REPORT AND RECOMMENDATION

Date: October 23, 2020

From: Salt Lake County District Attorney's Conviction Integrity Panel
Justice Christine Durham
Judge Judith Atherton
D. Gilbert Athay
Michelle Love-Day
David Schwendiman

To: Sim Gill, Salt Lake County District Attorney

CC: Anna Rossi Anderson, Deputy Salt Lake County District Attorney, Conviction Integrity Unit Chief

Subj: Ryan David Burke; Report and Recommendation

Recommendation

After careful consideration, it is the consensus of the Conviction Integrity Panel that: (1) it possesses sufficient information to determine by a preponderance of the evidence whether Mr. Burke makes a valid claim of innocence or that his conviction or sentence lacks integrity;[1] (2) based on that information his claim does not meet the standard and, therefore, does not amount to a valid claim of innocence; and (3) based on our *de novo* review of the facts and the history of his case, we find nothing that impugns his conviction or the sentence he received. The Panel recommends nothing be done to vacate, modify or otherwise affect the conviction or sentence in Mr. Burke's case.

Application

1. On **October 19, 2018**, **Ryan David Burke** submitted an application for review of his **July 25, 2008**, conviction for aggravated sexual abuse of a minor (UCA §76-5-404.1 (2008)), for which he was sentenced to prison for fifteen years to life; sexual abuse (UCA §76-5-404 (Supp. 2010)), for which he was sentenced to prison for one to fifteen years; and dealing in material harmful to a minor (UCA §76-10-1206 (Supp. 2007)), for which he was sentenced to zero to five years in prison.[2]

2. The offenses occurred on **September 16, 2007**, at the Salt Lake County home of Matthew and Kelly Larson.

[1] Conviction Integrity Unit Policy and Procedure (approved and adopted September 15, 2020), ¶5
[2] Application, October 19, 2018.

3. Mr. Burke asserts his innocence and claims in his application that the checks he was originally charged with forging, charges which were severed from the original information and were not addressed in his 2008 trial, and thus were not considered by his jury, prove he was not at the Larson home when the crimes for which he was tried and convicted occurred. He further claims the checks "prove" that the adult victim of the sexual abuse charged in the second count gave false testimony at trial. He does not contest that he forged and passed the checks he claims provide him with an alibi. Charges related to the forgeries were severed from the original information on defense motion.

4. Mr. Burke further disputes evidence given at trial by the adult victim, claiming he did not sexually assault her.

5. He contends that he pulled the hand of the child victim "off his leg several times when she latched on to them (sic)." He claims he never made her touch him nor did he touch her in a sexual way. He asserts that he would never expose a child to pornography.

6. Mr. Burke's application was reviewed by Deputy Salt Lake County District Attorney Anna Rossi Anderson, Conviction Integrity Unit Chief. She determined it met the basic criteria for consideration by the Conviction Integrity Panel and referred it for our review and consideration.[3]

Procedural History and Outcomes

7. The events relevant to this application occurred on **September 15 and 16, 2007**, at the Salt Lake County home of Matthew and Kelly Larson and in various other locations in Salt Lake County.

8. On **October 18, 2007**, Mr. Burke was charged by information with the three counts that led to his conviction and several counts related to checks Mr. Burke now concedes he forged and passed on September 16 as well as additional checks forged and passed later in 2007.

9. Mr. Burke was arrested on **November 5, 2007** and has since been either detained awaiting trial or incarcerated serving his sentence. He is currently housed in Gunnison.

10. A preliminary hearing was held on **December 18, 2007**, before Judge Robert K. Hilder. Mr. Burke was bound over for trial on all counts in the original information. [4]

11. Prior to trial, Mr. Burke's counsel asked the trial judge, Judge Paul G. Maughan, to sever the forgery charges and the charge related to the adult victim from each other and from the

[3] Conviction Integrity Unit Policy and Procedure (approved and adopted September 15, 2020), ¶ 4

[4] Preliminary Hearing Transcript, December 18, 2007

charges involving the child victim. After a hearing held on **May 5, 2008**,[5] Judge Maughan agreed to sever the forgery charges, but kept the charge related to the adult victim and the charges involving the child victim together for trial.[6]

12. Mr. Burke's case was tried to a jury between **July 21 and July 25, 2008**.[7] Mr. Burke was represented at trial by Joseph H. Jardine and Peter Goodall. Deputy County Attorneys Cara M. Tangaro and Blake R. Hills, Salt Lake County District Attorney's Office, represented the State.

13. At trial the State called nine witnesses:

- ***The adult victim*** of the sexual abuse charged in Count 2 of the Amended Information; she was twenty years old in September 2007;
- ***The child victim*** of the aggravated sexual abuse charged in Count 1 and the dealing in harmful material to a minor offense charged in Count 3 of the Amended Information; daughter of Kelly Kilian Larson, step-daughter of Matthew Larson; she was four years old in September 2007;
- ***Matthew Lars*on**, husband of Kelly Killian Larson, brother of the adult victim, stepfather of the child victim;
- ***Kendall Dum*as**, an acquaintance of the defendant Ryan Burke; drove Ryan Burke from Snowbird to the Larson home the night of September 15, 16, 2007;
- ***Kelly Killian Larson***, wife of Matthew Larson, mother of the child victim, sister-in-law of the adult victim;
- ***Emily Hermansen***, an acquaintance of the defendant Ryan Burke; traveled from Snowbird to the Larson home with Kendall Dumas and Mr. Burke the night of September 15, 16, 2007;
- ***Shawn Kessler***, Audit Security Supervisor, Comcast Utah; testified regarding the downloads of pornography on Kelly Killian Larson's account on September 16, 2007;
- ***Detective Mandy Lovato***, Salt Lake County Sheriff's Office, Family Crimes Unit; detective who interviewed the child victim on September 26, 2007; talked to Matthew Larson before the interview;
- ***Detective Eric Brown***, Salt Lake County Sheriff's Office, Family Crimes Unit; detective who interviewed the defendant, Ryan Burke on October 11, 2007; interviewed the adult victim.

14. A number of exhibits were admitted during the State's case, including:

- five (5) text messages exchanged between Kelly Killian Larson and the adult victim during the early morning hours of September 16, 2007[8]

[5] Hearing Transcript, May 5, 2008, pp. 17-24

[6] Hearing Transcript, May 5, 2008, pp. 25-26; "... I'll give you a bifurcation, but not a trifurcation. All the sex related claims – sexually related will stay as one count, and the forgeries will be severed to a second trial. So we'll bifurcate the charges in the information."

[7] Trial Transcipt, Vol. I - V

[8] Trial Transcript, II/66-69 (NL), State's Exhibits 1 thru 5

- Comcast statements related to the pornographic materials ordered during the early morning hours of September 16, 2007[9]

15. The defense for Mr. Burke rested[10] after calling two witnesses:

- ***Detective Chris Christensen***, Salt Lake County Sheriff's Office;[11] detective who took the call from Kelly Larson on September 19, 2007, when she reported the assault on the child victim; and spoke with Kelly Larson on September 24, 2007
- ***Dr. Matt Davies***, a licensed Ph.D. child psychologist who treats victims of child abuse and child sexual abuse;[12] called by the defendant to testify about the techniques used by Detective Lovato when she interviewed the child victim on September 26, 2007; criticized the interview Detective Lovato conducted with the child victim; took issue with the protocols used at the Children's Justice Center, and followed by Detective Lovato, as suggestive and not tailored to the developmental stages of child victims; Dr. Davies did not speak with the child victim, Kelly Killian Larson, or Matthew Larson, though he reviewed police reports and the videotape of the interview of the child victim conducted by Detective Lovato on September 26, 2007.

16. The theory of the defense case at trial was that the adult victim, Matthew Larson, and Kelly Killian Larson lied.[13] The defense contended that the child victim was an unreliable witness due to her age and because she was coached by Matthew, and by her mother, Kelly, to fabricate a story that implicated the defendant. According to the defense, the child victim's mother and stepfather were angry with Mr. Burke because he slept over at their home, unexpectedly, uninvited, and inebriated, on the night of September 15 and 16. The defense argued the adult victim was coaxed by her brother and sister-in-law to lie for the same reason.

17. The defense further argued, relying on the testimony of Dr. Davies, that the child victim's recollection of events was corrupted by the way Detective Lovato conducted the child's interview at the Children's Justice Center, and by the way the prosecutors dealt with her.[14]

18. The forged checks were never mentioned at trial.

19. Mr. Burke did not testify.

20. On **July 25, 2008**, the jury returned a verdict of guilty on all three counts: aggravated sexual abuse of a minor (UCA §76-5-404.1 (2008)); sexual abuse (UCA §76-5-404 (Supp. 2010)); and dealing in material harmful to a minor (UCA §76-10-1206 (Supp. 2007)).[15]

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[9] Trial Transcript, II/72 (NL); II/156 (ML), Comcast, "I did discover that several pornographies had been ordered during the hours that he was there;" II/196-198 (KKL), State's Exhibits 17, 18, Comcast statements; Trial Transcript, II/204 (KKL), State's Exhibit 19

[10] Trial Transcript, III/174

[11] Trial Transcript, III/128-137

[12] Trial Transcript, III/142-174

[13] Trial Transcript, III/19-20

[14] See Hearing Transcript, May 5, 2008, pp. 4-18

[15] Trial Transcript V/3

21. On **October 8, 2008,** Mr. Burke was sentenced by Judge Maughan to prison for **fifteen years to life** on the aggravated sexual abuse of a minor count; for **one to fifteen years** on the sexual abuse count; and **zero to five** years for dealing in material harmful to a minor. The sentences run **concurrently**.

22. On **May 26, 2011**, the Utah Court of Appeals (Judge Roth, Judge Davis, and Judge McHugh) affirmed Mr. Burke's conviction and sentence. *State v. Burke*, 2011 UT App. 168.

23. On **September 28, 2011**, the Utah Supreme Court denied Mr. Burke's petition for certiorari review.

24. On **September 4, 2012**, Mr. Burke filed a petition with Judge Maughan asking for post-conviction relief. The petition raised a variety of claims of ineffective assistance of counsel at trial and related to sentencing. Mr. Burke was represented in the matter by Denver C. Snuffer. Jr., who continues to represent Mr. Burke.

25. In the petition and the memorandum he filed in support of his claim for relief,[16] Mr. Burke asserted, among other things, that trial counsel failed to investigate a potential alibi defense based on the checks that were the basis for the forgery charges eventually severed from the sexual abuse and pornography charges. Mr. Burke claimed that his defense team failed him because they focused solely on the credibility of the victims and the relatives of the victims. Mr. Burke asked for a new trial.

26. After a hearing held on **April 19, 2013,**[17] Judge Maughan vacated the conviction and sentence and granted Mr. Burke a new trial. As the Utah Court of Appeals noted in its opinion reversing Judge Maughan's order granting Mr. Burke's request for post-conviction relief:

> ¶15. The district court "agree[d] with the State that the evidence regarding the forged checks [was] not necessarily exculpatory" but ruled that trial counsel's performance had been deficient for "failing to make an adequate inquiry into the facts regarding Mr. Burke's alleged whereabouts . . . before making a decision as to whether to introduce that evidence at trial." The district court relied on our supreme court's conclusion in *State v. [J.A.L.]* that "trial counsel should [make] an adequate inquiry into the facts and available evidence in the case before making a reasonable decision on how to proceed." 2011 UT 27,¶36, 262 P.3d 1.

27. The State appealed Judge Maughan's order. On **January 2, 2015**, the Utah Court of Appeals reversed. *Burke v. State*, 2015 UT App 1. In a seventeen-page opinion, Judge Pearce, writing for

[16] Petition for Relief Under the Post-Conviction Remedies Act, UCA §§ 78B-9-101, et seq., URCP 65C, September 4, 2012; Memorandum of Points and Authorities in Support of Petition for Relief Under the Post-Conviction Remedies Act, UCA §§ 78B-9-101, et seq., URCP 65C, September 4, 2012.

[17] Hearing Transcript, Ryan D. Burke v. State of Utah, Case No. 120906001, April 19, 2013.

the court (Judge Christiansen and Senior Judge Greenwood concurring), concluded that the actions of defense counsel in Mr. Burke's case "were not objectively deficient" and thus did not meet the standard for finding ineffective assistance of counsel. The opinion parses the timing of the movies ordered and when Mr. Burke cashed the checks he claims provide him with an alibi, taking into consideration the information offered by Mr. Burke's investigator and a traffic engineer, but concludes the links in the chain of events that would have supported the alibi were weak, thus making it objectively reasonable for Mr. Burke's trial counsel not to further investigate the potential alibi. *Burke v. State, id.* at 17.

Relevant Facts

28. The established facts relevant to Mr. Burke's claim are set out in detail in the following:

- Utah Court of Appeals decision, *State of Utah v. Ryan David Burke*, 2011 UT App. 168, May 26, 2011, affirming the conviction and sentence; affirmed when the Utah Supreme Court denied his petition for certiorari review on September 28, 2011;
- Mr. Burke's petition and memorandum in support of his application for relief under the Post-Conviction Remedies Act, UCA §§ 78B-9-101, et seq., URCP 65C, dated September 4, 2012; the memorandum runs to 112 pages and is especially detailed regarding the timeline of events related to the conduct that led to his conviction, the timing of the transaction of the forged checks, and evidence proffered by a traffic engineer, Ryan Hales, supporting Mr. Burke's contention that he could not have been at the Larson home when what he was convicted of occurred;[18]
- Utah Court of Appeals decision, *Ryan David Burke v. State of Utah*, 2015 UT App 1, January 2, 2015, reversing Judge Maughan's order vacating Mr. Burke's conviction and sentence and granting a new trial on ineffective assistance grounds.

Standard of Review

29. In making its recommendation to the District Attorney, the panel is bound to decide whether it is convinced by a preponderance of the evidence that an application states a valid claim of innocence or that the conviction or sentence lacks integrity.[19]

30. In order to make that determination, the panel must be satisfied that it has sufficient information and a sufficient understanding of the information.[20]

[18] Memorandum, Petition for Relief Under the Post-Conviction Remedies Act, UCA §§ 78B-9-101, et seq., URCP 65C, September 4, 2012, pp. 18-29
[19] Conviction Integrity Unit Policy and Procedure (approved and adopted September 15, 2020), ¶5
[20] Conviction Integrity Unit Policy and Procedure (approved and adopted September 15, 2020), ¶5

31. The panel is not restricted to the issues raised by an applicant if in its examination of the claims in an application, its review of the record, or the information provided in support of the application, whether it was presented at trial or sentencing, on appeal, or in any submission or proceeding for post-conviction relief, or not, it becomes apparent, for any reason, that a conviction or sentence lacks integrity; that is, that a conviction was the result of a fundamental mistake in law or fact, known or unknown at the time of the conviction or sentence; misconduct on the part of any participant in the proceedings that throws serious doubt on a conviction or sentence; or newly discovered evidence or a new understanding or relevance of evidence that results from the application of a technology or methodology not available at the time of trial or plea that significantly calls into question the validity or reliability of a conviction or sentence.

Review

32. In addition to reviewing Mr. Burke's application, the members of the Conviction Integrity Panel individually reviewed the record in Mr. Burke's case, including the following relevant items:

- transcript of his preliminary hearing;
- transcript of his jury trial;
- Utah Court of Appeals decision, *State of Utah v. Ryan David Burke*, 2011 UT App. 168, May 26, 2011, affirming the conviction and sentence; affirmed when the Utah Supreme Court denied his petition for certiorari review on September 28, 2011;
- Mr. Burke's petition and memorandum in support of his application for relief under the Post-Conviction Remedies Act, UCA §§ 78B-9-101, et seq., URCP 65C, dated September 4, 2012;
- Utah Court of Appeals decision, *Ryan David Burke v. State of Utah*, 2015 UT App 1, January 2, 2015, reversing Judge Maughan's order vacating Mr. Burke's conviction and sentence and granting a new trial on ineffective assistance grounds;
- the checks that were the basis for the alibi claim Mr. Burke asserts;
- letters written by Mr. Burke in 2008;
- letter written by Mr. Burke dated January 1, 2020;
- letter from Mr. Burke to the panel dated August 23, 2020

33. The members of the panel either participated directly in or reviewed the recording of a meeting with Mr. Burke conducted December 18, 2019 at the Utah State Prison in which he further asserted his innocence, claiming that the checks he forged and passed on September 16, 2006, proved he could not have been in the Larson home when he is supposed to have committed the offenses for which he was convicted and sentenced. He further claimed that the mother of the child victim and her husband, the stepfather of the child victim and the adult victim's brother, falsely testified, and, more importantly, influenced the testimony of both the child victim and the adult victim in his case. He re-iterated this claim in his letter to the panel dated January 1, 2020.

Mr. Burke's Claims

Alibi

34. When the checks were negotiated on September 16, and how that is relevant to Mr. Burke's alibi claim are discussed in detail in both the memorandum filed in support of the post-conviction relief he sought from Judge Maughan and the second Court of Appeals decision. *Burke v. State*, 2015 UT App. 1. As noted, the Court of Appeals concluded the links in the chain of events that would support the alibi are weak, thus making it objectively reasonable for Mr. Burke's trial counsel not to further investigate the alibi as a potential defense. Burke v. State, id. at 17.

35. While the Conviction Integrity Panel concedes the Court of Appeals did not decide whether the alibi defense would have prevailed at trial, it did conclude it was weak. Though the severance prevented the defense from presenting the alibi and, incidentally, from arguing that the checks were motive for Matthew and Kelly Larson to complain to the police and to coerce or influence the testimony of the victims, the Court confined itself to deciding whether it was objectively unreasonable for Mr. Burke's trial counsel to do as they did and focus on the credibility of the witnesses rather than run the alibi defense. The Court decided only that Mr. Burke's trial counsel did not act ineffectively by not investigating further the timelines related to the checks; there was enough that was adverse about the checks to justify leaving them alone, hindsight notwithstanding.

36. We are left to decide whether the alibi claim Mr. Burke's makes is sufficiently believable for the Panel to conclude by a preponderance that his conviction is suspect and should be vacated; that is, whether the alibi he claims the checks give him exonerates him.

37. After parsing the timing, based on the testimony offered at trial; after carefully examining the checks and the notations on the checks; after reading and considering the memorandum in support of the post-conviction relief Mr. Burke sought (and got) from Judge Maughan, including what the traffic engineer had to say; and after carefully reviewing the decision of the Court of Appeals reversing Judge Maughan's decision to grant Mr. Burke a new trial, we are not convinced that what Mr. Burke claims regarding the alibi is sufficiently supported by the evidence to satisfy our standard of review. It does not, in our opinion, exonerate him. It does not establish, by a preponderance, that he could not have been at the Larson home when the crimes alleged were committed. Instead, the facts as we have them and as interpreted in light of the circumstances of the case establish by a preponderance that Mr. Burke was there.

38. Notwithstanding the checks and when and where they were negotiated, the accounts of both victims were tested at trial and believed by the jury. We find little support in the record or in what Mr. Burke provided us in support of his application that undermines their testimony. What they said is corroborated to a large degree, with some minor inconsistencies, by the text messages exchanged between the adult victim and Kelly Larson and by the Comcast statements

confirming that pornographic material was ordered and downloaded at the Larson home early on the morning of September 16, 2007.

39. Contrary to what Mr. Burke claims the checks prove, he does not credibly answer questions raised by evidence presented to the jury and by the reasonable inferences the jury could draw from it that place Mr. Burke in the Larson home at the time the crimes for which he was convicted were committed, including:

- who downloaded the pornographic material, or
- when it was downloaded, or
- why it was downloaded, or
- why Kelly and the adult victim were exchanging texts, or
- when they were exchanged, or
- why the child victim and the adult victim behaved the way they did that night, or
- what the child victim said she experienced that night, or
- for what she told her mother a short time later, or
- for what Mr. Burke said to Matthew Larson when he was confronted on the phone.

40. Our consensus view is the weight of the evidence does not favor the alibi. Nothing is offered in support of this application that was not thoroughly reviewed by the Court of Appeals in the second decision. We find nothing the Court of Appeals overlooked or got wrong in its decision in *Burke v. State* that convinces us that Mr. Burke was anywhere other than in the Larson home at the time the crimes he was convicted of were committed.

41. With regard to the possible effect of the alibi Mr. Burke claims exonerates him, we see no reason, on that ground, to recommend vacating, modifying or otherwise affecting the verdict or sentence in his case.

Credibility of the State's Witnesses

42. As noted, the credibility of the victims and their relatives were the sole focus of the defense at trial. Under cross-examination, Mr. Burke's counsel probed the adult witnesses for animus they had toward Mr. Burke which the defense claimed was motive for them to lie about the events of September 16, 2007, and to collaborate with the adult victim and the child victim to fabricate their accounts of what happened that night. Counsel did their best to discredit the child victim when she testified.

43. The reliability of the accounts given by the law enforcement officers who took statements from the victims and from the other witnesses called by the State were also more or less effectively challenged by Mr. Burke's counsel.

44. After thoroughly reviewing the transcripts, we find no reason to discredit or doubt the testimony of the State's witnesses, of the adult victim and the child victim in particular.

45. Dr. Matt Davies, a child psychologist with experience treating child victims of sexual abuse, was called by the defense to throw doubt on the testimony of the child victim by challenging the methods used by Detective Lovato when she interviewed the child on September 26, 2007, ten days after the events charged in the information occurred, and by laying a foundation for the defense to argue that the child's mother and stepfather and the prosecutors involved in the case corrupted the child's recollection of events by the way they interacted with her. The evidence he gave, in our opinion, and likely in the opinion of the jurors, was not especially helpful.

46. The members of the jury were fully aware of both the strengths and weaknesses of all of the witnesses who testified and could evaluate for themselves whether they were believable and gave reliable evidence; evidence sufficient to support conviction.

47. Absent some indication that what the jury saw and heard at trial was not consistent with the verdict, and absent anything more than what is in the record, Mr. Burke's claims to the contrary, we are disposed to accept the jury's verdict, based as it was on the evidence given by the child victim and the adult victim, corroborated by the text messages, the Comcast statements, and the testimony of Kelly and Matthew Larson.

48. We find no reason to dispute the jury's verdict and do not recommend vacating, modifying or otherwise affecting the verdict or sentence based on Mr. Burke's claims regarding the motives and credibility of the State's witnesses.

Conclusion and Recommendation

49. We find insufficient merit in the alibi claim to justify reversing the jury's verdict or the sentence in Mr. Burke's case.

50. We find nothing that leads us to question the jury's assessment of the credibility, reliability or value of the testimony of the victims and of the other witnesses called by the State, or of the value of the evidence presented by the defense in the form of expert testimony.

51. Nothing Mr. Burke presented in support of his application, not his alibi claim, not his contention that the Larson family had it out for him, nor his protestations of innocence, suggests the jury was wrong in its assessment of the evidence or the witnesses or, as noted above, that the outcome would have been different if the defense had presented the jury with the alibi suggested by the dates and times on the checks Mr. Burke forged and passed on September 16, 2006.

52. The panel concludes it has sufficient information to determine whether Mr. Burke's claim of innocence is supported by a preponderance of the evidence. We conclude it is not.

53. The panel recommends no action be taken by the District Attorney to vacate, modify or otherwise affect Mr. Burke's conviction or sentence.

Signed: Conviction Integrity Unit Panel

/s/ D. Gilbert Athay_____
D. Gilbert Athay

/s/ Judith Atherton_____
Hon. Judith Atherton

/s/ Christine Durham_____
Hon. Christine Durham

/s/ Michelle Love-Day_____
Michelle Love-Day

/s/ David Schwendiman_____
David J. Schwendiman