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IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

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IN THE MATTER OF  
  
STATE OF UTAH  
  
vs.  
  
ADRIAN GORDON  
  
3RD DISTRICT COURT  
CASE NO.

**PETITION TO VACATE  
CONVICTION PURSUANT TO  
U.C.A. 78B-9-501,  
CONVICTION INTEGRITY UNITS  
ACT, AND TO REINSTATE  
PROSECUTION**

Case No.

JUDGE \_\_\_\_\_

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The State of Utah, through its counsel, Sim Gill, Salt Lake County District Attorney, and Anna Rossi Anderson, Deputy District Attorney, hereby submits this Petition to Vacate Conviction Pursuant to U.C.A. 78B-9-501, Conviction Integrity Units Act (“State’s Petition”). The State requests that the conviction in Third District Case No. 011915498 be vacated and that the case be remanded to the trial court for further proceedings.

**JURISDICTION AND AUTHORITY FOR COURT TO VACATE CONVICTION**

Pursuant to Utah Code Title 8B, Chapter 9, Part 5, Conviction Integrity Units Act, a prosecution agency may “establish a conviction integrity unit to investigate...information discovered or received by the prosecution agency after trial, judgment of conviction, or sentencing that...significantly calls into question the legitimacy of the jury verdict, judgment of

conviction, or sentence.” Under the statute a conviction integrity unit may investigate a claim regarding a case if the case “occurred within the judicial district of the establishing office[] and...was prosecuted by the establishing office...” *Id.* Upon completing any review, the conviction integrity unit is required to present its findings to the district attorney or other prosecutor who supervises the office within which the conviction integrity unit operates, whereupon the supervising prosecutor may choose a course of action to take. *Id.* Should the prosecutor choose to take action regarding the case at issue, they may file a civil petition in district court seeking to either vacate the conviction, vacate the conviction and order a new trial, vacate the sentence and order further proceedings, or modify the conviction or sentence.<sup>1</sup> *Id.* This decision to petition the district court is solely within the discretion of the prosecutor who oversees the office within which the conviction integrity unit operates. *Id.*

The Salt Lake County District Attorney’s Office (“DAO”) established a conviction integrity unit (“CIU”) in October 2018. At that time no legislation was in place governing the operation of the CIU. The DAO, however, was active in the development of the legislation governing the development and operation of conviction integrity units statewide and has complied with the requirements of the statute since it was passed in the 2020 legislative session. The DAO reviews applications for felony offenses which occurred within Salt Lake County, and in which there has been credible or verifiable evidence provided that the conviction or sentence lacked integrity. The CIU process entails an initial review by the Conviction Integrity Unit Chief (employed by the DAO) and upon certification that the initial criteria are met, a five-member independent panel conducts further review and investigation as they deem necessary.<sup>2</sup> Upon completion of their review, the panel authors a report and recommendations for presentation to the District Attorney, who then makes a final decision as to what action, if any, should be taken.

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<sup>1</sup> The statute requires the State to notify the victim of the crime and the Attorney General of the filing of the petition. The State has spoken with the victim representative in this matter, as well as the Attorney General and has provided copies of the panel recommendations and of this petition to the Attorney General.

<sup>2</sup> The members of the CIU panel for this review were Gil Athay, Sandra Peuler, Christine Durham, Michelle Love-Day, and David Schwendiman.

The CIU operates in accordance with the statutory requirements. This petition, therefore, is appropriately filed and should be considered by the Court.

### **PLEA FOR VACATION OF CONVICTION**

Mr. Gordon was charged with the September 29, 2001, murder of Lee Lundskog. The case was initially reviewed by the Salt Lake County District Attorney's Office ("DAO") after an investigation into the murder led police to Mr. Gordon. The DAO filed one count of murder (first-degree felony) against Mr. Gordon on October 4, 2001. After a preliminary hearing on November 21, 2001, the matter proceeded to bench trial on December 17, 2001, ending in a finding of guilt on December 20, 2001. Mr. Gordon was sentenced on April 5, 2002, to a term of five years to life in the Utah State Prison. Mr. Gordon served more than 20 years of his sentence prior to being paroled in 2023.

Mr. Gordon's attorney from the Rocky Mountain Innocence Center ("RMIC") contacted the Conviction Integrity Unit ("CIU") in 2021 and asked for a review of his case. Counsel for the defendant submitted information to the State indicating that Mr. Gordon's conviction lacked integrity citing, among other things, the failure of the lead Salt Lake City Police detective to investigate or to even disclose to the State (and hence, to Mr. Gordon's trial counsel) that another individual had been identified as the person who murdered Mr. Lundskog.

After an initial review of the State's original case file and the materials submitted to the CIU by counsel, the Unit Chief determined that there was, in fact, credible and verifiable evidence presented that brought into question the integrity of Mr. Gordon's conviction and sentence. The information presented by counsel raised a legitimate question as to whether Mr. Gordon was the person who committed the murder, and at the very least presented questions as to whether his conviction lacked integrity. Based on this information and review the Unit Chief presented the case to the CIU panel for further investigation.

The CIU panel reviewed the case in several meetings after the initial presentation by the Unit Chief and reached a unanimous decision as to their recommendation in September of 2024. The panel submitted a written report and recommendation to District Attorney Sim Gill at that

point. (Attachment A). Upon review of the report and recommendation, DA Gill and the Unit Chief discussed the issues with DAO leadership over a period of more than a year. The DAO was aware that Mr. Gordon was actively pursuing relief in District Court through a Post Conviction Remedies Act (“PCRA”) petition and was concerned that pursuing action through the CIU process may interfere with that petition. As the PCRA proceedings have languished, however, the DAO has determined that justice requires adjudication of this matter as expeditiously as possible. The DAO submits that the case presented significant issues regarding the failure to disclose exculpatory evidence, which are outlined in the panel’s report and recommendations.

The murder prosecution of Adrian Gordon, from the date of the murder to the time of his conviction, took less than three months – 82 days, to be exact. This timeline is not only unusual but is unheard of for a case of this nature and with such immense consequences for not only the person charged, but the family members of the person killed and the community as a whole. This timeline, while surprising at first glance, is even more troubling when considering the problematic treatment of the case, leading the DAO to request vacation of Mr. Gordon’s conviction.

The most significant factor for the State in vacating Mr. Gordon’s conviction is the failure of law enforcement to provide potentially exculpatory evidence to the prosecution and defense prior to Mr. Gordon’s trial. On the date of Mr. Lundskog’s murder the Salt Lake City Police Department were called to investigate, and the case was assigned to a detective to lead the investigation. The lead detective secured the murder charge from the District Attorney’s Office just five days later. There is no indication, however, that information was provided to the DAO that on October 1, 2001, the Salt Lake City Police were called to an address within the city limits to respond to a call from an anonymous female who reported that the person who committed the murder at the 7-Eleven was in the apartment. Police arrived at that scene and arrested an individual, A.B., on outstanding warrants. At no time was the report of A.B.’s arrest or the circumstances leading to it provided to the prosecution or defense in Mr. Gordon’s case. In fact,

the report was filed under a separate case number from the report pertaining to Mr. Lundskog's murder and was not discovered until RMIC subpoenaed SLCPD for the information and were provided the report in 2019. The existence of A.B. as a suspect was briefly addressed at Mr. Gordon's trial (apparently after Mr. Gordon himself was told by another jail inmate that A.B. was the actual murderer) but when the lead detective was asked about A.B. as a suspect, he testified that the only A.B. he knew was a probation officer. In an affidavit provided to the DAO with Mr. Gordon's CIU petition, A.B. swore that he was, in fact, arrested on October 1, 2001, that he was questioned about the murder at the 7-Eleven, that he was shown still photos of himself inside of the 7-Eleven, and that he denied being involved in the murder. None of this information was provided to the prosecution or defense prior to Mr. Gordon's trial, nor has any documentation of those conversations been produced as of this date. Additionally, in the lead detective's handwritten notes, a reference dated 10-1-01 is made reading "lives in apt 13" which seems to indicate information regarding the A.B. arrest location. While the lead detective is not listed as one of the officers who physically contacted and arrested A.B., it appears he may have had knowledge of his existence and the fact that he was reported to have been the person who committed Mr. Lundskog's murder. If the lead detective was not aware of this information, personnel at the Salt Lake City Police Department were certainly aware of the connection, and yet the information was never properly channeled and provided to the prosecution or defense in the matter.

In its *Brady v. Maryland* decision, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."<sup>3</sup> The Utah Supreme Court explained its standard for materiality under *Brady* in *Tillman v. State*:

"First, when determining whether a "reasonable probability" of a different result exists, "the question is not whether the defendant would more likely than not have received a different [result] with the evidence," but rather, "whether in its absence

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<sup>3</sup> 373 U.S. 83 (1963) at 87.

[the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence.”...Second, “materiality ... is not a sufficiency of the evidence test,”...and, therefore, “not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions,”...To establish materiality, a defendant need only show “that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict” or sentence...Third, the materiality of suppressed evidence must be evaluated in the context of the entire record...Although a court may “evaluate the tendency and force of the undisclosed evidence item by item,” it is the cumulative or collective effect of the evidence that is weighed when determining whether the disclosure would have created a reasonable probability of a different result...<sup>4</sup>

In light of these standards, the existence of a potential alternative suspect is exculpatory information that, when withheld, can be – and is in this case – fatal to the integrity of a conviction.

### CONCLUSION

The presentation of independent, newly-discovered evidence of an alternative suspect in Mr. Lundskog’s murder provides clear and convincing evidence that Mr. Gordon’s conviction and sentence lack integrity. The State submits that this issue justifies vacating the conviction and sentence, and that the case should be reassigned to a trial court judge and proceed in a manner that considers that issue.<sup>5</sup> In preparation for the filing of this Petition, the District Attorney’s Office has communicated extensively with RMIC and the Attorney General’s Office, as well as with one of the originally assigned prosecutors, family members of Mr. Lundskog, and leadership at the Salt Lake City Police Department. The AGO has indicated that they will not move to intervene in this matter at this time.

WHEREFORE, the State requests that the conviction in Third District Case No. 011915498 be vacated, that the matter be set for a hearing before the assigned Civil Judge at the earliest date possible given the lack of intervention by the AGO, and that the case be assigned a

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<sup>4</sup> *Tillman v. State*, 2005 UT 56 at ¶¶30-32 (citations omitted).

<sup>5</sup> It is the State’s position that because there is no statute of limitations for these charges, and because there is no finding of actual innocence at this time, the vacating of the conviction does not warrant a dismissal of the charges unless and until the DAO homicide division screens the case and finds the charges cannot be pursued.

trial court judge for further proceedings on the original charges. The State requests that the defendant appear in criminal court via summons.

RESPECTFULLY SUBMITTED this \_\_22\_\_ day of \_\_December, 2025.

By: /s/ Sim Gill\_\_\_\_\_

Sim Gill

District Attorney

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copies of the foregoing PETITION TO VACATE CONVICTION PURSUANT TO U.C.A. 78B-9-501, CONVICTION INTEGRITY UNITS ACT were delivered to Jennifer Springer, counsel for the defendant, on this 19<sup>th</sup> day of December 2025, via email.

/s/ Anna Rossi Anderson

Anna Rossi Anderson

Deputy District Attorney

# ATTACHMENT "A"

## REPORT AND RECOMMENDATION

08/2023

**Date:** September 3, 2024

**From:** Salt Lake County District Attorney's Conviction Integrity Panel

Justice Christine Durham

Judge Sandra Peuler

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:** GORDON, Adrian Whitfield

### Recommendation

After careful consideration, it is the consensus of the Conviction Integrity Panel ("panel") that:

- It possesses sufficient information to determine by a preponderance of the evidence whether Mr. Gordon makes a valid claim of innocence or that his conviction or sentence otherwise lacks integrity;<sup>6</sup>

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<sup>6</sup> Conviction Integrity Unit Policy and Procedure (approved and adopted September 15, 2020), ¶15

- **The preponderance of the evidence reviewed by the panel leads us to conclude that the evidence given by the only witness who identifies Mr. Gordon as Mr. Lundskog’s assailant was unreliable, thus compromising the integrity of his conviction;**
- **Further, a preponderance of the evidence reviewed by the panel, supports our conclusion that the failure of the investigating officers to follow-up on a potential suspect or explain why he was eliminated as a suspect, along with the failure to timely advise the prosecutors and defense as well as RMIP of the existence of a second suspect, settling instead on convicting Mr. Gordon as the singular focus of their efforts, adversely affected Mr. Gordon’s defense and post-conviction relief efforts, and compromised the integrity of Mr. Gordon’s conviction;**
- **Given the weaknesses we believe exist in the investigation, the failure to disclose potentially significant information to the defense, and what we believe to be the unreliable testimony of the State’s principal witness, we conclude by a preponderance of the evidence we reviewed, that on balance the circumstantial evidence considered by the judge in finding Mr. Gordon guilty of the crimes with which he was charged does not support the conviction in Mr. Gordon’s case. It, therefore, lacks integrity.**

**The panel recommends that the CONVICTION AND SENTENCE in Mr. Gordon’s case be VACATED.**

#### **Application**

1. On May 11, 2021, Adrian Whitfield GORDON made application for the review of his 2001 Third District Court (judge alone) conviction and subsequent sentence for the First-Degree Murder of Lee LUNDSKOG on September 29, 2001, in Salt Lake County.
2. The Conviction Integrity Panel (panel) received Mr. Gordon’s application in January 2022.
3. Mr. Gordon claims in his application supported by the material provided in the addendum that:
  - Police failed to properly secure and collect crucial evidence from the scene of the crime;
  - Steven Butcher reported to police who responded to the crime scene that a white transient male was at the 7-11 around the time of the murder who appeared to be “nervous and panting heavily,” but the lead was never followed and the person never found;
  - Information regarding a “group of hispanics” seen hanging around the 7-11 with baseball bats the evening before the attack was reported to Detective Jim Prior who was

deposed in Mr. Gordon's first PCRA case and testified that "some follow-up" was done on this information, but the information was never provided to the defense;

- There was no follow-up on information provided by a witness that there was a dark SUV occupied by a black male and two Hispanic males that was parked in the 7-11 parking lot while the occupants went into the store, but became nervous after leaving the store and left the area quickly;
- Dr. Todd Grey, the Utah State Medical Examiner, noted at the autopsy that Mr. Lundskog's injuries were not consistent with injuries inflicted by a baseball bat or bats, but were "characteristic" of injuries caused by "some type of instrument with a 'more rough & uneven edge & surface,'" but when Detective Prior, who was aware of Dr. Gray's observation, returned to the crime scene he failed to collect the "rough-edged concrete panel covered in blood that he had previously seen lying directly next to the victim's head;"
- Jose Lopez's identification of Mr. Gordon and his account of what he said he saw was fabricated, but he admitted telling Gustavo Diaz-Hernandez, who shared an apartment with Lopez, about the interview with Detective Prior, about the video clips he was shown during the interview, and about the person he'd identified from the video;
- Lopez returned to the 7-11 on October 1, 2001, the day after the murder was reported, saw a black male with "nappy hair" in the store, told the store clerk that was the man he'd seen commit the attack he described for Detective Prior the day before. The store clerk called police, but when Detectives responded the man was gone. When they reviewed the store surveillance video, they realized the person on the tape was a different person than the one Lopez just told the clerk he'd recognized in the store, but they "conducted no follow-up investigation;"
- Detective Prior had the surveillance video images converted to still images, studied them, and recognized Mr. Gordon as the person on the surveillance tape;
- On October 2, 2001, Detective Prior interviewed Gustavo Diaz-Hernandez, Lopez's roommate and cousin and an undocumented Mexican citizen. Mr. Gordon claims Diaz-Hernandez speaking through an interpreter and "relying on the story he knew Lopez told the police," described what he saw early in the morning on September 29, including details of the attack he witnessed and seeing the assailant walk away from the victim and enter the 7-11. He told Detective Prior he saw blood on the attacker's right shoe as he approached the store. He described the person he saw as a thin male, approximately 150-155 pounds, white shoes, shaven head, wearing a white shirt. Mr. Gordon claims he does not fit this description; he had medium length black hair, a goatee, has a muscular build, and is 5'8" tall. Mr. Gordon claims Diaz-Hernandez learned the attacker was black only after he was shown a photo line-up of all black males. Diaz-Hernandez told the detective he saw the attacker exit the store carrying two bags, open the rear passenger door of a vehicle in the 7-11 parking lot, put his bags inside, then go back to the victim and kick him several more times. He said he saw the attacker walk away from

the store with the vehicle which he identified as a blue or grey Nissan or Chevrolet, four doors, following him. Diaz-Hernandez could not identify a suspect from the photo line-up he was shown.

#### **Material Reviewed by the Panel**

4. The panel received several items to review, including Mr. Gordon's initial submissions and a memorandum provided by the Rocky Mountain Innocence Project ("RMIP") in support of his application. RMIP provided additional material after the application was submitted.
5. The panel was provided the transcript of the Preliminary Hearing held in Mr. Gordon's case on November 21, 2001. It also was given the trial transcript from the trial before Judge Leslie Lewis held on December 17, 18, 19, and 20, 2001.
6. The prosecution binders in the case were also made available to the panel for review.
7. The Motion for Summary Judgment filed by the Utah Attorney General's Office in the latest PCRA case brought on Mr. Gordon's behalf (Gordon III) by the RMIP was reviewed by the panel.
8. The Panel reviewed each of the appellate decisions in Mr. Gordon's case. It should be noted that panel member Justice Christine Durham was Chief Justice of the Utah Supreme Court when it decided *State v. Gordon*, 84 P.3d 1167, 2004 UT 2 (January 16, 2004) (J. Wilkins; Chief Justice Durham, Associate Chief Justice Durrant, J. Parrish, and J. Nehring concurring). After carefully considering newly presented information reviewed by the panel in this case, Justice Durham concluded, with the concurrence of the panel members, that no grounds exist which compel her to recuse herself from advising the District Attorney on the merits of Mr. Gordon's application.
9. The panel spoke with B. Fred Burmester, the Deputy District Attorney who prosecuted Mr. Gordon. Kevin Murphy who prosecuted the case with Mr. Burmeister, declined to be interviewed.
10. Paul Gotay, Mr. Gordon's trial counsel, was invited to speak with the panel, but declined.
11. Mr. Gordon was not interviewed.

12. On May 30, 2023, the panel met with Ms. Jennifer Springer and Ms. Kristy Columbia of the RMIP to discuss Mr. Gordon's application. What we learned from Jennifer Springer and Kristy Columbia from the RMIP and the material they gave us during our last meeting on 30 May 2023 is significant.

13. They provided a copy of a detailed chronology/timeline based on the 7-11 surveillance video and stills, along with copies of two still photos from the video showing the register in the interior of the 7-11 at @ 5:47 a.m. on September 29, 2001. Copies of 4 photographs of Mr. Gordon taken by police on August 13, 2001, presumably in connection with another matter, and copies of 2 photographs taken on September 13, 2001, again, presumably taken by police as part of the investigation of another matter were included in what they brought to us on 30 May.

14. They also provided copies of 5 photographs taken on September 29, 2009, between 5:38 a.m. and 5:44 a.m., showing the general lighting conditions behind the 7-11 around the time of day on the same day of the year when Mr. Lundskog was murdered eight years earlier.

15. Ms. Springer gave the panel a copy of a Salt Lake Police Department report on the arrest of Anthony Eugene BROWN on October 12, 2001. The report is a follow-up on information received from an "anon female" who told police that the "suspect from the 7-11 homicide" was in an apartment at 1768 West 1300 North. Later that day, Mr. Brown was arrested at the apartment on an outstanding escape warrant (aggravated assault). An entry on the report by the arresting officer, Craig D. Merrill, notes the Mr. Brown was found "as a result of looking for a homicide suspect." The report was just recently provided to the RMIP pursuant to subpoena.

16. Ms. Springer also gave the panel a copy of the Salt Lake Police Department case report from October 17, 2001, prepared by Teresa McKinnon. The case report is among the items the panel already had access to as part of the DA's case file.

17. On October 24, 2023, the panel met with Ms. Erin Riley, an Assistant Utah Attorney General to discuss Mr. Gordon's application. Ms. Riley made it clear to the panel that her position and the position of the Attorney General's Office was that there were no defects of concern in the conviction or sentencing of Mr. Gordon. She reiterated the position taken by the State in its filings in the appeals and post-conviction efforts in Mr. Gordon's case.

18. Detective Jim Prior was located but was not interviewed by the panel. He still works in the SLCPD, assigned to the Pioneer Division. He was and now, after filings by the RMIP, is the subject of a claim of misconduct. What he did and didn't do in this case is one of the points of contention in the current PCRA case. When asked whether the panel was free to talk to Detective Prior, Ms. Riley indicated the State

had no issue with us doing so if Detective Prior was willing to speak with us. The panel is unaware whether Detective Prior is represented by counsel or his police representative.

### **Procedural History and Outcomes**

19. On September 29, 2001, Mr. Gordon was on probation after his 1999 plea of guilty in Third District to a Robbery/3<sup>rd</sup> Degree Felony committed in 1998, an offense for which he was sentenced on April 12, 1999, to five years in prison. The sentence was suspended, and Mr. Gordon was placed on probation.

20. Mr. Gordon's probation was revoked on March 27, 2000. He was ordered to serve 60 days in jail and 36 months' probation, the period of probation to run from March 27, 2000.

21. A warrant was issued for Mr. Gordon's arrest on October 4, 2001, based on an Information filed in the Third District Court by Deputy District Attorney Robert Stott on October 4, 2001, charging him with one count of Criminal Homicide, Murder, a First-Degree Felony (UCA ¶76-5-203), for the murder of Lee LUNDSKOG on September 29, 2001, at 1285 North Redwood Road in Salt Lake County, Utah.

22. Mr. Gordon was taken into custody the same day, October 4, 2001.

23. A bench trial in Mr. Gordon's case was held before Judge Leslie Lewis between December 17, 2001, and December 20, 2001. Judge Lewis announced findings and delivered her verdict on December 20, 2001. Among the findings Judge Lewis' made that we believe to be relevant to our review are the following:

23.1. Judge Lewis observed, "In this case the sole issue is identification." (See, Trial Transcript, Fourth Day, pg. 537). We agree.

23.2. She also noted, "None of the acts or the pieces of evidence if they stood alone would probably be sufficient [for conviction]. It's the totality that, when they come together, paint a vivid picture. And to that end, I would point out that that is where the basis for this conviction lies." (See, Trial Transcript, Fourth Day, pg. 537). We agree but find that some of the most important pieces were not especially reliable, Mr. Diaz-Hernandez's testimony taken as a whole in particular. It is also significant that a second suspect was never fully investigated. Moreover, because the prosecutors and defense were never told of the second suspect prior to trial and no explanation was ever offered for why that suspect was eliminated from consideration for Mr.

Lundskog's murder, there was no opportunity to fully develop the possibility that someone else killed Mr. Lundskog.

23.3. Judge Lewis acknowledged the difficulties with eyewitness identification generally and in this case specifically: "There is eyewitness identification. And I am very much aware under *State v. Long* [*State v. Long*, 721 P.2d 483 (Utah 1986), holding modified by *State v. Clopten*, 2009 UT 84, 223 P.3d 1103] that eyewitness identification is suspect. Eyewitness identification has to be [*sic*] carefully considered in view of things such as the lighting, the race of the individual being identified versus the race of the person doing the identification, the time one has to see the individual, whether or not one has problems with their vision, the emotions or tensions that are aroused in people when they do the observation. As I said, visual problems and lighting are key factors." (See, Trial Transcript, Fourth Day, pgs. 539-540). We are persuaded that Mr. Diaz-Hernandez's ability to make the identification of Mr. Gordon as the person who assaulted and killed Mr. Lundskog was compromised not only by the conditions under which he saw what he said he saw, but also by his circumstances.

23.4. Judge Lewis assumed from the absence of "white tennis shoes" in Mr. Gordon's home when it was searched that Mr. Gordon disposed of them. (See, Trial Transcript, Fourth Day, pg. 545). We believe the shoes worn by the assailant are a critical piece of evidence. We also believe that the adverse inference that Mr. Gordon disposed of shoes matching the description given by Mr. Diaz-Hernandez should not have been drawn from the fact that shoes matching those Mr. Diaz-Hernandez said he saw that morning were not found in Mr. Gordon's possession or in his residence or anywhere else where he had access.

23.5. Regarding Mr. Diaz-Hernandez's testimony and the testimony of Mr. Mellen, Judge Lewis concluded: "I found both Mr. Hernandez - who of course was reluctant initially to report this crime for obvious reasons, he's an illegal alien - and Mr. Mellen to be particularly credible witnesses. They didn't wish to be here, but they were both here and they testified in an open, credible manner. They didn't have to search for information because they were telling the truth. That is my perception from watching them." (See, Trial Transcript, Fourth Day, pg. 546). We disagree.

23.6. Curiously, despite acknowledging Mr. Gordon's right not to testify from which no inference could be drawn, Judge Lewis, drew a critical inference from his silence, observing; "And, finally, the defendant has not testified, nor do I consider that nor is it a factor in this. But I have observed throughout the trial the defendant's demeanor, which is one of a total lack of emotion, even when one listened to very painful evidence being adduced. And that, coupled with everything else, contributes to the verdict." (See, Trial Transcript, Fourth Day, pg. 547).

24. Mr. Gordon was sentenced on April 5, 2002, to a term of imprisonment of five years to life.

25. On April 15, 2002, Michael A. Peterson, Salt Lake Legal Defender Association, filed a Notice of Appeal on Mr. Gordon's behalf.

26. On December 13, 2002, an appellate brief was filed in the Utah Supreme Court on Mr. Gordon's behalf by Linda Jones and Michael Peterson, Salt Lake Legal Defenders Association, challenging his conviction on the ground that the evidence in his case was insufficient to support the verdict, claiming that (1) the evidence as a whole did not support the first set of findings the judge made in reaching her verdict, those regarding the eyewitness testimony of Mr. Diaz-Hernandez in particular; (2) additional findings by the judge made "improper references" and "were irrelevant;" and, (3) the eyewitness evidence in his case was unreliable and insufficient to support the verdict.

27. On February 27, 2003, Assistant Attorney General Jeanne B. Inouye filed a response on behalf of the State of Utah, to which Mr. Gordon's counsel replied on June 2, 2003, once again arguing the inadequacy of the eyewitness testimony relied upon by the trial court.

28. On January 16, 2004, the Utah Supreme Court ruled against Mr. Gordon, noting that the "only issue at trial was the identity of the attacker and the only witness to the attack described an attacker who matched Gordon's physical description and was wearing clothing similar to that worn by Gordon that morning." Further, the court observed, "Another witness saw Gordon and Lundskog interact shortly before the murder." The evidence given by Robert Mellen and Gustavo Diaz-Hernandez was by itself ample evidence to support Mr. Gordon's conviction. *See State v. Gordon*, 84 P.3d 1167, 2004 UT 2 (January 16, 2004) (J. Wilkins; Chief Justice Durham, Associate Chief Justice Durrant, J. Parrish, and J. Nehring concurring)

29. A Post-Conviction Relief Act, UCA §78B-9-301, ("PCRA") petition (Gordon I) was filed on Mr. Gordon's behalf in Third District Court on October 28, 2009. Mr. Gordon claimed that his constitutional rights to due process were violated first, when the State withheld evidence that he asserted was exculpatory (*i.e.*, notes made by the detective who attended Mr. Lundskog's autopsy, notes containing the detective's observations and comments purportedly made by the Medical Examiner about the nature of the wounds). He further contended that he was denied due process when the police failed to collect or preserve the cement panel found at the crime scene, evidence, he maintained, was "critical physical evidence." Finally, Mr. Gordon claimed his trial counsel, Mr. Gotay, ineffectively represented him when he failed through reasonable diligence to discover the State's failure to disclose the notes and collect the cement panel as evidence.

30. On March 12, 2021, the district court granted the State's motion for summary judgment and denied relief.

31. The Utah Court of Appeals affirmed the district court's grant of summary judgment and denial of relief in Gordon I. *Gordon v. State*, 2016 UT App 190. In a lengthy opinion by Judge Kate Toomey, in which Judges Orme and Senior Judge Bench concurred, the district court's grant of summary judgment was affirmed. The Court of Appeals found the State had failed to disclose the notes complained of and failed to collect the cement panel as evidence, but agreed with the district court that it would not have significantly affected the verdict if the notes had been disclosed or the cement panel had been recovered. Consequently, the court agreed with the district court that Mr. Gordon's trial counsel was not ineffective. The Utah Supreme Court denied cert on January 30, 2017. *Gordon v. State*, 390 P.3d 726 (Utah 2017).

32. On December 4, 2013, a Verified Petition for Post-Conviction DNA Testing (Gordon II), was filed in Third District Court by Matthew M. Durham and David J. Williams (Stoel Rives) and Jensie L. Anderson (Rocky Mountain Innocence Project) on behalf of Mr. Gordon, pursuant to UCA §78B-9-301 and Rule 65C, Utah Rules of Civil Procedure. A Memorandum with exhibits was filed in support of the petition.

33. Mr. Gordon's DNA testing petition (Gordon II) was denied. The denial was affirmed by the Utah State Supreme Court in 2016. *Gordon v. State*, 2016 UT 11, 369 P.3d 1255.

34. A second post-conviction relief petition (Gordon III) was filed on March 24, 2020. On August 25, 2020, Gordon amended the petition. The amended petition claims only that Mr. Gordon's due process rights under *Brady v. Maryland*, 373 US 83 (1963) were violated when the State failed to disclose that it had investigated Anthony Brown as an alternate suspect.

35. Motion for Summary Judgment in Gordon III (Case No. 200902334/Judge Vernice Trease) was filed in the Third District Court by the Utah Attorney General's Office on January 26, 2021.

36. RMIP filed a response on Mr. Gordon's behalf on March 12, 2021. That motion has yet to be ruled upon.

37. While the Policies and Procedures of the Conviction Integrity Unit merely require that the "direct appeal" process be completed before an applicant can ask for review, which occurred when the Utah Supreme Court affirmed Mr. Gordon's conviction and sentence, *State v. Gordon*, 84 P.3d 1167, 2004 UT 2 (January 16, 2004) (J. Wilkins; Chief Justice Durham, Associate Chief Justice Durrant, J. Parrish, and J. Nehring concurring), the panel will ordinarily wait to offer its advice until *all* reviews in a case are

complete. In this case the applicant has twice sought relief under the Post Conviction Relief Act, UCA §78B-9-301, the last of which (Gordon III) is still pending. Thus, Mr. Gordon's legal avenues of relief have not yet run.

38. Since receiving Mr. Gordon's case for review the panel has chosen not to provide the District Attorney with a Report and Recommendation that might in some way interfere with or influence the outcome in Gordon III or in any other pending matter related to Mr. Gordon's application to have his conviction reviewed. Nonetheless, the panel feels it is important to finish its work because of the time it has taken to complete the legal reviews in Mr. Gordon's case and because of the considerable passage of time since his application was first given to us to be reviewed. We do not feel bound to wait until Gordon III is resolved.

39. After careful consideration, we do not believe our advice will be affected by the outcome of Gordon III. The panel applies an equitable, not a legal, standard in its review and, as noted below, in the appropriate case we can consider matters notwithstanding those raised and disposed of in the appellate review or the PCRA process. We provide our Report and Recommendation, of course, confident the District Attorney will, before acting on our recommendation, weigh our advice and consider the outcome in Gordon III once it is decided.

#### **Standard of Review<sup>7</sup>**

40. 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.<sup>8</sup>

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<sup>7</sup> See, UCA 78B-9-503. **Conviction Integrity Unit.**

(1) A prosecution agency may establish a conviction integrity unit to investigate:

- (a) plausible allegations of factual innocence;
- (b) newly discovered material evidence; or
- (c) information discovered or received by the prosecution agency after trial, judgment of conviction, or sentencing that:
  - (i) if disclosed to the convicted person prior to trial, judgment of conviction, or sentencing, would have resulted in a significant probability that the result would have been different; or
  - (ii) significantly calls into question the legitimacy of the jury verdict, judgment of conviction, or sentence.

41. The panel must be satisfied that it has sufficient information and a sufficient understanding of the information to make that determination.<sup>9</sup>

42. The panel is not limited by the issues an applicant raises if: (1) in its examination of the claims made in the application; or (2) its review of the record; or (3) considering the information provided in support of the application, whether or not it was known at the time a plea was being considered, whether or not it was presented at trial or in connection with sentencing, on appeal, or in any submission or proceeding for post-conviction relief; or (4) under appropriate circumstances, based on its own initiative and investigation of an applicant's case, it becomes apparent, for any reason, that an applicant has a valid claim of innocence or that his or her conviction or sentence lacks legitimacy; that is,

42.1. The plea, conviction or sentence was the result of a fundamental mistake in law or fact, known or unknown at the time of the plea, conviction or sentence that is more likely than not to have affected the outcome, resulting in a decision not to plead, dismissal, acquittal, or a lesser sentence; or

42.2. There was misconduct on the part of any participant in the case that causes serious doubt about the decision to plead, the integrity of the trial, the conviction, or the sentence; or

42.3. New evidence or new developments in law or fact relevant to the case, including reliable medical, psychiatric, or psychological evidence and opinion, emerges which would more likely than not have affected the outcome if it had been available at the time of trial, or known when the plea was negotiated or taken, or when sentence was imposed, resulting in a decision not to plead, dismissal, acquittal, or a lesser sentence; or

42.4. Reliable evidence known to exist but not presented at trial or not considered in connection with a plea or in relation to a sentence, became relevant after conviction or sentencing in a way that would more likely than not have affected the outcome, resulting in a decision not to plead, dismissal, acquittal, or a lesser sentence; or

42.5. The emergence or application of reliable science, or reliable technology or methodology which did not exist or was not available to be used at the time of trial or plea,

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<sup>8</sup> Conviction Integrity Unit Policy and Procedure (approved and adopted September 15, 2020), ¶15. While the panel is not bound to apply the standard of review used on appeal when an applicant claims actual innocence, the standard is instructive. In the case of a bench trial, when a conviction is challenged on appeal for insufficiency of the evidence, the judge's verdict must be sustained "unless it is 'against the clear weight of the evidence, or if [the appellate court reaches] a definite and firm conviction that a mistake has been made.'" *State v. Gordon*, 84 P.3d 1167, 2004 UT 2 (January 16, 2004), citing *State v. Goodman*, 763 P.2d 786, 786-787 (Utah 1988); *State v. Walker*, 743 P.2d 191, 193 (1987).

<sup>9</sup> Conviction Integrity Unit Policy and Procedure (approved and adopted September 15, 2020), ¶15

if it had existed or been considered at trial, in connection with a plea, or in relation to a sentence, would more likely than not have affected the outcome, resulting in a decision not to plead, dismissal, acquittal or a lesser sentence

### **Relevant Facts, Findings, and Conclusions**

43. The panel views this as a case that turns on whether the investigation, prosecution, and conviction bear up under equitable scrutiny. The panel has several concerns raised by its examination of what it believes are the relevant portions of the material it reviewed, including the trial transcript:

43.1. The police never followed up on Anthony Brown as a suspect in the homicide, nor was an explanation ever given as to why he was eliminated as a suspect.

43.2. It appears the police report related to Mr. Brown's arrest and the tip that led to it was not provided to the prosecutors, the defense, nor RMIP until sometime in 2019 or later. The panel is impressed that Mr. Brown was overlooked or ignored as a potential suspect after detectives fixed on Mr. Gordon as the focus of their investigation once Detective Prior settled on him as Mr. Lundskog's assailant based on prior experience he had with Mr. Gordon.

43.3. We cannot conclude, as the State appears to assume in its Motion for Summary Judgment,<sup>10</sup> that this was ever disclosed to the prosecutors, the defense, or to RMIP until years after the conviction. The citation to the record is not quoted in context in the Motion for Summary Judgment. In the portion not cited, Detective Prior appears to deliberately deflect when asked about Anthony Brown rather than answering that Mr. Brown was indeed a suspect and not an Adult Probation and Parole Officer with whom the detective was acquainted.

43.4. Despite Mr. Gotay's cryptic reference to an Anthony Brown as a suspect during his cross-examination of Detective Prior at trial (*see*, Trial Transcript, Third Day, pg. 461),<sup>11</sup> the SLCPD's

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<sup>10</sup> Motion for Summary Judgment, January 26, 2021, pg. 11:

¶167. After the video was shown during trial, Gordon's defense counsel asked the police detective who was testifying: "Isn't it true that at one time you thought that Anthony Brown, a gentleman named Anthony Brown, was a suspect? TR210:461.

¶168. The police detective answered: "No." TR210:461.

<sup>11</sup> Trial Transcript, Third Day, pg. 461:

failure to disclose information about Mr. Brown that was in its possession until eighteen years after trial, and the Detective Prior's less than forthright answer to Mr. Gotay's question about Mr. Brown as a potential suspect, significantly compromised the integrity of the investigation and unfairly hindered Mr. Gordon's defense. For this not to have been disclosed to prosecutors or the defense at the time of trial or provided to RMIP in a timelier manner, not only unfairly disadvantaged the defense at trial, but also set back the post-conviction relief effort undertaken by RMIP on behalf of Mr. Gordon.

43.5. There is no dispute that Mr. Gordon was in and out of the 7-11 located at 1300 North Redwood Road in Salt Lake City three times during a 12-minute period between 5:20 a.m. and 5:32 a.m. on September 29, 2001. Mr. Gordon is seen on the surveillance video entering the 7-11 (for the second time that morning) at around 5:25 a.m. and is seen leaving less than a minute later. He can still be seen on the surveillance video walking north in front of the store at 5:26 a.m. He is seen re-entering the store (for the third time) at 5:31 a.m. The surveillance video shows him for the last time outside the 7-11 at 5:32 a.m., walking north.

43.6. Mr. Lundskog was last seen alive on the 7-11 surveillance video walking in front of the store at around 5:27 a.m. on September 29, 2001. He was first seen laying behind the 7-11 shortly after 5:45 a.m. by Steven Butcher, a passerby on his way to the store. (See, Trial Transcript, Second Day, pgs. 268-269). Mr. Butcher thought he was "passed out." (*Id.*, pg. 270). He testified that the person he saw was "snoring," his chest "moving like he was breathing." (*Id.*, pg. 270). He did not approach the man. (*Id.*, pg. 270). He did not mention what he saw to the clerk in the 7-11. (*Id.*, pg. 273). As he returned the way he came, Mr. Butcher looked at the person again and thought he heard him snoring. (*Id.*, pg. 274).

43.7. The State Medical Examiner, Dr. Todd Grey, testified at trial that Mr. Lundskog suffered traumatic injuries to his head and brain resulting in his death. The injuries were consistent "with someone stomping on another person's head with a shoed foot?" (See, Trial Transcript, Second Day, pg. 220). He also testified that Mr. Lundskog was "alive and breathing for some period of time after these injuries of the head and face were sustained." (*Id.*, pg. 217).

43.8. Dr. Grey attended the crime scene the morning of September 29, before Mr. Lundskog's body was removed. He was aware of the presence of cement fence panels

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*Q [Gotay]* Isn't it true that at one time you thought that Anthony Brown, a gentleman named Anthony Brown, was a suspect?

*A [Prior]* Tony Brown?

*Q* Yes.

*A* No. Tony Brown is an Adult Probation & Parole officer that I know.

near Mr. Lundskog's body. He testified at trial that there was blood on some of the cement panels. (See, Trial Transcript, Second Day, pgs. 225-226). The panels were not collected as evidence, but we don't believe that is relevant, though it may have been significant if DNA evidence from the panels revealed the presence of blood other than Mr. Lundskog's, blood that might have eliminated Mr. Gordon as a suspect. DNA analysis was not available at the time and without the panels no analysis can now be done. We note, however, that Mr. Gordon had no injuries when he was arrested that would have bled onto the cement panels.

43.9. We believe the condition of Mr. Lundskog's body and the amount of blood at the crime scene is significant because of the likelihood that blood would have transferred, perhaps in large spatters, onto Mr. Lundskog's assailant during the attack. Dr. Grey testified about the amount of blood around Mr. Lundskog's body and the potential for spatter without being asked or offering that it could have been transferred to an assailant during the assault that killed Mr. Lundskog. (See Trial Transcript, Second Day, pgs. 224-225). If there was transfer, none was noticed on Mr. Gordon by those closest to him when he re-entered the 7-11 for the last time around 5:31 a.m. the morning of the murder.

43.10. The sole of a shoe left an impression ("Reebok") in blood near Mr. Lundskog's body. It was observed by Dr. Grey, the Medical Examiner at the scene (see, Trial Transcript, Second Day, pg. 226) and noted (as the print from a right foot shoe) and photographed (State's Exhibits 9-14) by investigating officers at the crime scene. (See, Trial Transcript, Second Day, pgs. 290-294; 296-298, 299-300 (McKinnon)). However, when the room and residence where Mr. Gordon was staying at the time of his arrest were searched no Reebok shoes were found. Moreover, when he was interviewed after his arrest, Mr. Gordon told investigating officers he owned and was wearing Nike brand shoes on September 29, 2001. No one who was interviewed by police or who testified at trial put Reebok brand shoes on Mr. Gordon on September 29, 2001.

43.11. Mr. Diaz-Hernandez testified he saw blood on the tip and along the side of one shoe of the person he said he saw kicking Mr. Lundskog, but this is a detail he would have had to see at a considerable distance, from across Redwood Road, and in the dark (see, Trial Transcript, First Day, pgs. 76-80; 109-113, 124-127) when the assailant, according to Mr. Diaz-Hernandez, entered the 7-11 sometime after 5:45 a.m. (see, Trial Transcript, First Day, pgs. 78-80), almost ten minutes after Mr. Gordon was last in the 7-11 and was last seen on the surveillance video outside the 7-11.

43.12. The question about shoes and blood on shoes should have been asked of all the witnesses who placed Mr. Gordon in the 7-11 that morning but wasn't.

43.13. The panel believes the idea that Mr. Gordon could have beaten Mr. Lundskog in the bloody and brutal manner that resulted in his death and then moved in and out of the 7/11 with no reported or discovered blood on his person, clothing, on the telephone

he used, or on the floor given that the assailant likely walked through blood after the assault, or that he exhibited no apparent emotion is hard to reconcile with the circumstantial evidence upon which Mr. Gordon's conviction was based.

43.14. The evidence given by Mr. Diaz-Hernandez, evidence that comprises the bulk of substantive proof of Mr. Gordon's guilt, in our view, is inherently suspect. He did not report what he purportedly saw to police, but instead first relayed it to others, including a friend, Mr. Jose Lopez, who, in turn, told detectives. When the subterfuge was sorted out and it was revealed that it was not Mr. Lopez who saw what he reported, but Mr. Diaz-Hernandez, and he was interviewed, the question of identification and recollection had, in the panel's view, already been compromised by what Mr. Lopez was told and more importantly shown by detectives. Details of his interview with detectives were undoubtedly repeated by Mr. Lopez in his conversations with Mr. Diaz-Hernandez. (*See*, Trial Transcript, First Day, pgs. 137).

43.15. Mr. Diaz-Hernandez statements and testimony must be evaluated considering his personal circumstances. He was especially vulnerable to influence and motivated to absorb and conform his recollection of events to what he believed the detectives were looking for because he was in the country illegally and feared deportation, something that led him not to come forward initially and may have made him susceptible to suggestion, certainly eager to please the detectives, particularly eager perhaps to identify Mr. Gordon as the assailant when shown photos, something he was initially unable to do. (*See*, Trial Transcript, First Day, pgs. 139-140; 102-104, 108-109).

43.16. Mr. Diaz-Hernandez's account of what he says he saw happening behind the 7-11 (*see*, Trial Transcript, First Day, pgs. 68-86) is consistent with the medical examiner's evidence, but his recollection of time, as he testified at trial, especially under cross-examination (*Id.*, pgs. 76-86; 128-131), is inconsistent with what is seen on the surveillance video, and inconsistent with Mr. Butcher's testimony. According to Mr. Diaz-Hernandez's account, the assault took place sometime around the time Mr. Gordon was seen entering the 7-11 for the last time on September 29 and would have continued for some minutes while he was in the store, a fact somewhat corroborated by the timecard for September 29 introduced by Mr. Gotay during his cross examination of Mr. Diaz-Hernandez.

43.17. Under cross examination, Mr. Diaz-Hernandez admitted that when he was interviewed by Detective Prior, he told the detective he could not identify Mr. Gordon as the assailant and, in fact, could not pick Mr. Gordon out of the photospread because, "they showed me some but there was so many. There were many that looked alike." (*See*, Trial Transcript, First Day, pg. 102-104, 108-109). He also conceded at the preliminary hearing that he was not sure Mr. Gordon was the assailant. (*Id.*, pgs. 107-108). While he professed at trial to be "sure" it was Mr. Gordon, under cross-examination, Mr. Diaz-Hernandez agreed that he only saw the assailant's full face for

perhaps three to four seconds and admitted he gave inconsistent evidence regarding identification at the preliminary hearing. (*Id.*, pgs. 118-119).

43.18. While Robert Mellen, a customer at the 7-11 early on September 29, 2001, testified that he saw Mr. Gordon gesture towards Mr. Lundskog (“for him to come over and talk to him, or whatever he was doing”) at around 5:26 a.m. (*see* ,Trial Transcript, Second Day, pgs. 241-248; 256-260), no one else besides Mr. Diaz-Hernandez saw anyone interact with or do anything to Mr. Lundskog.

43.19. Based on what the RMIP provided for the panel’s to consider, we find there have been developments since the original Conviction Integrity Unit application was submitted, including the revelation that relevant police reports, including reports about a second suspect, most likely were not given to prosecutors and were not produced before trial, making it unlikely the defense knew enough to pursue a defense or conduct effective cross-examination that might have resulted in reasonable doubt.

43.20. The second suspect was almost certainly eliminated by the detective responsible for the investigation once he fixed on Mr. Gordon as the person responsible for the murder of Mr. Lundskog, based on his suspicion of Mr. Gordon in other cases under investigation. Everything that was done from that point forward was focused exclusively on proving Mr. Gordon's guilt. Though it comes close, none of this establishes Mr. Gordon's innocence, but it does mean his conviction cannot survive our equitable integrity test.

43.21. Additionally, foot dragging by Salt Lake Police Department regarding RMIP production requests during the PCRA process, including material produced only recently, perhaps because the requests were not taken seriously by the department, caused delays which have made it difficult for RMIP to properly present a case for Mr. Gordon. The panel is impressed that what was finally produced pursuant to subpoena, if it had been presented earlier in the PCRA process, may have thrown doubt on Mr. Gordon's conviction and produced a different PCRA outcome.

43.22. Despite all of this, the panel is not persuaded the detectives intentionally misled or failed to properly inform the prosecutors of the second suspect or of any critical information, including weaknesses in their investigation (*e.g.*, failure to collect the piece of the concrete barrier that may have figured into the investigation of Mr. Linskog's death; failure to properly follow-up on reports there were a group of Hispanic men with baseball bats loitering near the 7-11 around the time of the assault). As noted above, we conclude that it is more likely that once the detective fixed on Mr. Gordon, he simply did not believe it important to go further; to inquire fully about alternative explanations, to resolve inconsistencies, or to fully consider the possible unreliability of the key witness, Mr. Diaz-Hernandez. It was, in the panel’s view, a cascade of assumptions that led to the detective concluding that only Mr. Gordon could have committed the crime. Detective Prior saw no point in going further. The approach Detective Prior took, in the panel’s view, compromised the investigation and the integrity of Mr. Gordon’s conviction.

43.23. Likewise, the panel does not believe prosecutors were aware of some of the inadequacies of the investigation, including the situation with the second suspect. There is no basis, in our view, for concluding that prosecutors deliberately or inadvertently failed to apprise the defense of critical material they were aware of, material that might have led to a more effective defense and, possibly, a different outcome.

43.24. The panel acknowledges that its conclusions are at odds with what the Utah Supreme Court, with Chief Justice Durham concurring, decided in *State v. Gordon*, 84 P.3d 1167, 2004 UT 2 (January 16, 2004). As noted, the opinion turned solely on the identity of Mr. Lundskog's attacker. The Court reviewed Mr. Gordon's conviction by judge alone (bench trial) for sufficiency of the evidence, concluding it must sustain the trial court's judgment because it was not "against the clear weight of the evidence" or because the Court could not "otherwise reach a definite and firm conviction that a mistake has been made." *Id.*, citing *State v. Goodman*, 763 P.2d 786, 786-87 (Utah 1988) (quoting *State v. Walker*, 743 P.2d 191, 193 (Utah 1987)). The Court relied heavily on Robert Mellen's evidence (*id.*, ¶7, ¶10, ¶12) which the panel has reviewed carefully. We conclude that it does little more than place Mr. Gordon at the 7-11, something Mr. Gordon never contested. The Court also placed considerable weight on Mr. Gustavo Diaz-Hernandez's evidence, concluding that "any discrepancies in [his] testimony are minor compared to the accuracy of his observations." *Id.*, ¶11. The Court acknowledged that Mr. Diaz-Hernandez failed to identify Mr. Gordon in a photo line-up and at the preliminary hearing but concluded nonetheless that he convincingly identified him at trial. (*Id.*, ¶12). After carefully considering the circumstances surrounding Mr. Diaz-Hernandez's identification of Mr. Gordon and his personal circumstances which we believe made him vulnerable to influence and suggestion by the investigating officer, as well as what we find was the detective's less than candid answer when asked about another potential suspect, we conclude, as noted, that the trial judge made a mistake relying to the extent she did on Mr. Diaz-Hernandez's testimony to reach her verdict. We respectfully disagree with the Supreme Court's conclusion that the verdict in Mr. Gordon's case "was well-supported by the evidence offered at trial." (*Id.*, ¶16)

43.25. The panel does not consider the issues addressed in Gordon I and Gordon II nor the outcomes in Gordon I and Gordon II relevant for its purposes.

44. Given the weaknesses we believe exist in the investigation, the failure to disclose potentially significant information to the defense in time for it to make a difference, and what we believe to be the unreliable testimony of the State's principal witness, we conclude by a preponderance of the evidence we reviewed, that on balance the circumstantial evidence considered by the judge in finding Mr. Gordon guilty of the crimes with which he was charged does not support the conviction in Mr. Gordon's case. It, therefore, in the panel's view lacks integrity.

