.

Alan M. Williams  
Alan M. Williams  
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that three true and correct copies of the foregoing brief were mailed or hand delivered to Jan Graham, Attorney for Appellee, at 262 State Capital on this 15<sup>th</sup> day of April, 1996.

Alan M. Wallace

## **Addendum D**



**Rule 4. Prosecution of public offenses.**

(a) Unless otherwise provided, all offenses shall be prosecuted by indictment or information sworn to by a person having reason to believe the offense has been committed.

(b) An indictment or information shall charge the offense for which the defendant is being prosecuted by using the name given to the offense by common law or by statute or by stating in concise terms the definition of the offense sufficient to give the defendant notice of the charge. An information may contain or be accompanied by a statement of facts sufficient to make out probable cause to sustain the offense charged where appropriate. Such things as time, place, means, intent, manner, value and ownership need not be alleged unless necessary to charge the offense. Such things as money, securities, written instruments, pictures, statutes and judgments may be described by any name or description by which they are generally known or by which they may be identified without setting forth a copy. However, details concerning such things may be obtained through a bill of particulars. Neither presumptions of law nor matters of judicial notice need be stated.

(c) The court may strike any surplus or improper language from an indictment or information.

(d) The court may permit an indictment or information to be amended at any time before verdict if no additional or different offense is charged and the substantial rights of the defendant are not prejudiced. After verdict, an indictment or information may be amended so as to state the offense with such particularity as to bar a subsequent prosecution for the same offense upon the same set of facts.

(e) When facts not set out in an information or indictment are required to inform a defendant of the nature and cause of the offense charged, so as to enable him to prepare his defense, the defendant may file a written motion for a bill of particulars. The motion shall be filed at arraignment or within ten days thereafter, or at such later time as the court may permit. The court may, on its own motion, direct the filing of a bill of particulars. A bill of particulars may be amended or supplemented at any time subject to such conditions as justice may require. The request for and contents of a bill of particulars shall be limited to a statement of factual information needed to set forth the essential elements of the particular offense charged.

(f) An indictment or information shall not be held invalid because any name contained therein may be incorrectly spelled or stated.

(g) It shall not be necessary to negate any exception, excuse or proviso contained in the statute creating or defining the offense.

(h) Words and phrases used are to be construed according to their usual meaning unless they are otherwise defined by law or have acquired a legal meaning.

(i) Use of the disjunctive rather than the conjunctive shall not invalidate the indictment or information.

(j) The names of witnesses on whose evidence an indictment or information was based shall be endorsed thereon before it is filed. Failure to endorse shall not affect the validity but endorsement shall be ordered by the court on application of the defendant. Upon request the prosecuting attorney shall, except upon a showing of good cause, furnish the names of other witnesses he proposes to call whose names are not so endorsed.

(k) If the defendant is a corporation, a summons shall issue directing it to appear before the magistrate. Appearance may be by an officer or counsel. Proceedings against a corporation shall be the same as against a natural person.