

2007

# Markell Harrison v. Blake Nielson : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: [https://digitalcommons.law.byu.edu/byu\\_ca3](https://digitalcommons.law.byu.edu/byu_ca3)



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.

Markell Harrison; Attorney for Appellant Pro Se.

Mark L. Shurtleff; Utah Attorney General; Attorney for Appellee.

---

## Recommended Citation

Brief of Appellant, *Harrison v. Nielson*, No. 20070442 (Utah Court of Appeals, 2007).  
[https://digitalcommons.law.byu.edu/byu\\_ca3/288](https://digitalcommons.law.byu.edu/byu_ca3/288)

This Brief of Appellant 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.

Markell Harrison #36298  
P.O. Box 250  
Draper, Utah 84020

---

In The Utah Court Of Appeals

---

Markell Harrison, Appellant

v.

Blake Nielson, Appellee

Brief of Appellant

Case No. 20070442

District case No. 060906781

Appellant, Markell Harrison #36298 pro-se, hereby  
submits the following Brief of Appellant.

List of all parties below:

Markell Harrison  
USP #36298  
P.O. Box 250  
Draper, Utah 84020

Mark L. Shurtleff  
Utah Attorney General  
160 East 300 South 6<sup>th</sup>.  
Salt Lake City, Utah 84114-0854

Attorney for Appellant pro-se      Attorney for Appellee

## Table Of Contents

Table of Authorities	pg. 5
Jurisdictional Statement	pg. 7
Statement of Issues and Standard of Review	pg. 8
Constitutional or Statutory Provisions	pg. 11
Statement of the case	pg. 12
Statement of Facts	pg. 13
Summary of Argument	pg. 14
Argument	pg. 15

### Point 1

The appellant was denied his right to fair trial, in violation of Rule #56 Summary Judgement Act, R.Civil.Proc, by the court's ruling granting the state's Motion for Summary Judgement..... pg. 15

## Point 2

The appellant was denied his right to effective assistance of appellate counsel, by the court's ruling that appellant failed to demonstrate that appellate counsel omitted a dead-bang winner in Appellant's (Motion for Cross Summary Judgement and Motion In Response To Summary Judgement Request) dated April 23, 2009, and as a result violated Appellant's Six Amendment and Fourteenth Amendment (Section 1) U.S. Constitution.....pg. 19

## Point 3

The appellant was denied his right to fair trial and due process of law, in violation of the Fourth Amendment - Fifth Amendment - Sixth Amendment - Fourteenth Amendment (Section 1), of the U.S. Constitution, when the court

pg. 3 of 34

failed to specifically rule on appellants claim,  
that the prosecutor used false and manufactured  
evidence at jury trial in its ruling granting  
respondent's Motion for Summary Judgement...

... pg. 29

Conclusion pg. 33

Certificate of Service pg. 34

## Table of Authorities

### Federal Cases

White v. Ragen, 324 U.S. 760, 89 L. Ed. 1348, 45 S. Ct. 978 (1945)

Michigan v. DeFillippo, 443 U.S. 31, 35 (1979)

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d. 694 (1966)

U.S. v. Thomas, 987 F.2d 1298 (7th Cir. 1993)

### Utah State Cases

Carter v. Galetka, 2001 UT 96, ¶ 48, 44 P.3d 626

Cramer v. State, 2006 UT App. 492, ¶ 10, 566 Utah Adv. Rep. 19

State v. Levin, 2007 UT App. 65, ¶ 11, 572 Utah Adv. Rep. 18.

State v. Perry, 899 P.2d 1232, 1241 (Utah App. 1995)

State v. Termyson, 850 P.2d 461, 468 (Utah App. 1993)

## Ohio State Case's

State v. Frady, 757 N.E. 2d. 12, 15 (Ohio App. 2001)

## Statutes And Rules

### United States Constitution

Amendment #4

Amendment #5

Amendment #6

Amendment #14

### Utah Rules Civil Procedure

Rule #56 (Summary Judgement)

Markell Harrison #36298  
P.O. Box 256  
Draper, Utah 84626

In The Utah Court Of Appeals

Markell Harrison, Appellant

v.

Blake Nielson, Appellee

Brief of Appellant

Case No. 20070442

District Case No. 060906781

Brief of Appellant

Jurisdiction and Nature of Proceedings

This appeal is from a ruling granting state's motion for summary judgement, dated May 11, 2007. On May 22, 2007 appellant filed an notice of appeal.

Appellant pro-se, believes the Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah State law.

Signed Markell Harrison #36298  
Markell Harrison 7-23-2007



## Statement of issue's and Standard of review

### Point 1

Did the trial court commit plain error when it granted the state's motion for Summary Judgement, despite material facts in dispute, as raised by petitioner's opposition motion (Motion for Cross Summary Judgement and Motion In Response To Summary Judgement Request), dated April 23, 2007.

### Standard of review

The factual findings underlying trial courts decisions are reviewable under, Utah Rules of Civil Procedure, Rule #56 Summary Judgement. The issue is a question of law and fact.

### Point 2

Did the trial court commit plain error in

ruling that petitioner failed to demonstrate that appellate counsel was ineffective and did not show that appellate counsel omitted a dead-bang winner, in petitioner's (Motion For Cross Summary Judgement and Motion In Response To Summary Judgement Request) dated April 23, 2007.

### Standard of review

The factual findings underlying the trial court's decision's are reviewable under, Cramer v. State, 2006 UT App. 492, ¶ 10, 566 Utah Adv. Rep. 19, citing Carter v. Galetka, 2001 UT 96, ¶ 48, 44 P.3d 626).

"A dead-bang winner" is an issue which is obvious from the trial record and one which probably would have resulted in reversal on appeal". Id (quoting Carter, 2001 UT 96 at ¶ 48).

### point 3

Did the trial court commit plain error in not ruling specifically in the summary judgement motion on the prosecutor using false and manufactured evidence during jury trial presented in petitioner's (Motion And Request To Amend Original Writ of Habeas Corpus, dated January 23, 2007) and (Motion For Cross Summary Judgement And Motion In Response To Summary Judgement Request, dated April 23, 2007).

#### Standard of review

The factual findings underlying the trial court's decision are reviewable under, U.S. v. Thomas, 987 F.2d 1298 (7th Cir. 1993) and White v. Ragen, 324 U.S. 760, 89 L.Ed. 1348, 65 S. Ct. 978 (1945). See also, (Carter, 2001 UT 96 at ¶ 48).

# Constitutional Provisions, Statutes and Rules

## United States Constitution :

### Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

### Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial

'jury of the state and district wherein the crime shall have been committed': which district shall have been previously ascertained by law, and do be informed of the nature and cause of the accusation: do be confronted with the witnesses against him: do have compul process for obtaining witnesses in his favor, and do have the assistance of counsel for his defense.

### Fourteenth Amendment (Section 1)

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### Statement of case

Defendant was convicted of Robbery, a second degree felony and attempted burglary, a class A misdemeanor and gang-enhancement. Defendant was sentenced to Utah State Prison on a 5 to life for robbery and 365

days on the class (H). Defendant is in the Utah State Prison.

### Statement of Facts

Appellant filed an Habeas Corpus petition in Second District Court, State of Utah, dated November 9th, 2006. The State of Utah requested Summary Judgement in a motion, dated April 4, 2007.

Appellant then filed a "Motion For Cross Summary Judgement and Motion In Response To Summary Judgement Request", dated April 23, 2007.

Second District Court, then granted the state's motion for Summary Judgement, dated May 11, 2007.

Appellant's "Notice of Appeal" was filed on May 22, 2007, followed by appellant's "Docketing Statement", dated July 3, 2007.

## Summary of Argument

In the case at bar, the trial court committed plain error when it granted the state's, Motion for Summary Judgement, despite several material facts in dispute as raised in appellant's opposition motion (Motion for Cross Summary Judgement and Motion In Response To Summary Judgement Request) dated April 23, 2007.

Also, the trial court committed plain error in ruling, Appellant failed to demonstrate that appellate counsel omitted a dead-bird winner in Appellant's (Motion for Cross Summary Judgement and Motion In Response To Summary Judgement Request) dated April 23, 2007.

And lastly, the trial court committed plain error in not specifically ruling on the prosecutor

pg. 14 of 34

using false and manufactured evidence at jury trial, presented in the (Motion and Request To Amend Original Writ of Habeas Corpus, dated January 23, 2007) and (Motion For Cross Summary Judgement and Motion In Response To Summary Judgement Request, dated April 23, 2007).

## Argument

### Point 1

The appellant was denied his right to fair trial, in violation of Rule #56 Summary Judgement U.T.R.C. Pro, by the court's ruling granting the state's Motion for Summary Judgement.

The court failed to adhere to Rule #56 Summary Judgement U.T.R. Civil, Pro, when there are material facts in dispute. As presented by petitioner/appellant's (Motion For Cross Summary  
pg. 15 of 34



Judgement and Motion In Response To Summary  
Judgement Request, dated April 23, 2007).

The issues in dispute are : 1. The chief attorney  
for the Weber County's Attorney's office, confirmed in  
a written statement dated January 12, 2007, that  
the alleged Bulice Rushing statement used by the  
prosecutor at jury trial (did not exist). And  
therefore confirming that the prosecutor (intentionally  
used perjured testimony at jury trial. That  
Det. Steve Reavis C.P.D., manufactured and falsified  
evidence and then committing perjury at  
jury trial by using false/manufactured statement  
against appellant, as the states witness at trial.

Appellate counsel refused to include in the  
direct appeal, that the Bulice Rushing statement  
was false and manufactured and therefore

prosecutorial misconduct in denying appellant's right to fair trial and due process of law.

②. Det. Steve Reaves committing perjury at jury trial. When he use an alleged Markell Harrison statement, that was obtained illegally, violating appellant's fifth amendment. Det. Reaves, arrested appellant and never advised him of his miranda rights, and than interrogated appellant for an alleged statement that was used at trial by Det. Reaves. Appellant always maintained Det. Reaves never advised him of his miranda rights and that the alleged Markell Harrison statement was never made by appellant. The alleged statement was manufactured by Det. Steve Reaves to obtain a conviction, as confirmed by Det. Reaves Golden

City Police report dated June 9, 2003 where Det. Reav  
pg. 17 of 34

admits to not advising appellant of his miranda rights and also to not receiving a statement from Markell Harrison, this ~~the~~ police report was filed in the discovery of District case No. 031902805 and presented to a jury at trial.

Appellate counsel refused to include in the direct appeal, that trial counsel was ineffective for not fully reading the Ogden City Police report and then having that police report suppressed, **And** the alleged Markell Harrison statement suppressed. Or the perjury committed by Det. Steve Renu's by using that alleged statement against appellant.

With clear material facts in dispute, according to Rule #56 Summary Judgement 11, R, C, Pro, the court erred in granting the state's motion for Summary Judgement and the Utah Court of Appen

pg. 18 of 34

should rule in favor of appellant by overturning the Second District Court's decision, and not grant the State's motion for Summary Judgement.

## Point 2

The appellant was denied his right to effective assistance of appellate counsel, by the court's ruling that appellant failed to demonstrate that appellate counsel omitted a dead-bang winner in appellant's (Motion for Cross Summary Judgement and Motion In Response To Summary Judgement Request) dated April 23, 2007, and as a result violated appellant's Six Amendment and Fourteenth Amendment (section 1) of the U.S. Constitution.

The court ruled appellant is unable to succeed on a claim of ineffective assistance of appellate counsel

because appellant cannot "show that appellate counsel omitted a dead-bang winner." Cramer v. State, 2006 UT App 492, ¶ 10, 566 Utah Adv. Rep. 19 (citing Carter v. Galetka 2001 UT 96, ¶ 48, 44 P.3d 626). "A dead-bang winner" is an issue which is obvious from the trial record and one which probably would have resulted in reversal on appeal." Id. (quoting Carter, 2001 UT 96 at ¶ 48).

Appellant can clearly demonstrate that appellate counsel did overlook several dead-bang winning arguments according to trial records.

A), Appellant's claim of a fifth amendment violation of the U.S. Constitution

The court ruled that the lack of a miranda warning does not invalidate appellant's fifth amendment.

Appellant asserts, Miranda is required before interrogating a suspect who is already in custody.

See, State v. Levin, 2007 UT App 65, ¶ 11, 572 Utah Adv. Rep. 18. And also, State v. Frady, 757 11.E. 2d 12, 15 (Ohio App. 2001) ("before defendant's arrest, the officer was under no obligation to administer warnings pursuant to Miranda").

Clearly the question before the court is, when was appellant placed in custody. And according to trial records (See exhibit 9A, 9b, of the ~~██████~~ ~~██████~~ Memorandum In Support of Motion For Cross Summary Judgment and Motion In Response To Summary Judgment Request, district case No. 06C906781, which is a part of the record index in this appeal), Det. Steve Beaves testifies he told appellant he was not free to leave, and took appellant to the police station for questioning. After appellant identifies himself as being the person in the surveillance photo, establishing probable cause.

pg. 21 of 21

See, Michigan v. DeFillippo, 443 U.S. 31, 35 (1979).

In a Ogden City Police report dated June 9, 2003, Det. Steve Beauvais admits to not advising appellant of his miranda rights (see exhibit 11A, 11B, of the memorandum in support of motion for cross summary judgement and motion in response to summary judgement request, district case No. 060906781, which is a part of the record index in this appeal) filed in the discovery of case No. 031902805.

Appellant asserts, once being placed in custody and taken to the police station for interrogation without being advised of miranda rights and using that alleged statement received as a result of that interrogation against appellant at jury trial, violated appellant's fifth amendment of the U.S. Constitution. See, Miranda v. Arizona  
441 U.S. 476 (1979).

, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966): In the absence of other effective measures the following procedures to safeguard the fifth amendment privilege must be observed: the person in custody must, prior to interrogation, be clearly informed that he has a right to remain silent and that anything he says will be used against him in court.....

Appellant asserts, ineffective assistance of appellate counsel when he omitted an issue obvious from the trial record which probably would have resulted in reversal on appeal. See (Carter, 2001 UT 96 at ¶ 48).

B). Appellant's two separate claims of due process violations, by Det. Reaves giving perjured testimony

D). The court's argument against Det. Reaves  
29. 23 L 26



committing perjury concerning appellant's miranda rights and alleged statement (See exhibit 9a, 9b, 11a, 11b, of the memorandum In Support of Motion For Cross Summary Judgement and Motion In Response To Summary Judgement Request, district case No. 060906781, which is a part of the record index in this appeal) is that, appellant's trial counsel was fully aware of the perjured testimony and as a trial strategy intentional did not seek to have Det. Beaves' police report suppressed.

Appellant asserts, that trial counsel was unaware of Det. Beaves' perjured testimony as a result of not reading Appellant's police report in its entirety.

Appellant asserts, that if trial counsel knew of the perjured testimony, that there would be (no) legitimate reason to not request the suppression of Det. Beaves' police report. See, State v. Perry,  
06-04-01-011

899 P.2d 1232, 1241 (Utah App. 1995) ("An ineffectiveness claim succeeds only when no conceivable legitimate tactic or strategy can be surmised from counsel's actions") (quoting State v. Tennyson, 850 P.2d 461, 468 (Utah App. 1993)).

Appellant asserts, ineffective assistance of appellate counsel when he omitted an issue obvious from the trial record which probable would have resulted in reversal on appeal. See, (Carter, 2001 UT 96 at ¶ 48).

2). The court has chosen not to address appellant's claim, that Det. Steve Beave's committed perjury concerning appellant's co-defendant Bulice Rushing's alleged statement (See exhibit 18a, 18b, 19, of the Memorandum In Support of Motion For Cross Summary Judgement and Motion In Response To Summary Judgement Request, district case No. 060906781, which is

a part of the record index in this appeal).

Appellant asserts, that Det. Reaves and prosecutor Brenda Beaton admit to having a Bulice Rushing statement and to giving a copy to both defense counsel (See exhibit 18A, 18b, 19, of the Memorandum In Support of Motion For Cross Summary Judgement and Motion In Response To Summary Judgement Request, district case No. C6C9D6781, which is a part of the record index in this appeal).

Appellant asserts, the court ruled that neither of defense counsels received a copy of the Bulice Rushing statement in discovery and that to let the statement stand on the record was a violation of due process. (See exhibit 21, 22A, 22b, of the Memorandum In Support of Motion For Cross Summary Judgement and Motion In Response To Summary  
na. 21 of 21)

Judgement Request, district case No. 060906781, which is a part of the record index in this appeal).

Appellant asserts, that the Bulice Rushing statement never existed, and was false and manufactured evidence.

Appellant asserts, that the Bulice Rushing statement was confirmed to not exist by the chief administrative officer, "Mark B. DeCaria" of the Weber County Attorney's Office. (See exhibit 23, of the memorandum in support of motion for cross summary judgement and motion in response to summary judgement request, district case No. 060906781, which is a part of the record index in this appeal).

Appellant asserts, that Det. Steve Beaves and prosecutor Brenda Beaton violated appellants

due process and right to fair trial. See U.S. v. Thomas, 987 F.2d 1298 (7th Cir. 1993): "The government's knowing use of perjured testimony at trial violates due process when the perjury could deceive the jury into unjustly convicting a defendant." Also, White v. Ragen, 324 U.S. 760, 89 L. Ed. 1348, 65 S. Ct. 978 (1945): A conviction secured by the use of perjured testimony known to be such by the prosecuting attorney is a denial of due process.

Appellant asserts, ineffective assistance of appellate counsel when he omitted an issue obvious from the record which probably would have resulted in a reversal on appeal. See (Carter, 2001 UT 96 at ¶ 48).

### Point 3

The appellant was denied his right to fair trial and due process of law, in violation of the Fourth Amendment - Fifth Amendment - Sixth Amendment - Fourteenth Amendment (Sec. 1), of the U.S. Constitution, when the court failed to specifically rule on appellants claim, that the prosecutor used false and manufactured evidence at jury trial in it's ruling granting respondent's Motion for Summary Judgement.

The court has not addressed appellants claim, that Det. Reaves committed perjury concerning Appellants co-defendant Bulice Rushing's alleged statement (See exhibit 18a, 18b, 19, of the Memorandum In Support of Motion for Cross Summary Judgement and Motion In Response To Summary Judgement pg. 29 of 21).

Request, district case No. 060906781, which is a part of the record index in this appeal).

Appellant asserts, that Det. Reeves and prosecutor Brenda Beaton admit to having a Bulice Rushing statement and to giving a copy to both defense counsel's. (see exhibit 18A, 18b, 19, of the Memorandum In Support of Motion For Cross Summary Judgement and Motion In Response To Summary Judgement Request, district case No. 060906781, which is a part of the record index in this appeal).

Appellant asserts, the court ruled that neither of defense counsel's received a copy of the Bulice Rushing statement in discovery and that to let the statement stand on the record was a violation of due process. (see exhibit 21, 22A, 22b, of the Memorandum In Support of Motion For Cross Summary  
ex. 30 of 71)

Judgement and Motion In Response To Summary Judgement Request, district case No. 06D906781, which is a part of the record index in this appeal).

Appellant asserts, that the Bulice Rushing statement never existed, and was false and manufactured evidence.

Appellant asserts, that the Bulice Rushing statement was confirmed to not exist by the chief administrative officer, "Mark B. DeCaria" of the Weber County Attorney's Office. (See exhibit 23, of the Memorandum In Support of Motion For Cross Summary Judgement and Motion In Response To Summary Judgement Request, district case No. 06D906781, which is a part of the record index in this appeal).

Appellant asserts, that Det. Reeves and prosecutor  
pg. 21 of 21



Brenda Beaton violated appellant's due process and right to fair trial. See, U.S. v. Thomas, 987 F.2d 1298 (7th Cir. 1993): "The government's knowing use of perjured testimony at trial violates due process when the perjury could deceive the jury into unjustly convicting a defendant". Also, White v. Ragen, 324 U.S. 760, 89 L. Ed. 1348, 65 S. Ct. 978 (1945): A conviction secured by the use of perjured testimony known to be such by the prosecuting attorney is a denial of due process.

Appellant asserts, ineffective assistance of appellate counsel when he omitted an issue obtrous from the record which probable would have resulted in a reversal on appeal. See, (Carter, 2001 U.T 96 at ¶ 48). pg. 32 of 34

## Conclusion And Relief

Based upon the foregoing, the appellant request this court, ①. reverse the appellant's conviction and remand for a new trial, or ②. reverse the appellant's conviction and order appellant's immediate release from the custody of the Utah State Prison.

Signed Markell Harrison #36298  
Markell Harrison 7-23-2007

# Certificate of Service

I hereby certify that a true and correct copy of this Brief of Appellant case No. 20070442 was mailed to all parties listed below:

Mark L. Shurtleff  
Utah Attorney General  
160 East 300 South 6<sup>FL</sup>.  
P.O. Box 140854  
Salt Lake City, Utah 84114-0854

Utah Court of Appeals  
450 South State  
P.O. Box 140230  
SALT Lake City, Utah 84114-0230

Signed Markell Harrison #36298  
Markell Harrison 7-23-2007

