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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FELIPE JESUS VILLASENOR,

Defendant and Appellant.

H035476

(Monterey County

Super. Ct. No. SS091515)

**I. STATEMENT OF THE CASE**

Defendant Felipe Jesus Villasenor appeals from a judgment entered after a jury found him guilty of continuous sexual abuse of a child under the age of 14. (Pen. Code, § 288.5, subd. (a).)<sup>1</sup> He claims the delay between his arrest and the trial violated his state and federal constitutional rights to a speedy trial. He further claims the admission of evidence of uncharged sexual misconduct against a different victim under Evidence Code section 1108 violated his right to due process.

We affirm the judgment.

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<sup>1</sup> All unspecified statutory references are to the Penal Code.

## **II. FACTS**

### **A. The Charged Offense**

The victim, A. was born in 1991 and was 18 when she testified. In the late 1990's, she lived in King City with mother, her older brother Albert, and younger brother O. Defendant was O.'s father. A.'s mother, L., and defendant dated and he spent time at the house but did not live there.

A. testified that when she was in the third or fourth grade, defendant sometimes forced his finger into her mouth and moved it around. She said that between the fourth and sixth grades, L. and defendant sometimes had sex on the floor in her bedroom and on some occasions in the twin bed next to her bed. When they used the bed, defendant sometimes rubbed A.'s legs. Later, he started to rub her vagina over her clothes and then started to do so under her clothes. One time, he penetrated her with his finger.

A. testified that once when she was in the fifth grade, defendant tried to make her watch a pornographic videotape in the master bedroom. However, she ran to the living room and watched TV there. However, she could still hear his videotape. That same day, she was in the bathroom, defendant entered, and she kicked him in the groin. He then grabbed her hand and made him massage his erect penis before she could pull free and run out.

On another occasion, she woke up and saw defendant naked. He was holding his penis and apparently masturbating.

A. testified that in the fifth grade, she sat outside L.'s bedroom door crying and wanting to tell her about the molestation. However, her mother was not concerned about why she was crying, pushed her away with her foot, and told her not to listen at the door.

A. testified that one day, when she was 15 and in high school, and after her mother had stopped seeing defendant, her mother told her that defendant was coming over with a support payment. When defendant arrived, A. was talking to her boyfriend, Manny, on the phone. She answered the door, and defendant said he would not give her the payment

unless she showed him her legs. She did and then grabbed the check. She returned to the phone, and Manny, who had heard the conversation, asked her why defendant had spoken to her that way. She told Manny “everything,” and he said he would report defendant if she did not.

After that, A. told her close friend Danny. She also wrote a letter to her brother Albert. In it, she said that defendant had been molesting and raping her since the second grade and that she had lost her virginity. Albert told a school counselor about the letter and showed it to her. At trial, A. admitted that she had not been raped and had not lost her virginity. She said she considered what he did rape and that digital penetration qualified as rape.

A. admitted that she never liked defendant because he tried to act like her father and tell her what to do, and she resisted him. A. also admitted that she fought with her mother because she was dating a 19-year-old boy who her mother thought was too old for her. Even defendant told her not to see him. A. and her mother also argued about her phone bill, the way she dressed, and her truancy. At one point, A. wanted to move to live with her father. However, A. denied that she falsely accused defendant because of the conflicts with her mother.

In 2006, A. reported the abuse to a teacher at her high school, and he related the report to the high school counselor.

At trial, A. admitted that she had exaggerated the instances of abuse when she reported it to personnel at Natividad Hospital and to the police. She also admitted that she did not report the masturbation incident until she was interviewed by the district attorney.

## **B. Uncharged Sexual Misconduct**

The prosecution introduced evidence that defendant had also molested Jane in 1997.<sup>2</sup> She testified that when she was 12, defendant and her mother were friends, and he used to come to her mother's store in San Lucas. Her father suspected that defendant and his wife were having an affair. During that time, Jane spent time with defendant, who would take her for rides in his pickup truck. He made her sit next to him and hold his hand. He would then take her hand and put it on his groin. He would rub her thigh and move his hand up her leg. Sometimes, he would open his fly and want her to touch his penis. She declined, although on one occasion he pulled her hand to his exposed penis. On other occasions, defendant pulled her head down to his crotch and asked her to orally copulate him.

Jane said that once, they took a back road on their way home in the truck. Defendant stopped in the countryside and asked her to walk up a hill with him. There, he unbuttoned his pants and pulled out his penis. He wanted her to orally copulate him. She refused but agreed to masturbate him. When they returned to the truck and headed home, he stopped near some railroad tracks and tried to have sexual intercourse with her but could not penetrate her.

Jane testified that when she told her mother, her mother accused her of lying and warned her not to tell the police because defendant would get deported. Jane testified she spoke to the police twice about defendant molesting her. She admitted that the second time, she told the officer about an incident that she had not reported the first time, and at that time, she admitted to the officer that she had purposefully concealed the additional incident because she thought it would make her look bad.

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<sup>2</sup> We refer to her as Jane because her real name also begins with A.

### **C. The Defense**

L. testified that she and defendant never had sex in A.'s bedroom. She said A. never mentioned any abuse, and she never told A. that she did not believe her. On the contrary, one day A. told L. that defendant had not molested her. Finally, L. said she never saw defendant act inappropriately around A.

### **III. CONSTITUTIONAL RIGHTS TO A SPEEDY TRIAL**

Defendant contends that the three-year delay in bringing him to trial after his arrest violated his federal and state constitutional rights to a speedy trial. Before addressing this claim, we summarize the procedural history between arrest and trial.

#### **A. Chronology from Arrest to Trial**

In September 2006, school officials learned that A. had accused defendant of molesting her from 1996 to 2002. In October, police learned about the alleged molestation. In November, police referred the matter to the district attorney, who filed a complaint in January 2007 charging defendant with continuous sexual abuse. Defendant was arrested in March 1, 2007, and released on bail.<sup>3</sup> He waived formal arraignment, pleaded not guilty, and waived time. After the preliminary hearing was continued a few times, defendant waived the hearing and was held to answer.

The information was filed on November 7, 2007, and trial was set for May 12, 2008. In April, trial was reset for June 26, 2008. Thereafter, defendant waived time only to November 10, 2008.

On November 6, 2008, the prosecutor sought a continuance to secure the testimony of an expert on child sexual abuse accommodation syndrome (CSAAS). The court found good cause and continued trial to November 17. On November 13, defense counsel waived time to February 23, 2009. On February 19, the prosecutor informed the

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<sup>3</sup> The record does not clearly establish the date of arrest. However, in his brief, defendant states that it was March 1, 2007. His record citations do not unequivocally reflect the exact date but do not refute it either. We accept his date.

court that he recently had received information about a possible second victim (Jane) and sought a continuance to investigate. Over defense counsel's objection, the court found good cause but did not reset the trial at that time.

On February 23, 2009, the previous trial date, the prosecutor said he had located Jane, and she was willing to cooperate. Defense counsel objected to a continuance beyond the 10-day speedy-trial grace period. He suggested that the prosecutor could dismiss the case and refile it if he needed more time. However, having previously found good cause, the trial court continued trial to April 20, 2009.

On April 14, 2009, the prosecutor sought another continuance due to the unavailability of the two investigators on the case due to a family medical emergency and prepaid vacation. The court found good cause to continue trial and reset it for June 8.

On May 22, 2009, defense counsel moved to dismiss the case claiming a violation of speedy-trial rights.<sup>4</sup> He also sought to exclude any and all of the "Jane" evidence because he had not received any discovery. On May 28, defense counsel renewed his claim of incomplete discovery. The court ordered the prosecutor to produce all documentary evidence and make Jane available for an interview before trial. By June 4, 2009, the prosecutor had produced all documentary evidence but not Jane. The court again directed the prosecutor to produce her and postponed ruling on defendant's motion to exclude the "Jane" evidence.

On June 8, 2009, the court granted the motion to exclude because the prosecutor had not produced Jane for an interview. The prosecutor immediately moved to dismiss the case without prejudice, and the court granted the motion. The district attorney refiled the complaint on June 10. Defendant waived time and a preliminary hearing but not his speedy trial objections. The information was filed on August 17, defendant was arraigned, and trial was set for October 5, 2009.

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<sup>4</sup> Defense counsel had previously moved to dismiss on April 8, 2009, but the motion was not ruled upon at that time.

On September 2, 2009, defendant renewed his motion to dismiss. After a hearing on October 1, the court denied the motion. Thereafter, defendant renewed his motion to exclude all “Jane” evidence. The case remained set for trial on October 5. On that day, over defendant’s objection, the court ruled that the “Jane” evidence was admissible under Evidence Code section 1108.<sup>5</sup>

On October 6, 2009, the prosecutor said he needed to issue additional subpoenas because of new information that had come to light concerning Jane. The court “recessed” the trial until October 19, the last day to comply with defendant’s statutory right to a speedy trial. On October 15, defense counsel complained that because the prosecutor had recently produced numerous new reports related to Jane, he could not properly respond by October 19. On October 19, defense counsel waived time until November 2 in order to respond to the new discovery. The prosecutor agreed to continue trial to November 2.

On November 2, 2009, the prosecutor informed the court that he had not recovered from medical problems and was not ready to start trial and that Jane had been hospitalized. Defense counsel objected to a continuance and reasserted defendant’s right to a speedy trial. The court found good cause and continued the trial to November 4. On that day, the prosecutor said that Jane would not be released from the hospital until she could walk. Defense counsel objected and reasserted defendant’s rights. The court found good cause and continued the case to November 6 for an update on Jane’s condition. On that day, the prosecutor sought additional time because of Jane’s condition, but the court set trial for November 9. On November 9, jury voir dire began.

On November 12, 2009, the prosecutor had a sudden serious medical emergency, and the court found good cause to continue until November 13. On November 13, the prosecutor was unavailable, and a substitute prosecutor continue with voir dire. On

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<sup>5</sup> Evidence Code section 1108 authorizes the admission of evidence of uncharged sexual misconduct to show a propensity to commit such acts. (*People v. Falsetta* (1999) 21 Cal.4th 903, 911-912 (*Falsetta*).

November 16, the prosecutor was still unavailable. Defense counsel was ready for trial and objected to a continuance. The court found good cause and continued the case to November 17. On that day, the substitute prosecutor reported that the prosecutor would be unavailable for three weeks. Defense counsel conceded good cause but did not waive time and stipulated to a trial date of January 25, 2010. The court found good cause, dismissed the jury panel, and continued the trial to January 25, 2010. The trial commenced on that day.

## **B. Violation of the Federal Constitutional Right**

The Sixth Amendment guarantees criminal defendants the right to a speedy trial.<sup>6</sup> To determine whether the federal right has been violated, the court considers “whether delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay’s result.” (*Doggett v. United States* (1992) 505 U.S. 647, 651 (*Doggett*); *Barker v. Wingo* (1972) 407 U.S. 514, 530 (*Barker*); *People v. Harrison* (2005) 35 Cal.4th 208, 227.)

### **1. Presumptively Prejudicial Delay**

The first consideration—whether the delay was “uncommonly long”—“is actually a double enquiry. Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from ‘presumptively prejudicial’ delay, [citation] since, by definition, he cannot complain that the government has denied him a ‘speedy’ trial if it has, in fact, prosecuted his case with customary promptness.” (*Doggett, supra*, 505 U.S. at pp. 651-652.)

The Sixth Amendment speedy-trial guarantee attaches upon the filing of a formal charge, indictment, or information or when a suspect has been arrested and held to answer or released on bail. (*United States v. Marion* (1971) 404 U.S. 307, 321; *People v.*

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<sup>6</sup> The Sixth Amendment provides, in relevant part, that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial . . . .”

*Martinez* (2000) 22 Cal.4th 750, 761 (*Martinez*); e.g., *Dillingham v. United States* (1975) 423 U.S. 64, 65.) Thus, defendant's federal right attached on March 1, 2007, when he was arrested and released on bail. Trial did not finally begin for good until January 25, 2010, almost three years later.<sup>7</sup> Post-accusational delay is generally considered " 'presumptively prejudicial' " when it approaches one year. (*Doggett, supra*, 505 U.S. at p. 652, fn. 1; but see (See, e.g., *United States v. Colombo* (1st Cir.1988) 852 F.2d 19, 26 [24 months delay not presumptively prejudicial]; *United States v. Davenport* (11th Cir.1991) 935 F.2d 1223, 1240 [same 22 months]; *United States v. Molina* (1st Cir.2005) 407 F.3d 511, 533 [same 18 months].) On its face, the delay here from arrest to trial was sufficiently long to trigger full speedy-trial analysis.

Where, as here, the defendant shows that the delay was presumptively prejudicial, we then consider "the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim. [Citation.] This latter enquiry is significant to the speedy trial analysis because . . . the presumption that pretrial delay has prejudiced the accused intensifies over time." (*Doggett, supra*, 505 U.S. at p. 652.) We also consider the reasons for the delay, how and when defendant asserted his right, and the extent of the prejudice caused by the delay. (*Ibid.*; *Barker, supra*, 407 U.S. at p. 530.) None of these four factors are "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a

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<sup>7</sup> Given our analysis, we need not address defendant's claim that the *pre*-accusation delay between the commission of the offense and the refile of the complaint in June 2009 violated his state and federal right to due process.

speedy trial is specifically affirmed in the Constitution.” (*Barker, supra*, 407 U.S. at p. 533.)

## **2. Extension of Delay beyond Minimum**

As an historical fact, the post-accusational delay lasted almost three years. However, for purposes of analysis, we do not count the periods of time for which a defendant waived time against the prosecution. (See *People v. McDermott* (2002) 28 Cal.4th 946, 987; *People v. Seaton* (2001) 26 Cal.4th 598, 633-634; *People v. Anderson* (2001) 25 Cal.4th 543, 604, fn. 21.) Excluding these periods simply reflects that a defendant must assert his rights when faced with a possible delay that he or she considers unnecessary, unreasonable, or prejudicial. Moreover, a defendant should not be permitted to voluntarily contribute to a delay by waiving time and then rely on that voluntary contribution to establish that the delay was prejudicial and violated his or her federal constitutional right.

The record before use reveals that defendant generally waived time from March 8, 2007, until June 26, 2008, at which time he started entering limited time waivers to specified dates, the last waiver up to November 10, 2008. During this time, defendant also consented to a number of continuances, and that other continuances were due to court congestion and the unavailability of counsel due to conflicts with their other cases.

Under the circumstances, we shall not count the period up to November 10, 2008, in determining whether the post-accusational delay extended beyond the minimum necessary to trigger a full analysis.

After November 10, 2008, defendant did not seek or consent to the continuance the court granted to November 17, 2008. However, on November 17, he waived time to February 23, 2009.<sup>8</sup> Thereafter, defendant did not consent to the two continuances that

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<sup>8</sup> Defendant asserts that he did so “reluctantly.” However, the record citation reveals that defense counsel waived time between November 17, 2008, and February

the court granted the prosecution from February 23 to June 8, 2009. On June 8, 2009, the case was dismissed. After it was refiled, defendant regularly asserted his speedy-trial rights and preserved a claim of post-accusation delay until trial on January 25, 2010, except, that is, for a two-week period from October 19 to November 2, 2009, during which he waived time.

Given our survey of the time between defendant's arrest and trial, we find that for purposes of analysis, the pertinent period of delay to which defendant did not consent or waive time totaled less than one year—i.e., November 10 to November 17, 2008; February 23 to October 19, 2009; and November 2 to January 25, 2010. Accordingly, we do not find that the delay before trial extended much, if at all, beyond the minimum necessary to trigger a full examination of defendant's claim. Thus, this factor does not weigh in favor of finding a federal constitutional speedy-trial violation.

### **3. Reasons for the Delay**

Only those delays attributable to the state can weigh in favor finding a violation of federal rights.<sup>9</sup> Moreover, “different weights should be assigned to different reasons [for delay]. “A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily . . . . Finally, a valid reason, such as

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2009 because the prosecutor had a medical emergency. Moreover, a “reluctant” time waiver is still a waiver.

<sup>9</sup> In addition to the period during which a defendant waives time, delay may also be attributed to the defendant as when he flees the jurisdiction to avoid trial (see *People v. Perez* (1991) 229 Cal.App.3d 302, 308) or is standing trial in another jurisdiction (see *People v. Hill* (1984) 37 Cal.3d 491, 497; *Blake v. Superior Court* (1980) 108 Cal.App.3d 244, 251-252).

a missing witness, should serve to justify appropriate delay.” (*Barker, supra*, 407 U.S. at p. 531, fn. omitted.)<sup>10</sup>

As noted, defendant waived time until November 10, 2008, but did not consent to the week of delay until November 17 to allow time for the prosecutor to secure the testimony of a CSAAS expert. At the hearing on November 6, defense counsel conceded that his waiver to November 10 meant that trial could commence within 10 days without a statutory speedy trial violation, “so a continuance isn’t the issue.” Rather, counsel objected to the prosecutor adding a new expert at that late date, which would necessitate having to consider getting his own expert. As noted, the trial court found good cause because the school records, which the defense had recently subpoenaed and then voluntarily sent to the prosecution, indicated that A.’s failure to complain would be a part of its case.

In defendant’s subsequent motion to dismiss he argued the prosecutor knew before he received the school records from the defense that A. had not reported the abuse until years after it had allegedly occurred. Thus, he argues that it was inexcusable for the prosecutor not to have arranged for an expert sooner and reflected negligence in preparing the case. Defendant reiterates that claim on appeal.

Although the prosecutor could have lined up an expert sooner, we do not find that it was unreasonable for him not to do so before it became apparent that defendant would introduce the school records and base his defense, in part, on the fact that A. did not complain to school authorities during the alleged period of molestation. Thus, we agree

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<sup>10</sup> In his motion to dismiss, defendant argued that the delay between his arrest and June 26, 2008, was due to the slow pace at which the prosecutor provided discovery, court congestion, and conflicts that both counsel had with other cases. The record does not reveal the reasons for the pace of discovery or provide any basis for us to determine that the pace of discovery was negligent or intentionally dilatory. Moreover, during this period, defendant did not assert his rights to a speedy trial. Rather, he waived time and consented to a number of continuances. Accordingly, the delay until June 2008 does weigh against the prosecution.

with the trial court that there was good cause for a short continuance. (*Arroyo v. Superior Court* (2004) 119 Cal.App.4th 460, 464 [continuance reviewed for abuse of discretion], disapproved on another point in *People v. Sutton* (2010) 48 Cal.4th 533, 562.) In our view, the need to secure an expert provided a valid reason for a short continuance and justified the delay. Thus, we do not weigh it against the prosecution.

As noted, from November 17, 2008, to February 23, 2009, defendant waived time. From February to June 8, 2009, trial was delayed for a number of different reasons.

In February 2009, the prosecutor sought time to investigate recent information he had received about a potential second victim, Jane, whom he had located and who was cooperating. Although defendant objected, the court found good cause and reset trial to April 20, 2009.

The record does not suggest that the prosecutor was negligent in failing to discover Jane sooner or, worse, that he intentionally delayed finding her and investigating to gain some tactical advantage. Although defense counsel argued that the prosecutor was investigating hearsay from a third party about Jane and this could result in evidence of dubious admissibility, the court found the potential relevance of the evidence provided good cause for a continuance. Defendant does not claim that the court abused its discretion, and we note that the court ultimately found the resulting “Jane” evidence to be relevant, probative, and admissible. Under the circumstances, we find an investigation of recently acquired information about a new victim-witness constituted a reasonable and legitimate justification for the subsequent delay, which for that reason does not weigh against the prosecution.

Thereafter, the court found good cause to continue the case from April 20 to June 8, 2009, because two important prosecution witnesses—i.e., the investigators in the case—would be unavailable due to surgery and a prepaid vacation. The unavailability of a key witness is generally considered good cause for a continuance unless the unavailability results from the prosecution’s failure to exercise reasonable diligence.

(*People v. Johnson* (1980) 26 Cal.3d 557, 570.) The record does not suggest that the prosecution failed to exercise reasonable diligence, and we find the unavailability of these witnesses provided a valid reason for the delay and do not weigh it against the prosecution.<sup>11</sup> (E.g., *Barker, supra*, 407 U.S. at pp. 534-536 [delay justified by illness of ex-sheriff who had investigated the case].)

As noted, on May 28, the court ordered the prosecutor to make Jane available for an interview before trial on June 8. The prosecutor was apparently unable to do so, and as a sanction to preserve the trial date, the court granted defendant's motion to exclude the "Jane" evidence. Thus, the initial reason for the delay thereafter was the prosecutor's decision to seek dismissal and refile the case. The issue before us is whether the dismissal and refiling constituted a valid reason for further delay.

In his motion to dismiss, defendant argued that the dismissal was an intentional delaying tactic "to get another bite of the apple and, in particular, to seek another chance to get highly prejudicial [Evidence Code section] 1108 evidence admitted at trial." On appeal, defendant similarly argues that the dismissal was a "sham" tactic to circumvent the court's exclusion of evidence and delay trial in order to gain a strategic advantage, in that the prosecutor knew that if he were able to introduce the "Jane" evidence, it "would

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<sup>11</sup> Defendant suggests that the delay from April to June 2009 was due to the prosecutor's negligence in providing discovery concerning the "Jane" evidence. We disagree.

The record supports a finding that discovery was inexplicably delayed. The prosecution conducted a recorded interview with Jane in February 2009 and later that month the investigator wrote a report, which referred to a prior 1997 sheriff's report concerning Jane. However, the prosecutor did not produce the interview report until late May 2009, at which time, defense counsel complained that he had still not received a copy of the recording or the 1997 report. The prosecutor finally produced those on June 4, 2009.

There record does not reveal the reason for the delayed production or the failure to make Jane available for an interview. The prosecutor did not provide a reasonable explanation. Nor does the Attorney General do so on appeal. That said, however, the delayed discovery was not the reason that the trial had to be continued until June 8. Rather, the reason for the delay was the unavailability of key witnesses.

make a guilty verdict on the state's charged offense of molestation of another girl a foregone conclusion.”

Faced with going to trial without the “Jane” evidence, the prosecutor elected to dismiss and refile. Defendant acknowledged below that the dismissal and refiling were legally permissible. (See § 1387.) We agree and point out that in opposing a previous continuance to permit further investigation of the Jane evidence, defense counsel suggested that if the prosecutor needed more time, then he should dismiss the case and refile it.

Under the circumstances, we fail to see why it was improper or inappropriate for the prosecutor to exercise his authority to move for dismissal in order to present evidence to the jury that he considered to be not only relevant but also vital to his case. So long as jeopardy has not attached and the statute of limitations has not run, the prosecution may re-file charges. (*Crockett v. Superior Court* (1975) 14 Cal.3d 433, 437-438.) “Jeopardy does not attach when felony charges are dismissed prior to trial and since the People's ability to refile charges is generally limited to one additional filing, res judicata and collateral estoppel principles are not needed to prevent harassment of a defendant. [Citations.]” (*People v. Gallegos* (1997) 54 Cal.App.4th 252, 267.)

It is true if the evidence was found admissible under Evidence Code section 1108, it would be highly damaging to the defense. However, we disagree with defendant's view that the dismissal allowed the prosecutor a second chance to present evidence that was “highly prejudicial” evidence. The damage to a defense from relevant, probative, and admissible evidence is not the sort of “prejudice” against which a defendant must be protected. (See *People v. Bolin* (1998) 18 Cal.4th 297, 320 [prejudicial evidence is that which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues].) We agree that if the prosecutor had dismissed the case and the evidence been found inadmissible, then perhaps the dismissal could be viewed as a forum-shopping tactic designed to delay the case in the hope of obtaining a

different ruling on the admissibility of the evidence. (See *People v. Gallegos, supra*, 54 Cal.App.4th at p. 263.) But where, as here, the evidence was excluded for a reason unrelated to its admissibility and before its admissibility had been determined, the dismissal does not reflected bad faith, unreasonable gamesmanship, or an unjustified tactical maneuver to gain strategic advantage over defendant. Rather, the prosecutor's decision to dismiss in order to go to trial with all relevant evidence was, in our view, a reasonable and legitimate response to the exclusion of the "Jane" evidence and constituted a valid reason for further delay.<sup>12</sup>

Our conclusion does not mean, however, that we ignore the fact the prosecutor's failure to produce Jane for an interview before trial on June 8 caused the court to exclude the evidence. Although there is no evidence that the prosecutor intentionally refused to make Jane available, the unexplained failure to make her available for an interview and the delay in producing documentary evidence in the prosecutor's possession during the months before trial reflect a lack of diligence.<sup>13</sup> Thus, insofar as the prosecutor's lack of diligence caused the exclusion of evidence and that exclusion was the reason the prosecutor dismissed and refiled the case, the prosecutor's lack of diligence weighs against the prosecution.

After the case was refiled on June 10, 2009, it proceeded without undue, inexplicable, or unjustified delay, and trial was reset for October 5, 2009. In September, the court denied defendant's motion to dismiss the case. On October 5, the court ruled that the "Jane" evidence was admissible and denied defendant's motion to exclude it.

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<sup>12</sup> We note that later in denying defendant's motion to dismiss, the trial court implicitly rejected his claim that the dismissal was an improper "end-run" around the court's ruling to exclude the "Jane" evidence that unreasonably and unjustifiably delayed the case in violation of his speedy-trial rights.

<sup>13</sup> For example, a recorded interview with Jane took place in early February 2009 and it referred to an earlier 1997 sheriff's report about her. However, the prosecution did not provide a copy of the recorded interview or the 1997 report until late May 2009.

Thereafter, the case was delayed for nearly four months until January 25 for different reasons.

Trial was delayed from October 5 to October 19, 2009, because the prosecutor had obtained new information related to the “Jane” evidence that necessitated the issuance of numerous additional subpoenas, which resulted in numerous additional reports that were then provided to the defense. The record does not indicate that the prosecutor failed to exercise reasonable diligence in investigating the “Jane” evidence and could or should have obtained the new information and issued the subpoenas much sooner. Thus, on its face, the delay to October 19 appears to have been for a valid reason and does not clearly weigh against the prosecution. As noted, although defense counsel complained that he did not have time to respond by October 19, he nevertheless waived time until November 2.

Finally, between November 2, 2009, and January 25, 2010, the trial was continued several times. From November 2 to November 9, trial was continued over a defense objection because the prosecutor had not fully recovered from a medical condition and Jane had to be hospitalized and needed surgery because of a leg injury. From November 9 to November January 25, the case was continued because the prosecutor suffered a serious medical emergency that rendered him unavailable until January 25. Without waiving time, defense counsel conceded that there was good cause for a continuance.

The trial court acted well within its discretion in granting continuances due to Jane’s and the prosecutor’s unavailability for unanticipated medical emergencies. (*Lerma v. County of Orange* (2004) 120 Cal.App.4th 709, 716-717; *Hernandez v. Superior Court* (2004) 115 Cal.App.4th 1242, 1247-1248.) For this reason, there was a valid reason to justify the delay, and we do not weigh it against the prosecution.

As our review of the period November 10, 2008, and January 25, 2010, reveals, we do not find that any delay resulted from anything remotely suggesting a deliberate attempt to delay the trial in order to hamper the defense. Rather, virtually all of the

delays supported by findings of good cause and reflected a proper and valid justification for appropriate delays. Finally, although we consider the dismissal to be a reasonable and proper response to the court's exclusion of the "Jane" evidence and therefore a valid reason for further delay, we nevertheless give the prosecutor's failure to provide timely discovery of all the "Jane" evidence, which caused the exclusion of evidence, some weight in the balancing test to determine whether defendant's federal right was violated.

#### **4. Assertion of Rights**

On February 19, 2009, defense counsel withdrew his general time waiver, opposed the prosecutor's request for a continuance, and expressed defendant's interest in going to trial. Defendant counsel objected to a second continuance to April 20, 2009, and on April 8, filed a motion to dismiss the case for denial of a speedy trial. Defense counsel renewed the motion on May 22 and supplemented it on May 28 and again on June 4. After the case was refiled, counsel again moved to dismiss on September 2, 2009. In October, counsel refused to waive time. From November on, counsel objected to continuances and declined to waive time.

Given defendant's continuous and repeated objection to continuances, assertion of his right to a speedy trial, and motions to dismiss, this factor weighs in his favor.

#### **5. Prejudice**

Although defendant has shown that the delay was long enough to be presumptively prejudicial, "as the term is used in this threshold context, 'presumptive prejudice' does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry"—i.e., the four-factor balancing test. (*Doggett, supra*, 505 U.S. at p. 652, fn. 1; *Barker, supra*, 407 U.S. at p. 530.) For purposes of this test, prejudice must be "assessed in the light of the interests of defendants which the speedy trial right was designed to protect," which are "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the

defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.”

(*Barker, supra*, 407 U.S. at p. 532, fn. omitted.)<sup>14</sup>

Initially, we note that in his September 2009 motion to dismiss, defendant claimed the delay was prejudicial because it hindered his ability to recall and secure evidence of his activities, including the dates on which the incidents allegedly happened, and the delay lulled him into a false sense of security. He also argued that it was prejudicial because it prolonged the period of uncertainty and anxiety and disrupted his liberty and life. In denying the motion the court found that the delays had been justified by good cause, and defendant had not shown any prejudice.

On appeal, defendant greatly expands his claim of prejudice, arguing that the delay impaired the defense. He argues that because of the delay, he lost witnesses and important records; the memories of witnesses had faded; he ran out of money to pay retained counsel; and, “most significantly,” the prosecutor was able to introduce “the damning [Evidence Code] section 1108 evidence.”<sup>15</sup>

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<sup>14</sup> We acknowledge that actual prejudice is not invariably a prerequisite to show a constitutional violation. (*Doggett, supra*, 505 U.S. at p. 655; see *Barker, supra*, 407 U.S. at p. 533.) In certain limited circumstances, when the delay has been inordinately long, the government has acted negligently or in bad faith, and defendant has timely asserted his speedy trial right, a constitutional violation can be made out without a showing of actual prejudice. (Compare *Doggett, supra*, 505 U.S. at p. 655 [eight-year delay]; *U.S. v. Shell* (9th Cir.1992) 974 F.2d 1035 [five-year delay]; *Stabio v. Superior Court* (1994) 21 Cal.App.4th 1488 [four-year, one-month delay]; with *U.S. v. Beamon* (9th Cir.1993) 992 F.2d 1009 [showing of actual prejudice required for delays of 17 and 20 months].)

As noted, the delay attributable to the prosecution or court congestion here was not appreciably longer than the minimum necessary to trigger a full speedy-trial analysis. Accordingly, we look to see whether defendant can show any actual prejudice.

<sup>15</sup> In his reply brief, defendant implies that he raised these aspects of alleged prejudice in connection with his motion to dismiss. However, his record references refute this implication. Defendant mentioned these problems when he moved to exclude the “Jane” evidence, which was after the court had denied the motion to dismiss.

### **a. Loss of Witnesses**

Defendant notes that A.'s father—an important impeachment witness—was dead; Roberto Gomez—a man Jane had originally accused of molestation—could not be located; and A.'s babysitter—another important impeachment witness—refused to speak to defense counsel because of repeated delays.

The record reveals that A.'s father died in 1998, before the alleged molestation had been reported to the police. Thus, whatever value he may have had to the defense—value which defendant fails to explain—his loss as a witness cannot be attributed to post-accusational delay.

Similarly, the record reveals that in 1997, police investigated Jane's accusation of sexual misconduct against a man named Roberto Gomez. At that time, police had very little information about him, and their several attempts to locate him were unsuccessful. At the hearing on defendant's motion to exclude, counsel reported that he had an address for Gomez only up to 1998 and then only vague information that he had worked in Chicago. Again, Gomez disappeared long before this case was filed, and whatever value he might have had as a defense witness, defendant's inability to locate him cannot reasonably be attributed to the post-accusation delay.

Concerning the babysitter, defense counsel asserted that she had important things to say about A., but when his secretary called her, the babysitter complained about the number of delays, wanted to know when the trial was going happen, and hung up.

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We independently review whether the federal constitutional speedy trial right was violated. (See *People v. Cromer* (2001) 24 Cal.4th 889, 894, 901-902 [de novo review of mixed questions of law and fact that affect constitutional rights]; *U.S. v. Sandoval* (9th Cir.1993) 990 F.2d 481, 482 [de novo review of denial of speedy trial motion]; accord *U.S. v. Wanigasinghe* (7th Cir.2008) 545 F.3d 595, 597; *U.S. v. Molina-Solorio* (5th Cir.2009) 577 F.3d 300, 304.) Although the record concerning the alleged prejudice was not fully developed when the court ruled on the motion to dismiss, we nevertheless exercise our discretion to address defendant's claims based on the record before us and his representations to the court later at the motion to dismiss.

Nevertheless, counsel felt confident that he would have her for trial because she was under subpoena and he would resubpoena her if necessary. Ultimately, the babysitter did not testify. However, on the record before us, it would be speculation to conclude that it was due to the post-accusational delay. Given counsel's representation that the witness was under subpoena, the reason could just as well have been counsel's failure to resubpoena and ensure her presence. (Cf. *Bellizzi v. Superior Court* (1974) 12 Cal.3d 33, 35, 38 [where delay due to dismissal and refileing caused witness to become unavailable, prejudice not result of delay but failure of defense to ensure witness was available].)

In short, defendant fails to establish that the delay was prejudicial because two witnesses were unavailable and one did not testify.

#### **b. Loss of Records**

Defendant claims that the delay caused the loss of important records concerning Jane. He cites defense counsel's comments when he argued to exclude the "Jane" evidence: "There is no evidence of a report to any school, or a school authority. We know from the records that were subpoenaed and that the Court did receive that she did go to school. We know that she was going to school during this period of time. It's reasonable for the Court to draw an inference that schools have resources available for children who are being harmed to report." Counsel further argued that it was reasonable to infer that at the time, Jane's school had protocols to identify children who may be suffering abuse but who have difficulty reporting: "All of that was in place in the year 1997, and yet we have no records of any report."

Simply put, defendant fails to show that the delay caused prejudice because this passage does not reasonably suggest, let alone establish, that there were relevant school records concerning Jane that were lost, let alone records that would have been beneficial to the defense.<sup>16</sup>

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<sup>16</sup> Defendant also cites to a page of the reporter's transcript of the jury voir dire, which is clearly irrelevant. Even assuming he meant to cite to the clerk's transcript, that

### **c. Faded Memory**

Defendant claims that because of the delay, Deputy Sheriff John McCormick, an investigator for the District Attorney, had no memory of an investigation he conducted in 1997 concerning allegations that Jane had made. To establish this claim, defendant cites another comment that counsel made at the motion to exclude.

At that time, defense counsel noted that there was no corroboration of Jane's accusations against defendant. There were no reports concerning her alleged accusations; he was never charged; and he never admitted the conduct. Defendant noted that in her interview in 2009, Jane said that back in 1997, the police had questioned defendant after she accused him, and he had denied her accusations. Defendant also pointed out that in 2009, Deputy McCormick had no recollection of his investigation or anything Jane had said to him. However, he said that if Jane had provided any additional information about being molested by defendant, he would have included it in a report and done more follow-up.

Although Deputy McCormick's memory concerning events in 1997 had faded, defendant cannot establish, and the record does not suggest, that he would have remembered the details of his 1997 investigation ten years later in 2007, when defendant was charged, let alone in February 2009, when the prosecutor first discovered Jane. Thus, it is speculation to say that the delay after that time caused Deputy McCormick's memory to fade.

Second, the record does not suggest that Deputy McCormick's faded memory was in any way "significant to the outcome." (*Barker, supra*, 407 U.S. at p. 534.) Defendant

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page is part of the prosecutor's opposition to the motion to exclude the "Jane" evidence and has nothing to do with missing or lost records.

Defendant has a duty to provide appropriate record references to support his claims (Cal. Rules of Court, rule 8.204(a)(1)(C)), and his failure to provide references to show that records were lost forfeits reliance on that claim to show prejudice. (See *People v. Hovarter* (2008) 44 Cal.4th 983, 1029.)

suggests that had his memory not faded, Deputy McCormick could have impeached Jane's statement that she had complained to him about defendant.

The record reflects that Deputy McCormick was involved in an investigation in the early months of 1997 of allegations that Jane made against a man later identified as Roberto Gomez. Jane testified that when she spoke to Deputy McCormick about that man and how he had been bothering her, she also complained about defendant. Defense counsel examined her using Deputy McCormick's investigative reports of March 1997. The reports detail his and another other deputy sheriff's conversations with Jane and her mother, the conduct she complained about, the information they had about who the perpetrator was, and their investigation of Roberto Gomez. Despite Jane's insistence at trial that she had complained about defendant, there is no mention of defendant in any of these reports or of any effort at the time to talk to him. The absence of any reference to defendant is consistent with Deputy McCormick's statement that had he received any additional pertinent information, he would have made a report and conducted further investigation. It is also understandable because on redirect-examination, Jane testified that when at the time of Deputy McCormick's reports, defendant's alleged sexual misconduct had not yet occurred. After it did happen, Jane complained to the sheriff about it, and in November 1997, there was an investigation. However, the record reveals that a Deputy Rowley investigated those charges, not Deputy McCormick.

Even if we assume that Deputy McCormick would have testified that Jane did not mention defendant to him, the same fact was essentially conveyed by his detailed reports, which do not mention defendant. Moreover, impeaching Jane concerning whether she mentioned defendant to Deputy McCormick was of peripheral importance and could not have had much tendency to undermine Jane's testimony that defendant had molested her because, as noted, when she spoke to Deputy McCormick, the molestation had not even taken place yet. It is undisputed, however, that Jane later reported it.

Moreover, the potential impeachment value of Deputy McCormick's testimony was dwarfed by the other means used by defense counsel was able to undermine Jane's credibility at trial. In particular, he established that Jane had a motive to falsely accused defendant: she admitted at trial that she did not like defendant, whom her mother was dating. He elicited Jane's admission that in 1997, Jane was using drugs and alcohol and having serious behavioral problems at school and with her mother and the police. She admitted having lied to a sheriff about a gun to protect her father. She admitted having lied to a sheriff's deputy about whether her mother and brother had beaten her. She admitted that generally, she had lied to the police to protect others. And she admitted that when she did report defendant's alleged molestation, she did not mention that he had attempted to rape her near the railroad tracks. That incident she did not report until 2009.

Finally, we note that Deputy McCormick's duplicative, if not de minimus, impeachment testimony concerning whether Jane had mentioned defendant to him would have had no tendency to undermine A.'s credibility or her testimony about what defendant had done to her.

In short, defendant does not convince us that Deputy McCormick faded memory was prejudicial to his defense or that his testimony from a fuller memory would have had any significant impact on the outcome.

#### **d. Drain on Financial Resources**

Defendant next claims the delay was prejudicial because he ran out of money to pay retained counsel, which forced counsel to either represent him for free or "cut corners" and render ineffective assistance. (See *Moore v. Arizona* (1973) 414 U.S. 25, 26-27 [inordinate delay be prejudicial as a drain on financial resources].)

At a hearing on February 23, 2009, counsel opposed any continuance to permit the prosecutor to investigate Jane's allegations, arguing that while defendant had initially been able to afford retained counsel, with a continuance, "he's out of money." Counsel complained that it was unfair to make defendant pay him to keep preparing the case for

trial only to have it continued. “[A]t some point it gets to the point where the attorney is forced into a conflict. The attorney either has to just do it for free, or he has to start cutting corners, not providing effective assistance of counsel. That’s not fair.”

Where one retains counsel to defend oneself in a criminal case, one takes on the cost of doing so. Where a lengthy delay is unjustified, then, in our view, the additional financial burden constitutes prejudice of the sort that for purposes of speedy-trial analysis should be weighed against the prosecution, especially when the delay is due to negligence or, worse, an intent to gain tactical advantage. However, delays or continuances for good cause are a routine, reasonably expected occurrence in the progress of any trial, and the possibility of such a delay must be factored in to the costs that one reasonably should anticipate and expect to pay. (Cf. *United States v. Dreyer* (3d Cir.1976) 533 F.2d 112, 115 [a certain amount of anxiety and personal prejudice is inevitable].)

The continuances in this case because of the discovery of Jane certainly increased the amount of time counsel had to spend on the case and thereby the cost for his services. However, defendant would have incurred most of those costs if the prosecution had developed the “Jane” evidence earlier on. Moreover, all of the continuances were based on good cause, and the prosecutor was authorized to dismiss and refile the case, a procedural option that defense counsel himself suggested. Furthermore, it is not clear who suffered the financial burden of any increased costs—defendant or counsel—because the record does not show whether counsel, at some point, began working for free. In any event, the record does not suggest that defendant’s defense was impaired, hampered, or diminished in any way by the fact that counsel might have worked for free or, as he put it, cut corners and reduced his effectiveness. On the contrary, the record reveals that counsel’s representation from the beginning through the end of the trial was exemplary. Counsel’s pleadings and performance were at all times attentive, conscientious, intelligent, competent, and professional.

Under the circumstances, we do not find the increased financial burden on defendant because of the numerous continuances for good cause or delays for other valid reasons caused any unnecessary or unjustified financial burden that resulted in prejudice weighing in favor of finding a violation of speedy-trial rights.

**e. Anxiety and Incarceration**

Defendant was arrested and almost immediately released on bail, thus he did not suffer prejudice in the form of oppressive or lengthy pretrial incarceration. Nor does he claim that the delay caused him to suffer anxiety over and above that which a person charged with a crime and facing trial inevitably must endure.

**f. The Admission of the “Jane” Evidence**

Defendant claims that the most significant prejudice from the delay was that the prosecutor was able to introduce the evidence of defendant’s sexual misconduct toward Jane under Evidence Code section 1108 to prove a propensity to commit such offenses. However, as noted, the “Jane” evidence had initially been excluded because the prosecutor failed to comply with the court’s discovery order. After that, the prosecutor was entitled to dismiss and refile the case in order to get a hearing *on the merits* concerning the admissibility of the “Jane” evidence. Since the court ruled that the evidence was admissible, defendant cannot reasonably claim prejudice from the admission of relevant, probative, albeit harmful, evidence against him.

**g. Conclusion**

We first conclude that given the generic allegations of faded memory and disruption of personal life in defendant’s motion to dismiss and the lack of any evidence to support them, the trial court reasonably found that the delay as of September 2009 had not caused any prejudice.

We further conclude that defendant’s greatly expanded claim of prejudice on appeal fails to convince us that defendant suffered any appreciable prejudice in the form of (1) oppressive pretrial incarceration, restriction of his liberty, or excessive anxiety;

- (2) an unreasonable or unjustified drain on his financial resources; or, most importantly,
- (3) the impairment of his ability to defend himself.

## **6. Balancing the Factors**

In summary, the three-year delay between arrest and trial was sufficient to trigger a full review of defendant's claim in light of the four *Barker* factors.

In *Barker, supra*, 407 U.S. 514, the Supreme Court cautioned that the four factors are related and "must be considered together with such other circumstances as may be relevant." (*Id.* at p. 533.) The test requires court to "engage in a difficult and sensitive balancing process." (*Ibid.*, fn. omitted.)

Weighing against a finding that the delay violated defendant's Sixth Amendment right to a speedy trial are the following findings. Defendant waived much of that time, and the amount of the delay attributable to the prosecution did render the delay inordinate or even extend it beyond the minimum necessary to trigger further review. There is no evidence that the prosecutor acted in bad faith or intentionally delayed the case to hamper the defense or gain tactical advantage. The trial court found good cause for virtually all of the continuances the prosecutor sought, and we find that there were valid reasons for the delay attributable to the prosecutor. Finally, defendant did not suffer any appreciable, unfair, or unjustifiable harm or prejudice from the delay.

Weighing in favor of a finding that the delay violated defendant's rights are the following findings. Defendant consistently and persistently objected to continuances and asserted his right to a speedy trial after February 2009. The prosecutor could and should have provided discovery concerning the "Jane" evidence sooner than he did, which could have preserved an earlier trial date.<sup>17</sup>

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<sup>17</sup> However, subsequent events and further investigation, subpoenas, and reports that delayed the case after it was refiled might have inevitably delayed the case for some amount of time even if it had not been dismissed and refiled.

In *Barker*, the delay was well over five years, and the court recognized that it was uncommonly long and largely unexcused. Nevertheless, the court held that Barker was not deprived of his right to a speedy trial because the prejudice was minimal and Barker had not asserted his right for a long time before delays became necessary. (*Barker, supra*, 407 U.S., at pp. 534-536.)

In this case, given our discussion of the factors, we conclude that the delay in this case did not rise to the level of a constitutional violation. Accordingly, we reject defendant's claim.

### **C. Violation of the State Constitutional Right**

The right to speedy trial operates somewhat differently under the California Constitution. (*Martinez, supra*, 22 Cal.4th at p. 765.) “Under the *state* Constitution, by comparison, the showing that the defendant must make depends upon whether the allegedly unreasonable delay occurred before or after the defendant's statutory speedy trial rights attached. The statutory speedy trial provisions, Penal Code sections 1381 to 1389.8, are ‘supplementary to and a construction of’ the state constitutional speedy trial guarantee. . . . No affirmative showing of prejudice is necessary to obtain a dismissal for violation of the state constitutional speedy trial right *as construed and implemented by statute*. [Citation.] Instead, ‘an unexcused delay beyond the time fixed in section 1382 of the Penal Code without defendant's consent entitles the defendant to a dismissal.’ ” (*Id.* at p. 766.) In contrast, “when the claimed speedy trial violation is not also a violation of any statutory speedy trial provision, this court has generally required the defendant to affirmatively demonstrate that the delay has prejudiced the ability to defend against the charge.” (*Ibid.*)

Defendant claims only that his constitutional right to a speedy trial was violated. As noted, we find that the delay in this case did not result in any appreciable harm or actual prejudice, that is, defendant has not affirmatively demonstrate that the delay

impaired his ability to defend himself. Thus, we reject his California constitutional claim.

#### **IV. ADMISSION OF UNCHARGED SEXUAL MISCONDUCT**

Defendant contends that in admitting the “Jane” evidence under Evidence Code section 1108 to prove a propensity toward sexual misconduct, the court violated his constitutional rights to due process.

Defendant acknowledges that in *Falsetta, supra*, 21 Cal.4th 903, the California Supreme Court rejected this due process claim. (*Id.* at p. 907.) Being bound by the decision in *Falsetta (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455)*, we must reject it. Defendant implicitly acknowledges this and concedes that he is raising the issue only to preserve his right to further review.

**V. DISPOSITION**

The judgment is affirmed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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ELIA, J.