ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

MICHAEL A. DELANEY
ATTORNEY GENERAL

ANN M. RICE
DEPUTY ATTORNEY GENERAL

August 21, 2012

Chad Evans
#75414
New Hampshire State Prison
P.O. Box 14
Concord, NH 03302-0014

RE: The State of New Hampshire v. Chad Evans

Mr. Evans:

As you know, I agreed to conduct a review to see if your murder case should be reopened and reinvestigated. In connection with that review, I examined numerous materials, including all the materials provided to me by your advocate, Morrison Bonpasse, including the original 46 (revised to 48) reasons offered as grounds to reinvestigate your case, as well as the "seven important facts" outlined in Mr. Bonpasses's letter entitled, "Time for Justice for Chad Evans." I have also reviewed other materials provided by people who attended a meeting here at our office last year. In addition, I have reviewed your case file, including all the trial transcripts and photographs. Further, I have reviewed the medical evidence, including the autopsy report and photographs, as well as medical opinions from your two experts, Dr. Baden and Dr. Wecht. Finally, the "lie detector" tests you have offered as evidence have also been reviewed.

Besides reviewing the factual components of your case and claims, I have also reviewed the legal decisions made in connection with your case, as well as the law relevant to motions for new trials and habeas corpus petitions.[1] That review also included examining the cases and the law pertaining to claims made regarding the legal aspects of your case, which you and your advocate dispute.

[1] Pursuant to RSA 526:4, the time for filing a motion for new trial in your case has expired. As for a habeas corpus petition, the burden would be on you to prove your claims by a preponderance of the evidence.

Finally, I provided copies of portions of your case file, including photos and medical evidence to the State's Chief Medical Examiner, Dr. Thomas A. Andrew. I asked Dr. Andrew to review those materials, which he did. I spoke with Dr. Andrew on August 14, 2012, and he gave me his opinion regarding the cause of Kassidy Bortner's death, which will be discussed later in this letter.

Based on my review, and for the reasons detailed in this letter, your request for our office to reinvestigate the murder case and other charges against you is declined.

Current status of the case: State v. Chad Evans

First, it is important to note the posture of your case. You were arrested and subsequently convicted after a jury trial in late 2001. During that trial, you were represented by experienced and competent legal counsel trial, who engaged in significant pretrial discovery and litigation on your behalf. After trial, you appealed your convictions, which were affirmed by the New Hampshire Supreme Court on December 30, 2003. The State subsequently appealed your sentences to Sentence Review, where your original prison sentence was increased. Currently, you are serving a minimum sentence of 43 years.

Fairly recently, beginning in 2010, you sent letters claiming that you were innocent. As you put it, "All of the...charges had no factual basis whatsoever, and were prosecuted on the basis of mistakes, selective and incorrect memories, faulty investigative techniques, the pursuit of hunches and beliefs over facts and truth, a few lies and an overall biased investigation."[2]

In a subsequent letter, you said that:

> Since April 2010, my website, www.chadevanswronglyconvicted.org, has sought to present the entire truth about me and this case. There was much that the jury did not see, hear or understand. This letter is not the place to present the reasons for those deficits, arising generally from the nature of our adversarial system; but it is clear that the jury did not see the evidence, or enough of the evidence of my actual innocence.[3]

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[2] Source: November 9, 2010 letter from Chad Evans to Attorney General Michael A. Delaney, and others.
[3] This is from an October 12, 2011 letter sent to United States Senator Jeanne Shaheen, copied to Attorney General Michael A. Delaney.

In addition to direct communications from you, your advocate Morrison Bonpasse has been working on your behalf. He has sent a great deal of material to me and others to review, claiming that the materials prove your innocence and/or establish a basis to reinvestigate your case. I met with Mr. Bonpasse and others here at our office in the fall of 2011, and during that meeting I was given more materials on your behalf. Finally, our office has also received letters and emails from people who claim that you are innocent.[4]

The case for conviction

A significant part of my review involved reviewing all the evidence presented on both sides during the original prosecution. That included reading all the trial transcripts and reviewing all the photographs taken during the investigation, as well as the medical file on Kassidy Bortner. That review was done in order to have a complete picture of the case and verify whether the evidence presented at trial supported your convictions. In my opinion, it does. Those facts supporting your conviction will not be repeated here, since they are outlined in State v. Evans, 150 N.H. 416 (2003). However, one area of evidence that will be expounded upon in more detail involves Amanda Bortner.

A significant aspect of your claim of innocence and for a reinvestigation centers on Amanda Bortner. Amanda Bortner provided information during the investigative and prosecution phases of the trial, which was used to support your convictions. You and your advocate have claimed that she gave what amounted to a "false confession" in this case. Based on my review, that claim is without merit.

Amanda Bortner (now going by Amanda [redacted], emailed me in February 2012.[5] Initially, she said that she wanted to meet with me in person to talk to me "in hopes" that I "will grant Chad Evans a new trial." I responded to Ms. Bortner and declined to meet with her, but told her to mail or email me "any information" she wanted me to consider. On February 27, 2012, Ms. Bortner emailed back and said she would "put together something" for me to review. She also said:

"For me this is not about Chad it is about Kassidy my daughter.

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[4] Everything provided to our office in connection with your case has been reviewed and considered.
[5] Copies of the emails from and to Ms. Bortner ([redacted]are attached.

> I am not in contact with him and I am not a fan of his at all. He was physically abusive to me but not Kassidy."

On March 30, 2012, I contacted Ms. Bortner and inquired as to whether she would be sending me anything to review. She responded on April 5, 2012, and said that she would not be sending me anything because she had "decided to not relive my past at this time."

Ms. Bortner's February 27, 2012 email is significant for the fact that she admitted that you were "physically abusive" to her. That is not only consistent with her trial testimony, it is also consistent with how you treated your ex-wife Tristen. I will discuss the evidence from Amanda Bortner first, then Tristen.

My review of Amanda Bortner's information included not only what she said during the investigative phase, but what she actually testified to at your trial. Portions of her trial testimony included the following:

> Amanda witnessed you grab Kassidy's face five or six times, hard enough to leave bruises. Amanda told you to stop. You were frustrated when you grabbed Kassidy's face;
>
> You would pick Kassidy up and roughly put her in the corner for a "time out;"
>
> You would grab Kassidy by the back of the neck and toss her into the corner. This was done many times by you and could have been three times a week in the month before Kassidy died;
>
> On more than one occasion, you picked up Kassidy, sometimes jerking her arm, and threw her on the bed because she wasn't standing in the corner you had placed her in;
>
> You would get frustrated and lose your temper with Kassidy;
>
> You made the statement that you wished Kassidy wasn't around, possibly that you wished she had never been born;
>
> You used water to stop Kassidy from crying and afterwards, Kassidy was "scared of the kitchen sink when...[she] went to wash her hands;"

You said that Kassidy was "being a little bitch," and that Kassidy was "kind of slow, retarded;"

You and Amanda made up the "trampoline story" to hide the fact that you had caused bruises to Kassidy's face. Other excuses that were used to hide the bruises you inflicted to Kassidy included claiming that Kassidy hit her head against a wall, that another child hit her with a toy, and that she fell down;

Amanda was concerned about taking Kassidy to daycare with the bruises you inflicted on her because Amanda didn't want people to think she was doing anything to Kassidy;

You voiced concerns about members of your family seeing the bruising you'd inflicted on Kassidy;

You poked Kassidy's throat with your finger, making her gag. Amanda was mad that you did that and yelled at you. Amanda told the police you "probably did that a couple of times;"

You were concerned about Amanda's mother seeing a bruise on Kassidy's face and had a discussion with Amanda about not taking Kassidy to her grandmother's because "she might think something;"

Amanda told you at one point that she was sick of Kassidy getting hurt when she was with you;

You grabbed Amanda by the throat and had her against the couch. You said to Amanda:

- Cut it out;
- You know what gets me going;
- You know what makes my temper; and
- It's like you're looking for it.

You told Amanda that she "had to try to work" with your temper;

On the night you told Amanda the story about Kassidy being hit by a whiffle ball, you told Amanda that she should take Kassidy to the doctor's, but not until "the bruises clear[ed] up;

> On the morning Kassidy died, Amanda said that when she went in to get Kassidy ready to go to the babysitter's, Kassidy was laying down in bed, crying. She had a messy diaper and as Amanda changed her, Kassidy was "quiet," she did not have much energy, and "was a lot different" than she usually was in the morning; and
>
> When Amanda dropped Kassidy off that morning, she said that Kassidy's face "looks like shit."

The excerpts cited above support the charges against you and are consistent with Amanda Bortner's recent email to me, in which she confirmed that you were "physically abusive" to her. While Amanda claims in her recent email that you were not physically abusive to Kassidy, that claim is refuted by her sworn trial testimony; testimony that was given under oath, in open court, under a grant of immunity, while Amanda had legal counsel, was subject to cross examination by your lawyers, and testified without prodding or suggestion by the police or prosecutors. All these circumstances contradict the claim that Amanda's testimony amounted to a "false confession."

You recently questioned why Amanda would still lie to protect you. As you put it, "I can understand why the police may have assumed, at least initially, that Amanda would lie to protect me but what would she gain by lying today?"[6] One likely answer is that Amanda is lying today about what you did to Kassidy because if she admits that you caused Kassidy's death, she would be admitting her own culpability in Kassidy's murder, something she refused to do.[7]

Since Amanda Bortner's testimony provided significant evidence in support of your convictions, I looked for other evidence to corroborate her claims. In addition to her recent statement that you physically abused her, her statements about your abusive behavior are also corroborated your ex-wife, Tristen

For example, my review of the evidence in this case turned up photographs of a letter Tristen had written to you. That letter included the following statements:

> "...and you broke my heart the last time you hit me."

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[6] This is from an October 12, 2011 letter sent to United States Senator Jeanne Shaheen, copied to Attorney General Michael A. Delaney.

[7] Amanda was held partially responsible for her role in Kassidy's death when she was convicted of two counts of endangering the welfare of a child. *See State v. Bortner*, 150 N.H. 504 (2004).

(REDACTED)

In addition to the evidence provided by Amanda Bortner, I also reviewed all the other evidence used during the trial against you and accumulated during the investigation. While it is true that there were areas of dispute, such as your view of Jeff Marshall's credibility, the evidence supported the charges against you and the subsequent convictions.

Violation of the bail conditions

As part of my review, I also considered the fact that you violated the conditions of your bail on your murder charge and the explanations offered for that conduct.

As you know, you were not to have *any* contact with Amanda Bortner pending your murder trial. In spite of those bail conditions, you violated their terms repeatedly, and over a long period by spending a considerable amount of time with the mother of the child you were charged with murdering. That was not a mistake on your part; it was a deliberate violation of the law as evidenced by just one of the comments from your website where you stated, "Amanda and I knew we were violating my bail condition....".

While you have attempted to ascribe innocent motives to your bail violation conduct, other less-than-innocent conclusions can be drawn, such as your actions being

consistent with witness tampering and proof of your consciousness of guilt.[8] Therefore, this evidence supported your convictions and does not weigh in favor of your innocence or reinvestigating the case.

Claims regarding character evidence

You and your advocate have suggested that the jury should have been allowed to consider positive character evidence about you during your trial. You have also suggested that our office consider this positive character evidence as weighing in favor of your innocence and reinvestigating your case.

Character evidence is generally inadmissible in trials in New Hampshire. *See* N.H. R. Ev. 404. The rationale behind this rule is the notion that evidence of a person's character is of little probative value, has a tendency to be highly prejudicial, and often confuses the issues in a case. *See State v. Graf*, 143 N.H. 294, 297 (1999). Therefore, your attorneys' decision not to seek to admit this evidence was an appropriate legal decision.

Even assuming that Rule 404 had not existed and you would have been allowed to introduce positive character evidence at your trial, that still would not have been helpful to your case because the State would have been allowed to admit negative character evidence. That negative evidence would have included your abusive treatment of Amanda and Kassidy Bortner, and your two convictions for domestic assault against Tristen. Given the existence of that negative character evidence, it is unlikely that even if it had been admissible, any positive character evidence would have changed the outcome of your trial. Therefore, your attorneys' decision not to seek to admit positive character evidence was an appropriate legal and strategic decision.

In addition to arguing that the jury should have heard evidence regarding your good character, you have also offered this evidence as supporting the reinvestigation of

[8] The fact that you spent so much time with Amanda in violation of your bail order also contradicts the statements you gave to the Maine State Police about your relationship with her. In that interview, you portrayed your relationship with Amanda as being very one-sided, i.e., she was "totally in love" with you but you were not "ready" for that kind of relationship. You even told the police that you had been looking into getting Amanda her own place because you were not sure that you wanted a "move-in girlfriend." Yet in spite of those statements and the existence of a court order precluding contact between you and Amanda, you essentially decided to make Amanda your "move-in girlfriend" in Vermont, but only after you were charged with murdering her child and knew that Amanda would likely have to testify against you at the murder trial.

your case. Prosecutors do not make decisions whether to investigate or not investigate a case based on a person's character. Character evidence is not generally admissible in court. And, like most people, you can cite positive aspects to your character and behavior in addition to the negative aspects. Therefore, criminal cases are decided based on admissible evidence in court, not the opinions of others as to a defendant's character. So for all these reasons, your claims regarding your good character do not weigh in favor of your innocence or a reinvestigation.

Your offer to testify at a retrial

You claim that if you were given a new trial, you would testify. You also ascribe error to the fact that you did not testify at your prior trial and place much of the blame for that occurrence on your former attorneys.

The fact that you are offering to testify at a retrial over a decade after you have already had a trial and been convicted, must be viewed in the proper context. You had the absolute right not take the stand at your trial and have the jurors instructed that they could not use that decision in any way against you. You also had the absolute right to take the stand and testify in your defense, yet chose not to do so for legitimate reasons, based on the sound advice of counsel. Considering all the evidence against you, including your prior convictions and the lies you told during the investigation, your decision not to take the stand was reasonable. To the extent your lawyers counseled you not to take the stand, that advice was likewise reasonable.

Finally, your offer to testify at any potential retrial carries no weight since you know that you would still have the absolute right not to take the stand at trial. Therefore, no matter what promise you made now to testify in the future, you could still change your mind and choose not to testify. If that were to happen, the State could not compel you to testify nor tell the jury that you had promised to take the stand before trial and then changed your mind.

For all these reasons, your claims stemming from your choice not to testify at your trial and your offer to testify at any potential retrial do not weigh in favor of your innocence or a reinvestigation.

Claims regarding "lie detectors."

Your advocate, Morrison Bonpasse, has written our office and others announcing that you have "passed two lie detector tests regarding" your crimes. You have also argued for the use of SCAN (Scientific Content Analysis) in regards to statements in this case. In your May 7, 2012 letters to The Innocence Project and Centurion Ministries, you cite the results of the "two lie detector tests" and claim that they "add credibility to ...[your] claim of actual innocence."

In reviewing your claims on this subject, it is important to note that none of the procedures referenced are truly "lie detector" tests. Instead, they are methods or procedures that purport to measure certain responses, such as stress, which some believe are suggestive of deception. In addition, none of these methods or procedures have been deemed reliable enough to be admissible in court in New Hampshire.

In *State v. Ober*, 126 N.H. 471, 471-72 (1985), the New Hampshire Supreme Court addressed the admissibility of polygraph evidence and stated the following:

> We have consistently held that the results of polygraph tests are not admissible as evidence of guilt or innocence in criminal trials. This rule of inadmissibility is based upon the unreliability of such tests, as well as the danger that a jury will rely upon them to establish the truth or falsity of a witness's statements. Accordingly, it is error to refer to such a test.

(citations omitted).

In a subsequent case, the New Hampshire Supreme Court again reiterated the inadmissibility of polygraph evidence:

> We have held that polygraph examination results are inadmissible in criminal proceedings to prove an accused's guilt or innocence. This rule of inadmissibility is based upon the unreliability of such tests, and their "dubious scientific value."

Petition of Grimm, 138 N.H. 42, 54-55 (1993) (citations omitted).

The United States Supreme Court has weighed in on polygraph evidence as well. In *U.S. v. Scheffer*, 523 U.S. 303, 309 (1998), the Court noted that "there is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques."

It is likely that the New Hampshire Supreme Court's concerns with the reliability of polygraph evidence would result in preclusion not only of polygraph evidence, but also your proffered voice-stress analysis testing and any SCAN evidence as well.[9]

Finally, even if we were currently at a point in the law and the science where polygraph results were reliable and admissible in court, your particular results are not. I recently received a letter confirming that the polygraph administered to you has been deemed invalid. *See* Letter from David Crawford.[10] The New Hampshire State Police have also independently reviewed your polygraph examination and results at my request, and likewise deemed them invalid.

For all the reasons stated, the results of your polygraph test and voice stress analysis do not weigh in favor of your innocence or a reinvestigation of your case.

Medical claims

Many documents have been provided to me in an effort to offer other explanations for Kassidy Bortner's injuries and death, besides your actions. Those explanations have ranged from disease to environmental conditions, to claimed actions by Jeffrey Marshall. Along this same vein, you have also made the following statement, "To this day, we still do not know the exact cause of Kassidy's death."[11] Your claim is without merit.

While we do not know the exact mechanism (i.e., punch, kick, push, etc.), you used to inflict Kassidy's injuries, the cause of her death is clear and has even been recognized by you in recent letters. For example, in two May 7, 2012 letters to the Innocence Project and Centurion Ministries, you stated that "two world renowned Forensic Pathologists; Dr. Michael Baden and Dr. Cyril Wecht, agree that...Kassidy's death was the result of a traumatic event...." Nowhere in those two letters did you make any claim that Kassidy's death was due to some other medical condition or disease.

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[9] *See* Attached copy of article, "Voice Stress Analysis: Only 15 Percent of Lies About Drug Abuse Detected in Field Test."

[10] A copy of the letter is attached for your records and to use to amend your website to reflect the invalidity of your polygraph results and inform The Innocence Project and Centurion Ministries that your polygraph results have been deemed invalid.

[11] This is from an October 12, 2011 letter sent to United States Senator Jeanne Shaheen, copied to Attorney General Michael A. Delaney.

While Doctors Baden and Wecht may have disagreed with Dr. Greenwald as to the timing of some of Kassidy's injuries, both of their opinions are consistent with the evidence presented at trial that Kassidy's death was the result of trauma, not some other medical condition or disease. For example, in his November 20, 2001 letter, Dr. Baden stated, "I agree with Dr. Greenwald's assessment that Kassidy was a battered child and that the battering occurred over a period of at least weeks."[12] In that same letter, he also said that he "agree[d] that the cause of death was multiple blunt injuries inflicted by an adult." This was echoed in his sworn testimony, where he concluded that "there are a bunch of injuries to this [Kassidy Bortner] child. I agree with Dr. Greenwald, this is a battered child. The child was battered over a period of time and finally developed enough internal injuries that the baby died." That opinion is consistent with Dr. Wecht's May 24, 2007 letter, where he described the fact that Kassidy had been "traumatized." These opinions are also consistent with the evidence of your assaultive behavior towards Kassidy Bortner, which was introduced at trial.[13]

In addition, at my request New Hampshire's Chief Medical Examiner, Dr. Thomas A. Andrew, has reviewed numerous materials in this case pertaining to Kassidy Bortner's death. His conclusion is that Kassidy's injuries are consistent with abusive injury and he does not take issue with Dr. Greenwald's conclusion that Kassidy's death was due to abusive injuries.

Based on all the credible evidence in this case, your claim that Kassidy's Bortner's death was due to some medical condition or diseases is not supported by the evidence.

Legal claims

You and your advocate have made many claims regarding legal issues at your trial. Based on my review, none of those claims amount to ineffective assistance of counsel or errors affecting your conviction.

In some letters from your advocate, claims have been made that a change in the law should result in a reconsideration of your conviction. Specifically, your advocate

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[12] Dr. Greenwald's opinion is deserving of significant weight since she was the one who actually conducted the examination and autopsy on Kassidy Bortner.

[13] The nature and extent of Kassidy's injuries negate any claim that RSA 627:6, I, would have been helpful to your case. On the contrary, even if it had been applicable, it would likely have backfired and been seen as minimization of your assaultive, deadly conduct. In addition, it is likely that your conduct of "grabbing and squeezing" Kassidy's face, and continuing to do so in spite of leaving injuries, would not have been deemed objectively "reasonable" by the jury. *See State v. Leaf*, 137 N.H. 97, 99 (1993) (the test is an objective one as to whether the conduct was reasonable "under all the circumstances").

mentions the *Ramos* case, with regards to joinder and severance law. Most changes in the law are not retroactive, and that is the case with the *Ramos* decision. However, even if the *Ramos* case had preceded your case, it would not have substantively changed the evidence the jury heard against you. First, it is not clear that the *Ramos* case would have precluded the joinder of all the charges in your case. And second, even if joinder had not been allowed, the jury would still have heard the substantive evidence surrounding the abuse and assaults you committed against Amanda Bortner. *See State v. Beltran*, 153 N.H. 643 (2006). Accordingly, arguing that the *Ramos* decision should be retroactively applied to your case has no effect on the validity of your conviction.

Your advocate also claims that your trial attorneys failed to respond to "excessive and highly prejudicial pretrial publicity, including a newspaper editorial. One option would have been to request a change in venue." This claim is without merit.

An attorney's interactions with the media are limited by the Rules of Professional Conduct, specifically Rule 3.6. Pursuant to that rule, your trial attorneys were extremely limited in what they could say to the media about your case. Accordingly, their conduct with respect to the media was appropriate and did not prejudice your case.

As to venue, changes in venue are rare and granted in only the most extraordinary cases. *See State v. Smart*, 136 N.H. 639 (1993) (upholding denial of a change in venue). Based on the holding in *Smart* and other cases, your case would not have been granted a change in venue. Therefore, your former attorneys did not commit any error by failing to move to change venue.

As to the cooperating witness your advocate has referenced, Cory Merrill's testimony was stricken and the jury was told to disregard his testimony. The instruction given to the jurors as a result of that action was very favorable to you and prejudicial to the State, negating any perceived prejudice you claim you suffered as a result of that stricken testimony.

Finally, your advocate's claims regarding Jeff Marshall's arrests and criminal record are contrary to the Rules of Evidence. New Hampshire Rule of Evidence 609 makes clear that only certain felony level *convictions* and *convictions* for crimes of dishonesty may be used to cross-examine a witness. Jeff Marshall did not have any convictions that fell within the rule of admissibility. Therefore, your former attorneys' decision not to cross-examine Jeff Marshall about his prior arrests and convictions was proper.

Claims that there "was much the jury did not see, hear or understand."

The balance of your many claims can best be described as falling into the category of things you and your advocate have identified, which "the jury did not see, hear or understand."[14] Rather than go through each of these claims one by one, I will broadly summarize them instead.

Many of your claims concern character evidence, which have previously been addressed in this letter.

You also point to evidence, such as photographs, which you claim should or should not have been admitted. You make wide and varied claims as to the potential affect this evidence had or would have had on your case. Decisions about what evidence to admit are left to the discretion of the attorneys handling a case and then to the judge who decides if and under what circumstances the evidence is admissible. A review of all the claims you and your advocate have made surrounding evidence that should have been admitted or should not have been admitted does not reveal anything, which was improper or otherwise would have resulted in a different outcome in your case.

Finally, some of the "46 reasons for re-investigating" your case are simply opinions expressed by you or your advocate and are not facts supporting your claim of innocence or that your case should be reinvestigated.

Claimed errors by defense counsel

You and your advocate have claimed that your defense team committed errors at trial. These claims lack merit and none rise to the level necessary to seriously doubt or reverse your conviction.

It is well established that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Delaware v. Van Arsdall*, 475 U.S. 673, (1986). "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003). "There is good reason for this; "'anyone familiar with the work of courts understands that errors are a

[14] This statement comes from the first page of an October 12, 2011 letter from Chad Evans to U.S. Senator Jeanne Shaheen.

constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal.'" *Puckett v. U.S.*, 556 U.S. 129, 134 (2009) (quotation marks and citation omitted).

> The State and Federal Constitutions guarantee a criminal defendant reasonably competent assistance of counsel. To successfully assert a claim for ineffective assistance of counsel, a defendant must show, first, that counsel's representation was constitutionally deficient and, second, that counsel's deficient performance actually prejudiced the outcome of the case. To meet the first prong of the test, a defendant must show that counsel made such egregious errors that he or she failed to function as the counsel that the State Constitution guarantees. Broad discretion is afforded trial counsel in determining trial strategy, and the defendant must overcome the presumption that counsel's trial strategy was reasonably adopted. To meet the second prong, a defendant must demonstrate actual prejudice by showing that there is a reasonable probability that the result of the proceeding would have been different had competent legal representation been provided. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case.

State v. Sharkey, 155 N.H. 638, 640-41 (2007) (citations omitted).

In light of your claims, the evidence surrounding those claims, and the legal standards applicable to requests for new trials and ineffective assistance of counsel claims, you have failed to prove that any of the errors you have attributed to your former attorneys meet the criteria for a successful ineffective assistance of counsel claim. Likewise, none of your claims support the conclusion that you did not get a fair trial or weigh in favor of reinvestigating your case.

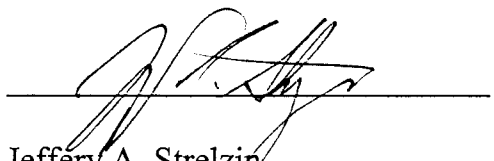
Claimed errors by the prosecution

At various times, there have been claims made that the prosecution engaged in inappropriate conduct during the investigation or trial. These claims are unfounded and appear to stem from a misunderstanding of the roles of the parties involved and permissible advocacy. None of the claims weigh in favor of reinvestigating your case.

Conclusion

I have reviewed the evidence presented at your trial and the many claims advanced by you and your advocate in support of your innocence claim and request that this case be reopened and reinvestigated. For all the reasons set forth in this letter, I have concluded that the evidence introduced at trial supported your conviction and none of your present claims are sufficient to doubt the validity of your conviction and reinvestigate this case. Therefore, after consultation with the Attorney General, we will not be reopening your case or reinvestigating the death of Kassidy Bortner.

Sincerely,



Jeffery A. Strelzin
Senior Assistant Attorney General
Chief, Homicide Unit
(603) 271-3671

cc: Morrison Bonpasse
[733086]

Strelzin, Jeffery

From: Amanda [redacted]
Sent: Thursday, April 05, 2012 8:27 PM
To: Strelzin, Jeffery
Subject: Re: Murder of Kassidy Bortner - State v. Chad Evans

Hello. Sorry it has taken me so long to respond. My fiancé was at Mass General for 12 days. We then went on vacation for seven days. And last week my fiancé went back to the hospital for 5 days. Needless to say I have my hands full.

With all of this recent activity in my life I have decided to not relive my past at this time. If you have any questions for me I will gladly answer them. Thanks and again I apologize for not getting back to you sooner. -- Amanda [redacted]

Sent from my iPhone

On Mar 30, 2012, at 4:06 PM, "Strelzin, Jeffery" <Jeffery.Strelzin@doj.nh.gov> wrote:

> Ms. [redacted]
>
> It has been a month since you contacted me and said you would be putting "together something" for me in connection with Chad Evans's murder conviction. Please let me know if you plan to send some materials for me to review.
>
> Sincerely,
>
> Jeff Strelzin

Jeffery A. Strelzin
Senior Assistant Attorney General
Chief, Homicide Unit
NH Attorney General's Office
33 Capitol Street
Concord, NH 03301

Office: (603) 271-3671
Fax: (603) 223-6262
E-mail: jeffery.strelzin@doj.nh.gov

From: [redacted]
Sent: Monday, February 27, 2012 5:46 PM
To: Strelzin, Jeffery
Subject: Re: Murder of Kassidy Bortner - State v. Chad Evans

Mr. Stezlin,

I appreciate you getting back to me so quickly. The only reason why I offered to meet in person is it has always been easier for me to talk in person about the case rather than writing. I am not the best at writing while being emotionally involved. But if that is what you want that is what I will do.

For me this is not about Chad it is about Kassidy my daughter. I am not in contact with him and I am not a fan of his at all. He was physically abusive to me but not Kassidy. The reason why I went to jail is because the state attorneys were prepping me for Chads trial and they wanted me to agree to things that never happenend. I really was cohearced into making a false confession. I could have easily agreed with the attorneys and I never would have been charged with child endangerment or anything for that matter. They even wrote out an immunity agreement that I signed. But again they wanted me to say things on the stand that never happened. I couldn't do it. My attorney at the time was Patricia Wiberg.

This case is not black and white at all. I will put together something for you next month sometime. Hopefully you will read it with an open mind. Thanks for your time.

Sincerely, Amanda [redacted]

-----Original Message-----
From: Strelzin, Jeffery <Jeffery.Strelzin@doj.nh.gov>
To: Amanda [redacted]
Sent: Mon, Feb 27, 2012 5:13 pm
Subject: RE: Murder of Kassidy Bortner - State v. Chad Evans

Ms. [redacted]

At the time Kassidy Bortner died, our office in conjunction with other law enforcement authorities, conducted an extensive investigation into her death. As a result of that work, several criminal charges were brought against Chad Evans. Later, a jury convicted Evans of murder and other charges after a trial where he was represented by two very competent and experienced defense attorneys. Since then, Mr. Evans has availed himself of his remedies in the legal system and appealed his convictions, which have all been affirmed. You were also convicted after a jury trial for charges relating to your role in Kassidy's murder.

I have reviewed a great deal of the case and will be continuing to review it in the future. To date, the overwhelming weight of the evidence reveals that Kassidy Bortner's death was the result of battered-child syndrome and that the person who caused her death was Chad Evans. Likewise, nothing in my review has caused me to doubt the validity of your convictions for your role in Kassidy's murder.

Given the facts surrounding Kassidy's murder and your convictions, I respectfully decline your request to meet in person. However, if there is any information you wish me to consider, you may mail it to me here or email it to me. My office's address and my email address are listed below.

Sincerely,

Jeffery A. Strelzin
Senior Assistant Attorney General
Chief, Homicide Unit
NH Attorney General's Office
33 Capitol Street
Concord, NH 03301

Office: (603) 271-3671
Fax: (603) 223-6262
E-mail: jeffery.strelzin@doj.nh.gov

From: Amanda [redacted]
Sent: Monday, February 27, 2012 3:51 PM
To: Strelzin, Jeffery
Subject: justce for Kassidy

Dear Jeff,

Hello! My name is Amanda Bortner the mother of Kassidy Bortner. I am writing to you in hopes that you will grant Chad Evans a new trial. I had seeked justice for quite awhile after her death and life got the best of me. I have tried to put it all behind me and move on with my life but can't seem to fully move forward knowing justice has not been served for my daughter. I am now engaged to a wonderful man and have a beautiful 5 month old daughter. Please help us to be able to live our lives to the fullest knowing justice has been served.

I would love to take a trip to Concord and meet you in person. I have a new last name because the media attention was so damaging over the years. If you have any questions please call me at [redacted] I look forward to hearing from you. Thanks for listening.

Sincerely,
Amanda [redacted]

U.S. Department of Justice, Office of Justice Programs
National Institute of Justice
The Research, Development, and Evaluation Agency of the U.S. Department of Justice

Voice Stress Analysis: Only 15 Percent of Lies About Drug Use Detected in Field Test

by Kelly R. Damphousse, Ph.D.

The products, manufacturers, and organizations discussed in this document are presented for informational purposes only and do not constitute product approval or endorsement by the U.S. Department of Justice.

Law enforcement agencies across the country have invested millions of dollars in voice stress analysis (VSA) software programs.[1] One crucial question, however, remains unanswered:

Does VSA actually work?

According to a recent study funded by the National Institute of Justice (NIJ), two of the most popular VSA programs in use by police departments across the country are no better than flipping a coin when it comes to detecting deception regarding recent drug use. The study's findings also noted, however, that the mere presence of a VSA program during an interrogation may deter a respondent from giving a false answer.

VSA manufacturers tout the technology as a way for law enforcers to accurately, cheaply, and efficiently determine whether a person is lying by analyzing changes in their voice patterns. Indeed, according to one manufacturer, more than 1,400 law enforcement agencies in the United States use its product.[2] But few studies have been conducted on the effectiveness of VSA software in general, and until now, none of these tested VSA in the field—that is, in a real-world environment such as a jail. Therefore, to help determine whether VSA is a reliable technology, NIJ funded a field evaluation of two programs: Computer Voice Stress Analyzer® (CVSA®)[3] and Layered Voice Analysis™ (LVA).

Researchers with the Oklahoma Department of Mental Health and Substance Abuse Services (including this author) used these VSA programs while questioning more than 300 arrestees about their recent drug use. The results of the VSA output—which ostensibly indicated whether the arrestees were lying or telling the truth—were then compared to their urine drug test results. The findings of our study revealed:

- **Deceptive respondents.** Fifteen percent who said they had not used drugs—but who, according to their urine tests, had—were *correctly* identified by the VSA programs as being deceptive.
- **Nondeceptive respondents.** Eight and a half percent who were telling the truth—that is, their urine tests were consistent with their statements that they had or had not used drugs—were *incorrectly* classified by the VSA programs as being deceptive.

Using these percentages to determine the overall accuracy rates of the two VSA programs, we found that their ability to accurately detect deception about recent drug use was about 50 percent.

Based solely on these statistics, it seems reasonable to conclude that these VSA programs were not able to detect deception about drug use, at least to a degree that law enforcement professionals would require—particularly when weighed against the financial investment. We did find, however, that arrestees who were questioned using the VSA instruments were less likely to lie about illicit drug use compared to arrestees whose responses were recorded by the interviewer with pen and paper.

So perhaps the answer to the question "Does VSA work?" is . . . it depends on the definition of "work."

What Is VSA?

VSA software programs are designed to measure changes in voice patterns caused by the stress, or the physical effort, of trying to hide deceptive responses.[4] VSA programs interpret changes in vocal patterns and indicate on a graph whether the subject is being "deceptive" or "truthful."

Most VSA developers and manufacturers do not claim that their devices detect lies; rather, they claim that VSA detects microtremors, which are caused by the stress of trying to conceal or deceive.

VSA proponents often compare the technology to polygraph testing, which attempts to measure changes in respiration, heart rate, and galvanic skin response.

Even advocates of polygraph testing, however, acknowledge its limitations, including that it is inadmissible as evidence in a court of law; requires a large investment of resources; and takes several hours to perform, with the subject connected to a machine. Furthermore, a polygraph cannot test audio or video recordings, or statements made either over a telephone or in a remote setting (that is, away from a formal interrogation room), such as at an airport ticket counter. Such limitations of the polygraph—along with technological advances—prompted the development of VSA software.

Out of the Lab, Into the Field

Although some research studies have shown that several features of speech pattern differ under stress,[5], [6] it is unclear whether VSA can detect *deception-related* stress. In those studies that found that this stress *may* be detectable, the deception was relatively minor and no "jeopardy" was involved—that is, the subjects had nothing to lose by lying (or by telling the truth, for that matter). This led some researchers to suggest that if there is no jeopardy, there is no stress—and that if there is no stress, the VSA technology may not have been tested appropriately.[7]

The NIJ-funded study was designed to address these criticisms by testing VSA in a setting where police interviews commonly occur (a jail) and asking arrestees about relevant criminal behavior (drug use) that they would likely hide.[8]

Our research team interviewed a random sample of 319 recent arrestees in the Oklahoma County jail. The interviews were conducted in a relatively private room adjacent to the booking facility with male arrestees who had been in the detention facility for less than 24 hours. During separate testing periods, data were collected using CVSA® and LVA.

The arrestees were asked to respond to questions about marijuana use during the previous 30 days, and cocaine, heroin, methamphetamine, and PCP use within the previous 72 hours. The questions and test formats were approved by officials from CVSA® and LVA. The VSA data were independently interpreted by the research team and by certified examiners from both companies.

Following each interview, the arrestee provided a urine sample that was later tested for the presence of the five drugs. The results of the urinalysis were compared to the responses about recent drug use to determine whether the arrestee was being truthful or deceptive. This determination was then compared to the VSA output results to see whether the VSA gave the same result of truthfulness or deceptiveness.

Can VSA Accurately Detect Deception?

Our findings suggest that these VSA software programs were no better in determining deception about recent drug use among arrestees than flipping a coin.

To arrive at this conclusion, we first calculated two percentage rates[9]:

- **Sensitivity rate.** The percentage of deceptive arrestees correctly identified by the VSA devices as deceptive.
- **Specificity rate.** The percentage of nondeceptive arrestees correctly classified by the VSA as nondeceptive.

Both VSA programs had a low sensitivity rate, identifying an average of 15 percent of the responses by arrestees who lied (based on the urine test) about recent drug use for all five drugs. LVA correctly identified 21 percent of the deceptive responses as deceptive; CVSA® identified 8 percent.

The specificity rates—the percentage of nondeceptive respondents who, based on their urine tests, were correctly classified as nondeceptive—were much higher, with an average of 91.5-percent accuracy for the five drugs. Again, LVA performed better, correctly identifying 95 percent of the nondeceptive respondents; CVSA® correctly identified 90 percent of the nondeceptive respondents.

We then used a plotting algorithm, comparing the sensitivity and specificity rates, to calculate each VSA program's overall "accuracy rate" in detecting deception about drug use.[10] We found that the average accuracy rate for all five drugs was approximately 50 percent.

Does VSA Deter People From Lying?

Although the two VSA programs we tested had about a 50-percent accuracy rate in determining deception about recent drug use, might their very presence during an interrogation compel a person to be more truthful?

This phenomenon—that people will answer more honestly if they believe that their responses can be tested for accuracy—is called the "bogus pipeline" effect.[11] Previous research has established that it is often present in studies that examine substance use.][12]

To determine whether a bogus pipeline effect existed in our study, we compared the percentage of deceptive answers to data from the Oklahoma City Arrestee Drug Abuse Monitoring (ADAM) study (1998–2004), which was conducted by the same VSA researchers in the same jail using the same protocols. The only differences—apart from the different groups of arrestees—were that the ADAM survey was longer (a 20-minute survey compared with the VSA study's 5-minute survey) and did not involve the use of VSA technology.

In both studies, arrestees were told that they would be asked to submit a urine sample after answering questions about their recent drug use. In the VSA study, arrestees were told that a computer program was being used that would detect deceptive answers.

Arrestees in the VSA study were much less deceptive than ADAM arrestees, based on responses and results of the urine test (that is, not considering the VSA data). Only 14 percent of the VSA study arrestees were deceptive about recent drug use compared to 40 percent of the ADAM arrestees. This suggests that the arrestees in the VSA study who thought their interviewers were using a form of "lie detection" (i.e., the VSA technology) were much less likely to be deceptive when reporting recent drug use.

See "Editor's Note—Polygraph and Voice Stress Analysis: Trying to Find the Right Tool."

The Bottom Line: To Use or Not Use VSA

It is important to look at both "hard" and "hidden" costs when deciding whether to purchase or maintain a VSA program. The monetary costs are substantial: it can cost up to $20,000 to purchase LVA. The average cost of CVSA® training and equipment is $11,500. Calculating the current investment nationwide—more than 1,400 police departments currently use CVSA®, according to the manufacturer—the total cost is more than $16 million not including the manpower expense to use it.

The hidden costs are, of course, more difficult to quantify. As VSA programs come under greater scrutiny—due, in part, to reports of false confessions during investigations that used VSA—the overall value of the technology continues to be questioned.[13]

Therefore, it is not a simple task to answer the question: Does VSA work? As our findings revealed, the two VSA programs that we tested had approximately a 50-percent accuracy rate in detecting deception about drug use in a field (i.e., jail) environment; however, the mere presence of a VSA program during an interrogation may deter a respondent from answering falsely. Clearly, law enforcement administrators and policymakers should weigh all the factors when deciding to purchase or use VSA technology.

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About the Author

Kelly Damphousse is associate dean of the College of Arts and Sciences and Presidential Professor of Sociology at the University of Oklahoma. He has 20 years of criminal justice and drug research experience. From 1998 to 2004, Damphousse served as the site director of the Arrestee Drug Abuse Monitoring program in Oklahoma City and Tulsa, Oklahoma. He has directed several statewide and nationwide program evaluation projects. Back to the top.

Go to Shopping Malls: Preventing, Responding to Attack

Notes

[1] The National Institute for Truth Verification (manufacturer of CVSA®) states that more than 1,400 law enforcement agencies use its product. See www.nitv1.com/Agenciesusing.htm, accessed February, 2008.

[2] Ibid.

[3] CVSA® was introduced into the market in 1988 by the National Institute for Truth Verification and has undergone a number of changes and system upgrades over the years. The version used in this field test was the CVSA® introduced in 1997.

[4] Hopkins, C.S., R.J. Ratley, D.S. Benincasa, and J. Grieco, "Evaluation of Voice Stress Analysis Technology," *Proceedings of the 38th Annual Hawaii International Conference on System Sciences,* 2005.

[5] In the few studies in which the theory behind VSA has been tested, there has generally been solid support. Cestaro, V.L., "A Comparison Between Decision Accuracy Rates Obtained Using the Polygraph Instrument and the Computer Voice Stress Analyzer (CVSA) in the Absence of Jeopardy," *Polygraph* 25 (2) (1996): 117–127; and Fuller, B.F., "Reliability and Validity of an Interval Measure of Vocal Stress," *Psychological Medicine* 14 (1) (1984): 159–166.

[6] Researchers at the Air Force Research Laboratory concluded that two VSA devices (Lantern™ and the Psychological Stress Evaluator—a precursor of CVSA®) could measure these differences in speech patterns. Hansen, J., and G. Zhou, *Methods for Voice Stress Analysis and Classification: Final Technical Report,* Rome, NY: U.S. Air Force Research Laboratory, 1999; and Haddad, D., S. Walter, R. Ratley, and M. Smith, Investigation and Evaluation of Voice Stress Analysis Technology (pdf, 120 pages), final report submitted to the National Institute of Justice, 2002 (NCJ 193832).

[7] Barland, G., "The Use of Voice Changes in the Detection of Deception," *Polygraph* 31 (2) (2002): 145–153. This study suggests simulated stress in a laboratory setting may not be sufficient to allow VSA to detect deception. This leads to the argument, by some VSA proponents, that mock deception in a staged (lab) scenario fails to create the necessary degree of jeopardy (and therefore stress) to stimulate a measurable response indicating deception. In an experiment in which the subject is not worried about getting "caught" because there are no real consequences or is pretending to lie, it is, they argue, more difficult for the software to detect deception, as the necessary stress levels are not present.

[8] Previous arrestee studies suggest that respondents are commonly deceptive about recent drug use. Fendrich, M., and Y. Xu, "Validity of Drug Use Reports from Juvenile Arrestees," *International Journal of the Addictions* 29 (8) (1994): 971–985; Hser, Y.I., "Self-Reported Drug Use: Results of Selected Empirical Investigations of Validity," *NIDA Research Monograph* 167 (1997): 320–343; Lu, N.T., B.J. Taylor, and K.G. Riley, "The Validity of Adult Arrestee Self-Reports of Crack Cocaine," *American Journal of Drug and Alcohol Abuse* 27 (3) (2000): 399–407; Mieczkowski, T., D. Barzelay, B. Gropper, and E. Wish, "Concordance of Three Measures of Cocaine Use in an Arrestee Population: Hair, Urine, and Self-Report," *Journal of Psychoactive Drugs* 23 (3) (1991): 241–249; and Harrison, L., "The Validity of Self-Reported Data on Drug Use," *Journal of Drug Issues* 25 (1) (1995): 91–111.

[9] Committee to Review the Scientific Evidence on the Polygraph, National Research Council, *The Polygraph and Lie Detection*, Washington, DC: National Academies Press, 2003.

[10] Sensitivity and specificity should be examined jointly, because an overly sensitive but not specific instrument—that is, one that indicates all responses as deceptive—is not very useful. The standard way to compare these two scores simultaneously is by examining them on a receiver operating characteristic chart. Programs with high sensitivity and specificity scores will efficiently predict who is being deceptive and who is not. If either the sensitivity or the specificity score is low, the usefulness of the programs for predicting deception is diminished.

[11] Jones, E.E., and H. Sigall, "The Bogus Pipeline: A New Paradigm for Measuring Affect and Attitude," *Psychological Bulletin* 76 (5) (1971): 349–364.

[12] Aguinis, H., C.A. Pierce, and B.M. Quigley, "Conditions Under Which a Bogus Pipeline Procedure Enhances the Validity of Self-Reported Cigarette Smoking: A Meta-Analytic Review,"