

2005

# State of Utah v. Stephan A. Pando : Reply Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca2](https://digitalcommons.law.byu.edu/byu_ca2)



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Mark L. Shurtleff; Utah Attorney General; Jeffrey S. Gray; Assistant Attorney General; Attorneys for Appellee.

Scott L. Wiggins; Arnold & Wiggins; Attorneys for Appellant.

---

## Recommended Citation

Reply Brief, *Utah v. Pando*, No. 20040074 (Utah Court of Appeals, 2005).  
[https://digitalcommons.law.byu.edu/byu\\_ca2/5484](https://digitalcommons.law.byu.edu/byu_ca2/5484)

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at [http://digitalcommons.law.byu.edu/utah\\_court\\_briefs/policies.html](http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html). Please contact the Repository Manager at [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu) with questions or feedback.

COPY

IN UTAH COURT OF APPEALS

STATE OF UTAH,	)	
	)	
Plaintiff / Appellee,	)	Case No. 20040074-CA
	)	
v.	)	
	)	
STEPHAN A. PANDO,	)	
	)	
Defendant / Appellant.	)	

REPLY BRIEF OF APPELLANT

Appeal from the Sentence, Judgment, Commitment signed by the district court on December 16, 2003, but reflected as having been entered on December 11, 2003, in the Second District Court, Davis County, the Honorable Darwin C. Hansen, presiding

SCOTT L WIGGINS (5820)  
ARNOLD & WIGGINS, P.C.  
American Plaza II, Suite 105  
57 West 200 South  
Salt Lake City, UT 84101  
*Attorneys for Appellant*

JEFFREY S. GRAY (5852)  
Assistant Attorney General  
MARK L. SHURTLEFF  
UTAH ATTORNEY GENERAL  
160 East 300 South, 6th Floor  
P.O. Box 140854  
Salt Lake City, UT 84114-0854  
*Attorneys for Appellee*

**UTAH COURT OF APPEALS  
BRIEF**

**UTAH  
DOCUMENT  
KFU  
50**

**.A10  
DOCKET NO. 2004 0074-CA**

**\*\*ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED\*\***

FILED  
UTAH APPELLATE COURTS  
FEB 03 2005

---

IN UTAH COURT OF APPEALS

---

STATE OF UTAH, )  
 )  
 Plaintiff / Appellee, ) Case No. 20040074-CA  
 )  
 v. )  
 )  
 STEPHAN A. PANDO, )  
 )  
 Defendant / Appellant. )

---

REPLY BRIEF OF APPELLANT

---

Appeal from the Sentence, Judgment, Commitment signed by the district court on December 16, 2003, but reflected as having been entered on December 11, 2003, in the Second District Court, Davis County, the Honorable Darwin C. Hansen, presiding

---

SCOTT L WIGGINS (5820)  
ARNOLD & WIGGINS, P.C.  
American Plaza II, Suite 105  
57 West 200 South  
Salt Lake City, UT 84101  
*Attorneys for Appellant*

JEFFREY S. GRAY (5852)  
Assistant Attorney General  
MARK L. SHURTLEFF  
UTAH ATTORNEY GENERAL  
160 East 300 South, 6th Floor  
P.O. Box 140854  
Salt Lake City, UT 84114-0854  
*Attorneys for Appellee*

**\*\*ORAL ARGUMENT AND PUBLISHED OPINION REQUESTED\*\***

TABLE OF CONTENTS

TABLE OF AUTHORITIES . . . . . 3

DETERMINATIVE AUTHORITY . . . . . .4

ARGUMENTS

    I.    NOT ONLY DID THE TRIAL COURT ERR BY FAILING  
          TO APPOINT SUBSTITUTE COUNSEL, IT FAILED TO  
          INQUIRE ABOUT MR. PANDO’S COMPLAINTS AND THE  
          ADEQUACY OF COUNSEL, NOT TO MENTION UTILIZING  
          THE WRONG STANDARD TO DENY THE NUMEROUS  
          REQUESTS FOR SUBSTITUTION OF COUNSEL. . . . .5

    II.   THE TRIAL COURT FAILED TO CONDUCT AN ADEQUATE  
          INQUIRY THAT INCLUDED A TOTALITY OF THE  
          CIRCUMSTANCES SURROUNDING MR. PANDO’S ABSENCE  
          PRIOR TO CONCLUDING THAT MR. PANDO HAD WAIVED  
          HIS RIGHT TO BE PRESENT AT TRIAL AND THEN  
          PROCEEDING WITH THE TRIAL IN ABSENTIA. . . . .10

CONCLUSION . . . . .12

ADDENDA. . . . .15

**TABLE OF AUTHORITIES**  
**CASES CITED**

Page (s)

**Federal Cases**

*Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970).....6

*McKee v. Harris*, 649 F.2d 927 (2d Cir. 1981), cert.  
denied, 456 U.S. 917, 102 S.Ct. 1773 (1982).....6

*United States v. Hart*, 557 F.2d 162 (8th Cir.), cert.  
denied, 434 U.S. 906, 98 S.Ct. 305 (1977).....6

*United States v. Welty*, 674 F.2d 185 (3d Cir. 1982).....6

**State Cases**

*Gardner v. Holden*, 888 P.2d 608 (Utah 1994).....5

*State v. Pursifell*, 746 P.2d 270 (Utah Ct. App. 1987).....6

*State v. Anderson*, 929 P.2d 1107 (Utah 1996).....11

*State v. Frampton*, 737 P.2d 183 (Utah 1987).....10

*State v. Houtz*, 714 P.2d 677 (Utah 1986).....11

*State v. Scales*, 946 P.2d 377 (Utah Ct. App. 1997).....5

*State v. Vessey*, 967 P.2d 960 (Utah Ct. App. 1998).....10

*State v. Wagstaff*, 772 P.2d 987 (Utah Ct. App. 1989).....11,12

*State v. Wanosik*, 2001 UT App 241, 31 P.3d 615, *aff'd*,  
2003 UT 46, 79 P.3d 937.....11

*State v. Wanosik*, 2003 UT 46, 79 P.3d 937.....11,12

**STATUTES CITED**

None.

**RULES CITED**

None.

**DETERMINATIVE AUTHORITY**

See cases, etc., cited above . . . . . *in passim*

## ARGUMENTS

- I. NOT ONLY DID THE TRIAL COURT ERR BY FAILING TO APPOINT SUBSTITUTE COUNSEL, IT FAILED TO INQUIRE ABOUT MR. PANDO'S COMPLAINTS AND THE ADEQUACY OF COUNSEL, NOT TO MENTION UTILIZING THE WRONG STANDARD TO DENY THE NUMEROUS REQUESTS FOR SUBSTITUTION OF COUNSEL.

In its Brief, the State argues that Mr. Pando was not entitled to the substitution of counsel. See Brief of Appellee, pp. 18-22. Utah case law surrounding the "good cause" requirement for the substitution of counsel demonstrates quite the contrary.

The State, in support of its argument, cites *State v. Scales*, 946 P.2d 377, 382 (Utah Ct. App. 1997) for the proposition that a defendant must meet a "heavy burden" to show "good cause" for the substitution of counsel. See Brief of Appellee, p. 18. In *Scales*, in the course of articulating what is required to establish "good cause", this Court stated that not only must a defendant show the lack of a meaningful relationship with counsel, he or she "must also establish that the animosity [between the defendant and his or her attorney] resulted in such a deterioration of the attorney-client relationship that the right to the effective assistance of counsel was imperiled." *Id.* (quoting *Gardner v. Holden*, 888 P.2d 608, 622 (Utah 1994)). Moreover, "[s]ubstitution of counsel is mandatory when the defendant has demonstrated good cause, such as a conflict of

interest, a complete breakdown of communication, or an irreconcilable conflict with his or her attorney." *State v. Pursifell*, 746 P.2d 270, 274 (Utah Ct. App. 1987) (citing *United States v. Welty*, 674 F.2d 185, 188 (3d Cir. 1982) and *McKee v. Harris*, 649 F.2d 927, 931 (2d Cir. 1981), *cert. denied*, 456 U.S. 917, 102 S.Ct. 1773 (1982)). "When a defendant is forced to stand trial 'with the assistance of an attorney with whom he has become embroiled in an irreconcilable conflict,' he is deprived of the 'effective assistance of any counsel whatsoever' and his Sixth Amendment<sup>1</sup> right to counsel is violated." *Pursifell*, 746 P.2d at 274. (quoting *Brown v. Craven*, 424 F.2d 1166, 1170 (9th Cir. 1970) and citing *United States v. Hart*, 557 F.2d 162, 163 (8th Cir.), *cert. denied*, 434 U.S. 906, 98 S.Ct. 305 (1977)).

As the record on appeal demonstrates, Mr. Pando's dissatisfaction with appointed trial counsel rose to the level of constitutional proportion, requiring the appointment of new counsel. In fact, the representations of appointed trial counsel, in and of themselves, evinced circumstances manifesting a complete breakdown of communication or an irreconcilable conflict between appointed trial counsel and Mr. Pando.

---

<sup>1</sup>The Sixth Amendment to the United States Constitution states that "[i]n criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of counsel for his defence."

Both prior to trial and on the first day of trial, appointed trial counsel moved to withdraw, citing the failure to communicate and the failure to cooperate as the grounds for withdrawal. The motions were summarily denied. In the course of an in-chambers conference on the first day of trial, appointed trial counsel stated the following:

**THE COURT:** Miss Thompson, do you have anything further?

**MS. THOMPSON:** Yes, I do, your Honor. I decided to try myself to contact my client at the cell phone 347-5543. At least leave a message we were going forward. If he had any interest in coming down and assisting with the defense, if he was able to, et cetera. And he answered the phone. Mr. Pando answered the phone. I recognized his voice. I believe he said, this is Steve, or business office. This is Steve or something to that effect. I was taken by surprise.

I don't remember his exact words in terms of the greeting. But I most certainly recognized his voice. It was Mr. Pando. He, in no uncertain terms, terminated me. He fired me. Asked me to make that representation to the Judge. *His reasons were that I have been doing all the wrong things in pursuing his defense. I'm not pursuing his theory of the case. He was very angry about that. We discussed his theory of the case, and that is the theory that he wants pursued. And I have not pursued that theory. I perceived that as trial counsel I'm entitled to make strategic decisions, but he's very upset that I'm pursuing a theory of the case that I am. He's*

indicated that he's going to be calling the bar. That he's hiring a team of lawyers and he had no intention of coming to court for the trial without new counsel. *And that as long as I continue as his counsel, he would not be coming to court.*

(R. 402:93-94) (emphasis added).

Additionally, at the beginning of the third day of trial, appointed trial counsel, again during an in-chambers conference, informed the trial court that she had again spoken with Mr. Pando, who told her that he was upset because she had not filed a written motion to withdraw as counsel. The trial court denied the motion because Mr. Pando's failure to appear was voluntary and because "his failure to appear is not a basis for the court to not go forward with the trial." (R. 406:05-06).

On that same day, appointed trial counsel filed a Motion to Withdraw as Counsel. See R. 207-08, Motion to Withdraw as Counsel, attached to the Brief of Appellant as Addendum A. Appointed trial counsel stated in the Motion that Mr. Pando "reiterated that I am pursuing a line of defense with which he disagrees; or put another way, I am not pursuing certain lines of defense that he wants put forward." (R. 207). Appointed trial counsel also stated that "Defendant has expressed that he has no confidence in my representation at least in terms of my following his requests and recommendations, in pursuing avenues of defense

that he believes are vital to his case." (*Id.*). Moreover, appointed trial counsel stated that Mr. Pando had "expressed that I had not spent adequate time with him preparing for his defense nor had I utilized evidence that he believes vital to his case." (*Id.*).

Contrary to that represented by the State, the complaints communicated to the trial court through appointed trial counsel not only established "good cause" for the substitution of counsel, but they had such a disadvantageous effect on Mr. Pando's representation that they constituted a constitutional violation.

Not only did the trial court err in its determination that good cause existed for the substitution of counsel, the record demonstrates that it made little or no effort to discern whether Mr. Pando had the opportunity to meet with appointed trial counsel. Notwithstanding appointed trial counsel's numerous attempts to withdraw as counsel, the trial court failed to inquire concerning the adequacy of counsel's representation and the condition of the attorney-client relationship between appointed trial counsel and Mr. Pando. In fact, the trial court failed to inquire even when informed of Mr. Pando's directive to appointed trial counsel that she had been discharged for failing, among other things, to pursue his theory of the case or utilize vital

avenues for his defense.<sup>2</sup> "[A] trial court's failure to investigate a . . . timely substitution request is per se error." *State v. Vessey*, 967 P.2d 960, 962 (Utah Ct. App. 1998).

Not only did the trial court fail to inquire, it failed to utilize the appropriate standard when confronted with Mr. Pando's requests for the substitution of counsel. Contrary to the previously discussed standard for determining when the substitution of counsel is warranted, the trial court utilized a standard of voluntariness as the basis for denying the requests for substitution of counsel.<sup>3</sup>

**II. THE TRIAL COURT FAILED TO CONDUCT AN ADEQUATE INQUIRY THAT INCLUDED A TOTALITY OF THE CIRCUMSTANCES SURROUNDING MR. PANDO'S ABSENCE PRIOR TO CONCLUDING THAT MR. PANDO HAD WAIVED HIS RIGHT TO BE PRESENT AT TRIAL AND THEN PROCEEDING WITH THE TRIAL IN ABSENTIA.**

The State argues that Mr. Pando was properly tried in absentia because his absence was voluntary. See Brief of Appellee, pp. 15-17. This argument, as propounded, ignores the

---

<sup>2</sup>Appointed trial counsel's failure to pursue Mr. Pando's theory of the case included not calling Ms. Crissy Pando as a witness at trial even though Ms. Pando had appeared to testify pursuant to subpoena.

<sup>3</sup>The State's claim of waiver is not only unsupported by case law but it is inconsistent with well-established case law concerning the prerequisites to a finding of waiver of a constitutional right such as that in the instant case. See, e.g., *State v. Frampton*, 737 P.2d 183, 187 (Utah 1987).

standard of voluntariness set forth in Utah case law to be utilized when a trial court is presented with a trial-in-absentia issue.

According to Utah law, not only do defendants have the right to be present at all stages of the criminal proceedings against them, the burden is on the prosecution to show that a defendant knowingly and voluntarily waived that right before trial in absentia can proceed. See *State v. Wanosik*, 2001 UT App 241, ¶¶10, 21, 31 P.3d 615, *aff'd*, 2003 UT 46, 79 P.3d 937; see also *State v. Anderson*, 929 P.2d 1107, 1109-11 (Utah 1996); *State v. Wagstaff*, 772 P.2d 987, 989-90 (Utah Ct. App. 1989). The hearing or trial should "ordinarily" be continued to obtain further information when there is an absence of direct evidence of the reason for a defendant's absence. *State v. Wanosik*, 2003 UT 46, ¶12, 79 P.3d 937.

In *State v. Houtz*, 714 P.2d 677 (Utah 1986), the Utah Supreme Court stated that

A defendant charged with a crime is entitled to be present at all stages of trial. The right to appear and defend in person is a constitutional one, but may be waived under certain circumstances if the defendant voluntarily absents himself from the trial. However, the voluntariness may not be presumed by the trial court . . . .

*Id.* at 678 (citations omitted). In light of such, the Utah Supreme Court concluded that “[t]he trial court made inadequate inquiry into defendant’s ability to appear . . . before deciding that he had waived his right to be present at trial. *Id.* “‘Voluntariness is determined by considering the totality of the circumstances,’ a standard that clearly contemplates some form of inquiry appropriate to the facts of the case . . . .” *Wanosik*, 2003 UT 46 at ¶14 (quoting *Wagstaff*, 772 P.2d at 990).

In the instant case, the trial court not only failed to make an adequate inquiry into the ability of Mr. Pando to appear, it failed to inquire, whatsoever, concerning Mr. Pando’s complaints concerning appointed trial counsel and the adequacy of counsel. Such facts were critical to a determination as to voluntariness. By so doing, the trial court failed to conduct an inquiry appropriate to the facts of the case. Thus, the trial court failed to consider the totality of the circumstances prior to concluding that Mr. Pando had voluntarily waived his right to counsel and then proceeding with trial in absentia.

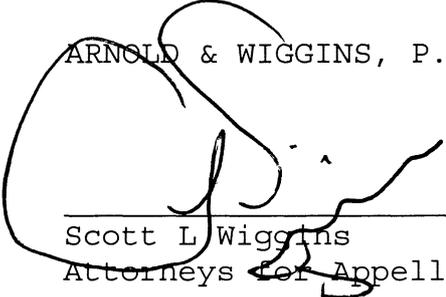
#### **CONCLUSION**

Based on the foregoing, as well as that set forth in the previously filed Brief of Appellant, Mr. Pando respectfully requests that this Court reverse his convictions and remand the

case for further proceedings consistent with the Court's instructions as specifically set forth in its opinion.

RESPECTFULLY SUBMITTED this 3rd day of February, 2005.

ARNOLD & WIGGINS, P.C.



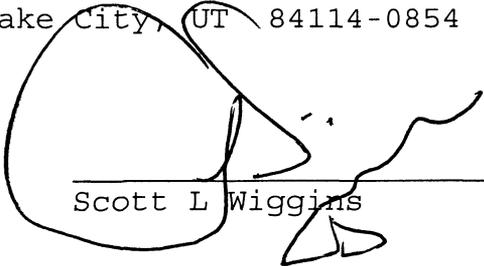
---

Scott L Wiggins  
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, SCOTT L WIGGINS, hereby certify that I personally caused to be hand-delivered two (2) true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT** to the following on this 3rd day of February, 2005:

Mr. Jeffrey S. Gray  
Assistant Attorney General  
P.O. Box 140854  
160 East 300 South, 6th Floor  
Salt Lake City, UT 84114-0854



\_\_\_\_\_

Scott L Wiggins

**ADDENDA**

No Addendum is utilized pursuant to Utah Rule of Appellate Procedure 24(a)(11).