THE STATE of NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

State of New Hampshire

v.

George Knickerbocker, Jr. (a/k/a Nicky Robbins)

Docket No. 2003-S-132

ORDER ON DEFENDANT'S MOTION TO DISMISS

The original copy of this order is to be kept in the court file under seal with copies to counsel only as it contains references to matters which are confidential pursuant to statute. A redacted copy of the order is to be available for public inspection and all requests for copies shall be of the redacted order.

The defendant, George Knickerbocker, Jr., also known as Nicky Robbins, is charged with one count of Second Degree Murder in connection with the death of a one-month-old infant, Adam Robbins, in February 1983. The defendant moves to dismiss the charge for lack of speedy indictment, and the State objects. The Court held an evidentiary hearing over three days on this matter, subsequent to which it directed the parties to file written legal arguments. Upon review of the parties' arguments, the testimony and evidence submitted at the hearing, and the relevant law, the Court finds and rules as follows.

On February 18, 1983, Denise Robbins,[1] mother of one-month-old Adam Robbins and two-and-one-half-year old Joshua Robbins, left her children alone with the defendant in the apartment they shared with Benoit St. Martin, which was located at 50 Old Loudon Road in Concord, New Hampshire. At that time, Denise and the defendant were involved in a romantic relationship and had been residing together for about one and one half months. The defendant was not the father of either child.

According to Denise, she left the defendant alone with her children for approximately one to one and one half hours in the late morning to early afternoon hours of February 18th. Sometime after returning to the apartment, Denise became aware that something was wrong with Adam. Specifically, the baby was having difficulty breathing and his head was cold to the touch. Further, he was occasionally stiffening his body and throwing his head back, as if convulsing. After initially contacting a doctor by telephone from her mother's house, Denise brought Adam to the Concord Hospital, where a doctor examined the baby and ordered a Computerized Axial Tomography ("CAT") scan of the baby's brain.

The CAT scan revealed the baby's brain was swollen and bleeding. Further, the baby was convulsing and bruising on the baby's head was becoming evident. Consequently, the baby was transferred by ambulance to the Dartmouth Hitchcock Medical Center. Denise and the defendant returned to their apartment briefly before traveling to the Dartmouth Hitchcock Medical Center. Adam died in the hospital at around 3:00 a.m. on Saturday, February 19th. Shortly after Adam Robbins was pronounced dead, Denise and the defendant returned to Concord.

On February 19th at approximately 10:45 a.m., Lieutenant Paul Murphy of the Concord Police Department (then Sergeant of the department's Juvenile Division) and Officer Tim Davis,

[1] Denise has since changed her name to Denise Dow. However, for purposes of this Order, the Court refers to her as Denise Robbins.

both dressed in plain clothes and driving together in an unmarked cruiser, went to 50 Old Loudon Road to question Denise in connection with her baby's death. The defendant answered the door, dressed in jeans with no shirt and appearing disheveled, as if he had just been awakened. Lieutenant Murphy asked to speak with Denise, and the defendant informed him that Denise was at her mother's house. The defendant gave Lieutenant Murphy Denise's mother's address, and stated that maybe the officers would want to talk with him as well. After telling the defendant they would be right back to do so, Lieutenant Murphy and Officer Davis left 50 Old Loudon Road in search of Denise.

During Lieutenant Murphy's exchange with the defendant, he had observed Lieutenant Donald Callahan and Detective John Reilly drive past 50 Old Loudon Road and knew they were planning to go to that address and question the defendant. Accordingly, when Lieutenant Murphy and Officer Davis left 50 Old Loudon Road, they met up with Lieutenant Callahan and Detective Reilly, who were in an unmarked cruiser waiting a few houses down, and discussed their brief exchange with the defendant. Lieutenant Murphy and Officer Davis then proceeded to Denise's mother's home, while Lieutenant Callahan and Detective Reilly proceeded to 50 Old Loudon Road to question the defendant.

Although it is unclear exactly what occurred at 50 Old Loudon Road that morning, Lieutenant Callahan and Detective Reilly eventually drove the defendant to the Concord Police Department for questioning.[2] Lieutenant Callahan and Detective Reilly questioned the defendant in a small interview room on the second floor of the Concord Police Department. The defendant signed a Miranda waiver form,[3] (see State's Ex. 14), and provided a statement in which he

[2] Detectives Callahan and Reilly are both deceased. Therefore, the events surrounding the officers' initial contact and subsequent interview with the defendant are, in large part, unknown. Information relative to these events as set forth in this Order comes from Lieutenant Murphy, who testified at the hearing.

[3] The Court is not commenting on or determining the validity of the defendant's waiver in this Order.

indicated that while he was alone with Joshua and Adam on February 18th, he left Joshua and the baby for several minutes to use the bathroom. While in the bathroom, the defendant claimed he heard the baby cry. Upon his return from the bathroom, the defendant stated he observed Joshua standing over the baby, who was lying on the couch, with his hands on the baby. Joshua allegedly told the defendant that he had given the baby a "boo-boo" on his head. (See State's Ex. 15A.)

Also on Saturday, February 19th, Dr. Charles S. Faulkner, II conducted an autopsy of Adam Robbins. (See State's Ex. 8.) Based on his examination of the baby, Dr. Faulkner diagnosed the child with "[t]raumatic injury to the head," recent "[m]ultiple external contusions," two lacerations to the liver and "[f]ocal acute bronchitis." (Id. at 1828.) Dr. Faulkner concluded that "Adam Robbins came to death as a result of violent trauma to the head, probably [by] being caused to strike or being struck by a blunt object." (Id., ellipses omitted.) Specifically, Dr. Faulkner stated in his report as follows:

> In view of the flexible character of the skull bones of a baby this age, the force required must have been considerable, and must have involved considerable acceleration, either of the head or of an object striking the head. The minor degree of injury to the skin suggests that the object struck by the head, or striking the head, may have been blunt. The other evidences of trauma on the body are of smaller extent. The abdominal wall bruises appear quite recent, and may correlate with the lacerations of the liver. The lack of blood around the liver lacerations remains unexplained. The presence of new bone formation along the outer aspect of one rib is consistent with a severe bruise occurring previous to the current injuries, probably by a matter of weeks, even possibly as far back as the time of birth.
>
> There is no evidence of previous ill health or malnutrition.
>
> I conclude that the baby died as a result of trauma to the skull. The severity of the trauma necessary to produce the injuries found argues against accidental injuries or injury caused by the baby's brother. The evidence would be more consistent with an older individual either striking the baby's head with a blunt object or striking a blunt object with the baby's head.

(Id. at 1828-1829.) In a February 19, 1983 taped statement, Dr. Faulkner stated it would be "very unlikely" that a child could have inflicted Adam Robbins' fatal injuries by using a fist. (See Def. Ex. P.)

Upon receiving a request from the Concord Police Department, Sharon Wolf, then an Associate Psychologist with the Central New Hampshire Community Mental Health Services, conducted a five-day psychological evaluation of Joshua in March 1983. Specifically, police had requested an evaluation of Joshua to determine 1) the state of his emotional welfare and 2) whether Joshua could have been involved in Adam's death. (See State's Ex. 10.) In an attempt to determine the possibility of Joshua's involvement in Adam's death, Ms. Wolf observed Joshua playing, asked him several questions about the death of his brother and asked Joshua to perform several tasks to test the extent of his motor coordination development.

When Ms. Wolf asked Joshua if he knew what happened to his brother, Joshua replied, "the monsters hit him." (Id. at 2.) Joshua then stated that the monsters "hit, hard." (Id.) When asked what specifically the monsters hit Adam with, Joshua said, "hit him with the stick." (Id.) According to Ms. Wolf, in an interview with the Concord Police three weeks earlier in which he was asked whether his brother Adam was hurt, Joshua replied, "hit Adam with a stick." (Id. at 3.) Joshua also referred to the "monsters" in his discussion with the police. (Id.) Ms. Wolf stated in her report that Joshua's comments to the police were remarkable because, based on her observations of other children Joshua's age, "the consistency of [his] responses seems unusual . . . ." (Id.) Ms. Wolf summarized her evaluation of Joshua as follows:

> In summary, there are some concluding observations which have resulted from the psychological evaluation. Because of his age, developmentally, it was noted that Joshua was unable to coordinate his body movements with much accuracy when either lifting or swinging heavy objects. Similarly, his perceptual abilities, also not fully developed, limited his capacity to aim accurately at a specified object. Furthermore, the forcefulness of his hitting abilities were felt only minimally.

> Therefore, it's this therapist's opinion that Joshua was developmentally incapable of inflicting the magnitude of injury which resulted in his brother[']s death as was reported in the pathology report.
>
> Finally, those responses made by Joshua during the police inquiry and psychological evaluation which pertained to questions about what happened to his brother, were remarkably consistent for that span of time. The reasons for this consistency in comments is unknown, except to speculate that whatever it was that Joshua experienced, had impressed him.

(Id.)

Between April 19 and April 22, 1983, Lieutenant Callahan and Detective Reilly traveled to the defendant's hometown of Vincentown, New Jersey, where they interviewed several individuals regarding their knowledge of and prior contacts with the defendant. (See Def. Ex. X.) Specifically, Lieutenant Callahan and Detective Reilly spoke with the Reverend Charles Scheihing, pastor at the church the defendant attended while in high school and shortly after graduation; Detective Leland MacLaney, who had arrested the defendant for possession of marijuana; Robert J. Robbins, the defendant's step-father; Cindy Robbins, the defendant's sister; Katherine Worrell, the defendant's aunt; Richard Driscoll, principal of the high school the defendant attended; and Gretchen Stolten and Janet P. Kline, both of whom attended high school with the defendant. (See id.) Lieutenant Callahan wrote in his report relative to the trip to New Jersey that he and Detective Reilly "checked with police officers who knew [the defendant], all of the relatives who were left in the area, which are few; and anyone who knew [the defendant] while he was living there. All we talked to agreed that [the defendant] is non-violent, and has never shown any tendency toward brutality." (Id. at 7.)

On April 27, 1983, under circumstances not discussed at the hearing and therefore unknown to the Court, the defendant again signed a Miranda waiver form, (see State's Ex. 16), and provided another statement to Detective Callahan in which he indicated that approximately

80% of his February 19th statement was untrue. Specifically, on April 27th, the defendant told Detective Callahan he implicated Joshua in his earlier statement to protect Denise because he loved her. He then told the detective that Denise was the one who fatally injured Adam, and explained that he decided to tell the truth about what she did because she was not treating him well, having kicked him out of the 50 Loudon Road apartment and causing, to some degree, criminal charges to be brought against him for trespassing in her apartment. (See State's Ex. 17B.)

Meanwhile, based on Denise's continued cohabitation with the defendant in the aftermath of Adam's death, the Concord Police Department instituted [other]**[portions redacted]** proceedings in the Concord District Court. The district court issued an emergency placement order for Joshua, pursuant to which Joshua began living with Denise's mother, Elaine Robbins. The defendant eventually moved out of the apartment he and Denise had shared, presumably pursuant to Denise's request or directive. In late April, 1983, the Concord District Court issued a protective order prohibiting the defendant from having contact with Denise. The court later found that the defendant had violated the terms of the protective order, and ordered him committed to the Merrimack County House of Corrections for 90 days, to be served on weekends. (See Def. Ex. H.)

Also during this time, Denise Robbins obtained representation from the New Hampshire Public Defender's Office because the State charged her with witness tampering, a felony. [**Portions Redacted]** The witness tampering charge was based on an alleged threat Denise made to Elizabeth O'Mara, one of her acquaintances. Eventually, the State nol prossed the witness tampering charge and Denise pled guilty to the misdemeanor charge of criminal threatening.

In the course of their investigations pertaining to Adam Robbins' death**[Portions Redacted}**, officers from the Concord Police Department interviewed several acquaintances of both the defendant and Denise. On March 1, 1983, Detective Magoon interviewed Roger Cullen, who lived in an apartment below the apartment Denise shared with the defendant and Benoit St. Martin. (See Def. Ex. BB at 4.) In his report, Detective Magoon writes that Cullen stated he was at one of the many "wild parties" Denise and the defendant used to throw in their apartment when he observed the defendant, on several occasions, allowing Joshua to drink beer out of a beer bottle. (Id.)

The next day, Detective Magoon, with Officer James Cross, spoke with Steven Plourde, who had known Denise for approximately six to eight months. (See Def. Ex. CC.) According to Detective Magoon's report, Plourde stated he was at the apartment where Denise and the defendant lived when they returned from the Concord Hospital before traveling to the Dartmouth Hitchcock Medical Center on February 18, 1983. (Id. at 1.) The report also indicates that Denise told Plourde and the others who were at the apartment that her son Adam "had hurt his head," and that the defendant did not talk at all about what happened to the child. (Id. at 1, 2.) According to the report, Plourde stated that Denise was a good mother and the defendant treated Adam as if Adam was his own son. (Id. at 2.)

After speaking with Plourde, Detective Magoon and Officer Cross spoke with Reggie Berube, who was also at the 50 Old Loudon Road apartment on February 18th when Denise and the defendant returned from the Concord Hospital. (See id.) According to the report, Berube stated that he had been at the apartment on a number of occasions and witnessed Josh sitting on the couch holding Adam. (Id. at 3.) Berube also stated that he believed Joshua and Adam were

"real close" and told the officers he had never seen Joshua do anything to hurt Adam. (Id.) At the end of his report, Detective Magoon wrote:

> Both Steven Plourde and Reggie Berube indicated that from what they understood, that Denise Robbins had left the house some time that day and had left Josh and Adam with Nicky Robbins, while she went out and did some errands, that as far as he knows, the only 3 people in the house was [sic] Nick Robbins and the two boys. They both indicated that they have not heard any other stories, other than what Denise and Nick had told them, that Nick had gone to the bathroom, when he come [sic] out, Adam was crying and that [sic] Josh was seated on the couch somewhere near Adam. They did not know how the baby Adam had received the injuries.

(Id.)

On March 23, 1983, Detective Reilly and Lieutenant Callahan traveled to the Dartmouth Hitchcock Medical Center with Assistant Attorney General John Malmberg, Joshua Robbins and Denise's mother, Elaine Robbins. (See Def. Ex. E; State's Ex. 31.) While Detective Reilly, Lieutenant Callahan and Assistant Attorney General Malmberg waited to speak with Dr. Faulkner, Dr. Little, who was the admitting physician for Adam on February 18, 1983, and who witnessed part of the autopsy performed by Dr. Faulkner, took Joshua and Elaine into a play area in the pediatric room and observed Joshua. (Id.) Upon Dr. Faulkner's arrival, Detective Reilly, Lieutenant Callahan and Assistant Attorney General Malmberg showed Dr. Faulkner and Dr. Little slides from the autopsy and discussed the child's liver, skull and brain injuries, as well as the presence of blood in the child's urine. (Id.) Based on Detective Reilly's report, only Dr. Faulkner answered questions pertaining to the autopsy. Further, there is no indication in the report that Dr. Little offered or was asked to provide information based on his earlier observation of Joshua in the play area of the pediatric room. (Id.)

On April 4, 1983, detectives Reilly and Magoon interviewed Chris Wittenberg, who had known Denise for approximately three years. (See Def. Ex. Y at 2.) According to Detective Reilly's report, Wittenberg stated she once saw Denise "lose her temper and throw Joshua, the

baby, who at this time . . . [was] less than a year old, into the wall in the bedroom. " (Id. at 2-3.) Wittenberg stated that Joshua "hit the wall and then fell into his crib." (Id. at 3.) In his report, Detective Reilly indicates that Wittenberg told the detectives she believed Denise did not feed Joshua a balanced diet because Denise fed him "items normally used for breakfast at all different times of the day" and also added that she believed Denise had a "very bad temper." (Id.) Detective Reilly indicates that Wittenberg also stated Denise did drugs, specifically, LSD, speed, marijuana and cocaine. (Id.)

Detective Magoon and Detective Chris Domain obtained a taped statement from Elizabeth O'Mara on April 6, 1983. (See Def. Ex. L; see also Def. Ex. Y.) At that time, O'Mara had known Denise for approximately three to three and one half years. O'Mara told the detectives she and a friend had gone to Denise's apartment when Joshua was about six months old, and stated that Denise told O'Mara she had "lost her temper with the baby and . . . struck him[.]" (Id. at 2.) O'Mara stated that she observed a bruise on the child's forehead and one on his "back end." (Id.) O'Mara told the detectives she called the state welfare office within two weeks to report the incident. (Id.) O'Mara also stated she had observed Denise using mushrooms, acid, pot and speed while in the presence of Joshua. (Id. at 3.) When asked whether she had ever observed Denise abuse or strike Joshua, O'Mara replied:

> [N]o, just, I don't know if you could call it abuse, but the way she treated him sometimes was, I don't think fit for a baby, I don't, she made him nervous, like she'd be holding him, then she'd shake him and scream at him and tell him to stop crying or she'd go to drop him and then catch him, you know, before he hit the floor[.]

(Id. at 4.)

On April 8, 1983, Detective Magoon contacted Gary Yeaton by telephone. (See Def. Ex. DD.) According to the detective's report, Yeaton had recently seen Denise Robbins, who was carrying the autopsy report on Adam and attempting to show it to everyone. (Id. at 1.) Yeaton

stated he refused to look at the autopsy report. (Id.) The detective also spoke with Jimmy Gelinas, who was at Yeaton's residence. Gelinas, according to Detective Magoon's report, stated that about two weeks ago Denise had been with his sister, Theresa Gelinas, at his father's residence. (Id.) Gelinas stated that Denise had carried Theresa's four month-old daughter into the residence and "threw the baby in the carrying holder onto the kitchen shelf . . . ." (Id. at 1-2.) Detective Magoon then located Theresa Gelinas, who, according to the report, reiterated her brother's account of Denise throwing her baby onto the kitchen counter but refused to give a taped statement regarding the incident. (Id. at 2.)

On April 12, 1983, Detective Magoon obtained a taped statement from Benoit St. Martin, who had lived next door to Denise before she moved in with the defendant, and who lived with Denise and the defendant at the 50 Old Loudon Road apartment. (See Def. Ex. J-1.) According to St. Martin, he was at the 50 Old Loudon Road apartment on February 18, 1983 when Denise and the defendant came back from the Concord Hospital before traveling to the Dartmouth Hitchcock Medical Center. (Id. at 1.) St. Martin stated that Denise and the defendant did not know what was wrong with Adam at that time, and explained that Adam's "eyes were rolled back or somethin[']] and he wasn't actin[']] right or somethin[']][.]" (Id. at 2.) St. Martin further stated that since the night of February 18, 1983, Denise and the defendant "said all different kinds of things" as to what happened to Adam, such as "somethin[']] fell on his head like an ashtray or somethin[']], or he was dropped accidentally like . . ." (Id.) St. Martin told Detective Magoon that some people were saying Denise may have killed the child, and the officer asked why he thought people might say Denise was to blame. St. Martin replied as follows:

> I don't know, well she was over Theresa's house, too, I don't know, it was last week or so, and Theresa asked her to bring my daughter in, Sonya, I guess Denise took the baby, the car seat thing and she threw it on the table and Theresa bitched at her about that, I don't know if its anything.

(Id.) In a May 6, 1983 taped statement, St. Martin later told police that twice in one day he observed Denise making contact with the defendant, although at that time a restraining order was in place prohibiting the defendant from having contact with Denise. (See Def. Ex. J-2.)

That same day, Detective Magoon obtained a taped statement from Robert Gelinas, Theresa and Jimmy's father. (See Def. Ex. FF.) The statement reads, in pertinent part, as follows:

> Q: I've been told, Theresa come [sic] into the house with some laundry and Denise was carrying your granddaughter into the house in a little baby carrying carriage, that you carry in your hands, did something happen when she brought that baby into the house?
> A: [Y]ah, she sort of threw it on the counter[.]
> Q: Threw it on the counter in your kitchen?
> A: [R]ight.
> Q: Could you describe to me how she threw the baby?
> A: [W]ell it was in the carrying case there, and instead of just setting it down on the table, in the case, she just threw it up on the counter, I didn't like the way she done [sic] it[.]

(Id. at .) Gelinas told the detective that the defendant did not come around his residence at all, because Gelinas did not like his attitude and did not want him around. (Id. at 2.)

On April 14, 1983, detectives Reilly and Magoon spoke with Daniel "Rusty" Edwards, the man Denise claimed was Joshua's father. (See Def. Ex. EE.) According to Detective Reilly's report, Edwards stated that he never saw Denise abuse Joshua, "but **[Portions Redacted]**, he was never really taken care of the way he should have been or probably had as much attention paid to him as he should have had **[Portions Redacted]** [.]" (Id. at 2.) Edwards also stated that sometimes when Joshua cried, Denise would "just go and put him in the bedroom and close the door" until he fell asleep. (Id.) When asked what kind of a person he believed Denise was, Edwards stated, "[M]essed up, got a problem with her mind I think[.]" (Id. at 3.)

In a report dated April 26, 1983, Detective Callahan writes that he spoke with Faye Abbott, who lived at 48 Old Loudon Road at the time. (See Def. Ex. HH.) According to the report, Abbott stated that approximately two weeks ago she observed Joshua playing on the swings outside, and a short time later observed Denise go outside and begin walking down the road with Joshua. Abbott told the detective that Elaine Robbins, Denise's mother, was nowhere in sight. (Id.) Abbott further stated that the individuals residing at 48 Old Loudon Road could verify the fact that Denise had been bringing Joshua to her home without her mother being there, which violated of one of the district court's orders regarding Joshua. (Id.)

In a May 5, 1983 taped statement, Claire Gelinas informed Lieutenant Callahan that on two occasions when a restraining order was in effect prohibiting the defendant from having contact with Denise, she observed Denise with the defendant. (See Def. Ex. GG.) Specifically, Gelinas stated that she, a friend and the defendant had gone to the Heights Market, and Denise, who had been inside the store, followed the defendant out of the store. (Id. at 1-2.) When the defendant held up the restraining order for Denise to see, Denise claimed she did not know what the restraining order was and denied having signed it. (Id. at 2.) Denise and the defendant then began to talk, and Gelinas and her friend walked away. (Id.) On another occasion, Gelinas walked out of her sister, Theresa's, apartment, and observed Denise and the defendant sitting on the steps, talking. (Id.)

On July 8, 1983, detectives Magoon and Reilly obtained a taped statement from Laura E. Phillips. (See Def. Ex. K.) Phillips told the detectives that during the three years she had known Denise, she saw Denise smoking marijuana in the presence of Joshua, who at the time was "very young." (Id. at 1.) According to Phillips, Denise would blow the marijuana smoke in baby Joshua's face. (Id.) Phillips also told the detectives that she observed Joshua, when he was "a

little older," taking imaginary puffs from unlit joints and, more recently, smoking a lit but "partially out" pipe with marijuana in it and saying "smoke a bowl." (Id.) Phillips informed the detectives that she did not believe Denise took proper care of Joshua, explaining that Denise used to bring Joshua to her apartment and leave him unattended while she smoked marijuana. Phillips stated Joshua used to eat out of the kitty litter box. (Id.) Phillips also relayed to the detectives a conversation she had with Denise while Denise was pregnant with Adam, in which Denise told Phillips she "could have her baby when it was born ['Jcause she sure as hell didn't want it[.]" (Id. at 2.) Phillips told the detectives that Denise was "very serious" when she made the above statement. (Id.)

On September 26, 1983, Lieutenant Murphy attended a meeting at the Concord Police Department at which Denise was present. (See Def. Ex. U.) According to Lieutenant Murphy's report, Denise stated that on September 20, 1983, Josh was saying his prayers before bed and said that the defendant was the monster who killed Adam. (Id. at 1.) The lieutenant went on to write the following:

> When Denise asked what monster, Joshua indicated the Frankenstein monster. Denise showed me a copy of a photograph depicting Chris wearing a Frankenstein-type Halloween mask and she further indicated that she felt that this is the mask that Joshua was speaking of. A copy of that photograph accompanies this report. According to Denise, Joshua went on to say that he (Joshua), had been wearing the mask and that [the defendant] had pulled it away from his face and allowed it to snap back. Joshua said that [the defendant] then put it on and he (Joshua) pulled the mask back from [the defendant's] face and let it snap. Joshua allegedly told Denise that this got [the defendant] mad and that he picked the baby up by the feet and swung Adam downward, striking his head on the floor, at a point that sounds like the threshold between Ben's room and Joshua's room. Denise went on to say that on Wednesday, 9-21-83, Joshua told the same thing to Sharon [Wolf] of Central NH Community Mental Health.

(Id. at 1-2.)

On September 27, 1983, Lieutenant Murphy spoke with Nancy Martin. (See Def. Ex. T.) According to Lieutenant Murphy's report, Martin stated that she heard from someone else that the defendant had picked Adam up by his ankles once and swung him around, claiming it was good for the baby's circulation. (Id.) Martin also stated that Denise wanted an abortion when she was pregnant with Adam, but did not have one because the father allegedly wanted her to have the child. (Id.)

For reasons still unknown to the Court, the police ceased their investigation of Adam Robbins' death sometime in 1983 and charges were not brought against anyone. In 1996, however, Denise Robbins wrote a letter to the Attorney General requesting action on the case. (See State's Ex. 1.) Apparently Denise requested action on the case because Joshua, then sixteen, had written a paper for school in which he discussed what happened on the day Adam received his fatal injuries. (See id.)

In addition to contacting the Attorney General's Office regarding the case, Denise contacted the New Hampshire Public Defender and requested a copy of her file. The public defender's office forwarded Denise a complete copy of her file in late January 1998. (See State's Ex. 2.) The public defender's office also turned Denise's file over to the Concord Police Department, apparently because it was known that Denise wanted the case reopened and the public defender's office believed the file contained information that would be useful to investigators.

Among other things, Denise's public defender file contained an internal memo from Bruce Sartwell, in which he stated that on April 19, 1983, he interviewed Anthony Pepe, an individual who had known the defendant for approximately one year, regarding Adam Robbins' death. According to Sartwell, Pepe stated he had seen the defendant "pick Adam up by the heals [sic]

and spin him around." (State's Ex. 3.) Pepe also told Sartwell that when he was with the defendant, the defendant came across a ruler wrapped in electrical tape and told Pepe he used it to hit Adam. (See id.)

Also contained in the public defender file is an internal memo from Betsy Kizis, in which she related a conversation she and Attorney Paul Twomey had with Denise. (See State's Ex. 4.) According to Kizis, Denise saw the defendant on April 26, 1983, and he stated he had tried to hang himself because he did not want to spend his life in jail. (Id.) When Denise asked, "What do you mean, about Adam, you did it?", the defendant allegedly said, "Yeah, I flipped out." (Id.)

Another internal memo from Attorney Twomey to Attorney David Garfunkel was in the file, in which Attorney Twomey discussed the conversation he and Kizis had with Denise. (See State's Ex. 5.) According to Attorney Twomey, Denise asked the defendant "why he wanted to kill himself. He told her that it was because he had lost control with Adam and she asked him if he had killed him and he said 'yes.' (The exact wording of the conversation may differ slightly)." (Id. at 5.) Attorney Twomey wrote in his memo that after speaking with Denise and upon returning to his office, he contacted the Attorney General's Office, but was unable to reach Jim Cahill. Attorney Twomey then called the Carroll County Superior Court "and spoke with John Malmberg and informed him of all the above." (Id.) Attorney Twomey stated that in addition to informing him of the conversation with Denise,

> [I] told him that we would like to talk to him concerning turning over a statement and various leads we have of past abuse on the part of [the defendant] towards Adam, at a meeting first thing tomorrow. . . . Furthermore, I indicated to him that when he spoke to Russell[4] of the Concord Police Department he should take affirmative steps to make sure that [Denise] remained in a safe condition. I furthermore told him that [the defendant] might be committing suicide today and told him that [the

[4] There are references in several documents to a Russell and/or Director Russell associated with the Concord Police Department. The court is unable to find anything in the testimony or documents submitted clearly establishing the identity of this individual.

> defendant] was presently in apartments near the Heights Market, which I described to him, drinking himself into a stupor.

(Id.)

In 1997 or early 1998, Lieutenant Murphy requested a records check on the defendant. By letter dated February 5, 1998, Ginger Hudson of the Hamilton County Sheriff's Office in Chattanooga, Tennessee informed the lieutenant that the defendant's true name was George B. Knickerbocker, Jr., and that he also used the name Nicky Robbins. (See Def. Ex. M.) Ms. Hudson also informed Lieutenant Murphy that the Chattanooga City Police Department had arrested the defendant on charges under both names, and that for more information the lieutenant needed to request a records check from that department. (See id.)

In Fall 2001, Detective Sean Ford of the Concord Police Department, at the direction of his supervisor, became involved in the Adam Robbins case. In preparation for officially re-opening the case, Detective Ford read through the entire Concord Police Department file which, at that time, consisted of over 2000 pages of documents. The Attorney General's Office and the Concord Police Department officially reopened the case in January 2002.

In preparation for, and as a result of, officially reopening the case, Detective Ford interviewed several individuals, including Denise, Denise's mother Elaine (Robbins) Smith and Dr. Mitchell Ross, one of the physicians at the Dartmouth Hitchcock Medical Center who treated Adam Robbins in 1983. The Attorney General's Office also forwarded several questions regarding Adam's death to Dr. Thomas A. Andrew, the Chief Medical Examiner for the State of New Hampshire, along with a file containing the following:

> 1. Taped statements of Denise Robbins, Elaine Robbins, Nicky Robbins, Dr. Thomas Creighton, Dr. George Devito, Dr. Ronald Faille, Dr. Chris Hallowell, Dr. Mitchell Ross, Dr. Rita Siegmund, Dr. Charles Faulkner and Beverly Small, RN.
> 2. Interviews and written statements from Denise Robbins, David Garfunkel and Elaine Robbins.

3. Letters from Dr. George Devito and Sharon Wolf (Psychologist).
4. Police reports filed by Lt. Fletcher, Det. Tim Davis and Det. James Cross.
5. Public Defender documents submitted by Betsy Kizis and Anthony Pepe.
6. Medical records of Adam Robbins.
7. Autopsy report on Adam Robbins prepared by Dr. Charles Faulkner.

(State's Ex. 6 at 1.) After reviewing the above materials, in addition to photographs from the autopsy procedure and radiographs of Adam Robbins from the Dartmouth Hitchcock Medical Center, Dr. Andrew answered five questions in a letter dated October 22, 2002. (See id.) In pertinent part, Dr. Andrew wrote as follows:

> Q2. Could a 3 year old boy have inflicted the fatal injuries?
>
> While heavy in proportion for [sic] his height Joshua was not unusually large for his age. There is nothing in his developmental assessments submitted by Dr. Devito and Psychologist, Sharon Wolf that would suggest Joshua Robbins was capable of administering blows to Adam's body of sufficient force to induce the extensive injuries described both clinically and at autopsy.
>
> . . . .
>
> Question 5 involved a possible time frame in which the injuries were sustained.
>
> Given this time line of events, the course of the clinical deterioration of Adam Robbins and the findings at autopsy, I would opine that the fatal injuries, that is those to the head, occurred between 12 noon and 1:30 on the 18th of February, 1983. I would further opine, that the injuries were not sustained as the result of any the [sic] actions by a 3 year old child nor any actions by the deceased himself. Furthermore, the dramatic differences in the initial and subsequent statements given by Nick Robbins regarding the events of 2/18/83 is [sic] quite suspicious. . . . While these are not medical issues *per se*, it is well described in the forensic and pediatric literature that shifting scenarios of this type and an inability to explain the incurred injuries are extremely common historical features in children who have ultimately determined to have been abused.
>
> The manner of Adam Robbins death is homicide.

(Id. at 2-3.)

On December 15, 2002, Detective Ford and Detective Sergeant Keith Mitchell arrested the defendant in Walker County, Georgia for causing the death of Adam Robbins. The defendant

initially agreed to give Detective Ford and Detective Sergeant Mitchell a statement. However, once Detective Ford began taping the conversation, the defendant had second thoughts and ultimately ended up requesting the assistance of a lawyer, thus concluding the interview. (See State's Ex. 19A.)

While the defendant was in jail in Georgia before being transported back to New Hampshire, his sister, Cindy Robbins spoke with him about Adam's death. In a taped statement, Cindy relayed her conversation with the defendant to Detective Ford and Detective Sergeant Mitchell. (See State's Ex. 20.) Specifically, Cindy stated that the defendant told her that on the day Adam was fatally injured, after Denise left the apartment, "the two year old wanted to go with mommie and was crying, and all upset and then the baby started to cry and everyone was crying and screaming and he just lost it and he said he shook the baby." (Id. at 1.)

Cindy testified before the Merrimack County Grand Jury on February 21, 2003, and stated that the defendant told her that on the day Adam was fatally injured, "the mother went to a stores [sic] somewheres [sic] and the other child, the 2 ½-year-old child, was yelling 'cause he wanted to go to the store, and the baby was crying and everyone was screaming and he got upset and he – he shook the baby." (State's Ex. 21 at 5.) That day, the grand jury indicted the defendant for the second degree murder of Adam Robbins.

The defendant now moves to dismiss the charge against him for lack of speedy indictment. Before addressing the substance of the defendant's motion to dismiss, the Court considers the appropriate standard to use in analyzing his claims. In his motion to dismiss, the defendant states that the standard the Court must apply to the facts of this case is first, to determine whether the defendant has demonstrated material prejudice and second, if he has done so, to balance the resulting prejudice to him against the reasonableness of, and reasons for,

the delay. (See Def. Mot. to Dismiss Indictment, ¶¶14-16.) Citing State v. Weeks, 137 N.H. 687 (1993), however, the State maintains that to prevail on a motion to dismiss for lack of speedy indictment, an accused must establish not only material prejudice as a result of the delay, but also that the State caused the pre-indictment delay to gain a tactical advantage over the accused. (See State's Memo of Law, p. 11-12.)

In Weeks, the New Hampshire Supreme Court explained the standard it employs to determine whether a pre-indictment delay violates the due process rights of an accused as follows: "In order to prevail on [a] claim of unreasonable pre-indictment delay, the defendant must first show that the delay caused actual prejudice before the court will balance the prejudice against the unreasonableness of the delay." 137 N.H. at 697 (citations omitted). After discussing the Weeks defendant's various claims of prejudice, the Court stated, "The defendant makes no claim that the State intentionally delayed prosecution to gain a tactical advantage, and we hold that the defendant has not met his burden of proving that the length of time between the transactions and the prosecution caused actual prejudice." Id. at 698 (citation omitted).

In its memorandum objecting to the defendant's motion to dismiss, the State argues that "it is clear from its reference to a delay for tactical advantage in Weeks that the Court intends to employ the majority two-part test [which requires a showing of bad faith on behalf of the State to dismiss based on a delay in indicting.]" (State's Memo of Law, p. 11.) To the extent the State is arguing that an accused cannot obtain dismissal without first showing bad faith on behalf of the Government, however, this Court disagrees. As explained in detail below, this Court finds that the Government's bad faith in delaying indictment, if proven, is simply one factor to be considered in determining whether a case should be dismissed for lack of speedy indictment.

In United States v. Marion, 404 U.S. 307 (1971), the United States Supreme Court considered whether dismissal was constitutionally required when three years elapsed between the alleged criminal acts and indictment. The Court concluded that dismissal was not required, and discussed the matter, in pertinent part, as follows:

> [A]ppellees [have not] adequately demonstrated that the pre-indictment delay by the Government violated the Due Process Clause. No actual prejudice to the conduct of the defense is alleged or proved, and there is no showing that the Government intentionally delayed to gain some tactical advantage over appellees or to harass them.

404 U.S. at 325. Six years later, in United States v. Lovasco, 431 U.S. 783 (1977), the United States Supreme Court clarified its holding in Marion:

> In our view, investigative delay is fundamentally unlike delay undertaken by the Government solely to gain tactical advantage over the accused, precisely because investigative delay is not so one-sided. Rather than deviating from elementary standards of fair play and decency, a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. Penalizing prosecutors for these reasons would subordinate the goal of orderly expedition to that of mere speed[.] This the Due Process Clause does not require. We therefore hold that to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time.

431 U.S. at 795-96 (quotations and citations omitted). In cases decided subsequent to Marion and Lovasco, the Court has reiterated the test to be used in determining whether due process requires dismissal based on pre-indictment delay: "[T]he Fifth Amendment requires the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain a tactical advantage over him and that it caused him actual prejudice in presenting his defense." United States v. Gouveia, 467 U.S. 180, 192 (1984) (citing Lovasco, supra; Marion, supra); see also Arizona v. Youngblood, 488 U.S. 51, 57 (1988) (same).

In State v. Adams, 133 N.H. 818 (1991), the New Hampshire Supreme Court stated that to establish a due process violation based on a pre-indictment delay under the federal constitution, a criminal defendant "must show that the delay resulted in actual prejudice to the conduct of his defense." 133 N.H. at 824 (citing Marion, supra.) The Court then explained that it has "since followed the standard in Marion in determining whether a delay in prosecution has resulted in a denial of due process. Once the defendant has shown that actual prejudice resulted from the delay, the trial court must balance this prejudice against the reasonableness of the delay." Id. (citations omitted).

The New Hampshire Supreme Court has consistently explained that the standard it employs in deciding whether dismissal of a case is constitutionally required requires a defendant to show only prejudice, which trial courts must then balance against the reasonableness of the delay. See, e.g., State v. Ramos, 131 N.H. 276, 282 (1988); State v. Varagianis, 128 N.H. 226, 228 (1986); State v. Philibotte, 123 N.H. 240, 244 (1983). Indeed, Weeks is the only case in which the New Hampshire Supreme Court has mentioned whether the defendant made a claim of intentional delay on behalf of the Government to gain a tactical advantage. See 137 N.H. at 698. Moreover, because the New Hampshire Supreme Court has never concluded that a criminal defendant established prejudice, the Court has never squarely addressed whether it would require a criminal defendant to prove bad faith on behalf of the Government, and whether that factor alone would be used to determine the reasonableness of a delay. See, e.g., id.; Adams, 133 N.H. at 824; Ramos, 131 N.H. at 283; Philibotte, 123 N.H. at 244.

In Varagianis, however, after concluding that the defendant failed to prove actual prejudice due to a pre-indictment delay, the New Hampshire Supreme Court reasoned as follows:

> Additionally, assuming *arguendo* that the defendant had met her burden with respect to prejudice, we would have to balance that prejudice against the

> reasonableness of the delay. The State articulated several reasonable explanations for the two-year delay, including maintaining the secrecy of the informant's identity until completion of an on-going drug trafficking investigation and the unwillingness of the informant to testify due to his fear of his own personal safety. Clearly, the delay in this case was not unreasonable and would not be the basis for finding that the defendant had been denied due process.

128 N.H. at 229. Based on the foregoing discussion in Varagianis, the lack of any substantive discussion regarding the need of an accused to prove bad faith on behalf of the Government and the New Hampshire Supreme Court's criminal jurisprudence, which typically affords an accused greater protection under the state constitution than that which is afforded under the federal constitution,[5] this Court finds that an accused need not prove both actual prejudice and bad faith on behalf of the Government to obtain dismissal based on a pre-indictment delay. Rather, once an accused proves actual prejudice as a result of the delay, the trial court balances the prejudice against the reasonableness of the delay. One factor to consider in assessing the reasonableness of the delay is whether the Government acted in bad faith in delaying indictment. The Government's bad faith, or lack thereof, however, is not necessarily a controlling factor. With this standard in mind, the Court addresses each of the defendant's claims of prejudice in turn.[6]

WITNESSES [7]

Lieutenant Callahan and Detective Reilly

[5] See, e.g., State v. Goss, (September 29, 2003) (slip op.) (under state constitution, citizens have reasonable expectation of privacy in trash); State v. Roache, 148 N.H. 45, 49-52 (2002) (Part I, Article 15 of New Hampshire Constitution provides greater protection than federal constitution, therefore when attorney arrives at or calls police department and identifies self as counsel retained for suspect being interrogated, officers must stop questioning and inform suspect of attorney's attempts to make contact.)

[6] Under RSA 625:8, II, "[m]urder may be prosecuted at any time." (Supp. 2003). Therefore, the State is not barred from prosecuting the defendant based on the statute of limitations. See Philibotte, 123 N.H. at 244 (statute of limitations provides primary safeguard against initiation of "overly stale criminal charges.")

[7] The analysis which the court must make to resolve defendant's claim of prejudice due to pre-indictment delay, of necessity, relates to the defendant's theory of defense. As is related in more detail in the body of the order, a major theory of his defense is that either Denise Robbins or Joshua Robbins caused Adam's death. The court's analysis of prejudice must, therefore, relate directly to evidence tending to inculpate others or discredit the defendant's accusers. The analysis with emphasis on this evidence, however, should not be construed to mean that the court accepts the defendant's theories as fact.

Lieutenant Callahan and Detective Reilly are both deceased. The defendant argues that the unavailability of these officers, who were the lead investigators in 1983 relative to Adam Robbins' death, significantly prejudices his defense. Specifically, the defendant maintains that although Lieutenant Callahan and Detective Reilly generated reports as a result of their investigation, there is a substantial amount of information they learned during their investigation that does not appear in the reports. According to the defendant, it is not speculation to conclude that at least some of the information not contained in the reports would be helpful to the defense.

The State contends that the defendant's claim of prejudice relative to Lieutenant Callahan and Detective Reilly is sheer speculation, which is insufficient to prove actual prejudice. The State further maintains that the loss of Lieutenant Callahan and Detective Reilly operates in favor of the defense, as those officers made many unfavorable observations about the defendant during their investigation. Finally, the State argues that the defendant is not prejudiced by the loss of Lieutenant Callahan and Detective Reilly because Lieutenant Murphy **[Portions Redacted]** is available to testify at trial.

The defendant will not meet his burden of establishing actual prejudice from the pre-indictment delay if his claims of prejudice are speculative. See Marion, 404 U.S. at 325-26; Varagianis, 128 N.H. at 229. In Varagianis, the defendant asserted prejudice based on the loss of two "potential" eyewitnesses to the alleged incident. 128 N.H. at 229. The Court concluded that the defendant's claim of prejudice was speculative because there was no evidence that the individual the defendant claimed would have been able to identify the eyewitnesses had the indictment not been delayed ever knew the eyewitness's identities. Id. Specifically, according to the Court, ". . . whether the delay somehow contributed to the loss of potential witnesses is open to considerable doubt." Id.

In this case, the defendant identifies specific examples of alleged prejudice due to the loss of Lieutenant Callahan and Detective Reilly. First, the defendant asserts that Lieutenant Callahan's report of the meeting he and Detective Reilly had with Cindy Robbins is "cryptic at best" because although it appears the officers were searching for evidence of violence in the defendant's family history, it is not clear what they learned from Cindy in that regard. Further, the defendant contends it remains unclear whether Cindy agreed to assist the officers by providing information about the defendant and, if she did agree to do so, what information she actually provided. (Def. Memo. in Support of Mot. to Dismiss, ¶21.)

In his report of the meeting with Cindy Robbins, Lieutenant Callahan writes that Cindy discussed with the officers the defendant's move to Greece at age sixteen to live with his natural father, an injury the defendant received while in the Army, the story the defendant told his mother about the cause of Adam's death, her opinion as to whether the defendant would disclose to authorities the killer of the child if he knew and was close to the killer and stated that if he knew anything about the circumstances of the child's murder, she would be the one he would tell. (See Def. Ex. B at 4-5.) When the officers tried to get Cindy to discuss the rumored physical abuse she and the defendant suffered at the hands of their step-father, however, she refused. (Id. at 5.) The defendant's claim that the officers' intent in interviewing Cindy was to look for "any explanation for extreme violence in [the defendant's] family history," is speculative. (Def. Memo. in Support of Mot. to Dismiss, ¶21.) There is no indication in the report or otherwise suggesting that the officers were interested solely in learning about a history of violence in the defendant's family.

Lieutenant Callahan concludes his discussion of the meeting with Cindy with the following statement: "At the end of our interview with Ms. Robbins, we asked her that if she had any

contact with [the defendant] and if he told her anything that might be useful to us, for her to contact Detective Price, who would relay the information to us." (Def. Ex. B at 5.) There are no reports or other documents in evidence suggesting that Cindy ever contacted Detective Price, or anyone else involved in the 1983 investigation of the death of Adam Robbins, with useful information based on contact she had with the defendant subsequent to her discussion with Lieutenant Callahan and Detective Reilly. The Court therefore finds the defendant's claimed prejudice as to whether Cindy agreed to assist the officers and, if so, what information she provided them, is speculative.

The defendant's second specific assertion of prejudice relative to the loss of Lieutenant Callahan and Detective Reilly is that although Detective Reilly's April 1, 1983 report mentions an interview with Dr. Little, who had previously observed Joshua in the play area in the pediatric room at the Dartmouth Hitchcock Medical Center, there is no report from either Detective Reilly or Dr. Little as to what Dr. Little observed and what, if anything, he concluded about Joshua. The defendant contends that the absence of information pertaining to Detective Reilly's discussion with Dr. Little "becomes more acute in the face of Sharon Wolf's ill-informed, meandering evaluation and report of contacts with Joshua . . . and in light of the missing police videotape of Joshua (which Ms. Wolf reviewed and noted that Joshua was saying "similar" things to the police as he said to her)." (Def. Memo. in Support of Mot. to Dismiss, ¶22).

The Court finds the defendant's second claim of prejudice based on the loss of Lieutenant Callahan and Detective Reilly is, like his first claim, speculative. There is no indication that anyone discussed with Dr. Little his observations and conclusions, if any, regarding Joshua. Consequently, there is no indication as to whether any conclusions about Joshua that Dr. Little

reached would have been of any benefit to the defendant. On these facts, the Court finds the defendant has not demonstrated actual prejudice.

The defendant's third specific claim of prejudice relative to the loss of Lieutenant Callahan and Detective Reilly is as follows:

> Reilly's interview of Wayne Robbins, Denise's brother (Exhibit "D") gave a picture of Josh's penchant for violence different from that which Denise presented. To the extent that Wayne Robbins in unavailable or fails to remember, Reilly's loss prevents effective rebuttal of any State attempt to paint Joshua as a non-suspect.

(Def. Memo. in Support of Mot. to Dismiss, ¶23.) This claim of prejudice is also speculative, as the defendant is hypothesizing, not asserting or demonstrating, that Wayne Robbins may not be available to testify at trial or may not recall his opinions as to Joshua's violent nature.

The defendant's fourth assertion of prejudice due to the loss of Lieutenant Callahan and Detective Reilly is that Detective Reilly did not generate any reports either in the ten days preceding his trip to New Jersey with Lieutenant Callahan, or as a result of the trip to New Jersey. The defendant maintains that because the only report from the trip to New Jersey comes from Lieutenant Callahan, it is impossible to know why, after the trip, Detective Reilly apparently decided to forego further investigation of the defendant. The Court finds this claim inconsistent with the evidence.

Lieutenant Callahan's report of the trip to New Jersey, as stated previously in this order, ends with the conclusion that all individuals with whom he and Detective Reilly spoke agreed that the defendant was a non-violent man who had never demonstrated any tendency toward brutality. (See Def. Ex. X at 7.) Thus, to the extent Detective Reilly would have testified differently at trial, his absence benefits, rather than prejudices, the defense. Lieutenant Callahan's conclusion regarding the lack of violence or violent tendencies in the defendant's history further benefits the defense, as it is equally reasonable to infer that Detective Reilly

decided to forego subsequent investigation of the defendant based on his belief that the defendant, as a non-violent man, was no longer a primary suspect in the murder of Adam Robbins.

Fifth, the defendant argues prejudice because although Lieutenant Callahan wrote his final report on May 19, 1983 and apparently abandoned the murder investigation, three weeks earlier Denise's criminal defense attorney, Paul Twomey, had informed Assistant Attorney General Malmberg that the defendant had confessed to Denise. The defendant maintains that because the investigation stopped shortly after the defendant's alleged confession, Lieutenant Callahan and Detective Reilly must have obtained exculpatory facts relative to the defendant that are not contained in any of their reports.

Although there are aspects of this analysis which are troubling, the Court finds this claim is generally speculative. While one would assume that such critical information would have been conveyed to the investigating officers, there was no evidence presented that the Concord Police Department was ever notified of the defendant's alleged confession to Denise even though the Attorney General's Office possessed the information. Indeed, in his May 19, 1983 report, Detective Callahan states that he received from Director Russell a letter signed by Attorney David Garfunkel of the New Hampshire Public Defender's Office and addressed to Assistant Attorney General Malmberg describing four or five alleged violations by the defendant of the Concord District Court's protective order. (See Def. Ex. Z.) There is no indication in the report that the letter contained any information about the defendant's alleged confession to Denise.

Furthermore, Denise's public defender file contains a copy of a memo Attorney Twomey wrote to Attorney Garfunkel, in which Attorney Twomey states that after discussing with Denise the defendant's alleged confession to the death of Adam Robbins, he contacted Assistant

Attorney General Malmberg and told him of the alleged confession. (See State's Ex. 5 at 5.) Attorney Twomey told Assistant Attorney General Malmberg that when Malmberg spoke with Director Russell, to take appropriate measures to ensure Denise's safety. (Id. at 6.) There is nothing in the memo suggesting that Director Russell was told of the alleged confession, nor is there any other evidence suggesting that the Concord Police Department was ever informed of the alleged confession back in 1983. Thus, it is speculative to assume that Lieutenant Callahan and Detective Reilly had exculpatory information relative to the defendant sufficient to counteract his alleged confession and justify abandonment of the investigation.

Accordingly, the Court finds the defendant has failed to demonstrate actual prejudice based on the loss of Lieutenant Callahan and Detective Reilly.

Defendant's Exhibit S

As a preliminary matter, before discussing the defendant's claims of prejudice relative to additional witnesses, the Court addresses the State's objection in its Memorandum of Law to the defendant's Exhibit S. Exhibit S contains a packet of reports generated by several of the defense's investigators. According to the State, the investigators who prepared the reports contained in Exhibit S were "specifically retained as a result of the State's cross-examination of the defendant's investigator at the hearing on the Motion to Dismiss on December 11, 2003." (State's Memo. in Support of Obj. to Mot. to Dismiss at 13.) The State argues that the Court should not rely on Exhibit S in determining whether dismissal of this case is required because the State has not had an opportunity to cross-examine these investigators as to: 1) what measures they took to locate witnesses, and 2) issues "concerning the depth, duration and focus of the interviews that were conducted." (Id. at 14.)

The Court declines the State's invitation to disregard Exhibit S. The State's investigators have not, in large part, been made available to the defendant for cross-examination. It is inconsistent at best for the State to ask that the Court consider its exhibits containing information from unavailable investigators while also asking the Court to disregard the defendant's exhibits based on reports from previously unavailable investigators. The defendant has the burden of persuasion on the issue of prejudice, and the Court finds it would be unfair to disregard the defendant's evidence on this issue based on the State's lack of ability to cross-examine when the defendant has had, at most, minimal opportunity to cross-examine the State's investigators. Furthermore, the State's objection goes to the weight the court will give the exhibit and not to its consideration generally. It is of significant note that the State with all of its investigative resources makes no claim as to the falsity of any of the investigative reports.

Steven Plourde and Reggie Berube

As discussed previously in this Order, according to a 1983 police report, Plourde and Berube were at the 50 Old Loudon Road apartment when Denise and the defendant returned home from the Concord Hospital before proceeding to the Dartmouth Hitchcock Medical Center. (See Def. Ex. CC.) The police report indicates that Plourde told police he had never seen the defendant "do anything" to either one of the two children, and that he believed the defendant treated Adam as if Adam was the defendant's own son. (Id. at 2.) According to the report, Berube told police that the defendant explained that on the day Adam was fatally injured, Joshua had been on the couch with Adam and the defendant left the room to use the bathroom. When the defendant returned from the bathroom, he told Berube that Joshua was on the couch near Adam and "he did not really know what happened to Adam." (Id. at 3.)

According to a 2003 defense investigative report, Plourde does not recall being interviewed and he does not have a good memory of the events as they were described in the 1983 police report. (Def. Ex. S.) As for Berube, he initially and through most of the interview did not even recognize the name "Nicky Robbins." When one of the investigators read to Berube the 1983 police report of Berube's interview, Berube stated he did not recall saying anything contained in the report to the police and "added that he was intoxicated on the night Denise and [the defendant] returned to their home." (Id.)

The Court first considers whether the defendant has demonstrated actual prejudice with respect to Plourde. If able to testify consistent with his 1983 statement to the police, Plourde would have been helpful to the defense by stating that the defendant treated Adam like a son and never 'did anything' to either Joshua or Adam. According to the 2003 defense investigators' report, however, Plourde cannot even recall being interviewed in 1983 and does not have a good memory as to the events detailed in the report. There is no evidentiary rule pursuant to which Plourde's statement would otherwise be admissible. See Worster v. Watkins, 140 N.H. 546, 550-51 (1995) (statements to police not admissible under New Hampshire Rule of Evidence 803 (8)(B) and (C) because police report only qualifies as business record when "everyone involved in preparing a report is acting in the regular course of business.")

Moreover, there is no other witness who would testify to the information Plourde relayed to Lieutenant Magoon. Although Denise's mother, Elaine (Robbins) Smith initially told police in a February 19, 1983 taped statement that the defendant was "kind of overjoyed" when Adam was born and "the way [the defendant] acted you would think he was [Adam's] father," (Def. Ex. R. at 8), in a 2003 taped statement she told police

> that first interview comes off sounding like I really knew [the defendant], I liked him and all that stuff. I took him at face value. And he was very deceptive because I

> mean he was very nice, it's like he cared about Joshua, you know, and, he cared that, he took care of the baby, I mean it was that way.

(State's Ex. 11 at 19.) Further, there is no indication from Elaine's 2003 taped statement that she recalls or would testify to her 1983 statements that she had "seen [the defendant] around the baby, and every time I've seen him he's been, in fact was bragging to me, he says, ha, ha, grammy, I got to give [Adam] his first bath and he's bathed him, he's fed the baby, he's sat and talked with the baby, he thought he was quite a little guy[.]" (Def. Ex. R. at 11.) Indeed, in her 2003 statement, Elaine states that she only met the defendant once, at the hospital when Denise gave birth to Adam and then on February 18, 1983 the day before Adam died. (See State's Ex. 11.) Therefore, because the evidence is not cumulative and is not available through other sources, the Court finds the defendant has established actual prejudice with respect to Plourde.

As for Berube, the Court finds the defendant may also be prejudiced by his lack of memory. Berube's 1983 statement to the police consists almost entirely of recounting the defendant's version of what happened on the day Adam was fatally injured. In an April 1983 taped statement, the defendant told police that the story he had initially told them as to what happened on the day Adam was fatally injured, which was the same story he told Berube, was a lie to protect Denise. (See State's Ex. 17B at 31-32.) The admissibility of the defendant's April 1983 statement is disputed, and will likely depend on whether the defendant testifies at trial. If the April 1983 statement comes into evidence at trial, there will be no prejudice with respect to Berube, as the April statement would indicate that what the defendant told Berube was, like his initial statement to the police, a lie. If, however, the April statement does not come into evidence, the lack of testimony from Berube would be prejudicial, because the defendant would be unable to show that on more than one occasion, he told the same story implicating Joshua as the cause of Adam's death.

Thus, because the admissibility of the defendant's April 1983 statement cannot be determined until trial, the prejudicial effect of Berube's faded memory cannot be determined with certainty at this time. As of this point in time, the Court finds only that if the defendant's April 1983 statement does not come into evidence at trial, the defense will be prejudiced with respect to Berube.

Dr. Little

The Court previously discussed the defendant's claim of prejudice as to Dr. Little, in its discussion of Lieutenant Callahan and Detective Reilly. As stated above, the Court finds no actual prejudice with respect to Dr. Little, just speculation as to information the doctor may have been able to provide at trial.

Gary Yeaton

According to a 1983 report by Lieutenant Magoon, Gary Yeaton stated that he had recently seen Denise, and that she was carrying Adam's autopsy report around and attempting to show it to all of her friends. (See Def. Ex. DD at 1.) According to Yeaton, he refused to look at the report when Denise attempted to show it to him. (Id.)

In his memorandum in support of his motion to dismiss, the defendant states that when defense investigators located and spoke with Yeaton, Yeaton did not at first remember either Denise or the defendant. (Def. Memo. in Support of Mot. to Dismiss, ¶44.) After some discussion, Yeaton recalled the defendant, but could not remember the events surrounding Adam's death or seeing Denise carrying around Adam's autopsy report. (Id.) The Court, however, cannot locate any evidence indicating defense investigators actually spoke with Yeaton in 2003. According to defense Exhibit S, investigators called Robert Gelinas's secretary, who supposedly had a telephone number for Yeaton, but "only an answering service has picked up to

this point." Either way, however, it is undisputed either that the defense is unable to locate Yeaton, or that Yeaton has been located but has no memory of the events of which he spoke in 1983. Thus, the Court considers whether the defense is prejudiced by the absence of Yeaton.

The Court finds the defendant is prejudiced by the absence of Yeaton and/or by his lack of memory. If Yeaton was able to testify at trial consistent with the statements he gave the police in 1983, he could call into question Denise's credibility. Specifically, as Yeaton stated in 1983, he found it "really odd that a mother who had just lost her baby would be acting like she is, showing the results of the autopsy to everyone." (Def. Ex. DD at 1.) Given the defense theory that Denise or Joshua was responsible for fatally injuring Adam, Yeaton's testimony on this point would be helpful to the defense. Consequently, the absence of Yeaton's testimony is prejudicial.

James Gelinas

As discussed previously, according to a 1983 report by Lieutenant Magoon, Gelinas told him that approximately two weeks earlier, Denise had carried his sister's four-month old baby in from outside in a carrying crib and thrown the baby onto a kitchen counter upon entering the residence. (See Def. Ex. DD at 1-2.) According to a 2003 report from defense investigators, however, Gelinas has no memory of Adam passing away and, when an investigator read the 1983 police report to Gelinas, he stated he had no memory of being interviewed by the police regarding the death of Adam Robbins. (See Def. Ex. S.)

Rule 404(b) of the New Hampshire Rules of Evidence prohibits the admissibility of "other crimes, wrongs or acts" to prove a person's character and show that the person "acted in conformity therewith." Such evidence is only admissible for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Id. In this case, there is no reason to offer into evidence Denise's alleged act of

throwing Gelinas's sister's baby onto a kitchen counter other than to create the inference that because she acted violently towards someone else's child, she acted violently towards her own and was perhaps responsible for inflicting Adam's fatal injuries. Such an inference is impermissible under rule 404(b). Therefore, as Gelinas's testimony would be inadmissible at trial even if he was able to recall the events of which he spoke in 1983, the defendant is not prejudiced by the absence of Gelinas's testimony.[8]

Benoit St. Martin

In 1983, Benoit St. Martin provided police two taped statements, one on April 12th (see Def. Ex. J-1) and one on May 6th (see Def. Ex. J-2). In his April 12th statement, St. Martin told police, in relevant part, that he was living with the defendant and Denise; that the defendant and Denise told several stories as to what happened to Adam, including that something like an ashtray fell on his head and that he was accidentally dropped; and that he heard Denise had thrown Theresa Gelinas's baby onto a table. (Def. Ex. J-1 at 2, 3.) In his May 6th statement, St. Martin told police that twice in one day, when a restraining order prohibiting the defendant from having contact with Denise was in place, he observed Denise in an apparent attempt to contact the defendant and later, saw her arguing with the defendant in a local park. (Def. Ex. J-2.)

According to defense investigators, in a 2003 interview, St. Martin said he did not remember whether he was living with the defendant and Denise at the time of Adam's death, but thinks he was not. (Def. Ex. S.) St. Martin further stated that he only vaguely recalled Denise being pregnant and did not remember Adam being at the residence. (Id.) Additionally, St. Martin could not recall having had any conversations with either the defendant or Denise about Adam's

[8] In his memorandum in support of his motion to dismiss, the defendant notes that Gelinas also told defense investigators that he has no memory of the defendant or Denise returning from the hospital or discussing any of Adam's injuries. Lieutenant Magoon's 1983 report, however, contains no indication that Gelinas spoke of these matters back then. Thus, there is no prejudice to the defendant based on Gelinas's inability to recall such matters now.

death, but stated he "possibly" remembers telling the police "something about a blunt object falling off a windowsill or mantel and striking Adam, causing his death." (Id.)

The Court finds St. Martin's inability to recall conversations he had with the defendant and Denise regarding Adam's death is prejudicial to the defense. Earlier statements of St. Martin indicate that he heard different stories as to the cause of the child's death from both the defendant and Denise, which bears on Denise's credibility. Further, St. Martin's inability to recall correctly, or even at all with respect to certain matters, the events of 1983 pertaining to Adam's death indicates he would not be able to testify today to a crucial piece of evidence for the defense, namely, Denise's attempt at making contact with the defendant and later actually contacting the defendant while a restraining order was in place, while the defendant was under investigation for the murder of her child, and after the defendant had allegedly confessed to her. Denise's conduct in that regard bears significantly on her credibility. Accordingly, the Court finds the defendant has established actual prejudice with respect to St. Martin.

Robert Gelinas

In 1983, Gelinas provided a taped statement to police. (See Def. Ex. FF.) As explained in detail above, Gelinas told police about an incident in which Denise threw his granddaughter onto a kitchen counter. (Id. at 1.) According to the defense investigators' 2003 report, however, Gelinas could not recall the incident involving his granddaughter. (See Def. Ex. S.)

As discussed above with respect to James Gelinas, the Court finds the defendant is not prejudiced by Gelinas's inability to recall the incident where Denise allegedly threw his granddaughter onto a kitchen counter, because testimony relative to that incident would be inadmissible under rule 404(b) of the New Hampshire Rules of Evidence.

Daniel "Rusty" Edwards

In April 1983 Edwards, the man Denise believed to be Joshua's father, provided a taped statement to police in which he characterized Denise's treatment of Joshua as neglectful and described her as "messed up, got a problem with her mind . . . ." (Def. Ex. EE.) The defendant asserts in his memorandum in support of his motion to dismiss that his investigators have been unable to make contact with Edwards. The defendant states, however, that his investigators were able to obtain contact information for him. Based on the foregoing, the Court finds the defendant has not established actual prejudice with respect to Edwards. Rather, the defendant's claim of prejudice is speculative, as there is no indication his investigators have made anything other than a preliminary attempt to contact Edwards.

Faye Abbott

In 1983, according to a report by Detective Callahan, Faye Abbott stated that she had observed Denise in apparent violation of an order of the Concord District Court, in that she and Joshua were at Denise's home without Denise's mother, Elaine Robbins, being present. (See Def. Ex. HH.) In his memorandum in support of his motion to dismiss, the defendant asserts his investigators have not been able to locate Abbott. There is nothing in the 2003 defense investigators' reports indicating that they have been able to obtain contact information for Abbott. (See Def. Ex. S.)

The Court finds the defense is not prejudiced by the absence of Abbott. As discussed above, rule 404(b) of the New Hampshire Rules of Evidence states that evidence of prior crimes, wrongs or bad acts is not admissible, except for purposes such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Abbott's 1983 statements are not relevant to any permissible use of prior crimes, wrongs or bad acts under rule

404(b). Therefore, because her statements would be inadmissible, there is no prejudice to the defense as a result of her absence.

Claire Gelinas

In May 1983 Claire Gelinas provided a taped statement to Lieutenant Callahan, in which she stated that she had observed Denise approach the defendant outside of a convenience store when a restraining order was in effect prohibiting the defendant from having contact with Denise. (See Def. Ex. GG.) According to her 1983 statement, Gelinas observed the defendant attempt to avoid Denise by showing Denise the restraining order and heard Denise deny both knowing what it was and signing it. (Id. at 2.) Gelinas then observed Denise and the defendant begin talking. (Id.)

The defendant asserts that although his investigators located Gelinas on December 26, 2003, Gelinas did not recall the foregoing incident and did not even remember Denise or the defendant. The Court, however, has no documentation to that effect. The compilation of defense investigators' reports indicates they obtained an address and phone number for Gelinas, but the packet contains no information indicating they made contact with Gelinas and questioned her about the events of which she spoke in 1983. (See Def. Ex. S.) Accordingly, the Court finds the defendant has not sustained his burden of establishing prejudice with respect to Gelinas. If, however, Claire Gelinas is actually unavailable, the defendant would be prejudiced by the absence of her testimony as it further suggests a lack of credibility on the part of Denise Robbins,

Laura Phillips

In July 1983, Laura Phillips provided a taped statement to police in which she explained several instances where she observed Denise blowing marijuana smoke into young Joshua's face, Joshua taking imaginary puffs on unlit joints, Joshua smoking a lit but "partially out" pipe

with marijuana in it and Joshua eating out of the kitty litter box when Denise was smoking marijuana and not watching him. (See Def. Ex. K at 1.) Phillips also recounted to the police a conversation she had with Denise, when Denise was pregnant with Adam, in which Denise stated, in a serious manner, that Phillips could have the baby because she "sure as hell didn't want it." (Id. at 2.) According to the 2003 report of defense investigators, they have been unable to locate Phillips. (See Def. Ex. S.) Apparently the investigators obtained a possible address and phone number for Phillips, but attempts to call Phillips have not been successful as the phone number is no longer in service. (Id.)

The Court first addresses Denise's statements regarding her pregnancy with Adam. Rule 801(c) of the New Hampshire Rules of Evidence defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." In this case, Phillips' statements as to what Denise told her regarding her pregnancy are hearsay, as the statements were made by someone other than Phillips, not while testifying at the trial and would be offered into evidence for the truth of the matter asserted, namely, that Denise did not want to have Adam.

Under rule 802, "[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority." Rule 803(3) provides that even when the declarant of a statement is available as a witness at trial, "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)" will not be excluded by the hearsay rule. Here, Phillips' statements indicating that Denise did not want Adam fall within the scope of rule 803(3) as statements of her existing state of mind. Moreover, Denise's statements indicate a possible motive to murder Adam once she gave birth to him, which is significant to the defense

theory that either Denise or Joshua was responsible for inflicting Adam's fatal injuries. Thus, the Court finds the defendant has established prejudice with respect to Phillips on the issue of Denise's statements regarding her pregnancy with Adam.

The Court next considers whether the defense is prejudiced with respect to Phillips' statements regarding Denise's treatment of Joshua. These statements are evidence of other "wrongs" or "acts" within the meaning of rule 404(b) of the New Hampshire Rules of Evidence. Thus, under rule 404(b), the statements could not be offered to prove that just because Denise neglected Joshua she "acted in conformity therewith" and was responsible for mistreating Adam and causing his death. The statements would, however, when coupled with Denise's statements about the unwanted pregnancy be admissible as proof of motive, intent or other purposes in keeping with those set forth in the rule.

Accordingly, because Phillips' statements would have been admissible to demonstrate, among other things, motive for inflicting fatal injuries upon Adam, the Court finds her absence prejudicial to the defense.

Nancy Martin

According to a 1983 police report, Nancy Martin told authorities that she had heard from a woman named Karen Greenwood that the defendant had picked Adam up by his ankles and swung him around, stating it was good for the child's circulation. (See Def. Ex. T.) Martin also told police she was concerned about the amount of time Denise was spending with the defendant after Adam's death, and informed police that Denise had wanted an abortion when she was pregnant with Adam. According to Martin, Denise did not have an abortion because Adam's father wanted Denise to have the child. (Id.)

The 2003 report from defense investigators reveals they have obtained a Concord address for Martin. (See Def. Ex. S.) The defendant asserts, however, that his investigators have not made contact with Martin.

On these facts, the Court finds prejudice with respect to Martin speculative. There is no indication defense investigators have attempted to contact Martin. To the contrary, the only assertion is that "[s]ome locating information has been developed without contact as yet." (Def. Memo. in Support of Mot. to Dismiss, ¶35.) Absent evidence indicating that Martin cannot be located, or that, once located, she could not recall the matters of which she spoke in 1983, the Court finds no prejudice to the defense.

Anthony Pepe

According to a memo in Denise's public defender file, Bruce Sartwell spoke with Anthony Pepe on April 9, 1983. (See State's Ex. 3.) Sartwell wrote that William Gelinas told Pepe he had observed the defendant pick Adam up by his heels and spin the child around. (Id.) Pepe also told Sartwell that once when he was with the defendant, they came across a ruler wrapped in electrical tape and the defendant said he used the ruler to hit Adam. (Id.) Defense investigators have not been able to locate Pepe due to lack of personal information. (See Def. Ex. S.)

The defendant claims the unavailability of Pepe is prejudicial to his defense, because Pepe's statement that the defendant swung Adam around by his heals supports a defense of accident. There is a problem with the defendant's claim of prejudice, however: Pepe's statement to Sartwell about the defendant swinging Adam around by his heels is hearsay. See N.H. R. Ev. 801(a-c). The Court is not aware of any exception to the rule against hearsay under which Pepe's statement would be admissible at trial. See N.H. R. Ev. 803, 804 (explaining exceptions to rule against hearsay). Therefore, because Pepe' statement would not be admissible at trial,

the Court finds Pepe's unavailability is not prejudicial to the defense. Further, if Pepe were available and testified at trial, his statements concerning the ruler wrapped in tape and the statements of the defendant about same would be admissible as statements made by the defendant against his interest. See N.H. R. Ev. 804 (b)(3).

MISSING EVIDENCE

Videotape of Police Interview with Joshua/Sharon Wolf

As discussed previously, Sharon Wolf conducted a psychological evaluation of Joshua in March 1983, subsequent to which she generated a report containing her conclusion that Joshua could not have inflicted Adam's fatal injuries. (See State's ex. 10.) In her report, Ms. Wolf indicated she was particularly intrigued by Joshua's comments to her about what happened to Adam, because his comments were "remarkably consistent" with what he had told the police three weeks earlier. (Id. at 3.) It is undisputed that the videotaped police interview of Joshua is missing.

The defendant argues that the loss of the videotape is prejudicial in light of Ms. Wolf's 1983 report discussing the import of Joshua's consistent statements to her and the police, and given that Ms. Wolf does not now recall anything about the videotaped interview. The State counters that the defendant's claim of prejudice is without merit because: 1) it does not intend to call Joshua as a witness; 2) two of the witnesses to the tape are available to the defendant; and 3) investigative reports regarding the videotaped interview indicate that Joshua was not able to provide them new information.

As a preliminary matter, the Court notes that the State has not submitted into evidence any reports indicating that Joshua was unable to provide new information to the police in his 1983 videotaped statement. Furthermore, that two witnesses to the videotaped interview are available to the defense is of no consequence. Without the ability to view the videotape, the defense has no way of knowing whether those witnesses are able to accurately recall and explain the content of the interview. Finally, regardless of whether the State intends to call Joshua as a witness, it intends to call Ms. Wolf.

Sometime after this case was reopened, Ms. Wolf was deposed. (See Def. Ex. AA.[9]) According to an excerpt of Ms. Wolf's deposition, Ms. Wolf does not now recall the content of Joshua's videotaped interview with the police. (See id. at 50, 51.) Moreover, she does not remember receiving the pathology report, which she had referenced in her 1983 report as follows: "Therefore, it is this therapist[']s opinion that Joshua was developmentally incapable of inflicting the magnitude of injury which resulted in his brother[']s death as was reported in the pathology report." (Id. at 54; State's Ex. 10.)

The Court finds the defense is prejudiced by the loss of the videotape of Joshua's 1983 interview with the police and, as the two issues are interrelated, further finds it would prejudice the defense should Ms. Wolf testify at trial. In 1983, Ms. Wolf made two significant conclusions relative to Joshua: first, that the story he told her about what happened to Adam was similar to that which he told the police three weeks earlier, and second, that he could not have been the one who fatally injured Adam. Ms. Wolf cannot recall the police interview with Joshua, and direct evidence of that interview, namely, the videotape, is lost. Thus, the basis for one of her

[9] The State urges the Court not to consider the excerpt of Ms. Wolf's deposition because at the time the defendant filed the excerpt with the Court, Ms. Wolf had not had an opportunity to review the transcript of her deposition. The Court considers the excerpt, however, because the State does not point to any potential inaccuracies in the deposition.

significant conclusions with respect to Joshua is not available to the defense. Further, Ms. Wolf cannot recall the pathology report, which according to her 1983 report contributed to her conclusion that Joshua could not have killed his brother. Given that the defendant intends to argue at trial that Denise or Joshua was responsible for the child's death, or at least that there remain three viable suspects, Ms. Wolf's inability to recall the evidence from which she concluded Joshua should not be a suspect is significantly prejudicial to the defense. The defense is further prejudiced because the jury would be instructed that in evaluating an expert's opinions, they should consider such factors as the information available to the expert. The videotape was a key piece of evidence upon which Ms. Wolf based her opinion. The trier of fact, would thus be deprived of the ability to make a full analysis of the information on which Ms. Wolf based her opinion.

Items Seized from 50 Old Loudon Road

In 1983, pursuant to a search warrant, several items were seized from Denise and the defendant's 50 Old Loudon Road apartment. The defendant contends he is prejudiced by the lack of documentation pertaining to these items because: 1) a discrepancy remains as to precisely which items were seized from the apartment; and 2) there is no evidence log from 1983 that indicates what happened to the seized items both during a two-hour period of time after the items were removed from the evidence locker and subsequent to that, during the time they were in storage. The State disagrees, arguing that the evidence technician who collected the evidence from 50 Old Loudon Road is available to testify, asserting that gaps in the chain of custody relative to the seized items bear on the weight and not the admissibility of the evidence and maintaining that copies of the evidence tags that were attached to the items in 1983 clarify any discrepancy as to what specific items were seized.

At the hearing on this matter, Michael Forti, now a special agent with the New Hampshire Drug Enforcement Agency, testified that in 1983 he was a patrol officer and evidence technician with the Concord Police Department. In that capacity, he became involved in the investigation of Adam Robbins' death, specifically, by being called to 50 Old Loudon Road at the request of Lieutenant Callahan. Agent Forti testified that while at the 50 Old Loudon Road apartment, he collected a pair of pliers, a paperweight in the shape of a skunk, a paperweight with stones on it and an ashtray. Copies of the evidence tags that were attached to the items describe the items as "1 Pair of Pliers," "1 Stone Paper Weight," "1 Skunk Paper Weight" and "1 Ashtray." (State's Ex. 30.)

The defense apparently relies on one of Detective Reilly's reports to argue that discrepancies remain as to what items were seized from the apartment. According to a February 1983 report, Detective Reilly states that the following items were seized: "the ashtrays, the decorative rock and the cast iron skunk[.]" (Def. Ex. C.) Further, the defendant refers to a report from Lieutenant Callahan in which he refers to a cast-iron ornament and "some type of ornament with multi-colored objects on top[.]" (Def. Ex. A.)

The Court, however, finds no prejudice. Agent Forti is available to testify and, as the evidence technician charged with the duty of recovering and documenting evidence, he is in the best position to testify as to what items were seized. Moreover, and significantly, the evidence tags that were attached to the items contain explanations of the items that are consistent with the testimony Agent Forti offered at the hearing. Further, the Court finds that the claimed discrepancies between Agent Forti's description of the items and the descriptions in Lieutenant Callahan and Detective Reilly's reports are not material differences. Indeed, with the exception of Lieutenant Callahan's reference to multiple ashtrays (which could be simply a typographical error

in the report) the officers, although using different words, all appear to be describing the same objects.

As for the lack of explanation as to how the items, once seized, were handled, the Court also finds no prejudice. The defendant argues that there is a period of time where the seized items were not immediately placed into the evidence locker and were removed from the evidence locker for several hours without explanation as to what was done to them. Notably, however, Officer Cross was the individual who ultimately received the items and placed them in the evidence locker, and he was also the individual who removed the items from the evidence locker for several hours. (See State's Ex. 30.) Officer Cross is listed as a witness for the State. Accordingly, as Officer Cross is available to testify regarding his treatment of the items that were seized from the 50 Old Loudon Road apartment, the Court finds no prejudice to the defendant.

[Portions Redacted]

REASONABLENESS OF DELAY

Because the defendant has established that prejudice resulted from the delay with respect to several matters, the Court now examines the reasonableness of the delay. Varagianis, 128 N.H. at 228.

In this case, the State has not offered any explanation as to why the investigation of Adam Robbins' death ceased in 1983. The State has, however, attempted to persuade the Court that it discovered "new" evidence after receiving Denise's 1996 request to reopen the case, thus justifying the twenty-year delay in indicting the defendant. Specifically, the State claims the delay in this case is reasonable because, in 1983, it did not have the following "new" information and evidence: reassessment of witness statements; a report form Dr. Andrew, Chief Medical Examiner for the State of New Hampshire; information contained in Denise's public defender file,

including the statements of Anthony Pepe; the defendant's 2002 "confession" to his sister, Cindy Robbins; and the 1996 request from Denise, who was originally a suspect in Adam's death, to reopen the case.

First, the reassessment of witness statements cannot, by definition, be "new" evidence. The witness statements were available twenty years ago, and contained the same information then that they do now. Simply reviewing again that which already existed does not constitute new evidence.

Second, while it is true that there was no Chief Medical Examiner in the State of New Hampshire in 1983, Dr. Andrews was not, in 2002, able to offer the State any conclusions regarding Adam's death that were not available to the State in 1983. Notably, in 1983, both Dr. Faulkner and Ms. Wolf concluded that Joshua could not have fatally injured Adam. (State's Ex. 8 at 1829; State's Ex. 10 at 3.) The State contends that Dr. Andrews concluded, for the first time, that Adam was fatally injured between the hours of twelve noon and 1:30 p.m. on February 18th, thus unequivocally implicating the defendant. (See State's Ex. 6 at 4.) In 1983, however, the State had statements from Denise, the defendant and Denise's mother, Elaine Robbins, all indicating that the defendant was home alone with Adam and Joshua between the approximate hours of noon and 1:30 or so. (See State's Ex. 12 at 4 (Denise states she left 50 Old Loudon Road around noon time, and only defendant, Joshua and Adam were home); State's Ex. 15A at 1-2 (defendant states Denise left he, Joshua and Adam at apartment at about one o'clock); State's Ex. 17B at 23, 26 (defendant states Denise left sometime after noon time and returned after one o'clock, leaving him with Joshua and Adam); Def. Ex. R at 2 (Denise's mother, Elaine, states Denise arrived to get pick-up truck around one-thirty, and defendant was home alone with Joshua and Adam).)

Moreover, the State offers no reason as to why, in 1983, it did not employ the services of a medical expert to answer the types of questions it posed to Dr. Andrews in 2002. The lack of effort to do so is particularly significant where, as here, the 2002 opinions Dr. Andrews offered were based primarily, if not entirely, upon evidence the State obtained during the 1983 investigation. Indeed, the State has not identified what "new" evidence Dr. Andrews considered in reaching the conclusions he set forth in his October 22, 2002 letter to the Attorney General's Office, nor is there any indication that forensic science regarding establishment of time of death has advanced to the point that a "new" conclusion could be reached by reexamination of the old evidence. (See State's Ex. 6 at 1) (listing documents and other evidence Dr. Andrews reviewed for purposes of answering Attorney General's questions).

Third, there is nothing in Denise's public defender file that could be considered new evidence. There are documents in the file indicating that the defendant confessed to Denise that he was responsible for fatally injuring Adam. (See State's Ex. 4 & 5), According to Attorney Twomey, however, he relayed that information to Assistant Attorney General Malmberg. (See State's Ex. 5.) Furthermore, the memorandum from Bruce Sartwell contained in the file relative to his interview with Anthony Pepe cannot be considered new evidence justifying the delay in this case. (See State's Ex. 3.) According to Sartwell, Pepe stated that once when he was with the defendant, they came across a ruler wrapped in electrical tape, and the defendant told Pepe he used the ruler to hit Adam. (Id.) However, this information, would have been available if the Attorney General's Office and/or the Concord Police Department had followed up on the information relayed by Attorney Twomey to Assistant Attorney General Malmberg. Moreover, It is well established through the medical evidence submitted to the Court, and not disputed by the State, that Adam Robbins died of blunt force trauma to the head. (See, e.g., State's Ex. 6 at 2.)

The State does not argue that Adam's fatal injuries were inflicted by use of a ruler wrapped in electrical tape, nor has it introduced any evidence suggesting that such an implement could have caused the injuries to Adam as documented by the autopsy report. Therefore, the statements of Mr. Pepe cannot be considered to be new evidence for the purposes of an analysis of the reasonableness of the delay in indicting the defendant.

Fourth, the Court finds that the defendant's alleged confession to Cindy was not new evidence justifying the delay in indicting. As stated above, Attorney Twomey wrote in a memo contained in Denise's public defender file that he contacted Assistant Attorney General Malmberg in 1983 and informed Malmberg that the defendant had allegedly confessed to Denise.

Finally, the Court considers Denise's request to reopen the case. The Court does not dispute the State's characterization of Denise as a suspect back in 1983. Indeed, the evidence thus far submitted to the Court indicates the State's characterization of Denise is accurate. Thus, it is significant that, once being a suspect herself, Denise initiated contact with the Attorney General's Office in 1996 and requested action on the case. However, despite the significance of Denise's request, the Court finds it is not the type of evidence that would be considered "new" evidence for purposes of justifying a delay in indictment. Cf. Varagianis, 128 N.H. at 229 (State's delay reasonable where delay allowed State to maintain secrecy of informant's identity and where informant was afraid to testify for fear of own personal safety); State v. Whittey, Merrimack Co. Sup. Ct., Docket Nos. 00-S-273, 275, 942 (June 21, 2001) (Order, McGuire, J.) (even if defendant had established prejudice, reasonableness of delay would outweigh it where case not resolved until DNA techniques became sophisticated enough to test small, and old, samples of semen).

The defendant does not argue, nor does the Court find, that the State intentionally delayed indicting the defendant in order to obtain a tactical advantage over, or to harass, the defendant.

See Marion, 404 U.S. at 325. Therefore, the absence of bad faith on behalf of the State is one factor that weighs in favor of finding the delay reasonable. However, where, as here, approximately thirteen years elapsed during which no action at all was taken on this case, cf. Lovasco, 431 U.S. at 796 (delay reasonable where Government continued investigating case during delay), and where, as discussed above, the State has not offered any persuasive reason as to why the indictment was delayed and cannot identify any new evidence justifying the indictment of the defendant twenty years after he allegedly murdered Adam Robbins, the Court finds the delay is not reasonable.

CONCLUSION

In this case, investigators have not been able to locate a weapon that was used to inflict Adam Robbins' fatal injuries. Nor have investigators been able to locate physical evidence relevant to Adam's death. Consequently, if this case was to go to trial, the only evidence available to both the State and the defense is the child's autopsy report and the testimony of witnesses. Thus, the prejudice to the defendant due to the State's delay in indicting in this case is substantial, because the prejudice relates primarily to the absence or lack of relevant memory of several significant defense witnesses. More importantly, the lack of memory or unavailability of certain witnesses significantly impairs the defendant's ability to question the credibility of witnesses offering testimony against him. See Middlebrook v. Deleware, 802 A.2d 268, 277 (Del. 2002) (In discussing prejudice due to faded memories and lost witnesses the Court states that "[t]his type of prejudice . . . is the most serious . . . because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. . . . [I]t is [also] the most difficult form of speedy trial prejudice to prove because time's erosion of exculpatory evidence and testimony can rarely be shown.") (internal quotations and citations omitted). see also Dufield v. Perrin, 470

F.Supp. 687, 691 (D.N.H. 1979) ("Actual prejudice to the defense is apparent from the transcript in that the memories of prosecution witnesses had diminished significantly."); Alan L. Schneider, The Right to a Speedy Trial, 20 Stanford Law Review 476, 499 (1968) ("[A] delay in the prosecution of a crime proven primarily by testimonial evidence creates a greater possibility of prejudice . . . . Similarly, the possibility of prejudice is great when the sole witness for the prosecution has to use written records to refresh his recollection of the events in question.") (citations omitted).

As discussed above, the Court finds no reason for the State's delay in indicting this case. The State has not offered any explanation as to why it discontinued its investigation of Adam Robbins' death in 1983, or why it allowed the case to lay dormant for approximately thirteen years. Even after Denise contacted the Attorney General's Office, there appears to have been no action taken until 2002. Further, the specific reasons the State has offered as to why the delay is reasonable are not convincing. To put it succinctly, the Court finds there is no pertinent evidence the State has now that it did not have, or have the means to obtain, in 1983. The only factor weighing in favor of the State is the absence of bad faith motives for delaying the indictment.

In balancing the prejudice to the defendant against the reasonableness of the State's delay in this case, the Court finds the scales tip in favor of the defendant. To allow the State to continue prosecution of this case would be to subject the defendant to a trial that, under the circumstances as set forth in this Order, cannot and will not be fair. Accordingly, the defendant's Motion to Dismiss is **GRANTED**.

The effect of this order is stayed for a period of thirty days after the clerk's notice of same or thirty days after any order on a Motion for Reconsideration, whichever occurs later, and bail orders remain in effect.. Upon the expiration of the latter period, if no appeal has been filed, the

order shall become effective and the bail order is vacated. If an appeal is filed, the defendant may seek review of pending bail orders.

So Ordered.
Dated: February 5, 2004

_____
Edward J. Fitzgerald, III
Presiding Justice