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Court of Appeals No. 71754-5-1
King County Superior Court No. 09-1-07408-5 SEA

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

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State of Washington,

Plaintiff/Respondent,

v.

Jose Apolinar Flores-Solorio,

Defendant/Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Jean Rietschel, Judge

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# APPELLANT'S REPLY BRIEF

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## I. INTRODUCTION

Comes now Appellant, Jose Flores-Solorio ("Mr. Flores"), by and through undersigned counsel, and submits to this Court the following reply to the State's response to his opening brief.

## II. ARGUMENT

### A. The Trial Court Improperly Admitted Evidence Regarding the Alleged Abuse of MG and EG Under ER 404(b).

The State contends that the trial court properly admitted testimony about the alleged abuse of MG and EG pursuant to ER 404(b) on the basis that the evidence established that Mr. Flores implemented a common scheme or plan to accomplish the alleged abuse of PRY, SRY, and HRR. See State's Response Brief ("Response") at 20. As explained in Mr. Flores's opening brief, because there is a complete lack of similarity between the alleged abuse of PRY, SRY, and HRR, and the alleged abuse of MG and EG, the trial court abused its discretion when it admitted testimony about the abuse of MG and EG as evidence of a common scheme or plan that was used to undertake the charged offenses under ER 404(b). Because the outcome of Mr. Flores's trial would have been different but for the admission of the prior bad acts evidence pertaining to MG and EG, Mr. Flores's conviction should be reversed.

1. *The Trial Court Abused its Discretion When it Admitted the Testimony of EG and MG as Evidence of a Common Scheme or Plan to Molest Children under ER 404(b).*

Before admitting prior bad acts evidence pursuant to ER 404(b), the trial court must: "(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect." State v. Gresham, 173 Wn.2d 405, 421 (2012). In the instant, case the dispute between the parties revolves around the second element, whether the prior bad acts evidence was admissible for the purpose the trial court asserted. The trial court admitted the testimony about the alleged abuse of MG and EG to prove the existence of a common scheme or plan. RP II 67.

In Washington, two types of common scheme or plan evidence are admissible under 404(b). The first is evidence that the crime was part of a larger overarching criminal plan and was necessary to the furtherance of the overarching criminal plan, and the second is evidence that a defendant developed and repeatedly implemented a single plan to commit separate, but very similar crimes. See State v. DeVincentis, 150 Wn.2d 11, 19 (2002). In this case, the trial court admitted the evidence regarding the alleged abuse of EG and MG as the second type of common scheme or

plan evidence, i.e., evidence that the defendant used the same plan to accomplish similar offenses. R PII 67 ("In looking at everything else to the remaining issues, which issues related to [EG] and [MG], the age of the alleged victim, the gender, the very particular way access is gained through known friends or family, the nature of the alleged acts, do show sufficient similarities to be a common scheme or plan under the case law as it exists today.").

But, evidence of a common scheme or plan used in the commission of similar offenses is only admissible where there is "substantial similarity between the prior bad acts and the charged crime." See DeVincentis, 150 Wn.2d at 21. The similarity must not be "merely coincidental" but such that it "indicates that the conduct was directed by design." State v. Lough, 125 Wn.2d 847, 856 (1995). "Random similarities are not enough." DeVincentis, 150 Wn.2d at 18. "The degree of similarity for the admission of evidence of a common scheme or plan must be substantial." Id. at 20. There must be more similarities between the prior bad acts and the charged offenses than similar results, there must be "such common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations." Lough, 125 Wn.2d at 860. In the context of child molestation cases, evidence of prior bad acts cannot be admitted to

show that the defendant simply had a "plan to molest children." State v. Slocum, 183 Wn. App. 438, 454 (2014). Evidence of "prior opportunistic crimes, which are relevant to show propensity" only cannot be admitted as common scheme or plan evidence under ER 404(b). Id at 456. Contrary to the State's assertions, the alleged abuse of MG and EG was not sufficiently similar to the alleged abuse of SRY, PRY, and HRR to be admitted as evidence of a common plan used to carry out the charged offenses.

The State's attempt to liken Mr. Flores's case to State v. DeVincentis is unpersuasive.[1] The defendant in DeVincentis groomed the 404(b) witness and the alleged victim in a very similar manner, by inviting them to his house over a period of time, and wearing nothing but a g-string or bikini underwear around them while they were there, for the purpose of getting them more comfortable with nudity before proceeding to sexually assault them. See DeVincentis, 150 Wn.2d at 14 – 16. Further, in

[1] The other cases cited by the State are also inapposite, as in each of those cases in contrast to Mr. Flores's case, the defendant had devised a plan with distinctive features through which he gained access to and groomed children for sex. See State v. Carleton, 82 Wn. App. 680 (1996) (defendant purposefully joined youth organizations and told stories about alternate personality to lure boys into having sex); State v. Krause, 82 Wn. App. 688 (1996) (defendant intentionally befriended parents of young boys and groomed the boys for sex by playing games and taking them on outings); State v. Baker, 89 Wn. App. 726 (1997) (defendant allowed girls to sleep in his bed, rubbed their backs until they fell asleep, and then slipped his hand between their legs).

DeVincentis, the defendant asked both the 404(b) witness and the alleged victim for massages and to masturbate him until ejaculation. Id. at 16. The abuse also took place in the same location, the defendant's home. Id.

In contrast to DeVincentis, the alleged abuse of MG and EG and the alleged abuse of the charged victims, SRY, PRY, and HRR, did not bear such similar characteristics. The manner in which SRY, PRY, and HRR were allegedly abused was not substantially similar to the manner in which EG and MG were allegedly abused. SRY, PRY, and HRR reported severe sexual abuse over a prolonged period of time, including touching of the vagina, and in the cases of PRY and SRY, vaginal penetration. See RP VI 79, 191; RP V 93. With EG and MG, however, the alleged abuse was much less severe. All that MG had to report was that Mr. Flores touched her on thigh on one occasion.[2] RP VII 81. As for EG, she reported that on one occasion Mr. Flores tried to expose his penis to her and rubbed up against her back while she was clothed, and that on another occasion Mr. Flores brushed his hand over her breasts. RP VII 12 – 16, 67.

Nor was there any alleged distinctive grooming behavior with EG and MG, as was the case in DeVincentis. The alleged incident with MG was a single isolated incident. See RP VII 79 – 83. And the two alleged

[2] The defense submits that touching a child on the thigh does not rise to the level of sexual abuse.

incidents involving EG were similarly random, opportunistic acts. See RP VII 12 – 16, 67.

Additionally, contrary to the State's contentions, the fact that Mr. Flores knew both the charged victims and prior-bad-acts witnesses through friends and family does not lead to the conclusion that Mr. Flores devised a plan to meet young girls through his friends and family for the purpose of sexually abusing them. Rather, the only inference that could be drawn is that Mr. Flores would abuse young girls that he knew and who were accessible to him. See Slocum, 183 Wn. App. at 454 ("The evidence establishes only that in the case of all three victims, they were young, Mr. Slocum was an adult, and there was a family relation by marriage."). Indeed, Mr. Flores had met both the mother of PRY and SRY, and the mother of MG in Mexico, long before their daughters were born. RP VII 109 – 110; RP IX 127.

The State goes to great lengths to point out similarities between the alleged abuse of MG and EG and that of the charged victims, but none of the "random similarities" pointed out by the State are sufficient to establish that Mr. Flores developed a single scheme or plan that he implemented to commit the charged crimes. See DeVincentis, 150 Wn.2d at 18. The State asserts that the ages of the 404(b) witnesses and the charged victims were similar, i.e., they were all 6 to 10 years old.

Response at 21. But, that is simply not the case. SRY and PRY were as old as 15 when some of the alleged abuse occurred. See RP VI at 150. Nor is the fact that MG happened to be in front of the television when Mr. Flores allegedly touched her significant, as argued by the State. See Response at 22. SRY, PRY, and HRR, reported that their abuse took place in various places, including the car, the beach, in the bedroom, and in the living room. RP V 86; RP VI 79, 144 – 45, 186 – 87. SRY testified that the alleged abuse would "just be wherever I was." RP VI 55.

The State also asserts that both SRY and EG recalled experiences when they felt Mr. Flores's erect penis against them evidences a common plan. Response at 22. But, the circumstances of the two incidents cited by the State are very different. The incident involving SRY allegedly happened at the beach, while Mr. Flores was teaching SRY to swim, while the incident involving EG occurred in the laundry room, when Mr. Flores allegedly came up behind her and started rubbing against her. See RP VI 139 – 40; RP VII 14 – 15. It is also not evidence of a common scheme or plan that Mr. Flores allegedly complimented EG on her breasts and asked her if she wanted to see him ejaculate. See RP VII 13 – 14; 67. The fleeting comments that Mr. Flores made to EG are nothing like the detailed discussions about sex, sexuality, and sex positions that Mr. Flores allegedly had with SRY and PRY. See RP VII 15, 137. It is also

insignificant that both PRY and EG allegedly saw Mr. Flores's penis. It was unclear from PRY's testimony whether Mr. Flores intentionally exposed his penis to her or whether she simply walked in on him while he was getting ready for work. See RP VI at 53 – 54. Even if the exposure was intentional, it cannot be characterized as anything other than a random similarity.

Indeed, one of the similarities pointed out by the State has nothing to do with the charged victims at all. The State claims that Mr. Flores accessed the homes of the 404(b) witnesses, MG and EG by asking to use the restroom. See Response at 22. This was not the case with the charged victims. Surely, similarities between the alleged sexual abuse of uncharged victims does not evidence the implementation of a common scheme or plan during the abuse of the charged victims.

In summary, the random similarities pointed out by the State are insufficient to overcome the reality that the alleged incidents involving EG and MG, the 404(b) witnesses, were nothing more than opportunistic crimes, and are therefore evidence of nothing other than propensity. Slocum, 183 Wn. App. at 456. Perhaps this is the reason that the State's brief notably ignores the Court of Appeals' recent decision in State v. Slocum, which reversed a conviction based on the trial court's admission of similar opportunistic acts of abuse. Because there was a lack of marked

similarities between the alleged abuse of the 404(b) witnesses and the charged victims, and because the alleged offenses against MG and EG were random opportunistic acts, the trial court committed a manifest abuse of discretion when it admitted the testimony of EG and MG to establish the existence of a common scheme or plan pursuant to ER 404(b). See id. at 488.

2. *Mr. Flores's Conviction Should be Reversed because the Outcome of Mr. Flores's Trial Would have Likely Been Different if the Bad Acts Evidence had Been Excluded.*

The State's argument that the admission of the testimony of EG and MG was harmless error is contrary to both the law and the facts of Mr. Flores's case. Under the non-constitutional harmless error test, a conviction must be reversed if "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been different." Id. State v. Gunderson, 181 Wn.2d 916, 926 (2015). It is well established that prior bad acts evidence is the most damaging in sex cases. Id. at 925 (citing State v. Saltarelli, 98 Wn.2d 358, 362 (1982)).

Notwithstanding the State's contentions, there was a significant amount of evidence tending to show that SRY and PRY may have been motivated to fabricate allegations of abuse for the purpose of obtaining immigration benefits. The allegations against Mr. Flores partially formed

the basis for their immigration applications. See RP VI 95 – 97. There was also evidence that one of twins, PRY, previously threatened to make false claims about the twins' stepfather. See RP IX 87, 149. Indeed, the trial of the twins' step-father, based on similar allegations, resulted in a mistrial. CP 20. Similarly, there was evidence that HRR also had reasons to fabricate her claim against Mr. Flores. While the evidence casting doubt on HRR's credibility was admittedly not as strong as the evidence against the twins, it did undermine HRR's credibility as a witness. Specifically, HRR first revealed the alleged abuse by Mr. Flores more than five years after it took place. See RP V 97, 130. More importantly, HRR revealed the alleged abuse after CP, a girl who was living with HRR's family, reported her experiences with sexual abuse to HRR. RP V 96 – 97. Notably, HRR's sister, DR, did not recall witnessing any abuse. RP IX 13. The defense argued at trial that HRR fabricated the claims against Mr. Flores to appear older and develop a closer bond with CP, who she viewed as a role model. See RP X 80.

The admission of the 404(b) testimony pertaining to the alleged abuse of MG and EG had the effect of bolstering the testimony of the charged victims, and was extremely prejudicial to Mr. Flores, as it undermined Mr. Flores's credibility and painted him as a habitual sex offender. In light of the weaknesses of the State's case and the importance

that credibility played in the jury's determination on the issue of guilt, it cannot be said that "the admission of prejudicial evidence of [three] opportunistic acts of molestation . . . did not materially affect the trial within reasonable probabilities." Slocum, 183 Wn. App. at 457. As the state Supreme Court has previously recognized, "where credibility was a primary issue in the case and testimony regarding the prior sex offenses featured prominently at trial" the admission of highly prejudicial evidence of prior sex offenses cannot be considered harmless. See State v. Gower, 179 Wn.2d 851, 858 (2014). Because the admission of the prior bad acts evidence pertaining to EG and MG was not harmless, Mr. Flores's conviction should be reversed.

### B. Mr. Flores's Conviction Should be Reversed Because the Trial Court Erred in Denying Mr. Flores's Motion for a Mistrial Based on Improper Testimony About the Alleged Abuse of His Daughter.

The State argues that testimony regarding the alleged abuse of Mr. Flores's daughter from three separate witnesses in violation of the Court's pretrial evidentiary ruling was not sufficiently prejudicial to warrant a mistrial. In reaching this conclusion, the State understates the effect that the testimony about the abuse of Mr. Flores's daughter likely had upon the jury and misconstrues precedent.

Although a trial irregularity will only warrant reversal if the irregularity is so prejudicial that only a new trial can cure the prejudicial effect of the irregularity, as explained in Mr. Flores's opening brief, Washington courts have consistently held that the jury's exposure to prior bad acts evidence that is otherwise inadmissible is precisely the type of irregularity that can only be cured by a new trial. See State v. Babcock, 145 Wn. App. 157, 163 (2008). This is because no curative instruction can remove the prejudice that results from the jury's exposure to such evidence. Id. In determining whether improper prior bad acts testimony requires a mistrial, courts consider: "(1) the seriousness of the irregularity; (2) whether the statement was cumulative of other evidence properly admitted; and (3) whether the irregularity could be cured by an instruction to disregard the remark." State v. Escalona, 49 Wn. App. 251, 254 (1987).

The State attempts to downplay the prejudicial effect of the testimony about the alleged abuse of Mr. Flores's daughter by limiting the inquiry to the question of whether EG's testimony that: "Mr. Flores had something to do with his daughter," was sufficiently prejudicial to deprive Mr. Flores of a fair trial. See RP VII 20; Response at 34. But, it is inappropriate to limit the inquiry to EG's statement alone. EG's statement must be viewed in context.

First, EG's statement was made in response to a line of questioning by the prosecutor pertaining to whether EG was aware of Mr. Flores abusing anyone else and whether EG had reported the abuse to anyone. See RP VII 19 – 20. In this context, EG's comments can only be construed to mean that Mr. Flores was sexually abusing his own daughter.

Second, EG was the third witness who commented about the alleged sexual abuse of Mr. Flores's daughter. On day two of the trial, Detective McMillan testified that during her investigation of child sexual abuse by Mr. Flores, a King County Sheriff's Detective, Detective Luitgaarden, told her that individuals from her office were investigating allegations involving Mr. Flores and two other children, and that: "They were also concerned about his daughter." RP V 147 – 48. Similarly, PRY testified on day three of the trial that when she discussed the abuse with Mr. Flores's daughter, CF stated to her: "why don't you just let yourself." RP VI 24. This statement, like EG's statement, was made in response to a line of questioning about whether PRY was aware of other abuse. See RP VI 23 – 24. Given the context of Detective McMillan and PRY's testimony, their testimony cannot be brushed off as "vague and fleeting." See Response at 34. Contrary to the State's assertions, these improper comments clearly implied that Mr. Flores had sexually abused his

daughter and added significantly to the prejudicial nature of EG's subsequent testimony.

Third, in the context of Mr. Flores's trial, where testimony about the alleged sexual abuse of five child victims was presented to the jury, the jury's exposure to testimony about the abuse of Mr. Flores's daughter was prejudicial in the extreme. See Gunderson, 181 Wn.2d at 925 (evidence of prior bad acts is most prejudicial in sex offense cases). Recognizing the potential prejudice that could flow from the admission of evidence regarding the abuse of Mr. Flores's daughter and the absence of proof that the abuse occurred, the trial Court expressly held during Mr. Flores's trial that the evidence pertaining to the abuse of Mr. Flores's daughter would be inadmissible. See RP II 67.

There can be little doubt about the fact that, in combination, the testimony of Detective McMillan, PRY, and EG about Mr. Flores's alleged sexual abuse of his daughter was so prejudicial that it deprived Mr. Flores of a fair trial. See State v. Post, 118 Wn.2d 596, 620 (1992).

The State's attempt to distinguish Mr. Flores's case from the precedents he relies upon is also unpersuasive. The State asserts that the nature and extent of the evidence admitted in those cases was different than the evidence in this case. See Response at 34. But, a close review of these cases reveals that that is not at all the case. It is true that the

improper testimony to which the jury was exposed in this case was less extensive than in State v. Babcock. However, State v. Escalona, 49 Wn. App. 251, 254 (1987), and State v. Miles, 73 Wn.2d 67 (1968), are hardly distinguishable from Mr. Flores's case. In Escalona, for example, the Court of Appeals reversed the defendant's conviction and remanded for a new trial based on a single comment regarding a prior offense similar to the offense in question. The defendant was on trial for a stabbing, and a witness testified that the defendant "already has a record and already stabbed someone." Escalona, 49 Wn. App. at 253. Weighing the relevant factors, the Court held that the single statement in question constituted an extremely serious trial irregularity, that the statement was not cumulative, and that due to the inherently prejudicial nature of the statement, a curative instruction could not cure the irregularity. See id. at 255 – 56. In Miles, the state Supreme Court reversed and remanded for a new trial based on a witness's isolated comment during a burglary trial that the defendants were going to commit a similar crime in a different city. Miles, 72 Wn.2d at 70.

The nature and extent of the testimony at issue in Mr. Flores's case is more extensive than the isolated comments in Miles and Escalona. Unlike the isolated comments at issue in Miles and Escalona, in Mr. Flores's cases, the jury heard testimony on three separate occasions that

Mr. Flores allegedly abused his daughter in addition to the charged victims and the 404(b) witnesses already called by the State. There can be little doubt that this testimony was so prejudicial to Mr. Flores's case that the curative instruction given by the trial court after EG's testimony was insufficient to ensure that Mr. Flores received a fair trial. See Escalona, 49 Wn. App. at 255 – 56. The trial court therefore committed error when it denied Mr. Flores's motion for a new trial on this basis. Because Mr. Flores was deprived of a fair trial as a result of the jury's exposure to testimony regarding the alleged sexual abuse of his daughter, Mr. Flores's conviction should be reversed and his case should be remanded for a new trial. Id.

### C. Mr. Flores's Conviction Should be Reversed Because the Trial Court Erred When it Ordered Joinder of the Two Cases Against Mr. Flores and When it Denied Mr. Flores's Motion to Sever Counts.

The State similarly argues that the joinder of the counts involving SRY and PRY, and the counts involving HRR, did not prejudice Mr. Flores and that the trial court's failure to sever counts does not require reversal. This Court should reject the State's arguments.

#### *1. Mr. Flores did not Waive his Severance Claim.*

The State contends that Mr. Flores waived his severance claim because his attorneys did not renew his motion to sever at trial as required

under CrR 4.4(a)(2). The State misreads CrR 4.4(a)(2), and misconstrues the record. Mr. Flores's attorneys not only objected to joinder of the two sets of counts and requested to keep the cases severed pretrial, RP I 12 – 14, but also moved to sever with the trial court. RP II 24. Indeed, a motion to sever was included in Mr. Flores's trial brief, which was submitted to the trial court, and the motion was argued on the first day of trial, January 15, 2014. CP 51. Consequently, because Mr. Flores raised his motion to sever with the trial court on the first day of trial, he did not waive his claim of severance. See State v. Hernandez, 58 Wn. App. 793, 797 (1990) (motion made on the morning of trial is not made before trial).

2. *Mr. Flores's Misjoinder Claim was Preserved Even if Severance was Waived.*

Even if this Court finds that Mr. Flores's counsel failed to preserve Mr. Flores's severance claim by failing to renew the motion to sever, this Court is not precluded from considering Mr. Flores's misjoinder claim. See State v. Bryant, 89 Wn.App. 857, 865 (1998).[3] Of course, the analysis for both joinder and severance is the same, as both inquiries require a determination of whether the joint trial prejudiced the defendant. See Bryant, 89 Wn. App. at 865. In both cases, courts consider the following factors: "(1) the strength of the State's evidence on each count; (2) the

[3] Mr. Flores raised the issue of joinder in his opening brief. See Appellant's Opening Brief at 25, n.4.

clarity of defenses as to each count; (3) instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial." State v. Russell, 125 Wn.2d 24, 63 (1994).

*3. Mr. Flores was Prejudiced by the Joint Trial.*

The State contends that Mr. Flores was not prejudiced by the joint trial of the counts involving SRY and PRY, and the counts involving HRR. First, the State argues that the strength of the State's case was the same on each set of counts, pointing out that the credibility of SRY and PRY was "unimpeachable," as was the testimony of HRR. See Response at 40. The State tries to brush aside the weaknesses in its case on the counts involving SRY and PRY by claiming that the twins could not have been motivated to fabricate their claims by immigration concerns, as PRY made claims about sexual abuse by Mr. Flores four years before the twins reported their allegations to police. See id. The State overlooks a number of important facts that are fatal to its theory. When PRY initially told her family that Mr. Flores had sexually abused her, SRY denied the allegations. RP VI 36. Moreover, in this case, there is objective evidence that on its own the case involving the twins was much weaker than it was when presented together with HRR's case. As discussed above and in Mr. Flores's opening brief, a case based on the twins' allegations about their

stepfather resulted in a hung jury. See CP 20. Finally, the fact that PRY made some allegations against Mr. Flores previously is not inconsistent with the possibility that the claims against Mr. Flores were exaggerated or embellished subsequently for immigration purposes. As noted above, the twins' application for immigration benefits was in part based on their allegations against Mr. Flores. See RP VI 95 – 97. Nor does it lend additional credibility to SRY, who previously threatened to make up a claim of sexual abuse to get what she wanted. [4]

Second, the State contends that the joint trial did not undermine the strength of Mr. Flores's defenses, because both defenses amounted to a general denial. Response at 39. But as explained in Mr. Flores's opening brief, presenting two credibility-based defenses to two separate sets of counts in a single trial significantly undermines the strength of the defenses. See State v. Sutherby, 165 Wn.2d 870, 885 (2009).

The State's arguments regarding cross-admissibility of the evidence of the two sets of counts are also unpersuasive. The evidence would not be cross-admissible as res gestae evidence as the alleged abuse of PRY and SRY is not part of the "same transaction" and was neither

[4] The State argues that some of the testimony regarding SRY's threats to fabricate claims of sexual abuse by her stepfather was inconsistent. See Response at 26. But, this does not change the fact that two witnesses testified that SRY had threatened to fabricate claims of sexual abuse. See RP IX 87, 149.

simultaneous nor necessary to paint a complete picture of the crimes alleged. See State v. Tharp, 125 Wn.2d 825, 831 – 32 (1995) (describing res gestae evidence as evidence of acts that are part of the same transaction that is necessary to paint a "complete picture" for the jury). The evidence would also not be admissible as common scheme or plan evidence. As discussed at length in Mr. Flores's opening brief, there were very little similarities between the alleged abuse of SRY and PRY, and the alleged abuse of HRR. It is simply not enough that SRY, PRY, and HRR were known to Mr. Flores through friends and family, and that some of the alleged abuse occurred in Mr. Flores's home.

Contrary to the State's assertions, in light of the foregoing, it is apparent that Mr. Flores was prejudiced as a result of the joinder of the two cases, and that the trial court abused its discretion when it joined the two cases over a defense objection and denied Mr. Flores's motion to sever.

*4. The Joint Trial of the Two Sets of Counts was not Harmless Error.*

The State further asserts that even if the trial court erred in joining the two sets of counts and denying Mr. Flores's motion to sever, the error was harmless. Again, the State's argument lacks merit. This is a case where the prejudice resulting from the joinder of the two sets of counts is objectively quantifiable. Specifically, the State's attempt to convict

another defendant, SRY and PRY's stepfather, based on their allegations alone proved fruitless, and resulted in the dismissal of the charges. This fact alone is sufficient to establish the likelihood of a different outcome if the two cases were tried separately. See Gunderson, 181 Wn.2d at 926.

### D. Mr. Flores's Right to Compulsory Process was Violated When the Trial Court Refused to Continue the Trial to Accommodate the Appearance of Out-of-Country Witnesses and The Prosecution Failed to Act in Good Faith in Securing Parole for Mr. Flores's Witnesses.

The State asserts that this Court should deny Mr. Flores's compulsory process claim for three reasons: (1) Mr. Flores waived his right to compulsory process; (2) Mr. Flores failed to establish a violation of his right to compulsory process; and (3) any potential error was harmless.

*1. Mr. Flores did not Waiver his Right to Compulsory Process.*

The State posits that Mr. Flores's right to compulsory process was waived when he chose to proceed to trial without securing the presence of two essential out-of-country witnesses, his wife and his daughter, chose to present the telephonic testimony of his wife, and chose not to present the testimony of his daughter. Response at 44. This argument can be quickly disposed of. Mr. Flores did not choose to proceed to trial without the in-court testimony of his wife and his daughter. Rather, Mr. Flores had no choice but to proceed without his out-of-country witnesses, given the

court's express refusal to grant any further continuances for the purpose of securing their appearance. On May 10, 2013, Mr. Flores's trial counsel requested a continuance of the trial for the purpose of securing the appearance of Mr. Flores's wife and daughter, who were at the time located in Mexico and were unable to reenter the United States without the prosecution's assistance because they are not citizens of the United States. See RP I 22 – 24. The court granted the motion to continue, but held that no additional continuances would be granted. The court stated: "I'm going to grant the motion to continue, but I'm not going to continue this again to deal with this out-of-state – out-of-country witness. This has to be done by the next hearing or it's just going to go." RP I 25. Mr. Flores was thereafter unable to secure the presence of his out-of-country witnesses. Given the trial court's ruling it is clear that Mr. Flores had no other choice but to proceed to trial without these witnesses. Because Mr. Flores had no choice but to proceed to trial without his witnesses, his case is distinguishable from United States v. Theresius Filippi, 918 F.2d 244, 247 (1st Cir. 1990), where the defendant did not even request a continuance to secure the presence of his foreign witness.

The record is unclear as to why Mr. Flores's daughter did not ultimately testify telephonically. However, even if the defense made an affirmative decision not to call Mr. Flores's daughter to testify

telephonically, after it became clear that securing her appearance would be impossible, such a decision could not constitute a waiver of Mr. Flores's right to compulsory process. The decision would have been made after the court ruled that it would not grant any further continuances to secure her live testimony. See RP I 25. Without the live testimony of Mr. Flores's daughter, it would have been much more difficult for the defense to rebut allegations that Mr. Flores sexually abused his daughter.

*2. Mr. Flores's Right to Compulsory Process was Violated.*

The State also asserts that there was no governmental act or omission that interfered with Mr. Flores's right to compulsory process, i.e., his ability to secure the appearance and testimony of his wife and his daughter at trial, and that therefore no violation of Mr. Flores's right to compulsory process could have occurred. See Response at 46. The State's argument is contrary to precedent. It is true that governmental conduct, either an act or omission by the sovereign, is necessary before a compulsory process violation can be found. See State v. McCabe, 161 Wn. App. 781, 787 (2011). But, the governmental conduct requirement can be satisfied by the action or inaction of the court itself or the prosecuting attorney's office. See e.g., Webb v. Texas, 409 U.S. 95, 98 (1972) (court's threatening comments to defense witness violated right to compulsory process); United States v. Hoffman, 832 F.2d 1299, 1304 (1st

Cir. 1987) (analyzing whether prosecutor's actions amounted to compulsory process violation).

In Mr. Flores's case, both the actions of the court and the inaction of prosecution interfered with Mr. Flores's ability to secure the presence of material out-of-country witnesses. First, the court refused to grant any additional continuances to permit Mr. Flores to secure the presence of his out-of-country witnesses, forcing Mr. Flores to proceed to trial without the witnesses. See RP I 25. Second, the prosecution failed to make a good faith effort to secure the appearance of Mr. Flores's out-of-country witnesses by exhausting all avenues to secure their appearance.

The State claims that it did all it could to secure the appearance of Mr. Flores's wife and daughter at trial. See Response at 48 – 49. But, the State's claim is belied by the record. All that the State did to assist the defense with securing the presence of Mr. Flores's out-of-country witnesses was email the Department of Justice to inquire whether Mr. Flores could qualify for an S-Visa. See CP 41. The State did not inquire about Mr. Flores's eligibility for special interest parole pursuant to 8 C.F.R. 212.5(b)(4), despite the fact that the defense specifically cited this provision in its email request to the State. See CP 41 – 42. Further, even after the DOJ attorney contacted by the State advised the prosecution that the Office of Enforcement Operations ("OEO"), was the branch of the

DOJ responsible for addressing requests pertaining to out-of-country witnesses, the State failed to make any efforts to contact the OEO, and instead advised Mr. Flores's trial counsel that nothing could be done to secure the appearance of Mr. Flores's out-of-country witnesses. See CP 39 – 40. Nor did the State make any efforts to contact Immigration and Customs Enforcement, the federal agency that administers the special interest parole program. This record simply does not support the conclusion that the State made a good faith effort to secure the appearance of Mr. Flores's out-of-country witnesses.

*3. The Violation of Mr. Flores's Right to Compulsory Process was not Harmless Beyond a Reasonable Doubt.*

Under the constitutional harmless error test, a conviction must be reversed, unless the State can establish that the constitutional error was harmless beyond a reasonable doubt. See State v. Brown, 147 Wn.2d 330, 341 (2002). The State claims that it has met its burden of demonstrating that the violation of Mr. Flores's right to compulsory process was harmless beyond a reasonable doubt because the defense would likely not have called Mr. Flores's daughter to testify given the trial court's ruling that it would not admit evidence regarding the alleged abuse of Mr. Flores daughter, and because Mr. Flores's wife's testimony was minimally helpful to Mr. Flores. See Response at 50.

The State overlooks the fact that the testimony of Mr. Flores's daughter was not only relevant to the allegations about acts of sexual abuse committed against her, but also to the allegations of sexual abuse involving SRY, PRY, and HRR. Mr. Flores's daughter was present much of the time that Mr. Flores was living with SRY and PRY, and when Mr. Flores's wife was babysitting HRR. RP IX 9, 99 – 100, 111 – 112. Had the defense been able to secure her live testimony, it is highly likely the defense would call her as a witness despite the risk that the State would attempt to admit evidence that Mr. Flores sexually abused her.

The State's argument also ignores the fact that evidence of the allegations of abuse by Mr. Flores against his daughter were in fact introduced at trial, as outlined in Section B of this brief, *supra*. This occurred despite the court's order that such evidence was not admissible. Given how the trial transpired, the State's argument that the defense would not have risked opening the door to such testimony loses much of its weight.

Further, notwithstanding the claimed inconsistencies in the telephonic testimony of Mr. Flores's wife, there can be no question that her testimony would have been more powerful in person.

It simply cannot be said that the absence of live testimony at trial from Mr. Flores's wife and daughter, two material witnesses who were

present during the period that the alleged offenses occurred, was harmless beyond a reasonable doubt.

### E. Counsel's Failure to Move for an Order Compelling the State to File a Special Interest Parole Request Constituted Ineffective Assistance of Counsel.

Finally, the State asserts that Mr. Flores cannot establish that he received ineffective assistance of counsel based on his attorney's failure to move for an order compelling the State to file a request with ICE for special interest parole for his out-of-country witnesses because he cannot establish prejudice. See Response at 52.

The State argues that prejudice cannot be established because even if the court ordered the State to request special interest parole for Mr. Flores's out-of-country witnesses, there is no guarantee that ICE would have, in fact, approved the special interest parole request. The State's argument is deficient for two reasons. First, a defendant asserting a claim of ineffective assistance of counsel need not establish that the outcome of his trial would have certainly been different, but for counsel's errors. Indeed, the defendant need not even show that "counsel's deficient performance more likely than not altered the outcome of the case." See State v. Thomas, 109 Wn.2d 222, 225 (1987) (internal citation and quotation marks omitted). Rather the defendant only needs to prove that there is a "reasonable probability" that the outcome would have differed

absent the deficient performance. See id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." See id. Thus, Mr. Flores need not prove that his out-of-country witnesses would have certainly been granted special interest parole to prevail on his ineffective assistance of counsel claim.

Second, there are many reasons why ICE would have likely granted Mr. Flores's special interest parole request. The testimony of Mr. Flores's wife and Mr. Flores's daughter was material to Mr. Flores's case. Mr. Flores was charged with serious state felonies and faced a lengthy prison sentence. Mr. Flores was extradited from Mexico to face prosecution in the United States. Last, it seems likely that ICE would at least be inclined to comply with a state court order, absent significant contravening factors, which do not appear to be at play here. There is at the very least a reasonable probability based on these factors that a special interest parole request would have been granted by ICE had Mr. Flores's attorney moved to compel the State to make a request for special interest parole.

## III. CONCLUSION

For the foregoing reasons, and the reasons outlined in Mr. Flores's opening brief, the Court should reverse the judgment and sentence entered in Mr. Flores's case and remand the case for a new trial.

DATED this 15th day of July, 2015.

Respectfully submitted,

LAW OFFICE OF CHRISTOPHER BLACK, PLLC

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CERTIFICATE OF SERVICE

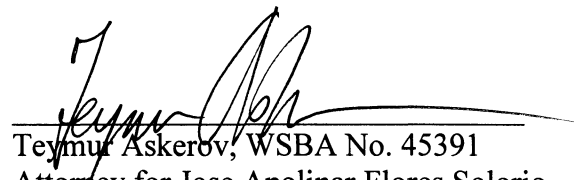
I hereby certify that on the date listed below, I served by United States Mail one copy of the foregoing on:

King County Prosecuting Attorney's Office
King County Courthouse, Room W554
516 Third Avenue
Seattle, WA 98104

DATED this 15th day of July, 2015.

Respectfully submitted,

LAW OFFICE OF CHRISTOPHER BLACK, PLLC



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