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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

State of Washington,

Plaintiff/Respondent,

v.

Jose Apolinar Flores-Solorio,

Defendant/Appellant.

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

The Honorable Jean Rietschel, Judge

APPELLANT'S OPENING BRIEF

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1. Whether the court's refusal to grant a continuance to accommodate the appearance of out-of-country witnesses coupled with the prosecutor's failure to file a request for parole of those witnesses

into the United States with federal immigration authorities violated Mr. Flores's right to compulsory process under the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington Constitution?

2. Whether trial counsel's failure to move for an order compelling the prosecutor to file a request with federal immigration authorities to parole material out-of-country witnesses into the United States violated Mr. Flores's right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington Constitution?

3. Whether the trial court abused its discretion when it denied Mr. Flores's motion to sever counts pertaining to different victims, where the State's evidence on counts 1 through 4, pertaining to two alleged victims, was significantly weaker than the evidence on counts 5 and 6, pertaining to a third alleged victim, and where Mr. Flores advanced different defenses against the two sets of counts?

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5. Whether the trial court abused its discretion when it denied Mr. Flores's motion for a mistrial after three witnesses testified about prior bad acts that the court previously held to be inadmissible?

III. STATEMENT OF THE CASE

A. Procedural History

On December 3, 2009, Appellant Jose Apolinar Flores-Solorio ("Mr. Flores") was charged with child molestation, child rape, and communicating with a minor for immoral purposes based on the alleged sexual abuse of twin sisters PRY and SRY, date of birth February 6, 1992, occurring between February 6, 2001, and February 5, 2006 (King County Superior Court Cause No. 09-1-07408-5 SEA). CP 1 – 3. On February 17, 2010, Mr. Flores was charged with rape of a child and child molestation for alleged acts involving HRR, date of birth May 26, 1997, occurring during the summer of 2003 (King County Superior Court Cause Number 10-1-00439-1 SEA). CP 10. On May 2, 2013, the two cases were joined on the State's motion, over Mr. Flores's objection. CP 35.

On January 21, 2014, the State issued an amended information charging Mr. Flores with one count of child molestation, RCW 9A.44.083, and one count of rape of a child in the second degree, RCW 9A.44.076, based on acts involving SRY; one count of child molestation in the first degree, and one count of child molestation in the second degree, RCW

9A.44.086, based on acts involving PRY; and one count of child molestation in the first degree and one count of rape of a child in the first degree, RCW 9A.44.086, based on acts involving HRR. CP at 56 – 58. Trial commenced on January 23, 2014.[1] RP V 1. On February 6, 2014, after a seven-day trial, the jury returned verdicts of guilty on all counts. CP 131 – 36.

Mr. Flores was sentenced on March 28, 2014. CP 145. The Court sentenced Mr. Flores to 101.5 months imprisonment on count four, the only count that carried a determinate sentence. Mr. Flores was also sentenced to 173.5 months to life on counts 1, 3, and 6; 245 months to life on count 2; and 279 months to life on count 5. CP 148 – 49. The Court ordered that the sentences for all counts would run concurrently. CP 149.

Mr. Flores timely filed a notice of appeal on March 28, 2014. CP 158. Mr. Flores now seeks review of the judgment and sentence issued by the superior court.

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[1] The Verbatim Report of Proceedings consists of 11 separately paginated volumes. Appellant refers to them as follows:

RP I – hearings held on 5/2/13; 1/13/14; 5/10/13; 1/14/14; and 1/15/14 (a portion of this hearing is contained in RP II); trial proceedings from 2/6/14; sentencing hearing held on 3/28/14; RP II – hearing held on 1/15/14; RP III – hearing held on 1/21/14; RP IV – hearing held on 1/22/14; RP V – trial proceedings from 1/23/14; RP VI – trial proceedings from 1/27/14; RP VII – trial proceedings from 1/28/14; RP VIII – trial proceedings from 1/29/14; RP IX – trial proceedings from 1/30/14; RP X – trial proceedings from 2/4/14; RP XI – trial proceedings from 2/5/14.

B. Facts

1. *Allegations Pertaining to SRY and PRY*

The charges against Mr. Flores in this case stem from allegations of sexual abuse by SRY, PRY, and HRR. RP V 20 – 21. The alleged acts of abuse occurred years before the initial information was filed by the State in 2009. Id.

SRY and PRY are twin sisters and the daughters of Norma Yanez ("Norma"), Mr. Flores's friend from his hometown in Mexico. RP IX 127. Norma and her husband Ernesto Romero ("Ernesto") purchased a house in Woodinville, Washington, around the time that Mr. Flores brought his family to the United States. RP IX 126. Between 2000 and 2002, Mr. Flores, his two children and his wife Isabel Sanchez ("Isabel" or "Ms. Sanchez"), rented a room in Norma's home. Ms. Sanchez and Mr. Flores's children were present in the United States for a substantial portion of the time that Mr. Flores lived with Norma Yanez and her family. RP IX 99. After Mr. Flores and his family moved out of Norma's home, they rented an apartment in Kirkland, Washington, for approximately two years, and then purchased their own home in Renton, Washington. RP IX 99. SRY and PRY often visited Mr. Flores and his family even after they moved out of the Woodinville home, as Ms. Sanchez frequently babysat Norma's children. RP IX 134 – 35.

The first time that SRY and PRY made allegations about sexual abuse by Mr. Flores was in 2009, after running away from home as a result of a dispute between SRY and Norma Yanez. RP VI 121 – 22. By this time, Mr. Flores had not been living with the twins for approximately seven years. RP IX 99. In 2007, SRY was sent back to Mexico for approximately eight months by her mother Norma after accusing her stepfather Ernesto of sexual abuse. RP X 55. When SRY returned to Washington from Mexico, the allegations of abuse against Ernesto continued to be a source of tension in the family, which ultimately led to SRY and PRY running away to a friend's house, and reporting to authorities that SRY had been sexually abused by Ernesto and that they had both been sexually abused by Mr. Flores, between 2001 and 2006. RP X 55.

Prior to making allegations of sexual abuse against Ernesto and Mr. Flores, SRY and PRY did not have permanent immigration status in the United States. RP VI 205. SRY and PRY both received U-Visas as a result of their cooperation with authorities in the investigations of Ernesto and Mr. Flores. RP VI 98, 205; RP II 83 – 85.

Ernesto was ultimately tried based on the twins' accusations, but the trial resulted in a hung jury. CP 20. The charges against Ernesto were subsequently dismissed by the State. CP 20.

The defense attempted to establish at Mr. Flores's trial that the twins had fabricated the allegations against Ernesto and Mr. Flores for the purpose of obtaining immigration benefits and thus depriving their mother of the ability to return them to Mexico at will. RP X 87. The defense also introduced evidence significantly undermining the twins' credibility, in particular, testimony by Norma Yanez and the twins' half-brother, KR, that SRY had on one occasion, during a fight with her mother, threatened to make up allegations of sexual abuse by Ernesto. RP IX 87, 149.

2. Allegations Pertaining to HRR

The State alleged that the abuse of HRR took place in 2003. During the summer of 2003, HRR's mother, Yrma Aguilar, hired Mr. Flores's wife, Ms. Sanchez, to babysit HRR and her older sister, DR. RP V 51 – 52. On weekdays, Yrma would drop HRR and her sister off at Mr. Flores and Ms. Sanchez's apartment in the mornings and pick them up after work in the evenings. RP V 51 – 52. Ms. Sanchez and Mr. Flores's daughter were present in the apartment during the times that HRR and DR were in the home. RP IX 111 – 112. HRR did not first report the allegations against Mr. Flores until 2009, some six years after the alleged abuse occurred. RP V 55. HRR's allegations were precipitated by a conversation with an older girl, CP, about sexual abuse. RP V 66 – 67, 106. At the time, CP was living with HRR and her family because her

mother's boyfriend had made sexual advances towards her. RP V 66 – 67. During the conversation between HRR and CP, CP disclosed to HRR that her mother's boyfriend had made sexual advances towards her. RP V 106. After CP's disclosure, HRR claimed for the first time in her life that Mr. Flores had sexually abused her during the summer of 2003. RP V 67, 106. The defense sought to rebut HRR's allegations by establishing that HRR, 12 years old at the time, fabricated the story to develop a stronger bond with 16-year-old CP, whom she viewed as a role model, and became too scared to retract the false allegations that she made after the police became involved. RP X 80 – 83.

3. Out-of-Country Witnesses

Mr. Flores was extradited from Mexico to face the charges in this case. RP II 110. When Mr. Flores relocated to Mexico, his wife Ms. Sanchez, his daughter CF, and his son also moved back to Mexico with him. Without legal status in the United States, Ms. Sanchez and CF could not reenter the United States to testify at Mr. Flores's trial. RP I 22 – 23. Of course, both Ms. Sanchez and CF were crucial to Mr. Flores's defense because Ms. Sanchez and CF would have been present when the alleged abuse of PRY, SRY, and HRR occurred. RP I 22 – 23; RP IX 97 – 125. At an omnibus hearing on May 10, 2013, the defense requested a continuance of the trial date on the basis that defense counsel had found a

mechanism for getting Ms. Sanchez and CF into the United States with the prosecutor's assistance. RP I 22 – 23. Specifically, the prosecutor would have to file a request for parole with federal immigration authorities. RP I 22 – 23. The Court granted the continuance, but admonished defense counsel that no future continuances would be granted to secure the appearance of the out-of-country defense witnesses. RP I 25.

Subsequently, defense counsel emailed the prosecuting attorney's office in the hope of having the latter submit a request to federal immigration authorities to have Ms. Sanchez and CF paroled into the United States. CP 41 – 42. In the email, counsel advised the prosecutor of two mechanisms under federal law for having witnesses admitted to the United States for the purpose of testifying in judicial proceedings. CP 41 – 42. The first was an S-Visa under 8 U.S.C. 1182(a)(5)(A). CP 41 – 42. The second was humanitarian parole or special interest parole under 8 C.F.R. 212.5(b)(4). CP 41 – 42. The prosecuting attorney's office inquired with the U.S. Department of Justice ("DOJ") about the possibility of having the federal government grant the defense witnesses an S-Visa, but failed to inquire about parole under 8 C.F.R. 212.5(b)(4) with Immigration and Customs Enforcement ("ICE"). CP 39 – 41. A DOJ attorney erroneously advised the prosecutor that there is no way to have defense witnesses in criminal proceedings admitted into the United States.

CP 39. Based upon the DOJ attorney's erroneous advice, the prosecutor took no action to make a formal request with ICE to have Ms. Sanchez and CF paroled into the United States.[2] On June 21, 2014, the prosecuting attorney's office emailed defense counsel erroneously advising her that there was no mechanism for getting defense witnesses into the United States under federal law. CP 39. Counsel failed to take any further measures to compel the prosecuting attorney's office to file a request for parole with federal immigration authorities. CP 33 – 34. Specifically, counsel never filed a motion for an order compelling the prosecuting attorney's office to make such a request.

4. Pretrial Motions

Pretrial motions were heard in Mr. Flores's case on January 15, 2014. The defense moved to sever the counts relating to the alleged abuse of HRR from the counts pertaining to SRY and PRY. RP II 13. The basis for the defense motion was that: (1) the State's evidence on the counts relating to SRY and PRY was weaker because there was significantly more evidence casting doubt upon SRY and PRY's credibility; (2) that Mr. Flores intended to present different defenses against the two sets of charges; and (3) that the evidence from the two cases would not be cross-

[2] Notably, the prosecutor did not even contact ICE, the federal agency that administers the special interest parole.

admissible. RP II 17 – 18. The Court denied the defense motion to sever, holding that the defense did not establish sufficient grounds to sever the cases. RP II 25.

The State moved to admit evidence of prior bad acts pursuant to ER 404(b). RP II 61. The evidence was primarily composed of testimony that Mr. Flores had sexually abused three other minor girls in addition to SRY, PRY, and HRR. RP II 61. The three other girls were MG, EG, and CF, Mr. Flores's daughter. RP II 61. The State argued that the evidence was admissible to show a common scheme or plan. RP II 61 – 63. Specifically, the State alleged that the scheme or plan was evidenced by the ages of the alleged victims, the fact that Mr. Flores knew the alleged victims through friends or family, and that the alleged victims were all of Mexican decent. RP II 61 – 63.

The incident involving MG allegedly occurred while Mr. Flores was living on MG's parent's property. RP VII 77 – 78. MG's mother was a friend of Mr. Flores and permitted Mr. Flores to park his van in their driveway and use their facilities. RP VII 77 – 78. MG alleged that one night, when Mr. Flores came in to use the bathroom, he touched her thigh while she was watching television. RP VII 78 – 82. The incident involving EG allegedly occurred when Mr. Flores, whom she knew through his children, came over to her family's apartment to use the

bathroom while nobody was home. EG alleged that after she let him in, Mr. Flores attempted to expose himself to her and then followed her to the laundry room where he rubbed against her from behind.[3] RP VII 12 – 16.

The State alleged that CF, Mr. Flores's daughter, had been abused by Mr. Flores simultaneously with PRY and SRY, and that Mr. Flores threatened the twins that he would commit additional abuses against CF if they ever told anyone that he had abused them. RP II 62, 99 – 100.

The Court granted the State's motion to admit evidence regarding MG and EG on the ground that the State had established that the evidence was relevant to prove a common scheme or plan under ER 404(b). RP II 66 – 69. However, the Court refused to admit evidence regarding CF because CF had denied that Mr. Flores had sexually abused her. RP II 67. The trial court expressly held that evidence regarding alleged abuse of CF would be inadmissible at trial. RP II 67.

5. *Trial*

Trial commenced on January 23, 2014. The State called numerous witnesses, including SRY, PRY, HRR, MG, and EG, relatives of the alleged victims, police officers and investigators involved in the investigation of the alleged abuse, and medical experts. RP V – RP X.

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[3] EG also testified on redirect that on a different occasion Mr. Flores ran his hand across her chest. RP VII 67.

The defense called Norma Yanez, SRY and PRY's mother, their half-bother KR, and DR, HRR's sister. RP IX 3 – 151. Mr. Flores's wife Ms. Sanchez testified by telephone from Mexico. RP IX 97 – 121.

DR, HRR's sister, testified that she did not recall any occasions when HRR was left with Mr. Flores without her. RP IX 8, 13. DR also testified that she had never observed any abuse of HRR by Mr. Flores or even heard of any abuse until 2009, when HRR disclosed the alleged abuse to her family. RP IX 13. Ms. Sanchez testified that she never left HRR alone with Mr. Flores during the summer that she babysat her. RP IX 112.

The defense also introduced evidence tending to establish that SRY and PRY received immigration benefits as a result of their cooperation with law enforcement in the investigation of Mr. Flores. RP VI 98, 205. Norma and KR testified about SRY's threat to make up false allegations of sexual abuse against her stepfather. RP IX 87, 149.

Significantly, at trial the State introduced no physical evidence of abuse as to any of the counts. Thus, the primary evidence against Mr. Flores was the testimony of the alleged victims.

During the State's case-in-chief, three of the State's witnesses violated the court's pretrial order excluding evidence or testimony about alleged abuse of CF. On day two of the trial, Kirkland Police Department

Officer Janelle McMillian, the police officer who initially investigated HRR's case, testified that she had been contacted by another law enforcement agency and notified that they had arrested Mr. Flores based on "allegations involving him and two children" and that "they were also concerned about his daughter." RP V 148. Outside the presence of the jury, defense counsel asked the Court to admonish Officer McMillian not to mention the abuse of CF. RP V 155. On day three of the trial, PRY testified about the alleged abuse of CF on direct examination by the State. RP VI 23. Specifically, when responding to the prosecutor's questions about whether she believed that there was other abuse going on, PRY testified that Mr. Flores's daughter, CF, would say to her about the abuse: "why don't you let yourself?" RP VI 24. Defense counsel immediately objected to the testimony and the objection was sustained by the trial court. RP VI 24. Following PRY's testimony, outside the presence of the jury, the defense moved for a mistrial on the ground that the testimony left the jury with the impression that Mr. Flores's daughter was being abused as well. RP VI 72. The Court denied the defense motion for mistrial. RP VI 117.

On day four of the trial, the State's 404(b) witness, EG, stated the following on direct examination: "[W]hen I told PRY what happened [that Mr. Flores touched her], she told me that [Mr. Flores] had something

to do with his daughter as well." RP VII 20. Defense counsel once again objected and asked for a recess. RP VII 20. During the recess, counsel moved for mistrial, arguing that no curative instruction could cure the prejudice suffered by Mr. Flores as a result of EG's testimony about Mr. Flores abusing his daughter, especially in light of the previous testimony by PRY. RP VII 21. The trial court permitted defense counsel to voir dire EG about her statement outside the presence of the jury. RP VII 28. During voir dire, EG testified that she had informed the prosecutor that the twins had told her that Mr. Flores had abused his daughter. RP VII 32. However, neither the prosecutor nor his paralegal could remember the conversation. RP VII 40 – 41, 142. Further, the prosecutor admitted that he had not instructed EG not to mention CF during her testimony. RP VII 22. Despite the clear prejudice suffered by Mr. Flores, the court denied Mr. Flores's motion for mistrial, and instead instructed the jury not to consider any of EG's testimony regarding what PRY or SRY had told her. RP VII 47 – 48. The trial court permitted counsel to renew the motion after reviewing of the prosecutor's notes regarding telephone conversations with EG. RP VII 47. When the prosecutor's notes showed no record of the conversation about Mr. Flores's alleged abuse of EG, counsel once again moved for mistrial and for dismissal pursuant to CrR 8.3(b). RP VII 137. The trial court denied both motions. RP VII 146.

On February 6, 2014, the jury convicted Mr. Flores Solorio on all counts. CP 131 – 136. The court sentenced Mr. Flores on March 28, 2014. CP 147. Mr. Flores is currently in custody at Coyote Ridge Corrections Center serving multiple indeterminate sentences.

IV. ARGUMENT

A. Mr. Flores's Right to Compulsory Process was Violated when the Court Refused to Continue the Trial Date to Accommodate the Appearance of Out-of-Country Witnesses and the Prosecutor Failed to File a Request for Parole.

The trial court's refusal to continue the trial to accommodate the appearance of material out-of-country defense witnesses and the prosecutor's failure to file a request for parole of the witnesses into the United States violated Mr. Flores's right to compulsory process under the Sixth Amendment to the United States Constitution and Article I, Section 22, of the Washington Constitution.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor." Article I, Section 22, of the Washington Constitution provides that: "[i]n all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face [and] to have compulsory process to compel the attendance of

witnesses in his own behalf." Claims involving violations of Sixth Amendment rights are reviewed de novo. State v. Iniguez, 167 Wn.2d 273, 280 – 81 (2009). A constitutional error is presumed prejudicial. State v. Maupin, 128 Wn.2d 918, 924 (1996). On appeal, the State bears the burden of proving beyond a reasonable doubt that the result would have been the same absent the error. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); State v. Easter, 130 Wn.2d 228, 242 (1996).

In order to establish a compulsory process violation, a defendant must establish that the government's action interfered with his ability to mount a defense. State v. McCabe, 161 Wn. App. 781, 787 (2011). Specifically, the defendant must show that the "contested act or omission" is "attributable to the sovereign" and that it caused "the loss or erosion of material testimony that is favorable to the accused." Id.

In United States v. Theresius Filippi, 918 F.2d 244, 247 (1st Cir. 1990), the United States Court of Appeals for the First Circuit held that the defendant's Sixth Amendment right to compulsory process and Fifth Amendment right to due process were violated when the government failed to file a request to parole a defense witness into the United States with federal immigration authorities. See id. at 248. In that case, the defense filed a motion to compel the United States Attorney's Office to

file a request with federal immigration authorities to parole a material witness into the United States. See id. at 246. The trial court ordered the prosecutor to file a request for parole with immigration officials. See id. The prosecutor failed to take any action, and instead filed a motion to reconsider with the court. See id. The motion was never resolved, as the defense agreed to proceed to trial without the witness. See id.

On appeal, the First Circuit held that the United States Attorney's failure to make a good faith request for Special Interest Parole with immigration authorities violated the defendant's Sixth Amendment right to compulsory process and Fifth Amendment right to compulsory process. See id. at 247. The court rejected the prosecution's argument that United States courts do not have the power to subpoena foreign witnesses. See id. The court explained that the subpoena power is not at issue where a witness is willing to appear at trial, but is prevented from doing so by United States immigration laws. See id. Nonetheless, the First Circuit ultimately affirmed the defendant's conviction on the ground that counsel's decision to proceed to trial without the witness constituted a knowing and voluntary waiver of the defendant's right to compulsory process. Id. at 248.

In light of the holding in Theresius Filippi, it is evident that Mr. Flores's right to compulsory process was violated. Mr. Flores's wife, Ms.

Sanchez, and his daughter, CF, were clearly material to Mr. Flores's defense. Mr. Flores's wife and daughter were present throughout most of the time that Mr. Flores lived with SRY and PRY's family. RP IX 97 – 124. CF denied allegations of abuse by Mr. Flores. RP II 64 – 65, 67. Ms. Sanchez and CF were also present in the Flores's apartment during the summer of 2003, when the alleged abuse of HRR occurred. RP IX 9, 111 – 112. Thus, both Ms. Sanchez and CF could have provided "material testimony that is favorable" to Mr. Flores. See McCabe, 161 Wn. App. at 787. CF's testimony became even more critical after the states' witnesses repeatedly violated a court order by referencing alleged abuse of CF by Mr. Flores.

Moreover, just as in Theresius Filippi, the prosecutor's failure to act resulted in the loss or erosion of the testimony of material defense witnesses. See Theresius Filippi, 918 F.2d at 247. Mr. Flores's defense attorney, upon the advice of an immigration consultant, asked the prosecutor to assist the defense with obtaining either parole or visas for out-of-country defense witnesses. RP I 22 – 24; CP 41 – 42. Counsel even provided the State with two potential mechanisms that could be used to admit Ms. Sanchez and CF into the country for the purpose of testifying at Mr. Flores's trial. CP 41 – 42. These included an S-Visa pursuant to 8 U.S.C. 1101(a)(15)(S) and special interest parole under 8 C.F.R. §

212.5(b). CP 41 – 42. The prosecutor inquired with the United States Department of Justice about obtaining an S-Visa for Ms. Sanchez and CF, but was erroneously advised that there were no avenues that would allow an out-of-country defense witness to enter the United States. CP 39. This advice was, in fact, incorrect. Under the Significant Public Benefit Parole Program, ICE can at the request of a state prosecuting attorney's office admit a foreign national into the United States for the purpose of testifying in a judicial proceeding. The relevant regulation, 8 CFR § 212.5(b)(4) provides that ICE may parole into the United States: "Aliens who will be witnesses in proceedings being, or to be conducted by judicial, administrative, or legislative bodies in the United States." Notably, the regulation does not require that the witness be favorable to the prosecution. However, ICE does require that a state prosecutor make the request for special interest parole. "Tool Kit for Prosecutors," Immigration and Customs Enforcement 2011, at 24 – 26, http://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf.

Based on the erroneous advice received from the Department of Justice, the prosecuting attorney did not take any further action or even attempt to contact ICE to request parole for Ms. Sanchez and CF. Instead, the prosecutor advised defense counsel that there was no mechanism for

securing Ms. Sanchez and CF's entry into the United States for trial. CP 39. As a result of the prosecutor's failure to act, Ms. Sanchez and CF were unable to enter the country for Mr. Flores's trial.

There can be no question that the prosecuting attorney's failure to make a good faith request for parole in Mr. Flores's case violated his right to compulsory process under the Sixth Amendment to the United States Constitution and Article I, Section 22, of the Washington Constitution. See Theresius Filippi 918 F.2d at 247.

Nor can it be said that Mr. Flores waived his right to compulsory process by proceeding to trial. Unlike the defendant in Theresius Filippi, Mr. Flores had no choice but to proceed to trial, as the trial court made clear that it would deny any future motions to continue the trial based on the inability to secure out-country-witnesses. RP I 25.

The State will likely attempt to argue that the compulsory process violation in this case was harmless because Ms. Sanchez testified telephonically at trial. RP IX 97 – 124. This argument is unpersuasive. First, telephonic testimony is no substitute for live in-person testimony. Kinsman v. Englander, 140 Wn. App. 835, 843 (2007) ("[O]ur court rules strongly favor the testimony of live witnesses whenever possible so that the fact finder may observe the witnesses' demeanor to determine their veracity."), superseded as recognized in In re Marriage of Swaka, 179 Wn.

App. 549 (2014). Second, the prosecution's failure to request parole for Ms. Sanchez and CF completely deprived the defense of CF's testimony. Although, the defense ultimately decided not to call CF to testify telephonically, it is probable that the decision to call CF would have been different if she was available in person. CF's live testimony would have been a heavy counterweight to SRY and PRYs allegations of abuse.

Because the prosecuting attorney's failure to make a good faith request for parole and the court's refusal to continue the trial to accommodate the appearance of material out-of-country witnesses violated Mr. Flores's right to compulsory process, and because the State will be unable to establish that Ms. Sanchez and CF's absence at trial was harmless beyond a reasonable doubt, Mr. Flores's conviction should be reversed. See State v. Brown, 147 Wn.2d 330, 341 (2002).

B. Trial Counsel's Failure to File a Motion to Compel the State to Request Parole for Out-of-Country Witnesses Violated Mr. Flores's Right to Effective Assistance of Counsel.

Mr. Flores's conviction should be reversed because his attorney's failure to file a motion to compel the State to request parole for Ms. Sanchez and CF violated his right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, Section 22, of the Washington Constitution.

The Sixth Amendment protects a defendant's right to effective assistance of counsel. To establish ineffective assistance of counsel a defendant must satisfy the two-prong test established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 688, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See State v. Sandoval, 171 Wn.2d 163, 168 (2011). Specifically, the defendant must show that: (1) counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant. Id. Claims of ineffective assistance of counsel are reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883 (2009).

Where a defendant claims that counsel's performance was ineffective based on counsel's failure to file a particular motion, the defendant must show that there were no "legitimate strategic or tactical reasons" for counsel's decision not to file the motion. State v. Rainey, 107 Wn. App. 129, 135 (2001). Additionally, to establish prejudice as a result of counsel's performance, the defendant must show that the motion would have likely been granted and that there is a reasonable probability that the outcome of the trial would have been different as a result. Id.

In Mr. Flores's case, there were absolutely no legitimate strategic or tactical reasons for counsel's failure to file a motion for an order compelling the State to request parole for Ms. Sanchez and CF. See id.

Indeed, it is clear from the record that counsel desperately wanted to secure the appearance of Ms. Sanchez and CF at trial and had exhausted all available avenues for getting them into the United States short of filing a motion to compel. RP I 22 – 24.

Further, such a motion would have likely been granted by the trial court based on the holding in Theresius Filippi. See id. Finally, there is a reasonable probability that the outcome of the trial would have been different if Ms. Sanchez and CF testified. See id. As discussed above, Ms. Sanchez and CF were material witnesses whose live testimony could have shed significant doubt on SRY, PRY, and HRR's allegations of sexual abuse because (at least) of their presence at the time and place of the allegations and the fact that they did not witness abuse or suspicious behavior. See RP IX 9, 111 – 112. It cannot seriously be denied that Ms. Sanchez and CF's testimony could have created serious doubts about Mr. Flores's guilt in the minds of the jury members.

Because trial counsel's failure to file a motion for an order compelling the State to request parole for Ms. Sanchez and CF violated Mr. Flores's right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, Section 22, of the Washington Constitution, Mr. Flores's conviction should be reversed.

C. The Trial Court Abused its Discretion When it Denied Mr. Flores's Motion to Sever Counts.

Mr. Flores's conviction should be reversed because the trial court abused its discretion when it denied Mr. Flores's motion to sever counts.[4]

Severance of charges "is important when there is a risk that the jury will use the evidence of one crime to infer the defendant's guilt of another or to infer a general criminal disposition." State v. Sutherby, 165, Wn.2d 870, 883 – 84 (2009). When the alleged crimes are sex offenses, joinder "can be particularly prejudicial," even where "the jury is properly instructed to consider each crime separately." Id. "Defendants seeking severance have the burden of demonstrating that a trial involving both counts would be so manifestly prejudicial as to outweigh the concern for judicial economy." State v. Markle, 118 Wn.2d 424, 438 (1992) (citing State v. Bythrow, 114 Wn.2d 713, 718 (1990)).

CrR 4.4(b) provides:

> The court . . . on application of the defendant . . . shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that

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[4] Mr. Flores also submits that the trial court erred in joining SRY and PRY's case with HRR's case over his objection. RP I 11 – 14, 18; CP 35. The analysis for misjoinder is identical to the analysis for severance motions. See State v. Russell, 125 Wn.2d 24, 63 (1994). The discussion herein focuses on Mr. Flores's motion for severance. However, the arguments advanced are equally applicable to analyzing the trial court's decision to join the two cases.

> severance will promote a fair determination of the defendant's guilt or innocence of each offense.

CrR 4.4(b). In determining whether to sever charges, courts consider: "(1) the strength of the State's evidence on each count; (2) the 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." Russell, 125 Wn.2d at 63.

In Mr. Flores's case, the trial court abused its discretion when it denied Mr. Flores's severance motion because it improperly weighed the relevant factors in conducting its severance analysis.

First, the evidence on the counts pertaining to PRY and SRY, counts 1 through 4, was substantially weaker than the evidence on counts 5 and 6, pertaining to acts involving HRR. The primary evidence of guilt against Mr. Flores was the testimony of the alleged victims. Thus, the credibility of the alleged victims was vital to the State's case.

However, there was evidence that cast serious doubt on the twins' credibility. Specifically, the defense introduced evidence that SRY had previously threatened to fabricate claims of sexual abuse, that the twins' own mother disbelieved their claims and that the twins were able to obtain immigration benefits as a result of their allegations against Mr. Flores, i.e., a U-Visa for victims of certain crimes which permitted them

to remain in the United States. RP VI 98, 205. The court was also aware from the outset of the trial that the twins' stepfather, Ernesto, had been tried based on very similar allegations by the twins and that his trial resulted in a hung jury. CP 20. Ernesto's charges were later dismissed by the State. CP 20. On the other hand, there was very little evidence to undermine HRR's credibility. The fact that the State's evidence on the counts involving the twins was significantly weaker than the State's evidence on the counts involving HRR, weighs heavily in favor of severance. State v. Hernandez, 58 Wn. App. 793, 800 (1990), overruled on other grounds by State v. Kjorsvik, 117 Wn.2d 93, 99 (1991).

Second, Mr. Flores offered separate defenses against the two sets of counts and the joint trial seriously undermined the strength of his defenses. Mr. Flores's defense against the counts involving the twins was that the twins had fabricated allegations of sexual abuse in order to become eligible for a U-Visa, so that their mother could not send them back to Mexico. RP X 87. Mr. Flores's defense against the counts involving HRR focused on establishing that HRR made up the story about abuse by Mr. Flores to build a stronger bond with CP, a sixteen-year-old who had disclosed to HRR that her mother's boyfriend had made sexual advances towards her. RP X 80. Presenting these two defenses together unquestionably weakened the credibility of the

defenses. See Sutherby, 165 Wn.2d at 885 (severance appropriate where credibility of defenses undermined). This is because the simple fact of being required to confront two separate sets of charges at the same time with completely different credibility-based defenses inherently and significantly weakens each of those defenses. Indeed, it appears that the State intentionally attempted to confuse the jury by asking HRR, a natural born United States citizen, questions about her immigration status. RP V at 20.

Third, while the jury was instructed to consider the counts separately, this factor does not alone justify the court's denial of Mr. Flores's motion to sever. See State v. Harris, 36 Wn. App. 746, 750 (1984).

Finally, the trial court assumed in considering Mr. Flores's motion that evidence of the alleged offenses against SRY and PRY and the alleged offenses against HRR would have been cross-admissible in separate trials under ER 404(b). The trial court's assumption was incorrect. It is highly likely that evidence of the two sets of counts would not be cross-admissible in separate trials. Surely, the evidence would not be cross-admissible to prove intent, as the only offenses that Mr. Flores was charged with were child molestation and child rape, and intent was therefore not a material issue before the jury. See State v. Ramirez, 46

Wn. App. 223, 227 (1986) (holding that prior bad acts are not admissible to prove intent in indecent liberties case where the act itself is sufficient proof that the act is done for sexual gratification).

The evidence likewise would not have been cross-admissible to prove a common scheme or plan. In order to be admissible to prove a common scheme or plan there must be "substantial similarity between the prior bad acts and the charged crime." State v. DeVincentis, 150 Wn.2d 11, 21 (2002). In DeVincentis, the Washington Supreme Court found that the trial court did not err in admitting prior bad acts evidence for the purpose of proving a common scheme or plan where the victim in the case at bar and the victim of a previous sexual assault were approximately the same age, the defendant met both victims through a "safe channel," i.e., children he already knew, and then lured them into his home, wore a bikini or g-string underwear with the intent of reducing the children's discomfort with nudity, and had both victims masturbate him until climax. Id. at 21. The Supreme Court noted, however, that the trial court properly excluded evidence of sexual abuse allegations that shared little factual similarities with the charged offense, and that the trial court's scrupulous application of 404(b) was exemplary, ensuring that mere propensity evidence was not admitted at trial. Id. at 23.

In Mr. Flores's case, there is a marked lack of similarity between the alleged abuse of HRR and the alleged abuse of the twins. The twins claimed they were much older when they were abused by Mr. Flores, between 9 and 14 years old, whereas HRR claimed that she was only 6 years old. RP VI 15, 150; RP V57. Similarly, with HRR, there was no alleged grooming behavior, while SRY and PRY claimed that Mr. Flores groomed them for sex by talking to them about sex and exposing them to pornography. RP VI 27, 138. Most pertinently, the abuse of SRY and PRY was alleged to have gone on for years, while HRR claimed that she was assaulted by Mr. Flores on only a number of occasions during the summer of 2003, when Mr. Flores's wife, who was HRR's babysitter, would leave her alone with Mr. Flores to go to the grocery store or run other errands. RP V 109 – 111. Due to the lack of factual similarity between the two cases, it is highly likely that evidence of the two sets of counts would not be cross-admissible in separate trials. It is not enough that both sets of charges involved sexual abuse of minors. See State v. Slocum, 183 Wn. App. 438, 450 (2014) ("[T]he evidence must demonstrate not merely similarity in results, but such occurrence of 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.").

Because the strength of the State's case varied greatly on the counts involving the twins and the counts involving HRR, joinder of the two cases undermined the strength of Mr. Flores's respective defenses, and evidence of the two sets of counts would not be cross-admissible in separate trials, the trial court committed a manifest abuse of discretion by denying Mr. Flores's motion to sever. See Sutherby, 165 Wn.2d at 885. Further, because a joint trial of the two cases was unfairly prejudicial, Mr. Flores's conviction should be reversed. See id. at 887.

D. The Trial Court Erred by Admitting Testimony About the Alleged Sexual Abuse of MG and EG under ER 404(b).

The trial court abused its discretion when it admitted testimony about the alleged sexual abuse of MG and EG pursuant to ER 404(b) to prove that the alleged abuse of SRY, PRY, and HRR was part of a common scheme or plan (which was the only basis for the ruling). Because admission of the evidence resulted in unfair prejudice, Mr. Flores's conviction should be reversed and the case should be remanded for a new trial.

ER 404(b) provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent,

> preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b). Before evidence can be admitted under 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). A trial court's admission of evidence under 404(b) is reviewed under the abuse of discretion standard. State v. Hudson, 150 Wn. App. 646, 652 (2009).

"The potential prejudice from admitting prior acts is at its highest in sex offense cases." State v. Gower, 179 Wn.2d 851, 857 (2014). As noted above, in order to admit evidence of prior sex offenses to prove the existence of a common scheme or plan under ER 404(b) a trial court must find that there exits "substantial similarity between the prior bad acts and the charged crime." DeVincentis, 150 Wn.2d at 21. Division III of the Court of Appeals recently held that a trial court abuses its discretion where it admits evidence of prior allegations of child molestation to establish that the defendant had a "plan to molest children." Slocum, 183 Wn. App at 453. Specifically, the court explained that prior opportunistic

acts of child molestation are inadmissible to prove a common scheme or plan pursuant to ER 404(b) where all that the acts establish is that the defendant would molest young girls if presented the opportunity and there are no substantial similarities between the charged acts and the prior bad acts. Id. at 422.

In Slocum, the defendant was charged with first degree child molestation and third degree child rape of his step-granddaughter. Id. at 443. The abuse was alleged to have continued for many years, and included touching of the victim's vagina and breasts, and vaginal penetration with the fingers on one occasion. Id. At trial, the State moved to admit testimony pursuant to ER 404(b) that the defendant had sexually assaulted the alleged victim's mother and aunt many years ago when they were children. Id. at 445. The evidence consisted of the mother's testimony that on one occasion, when she was approximately 12 years old, the defendant laid down on the floor with her and touched her breasts under her shirt, and the aunt's testimony that on one occasion when she was 12 years old the defendant put his hands on her breasts while helping her apply sunscreen. Id.

The State argued that these acts were admissible to prove a common plan to molest children. Id. at 443. The State described the plan as follows: "The defendant would find victims he had access to and

would abuse them in his home. He would perform the same abuse on similar aged children. Lastly, he was in the same position of authority over each child." Id. The trial court admitted the prior bad acts evidence. Id. at 446.

The Court of Appeals reversed, holding that evidence of the mother's abuse and the aunt's abuse was inadmissible because the acts they described were nothing more than opportunistic crimes and precisely the type of propensity evidence that ER 404(b) prohibits. Id. at 456. The court explained that in order for prior bad acts evidence to be admissible to prove a common scheme or plan under ER 404(b), there must be sufficient similarities between the prior bad acts and the charged crime to establish that "the charged crime was carried out in a manner devised by the defendant and used by him more than once." Id. The court further held that because of the "highly prejudicial" effect of prior bad acts in sex offense cases, the admission of the prior bad acts evidence in Slocum was not harmless error. Id. Mr. Slocum's conviction was therefore overturned. Id.

In the instant case, the trial court erred when it permitted the State to introduce the testimony of MG and EG about prior sexual abuse by Mr. Flores in order to establish the existence of a common scheme or

plan under ER 404(b), because the alleged incidents involving MG and EG were nothing more than isolated opportunistic acts. See id.

During the pretrial hearing, the State argued that the prior bad acts evidence involving MG and EG was admissible to prove a common scheme or plan because of the age of the alleged victims, the fact that Mr. Flores knew the alleged victims through friends or family, and that all of the victims were of Mexican descent. RP II 61 – 63. The State also argued that the alleged incident involving MG occurred while she was watching television and that the twins had reported that they had sometimes been touched by Mr. Flores while watching television. RP II 62 – 63. Finally, the State pointed out that after the alleged incident involving EG, Mr. Flores offered EG $20 not to tell anyone what happened and that this was similar to rewards given to SRY and PRY by Mr. Flores. RP II 62 – 63. The court admitted the prior bad acts evidence pertaining to EG and MG for the purpose of establishing the existence of a common scheme or plan. RP II 67 – 69.

MG testified that when she was approximately six or seven years old, Mr. Flores was parking his van in her mother's front yard and using their facilities, i.e., their restroom and kitchen, as he did not have a place to live. RP VII 77 – 78. She further testified that one night, when everyone else was asleep, Mr. Flores came inside the home and

inappropriately touched her thigh while she was watching television. RP VII 78 – 82.

EG testified that when she was approximately ten or eleven years old, Mr. Flores, whom she met through his children, came over to her house when no one was home to use the bathroom and tried to expose himself to her. RP VII 12 – 16. She testified that afterwards, Mr. Flores followed her to the laundry room in her apartment complex hugged her from behind and rubbed his "private part" against her. RP VII 12 – 16. After the incident Mr. Flores allegedly offered her $20 not to tell anyone about the incident. RP VII 15. EG also testified about another incident when Mr. Flores allegedly glided his hand across her chest and complimented her on her breasts. RP 67.

It is clear that the alleged incidents involving MG and EG were nothing more than opportunistic crimes, just like those introduced by the State in Slocum, and that testimony about the incidents should not have not been admitted under the common scheme or plan exception to ER 404(b). There were very few significant similarities between the incidents described by EG and MG, and the alleged offenses against SRY, PRY, and HRR.

First, the incidents involving MG and EG, were isolated events, whereas the abuse involving SRY, PRY, and HRR was continuous.

Second, the alleged abuse of SRY, PRY, and HRR was much more severe. The incident involving MG consisted of Mr. Flores simply touching MG's thigh, and the incidents involving EG consisted of Mr. Flores rubbing against EG from behind and gliding his hand across her chest. Third, SRY and PRY's testimony did not establish that Mr. Flores gave them money for keeping silent about the abuse, as the State alleged. Fourth, the mere coincidence that MG was watching television when Mr. Flores allegedly touched her does not establish sufficient factual similarity between her allegations and those made by the twins. The twins claimed that Mr. Flores abused them at many different locations. RP VI 17 – 18, 145. Finally, the fact that all the girls involved were of Mexican decent and known to Mr. Flores through friends or family does not prove the existence of a common scheme or plan. Rather, as the court explained in Slocum, it merely establishes that the defendant would molest victims to whom he had access. Certainly, it cannot be said that the prior bad acts evidence pertaining to MG and EG tended to establish that "the charged crime was carried out in a manner devised by the defendant and used by him more than once." Slocum, 183 Wn. App. 456.

Because the highly prejudicial testimony about the alleged abuse of MG and EG should not have been admitted under the common scheme or plan exception to 404(b), and because the admission of the highly

prejudicial testimony was not harmless error, Mr. Flores's conviction should be reversed. Id.

E. The Trial Court Abused its Discretion when it Denied Mr. Flores's Motion for a Mistrial.

Mr. Flores's conviction should be reversed because the trial court committed a manifest abuse of discretion when it denied his motion for a mistrial after violations of the court's pretrial orders by the State's witness led to the jury being exposed to highly prejudicial statements about Mr. Flores sexually abusing his daughter CF.

A trial court's denial of a mistrial motion is reviewed for an abuse of discretion. State v. Rodriguez, 146 Wn.2d 260, 269 (2002). A conviction will only be reversed on the basis of the trial court's erroneous ruling where the irregularity is so prejudicial that only a new trial could ensure the defendant a fair trial. State v. Post, 118 Wn.2d 596, 620 (1992). In determining whether a new trial is required as a result of the irregularity, courts consider: "(1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could be cured by an instruction." Id. Washington courts have uniformly held that a jury's exposure to testimony about prior bad acts by the defendant that are otherwise inadmissible can only be cured by a new trial. See State v. Babcock, 145 Wn. App. 157, 163 (2008). The reason for this is that no instruction can

"remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." Id. (quoting State v. Escalona, 49 Wn. App. 251, 255 (1987)) (alterations in original). And, evidence "concerning a crime similar to the charged offenses is inherently difficult to disregard." Id.

In Babcock, the Court of Appeals reversed and remanded for a new trial where the trial court denied a defendant's motion for mistrial after the jury was exposed to hearsay testimony about charges of sexual abuse pertaining to a different victim that were later dismissed. Id. at 159. In Escalona, the Court of Appeals reversed and remanded for a new trial where the trial court denied a motion for mistrial after a witness testified before the jury that the defendant "already has a record and had stabbed someone." Escalona, 49 Wn. App. at 253. Similarly, in State v. Miles, 73 Wn.2d 67 (1968), the Washington Supreme Court reversed and remanded for a new trial where the trial court denied a motion for mistrial on the basis that a police officer unexpectedly testified on the stand that the defendant had committed an identical robbery in a different city.

In Mr. Flores's case the trial court expressly ordered, prior to the commencement of trial, that testimony regarding the alleged sexual abuse of Mr. Flores's daughter, CF, by Mr. Flores would not be admissible. RP

II 67. Despite the court's clear pretrial order, three of the State's witnesses testified about the alleged abuse of CF. On day two of the trial, Kirkland Police Department Officer Janelle McMillian testified that she had been contacted by another law enforcement agency and notified that they had arrested Mr. Flores based on "allegations involving him and two children" and that "they were also concerned about his daughter." RP V= 148. On day three of the trial, PRY also testified about the alleged abuse of CF, stating that CF said to her about the abuse: "why don't you let yourself?" implying that she was experiencing the same abuse. RP VI 24. Then on day four of the trial, EG stated on direct examination: "[W]hen I told PRY what happened [that Mr. Flores touched her], she told me that [Mr. Flores] had something to do with his daughter as well." RP VII 20. There can be little doubt about the fact that in combination, these three statements left the jury with the impermissible impression that CF was being sexually abused by Mr. Flores in clear violation of the court's order excluding testimony about the abuse of CF.

Notwithstanding the substantial prejudice that resulted from the jury being exposed to testimony about the alleged abuse of CF, the trial court denied counsel's motion for mistrial, concluding that its limiting instruction to the jury not to consider EG's testimony about what SRY

and PRY told her, was sufficient to cure any prejudice to the defense. RP VII 47 – 48, 146.

In light of the precedents discussed above, it is clear that the trial court's denial of Mr. Flores's motion for mistrial is reversible error. The witnesses' statements about the alleged abuse of CF were highly prejudicial and inherently difficult for the jury to disregard. See Babcock, 145 Wn. App. at 163. Thus, the error could not be cured by a curative instruction. See id. Nor was the evidence cumulative. See id. As explained above, the trial court excluded the evidence. The only way to cure the prejudice that resulted from the testimony about the abuse of CF was to grant Mr. Flores a new trial. See id. The trial court's denial of Mr. Flores's motion for mistrial was a manifest abuse of discretion.

Because the trial abused its discretion when it denied Mr. Flores's motion for mistrial after the jury was exposed to highly prejudicial testimony about the abuse of CF and because "there can be no guarantee that the jury could effectively disregard the evidence," Mr. Flores's conviction should be reversed. See id. at 165 – 67; State v. Suleski, 67 Wn.2d 45, 51 (1965) ("We are not assured that the evidentiary harpoon here inserted could effectively be withdrawn. It was equipped with too many barbs.").

V. CONCLUSION

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

DATED this 2nd day of February, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

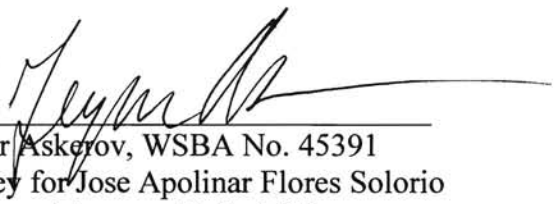
I hereby certify that on the date listed below, I served by United States Mail one copy of the foregoing on:

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

DATED this 2nd day of February, 2015.

Respectfully submitted,

LAW OFFICE OF CHRISTOPHER BLACK, PLLC



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