21-5579

No.: _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

EMMANUEL PEREZ - PETITIONER

vs.

STATE OF NEBRASKA - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

NEBRASKA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

There is a split between the United States Circuit Courts regarding whether the "inextricably intertwined" standard is a proper exception to Fed.R.Evid. 404(b), or whether a hearing should be held under Rule 404(b) regarding such evidence.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

-State v. Perez, Lancaster County District Court, Lincoln, Nebraska, Case No.: CR 18-1176.

-State v. Perez, Nebraska Court of Appeals, Lincoln, Nebraska, Case No.: A 19-1189

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits is the Nebraska Court of Appeals and appears at Appendix A to the petition and is unpublished.

The denial of the Petition for Further Review to the Nebraska Supreme Court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the highest court decided my case was December 2, 2020. A copy of that decision appears in Appendix A.

A timely Petition for Further Review to the Nebraska Supreme Court was thereafter denied on March 9, 2021 in A 19-1189. Said denial appears in Appendix B.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY

PROVISIONS INVOLVED

1. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted 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. Neb. Rev. Stat. § 27-404(2)

2. "Inextricably intertwined" rule includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime. *State v. Kelly*, 20 Neb. App. 871, 881 (2013)

3. Where evidence of other crimes is "so blended or connected, with the one[s] on trial [so] that proof of one incidentally involves the other[s]; or explains the circumstances; or tends logically to prove any element of the crime charged," it is admissible as an integral part of the immediate context of the crime charged. When the other crimes evidence is so integrated, it is not extrinsic and therefore not governed by [r]ule 404 . . . . As such, prior conduct that forms the factual setting of the crime is not rendered inadmissible for rule 404. . . . The State is entitled to present a coherent picture of the facts of the crime charged, and evidence of prior

conduct that forms an integral part of the crime charged is not rendered inadmissible under rule 404 merely because the acts are criminal in their own right, but have not been charged. . . . A court does not err in finding rule 404 inapplicable and in accepting prior conduct evidence where the prior conduct evidence is so closely intertwined with the charged crime that the evidence completes the story or provides a total picture of the charged crime. . . . *State v. Kelly*, 20 Neb. App. 871, 881-2 (2013) *quoting*, *State v. Robinson*, 271 Neb. 698, 714 (2006).

4. If uncharged misconduct directly provides the charged offense, it is not evidence of some "other" crime. Second, "uncharged acts performed contemporaneously with the charged crime may be termed intrinsic if they facilitate the commission of the charged crime. *United States v. Green*, 617 F.3d 233, 249 (3rd Cir. 2010)

5. If evidence is not direct evidence of the crime itself, it is usually propensity evidence simply disguised as inextricable intertwinement evidence, and is therefore improper, at least if not admitted under the constraints of Rule 404(b). *United States v. Gorman*, 613 F.3d 711, 718 (7th Cir. 2010)

6. Extrinsic offense evidence which is "inextricably intertwined" with the crimes charged is often admissible under Rule 404(b). *United States v. Rodriguez-Estrada*, 877 F.2d 153, 156 (1st Cir. 1989).

7. Evidence of other crimes corroborated and proved participation in the conspiracy because it was "inextricably intertwined" with the charged offense. *United States v. Romero-Padilla*, 583 F.3d 126, 128 (2nd Cir. 2009)

8. Other criminal acts are "intrinsic when they are inextricably intertwined or both acts are part of a single criminal episode. *United States v. Bush*, 944 F.3d 1989, 196 (4th Cir. 2019)

9. The search is "inextricably intertwined" with other evidence used to prove the crime of aiding and abetting possession with intent to distribute. *United States v. Flores*, 640 F.3d 638, 643 (5th Cir. 2011)

10. Where the challenged evidence is "intrinsic" to or "inextricably intertwined" with evidence of the crime charged, Rule 404(b) is not applicable. *United States v. English*, 785 F.3d 1052, 1059 (6th Cir. 2015), *quoting, United States v. Marrero*, 651 F.3d 453, 471 (6th Cir. 2011).

11. Prohibition on evidence does not extend to evidence that is "intrinsic" to the charged offense, including evidence that is "inextricably intertwined" with the alleged crime. *United States v. Bartunek*, 969 F.3d 860, 862 (8th Cir. 2020)

12. Evidence should not be considered "other crimes" or "other act" evidence within the meaning of Rule 404(b) if "the evidence concerning the 'other' act and the evidence concerning the crime charged are inextricably intertwined." *United States v. Loftis*, 843 F.3d 1173, 1177 (9th Cir. 2016)

13. An act is no extrinsic if it is "inextricably intertwined" with the charged crime. *United States v. Byfield*, 947 F.2d 954, 955 (10th Cir. 1993)

14. Evidence meets this exception when it is...inextricably intertwined with the evidence regafding the charged offense. *United States v. Nerey*, 877 F.3d 956, 974 (11th Cir. 2017)

15. When evidence is "inextricably intertwined" with the charged crime, courts typically treat it as the same crime. *United States v. Bowie*, 232 F.3d 923, 927 (D.C. Cir. 2000)

STATEMENT OF THE CASE

This is an appeal of a jury trial in which Emmanuel Perez was found guilty on a two-count information.

On August 13, 2018, Emmanuel Perez was arrested and charged with one count of sexual assault of a child in the first degree. On May 28, 2019, the district court heard a motion to suppress and *Jackson v. Denno* hearing which were overruled. On September 6 and 9, 2019, the district court attempted to accept a plea from Emmanuel. On September 19, 2019, Emmanuel requested a continuance to obtain new counsel, and the matter was continued to October 4, 2019. The district court overruled Emmanuel's request for continuance to obtain counsel, the State was given leave to file an amended information which added Count II, incest under 18 years of age. On October 8, 2019, Emmanuel was arraigned, preliminary hearing was held on the amended information, and the district court found there was probable cause to bind the amended information.

On October 16, 2019, trial began, and On October 23, 2019, the case was submitted to the jury for decision. After two hours and fourteen minutes of deliberation, the jury returned verdict of guilty on Counts I and II of the amended information.

On December 3, 2019, Emmanuel was sentenced to imprisonment on Count I for a period of not less than 40 years, but no more than 50 years, and for Count II for a period of not less than seven years, but no more than 12 years. Both sentences were to run concurrently.

On December 18, 2019, the instant case was timely appealed to the Nebraska Court of Appeals at Case No.: A 19-1189. On December 22, 2020, the Nebraska Court of Appeals affirmed the trial court's conviction. On March 9, 2021, the Nebraska Supreme Court denied further review.

REASONS FOR GRANTING THE PETITION

Pertinent Case Facts:

Prior to trial on October 4, 2019, hearing was held in the Lancaster County District Court of Nebraska in which several pretrial motions were before the Court for disposition. These included the State's Notice of Intent to Offer Evidence of Other Crimes, Wrongs, or Acts of Defendant. In that motion, the State specifically sought to offer evidence regarding alleged sexual abuse which occurred in the State of Texas while the alleged victim, J.R., was 5 to 10 years old. The State argued the alleged Texas abuse was "inextricably intertwined" with the alleged abuse in Nebraska. Emmanuel's attorneys argued the information was not "inextricably

intertwined" and should fall under Neb. Rev. Stat. § 27-404(2),[1] and there should be a hearing conducting regarding the admissibility of said alleged abuse and its prejudice to Emmanuel under Neb. Rev. Stat. § 27-403. On October 17, 2019, the district court ruled the evidence of prior bad acts occuring in Texas was "inextricably intertwined" and sustained the State's motion.

Testimony began October 17, 2019, and the States' first witness was J.R. On direct the prosecution began with asking J.R. about her life in Texas years before the events in Lancaster County, Nebraska, had taken place. J.R. was asked about where she lived while in Texas, which she responded with, "...we lived at Emmanuel's mom's house, then we moved into an apartment complex, we ended up moving to my great-great-grandmother's house." J.R. testified they lived in theses places on and off, and there was some back and forth between these residences. J.R. described the living situation in the apartment complex as living in a one bedroom apartment, but the sleeping arrangement was everyone in the living room with the parents on the pullout couch and the kinds on a blow-up bed. The prosecution then

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[1] Neb. Rev. Stat. § 27-404(2) essentially mirrors the Fed. R. Evid. 404(b):

> Character evidence; not admissible to prove conduct; exceptions; evidence of other crimes, wrongs, or acts; standard of proof; sexual assault; provisions applicable
>
> (2) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted 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.

questioned J.R. about Edna Perez's work schedule while they were living in Texas, J.R. stated she worked two jobs which meant she was not home much, leaving Emmanuel home to take care of the children.

After setting the early scene, the prosecution moved to asking J.R. about the sexual assaults. J.R. claimed it started out as "child's play." When she wouldn't be a good girl it was a way of making her behave. J.R. claimed that Emmanuel would touch her breasts. J.R. also stated that Emmanuel attempted to touch her vagina, but she would not allow that to happen. She went on to say that Emmanuel's response would then be to guilt trip her for not allowing him to touch her, and it would get to the point that she felt so bad she would feel as if she did something wrong. To make up for this the accusation, Emmanuel would ask for a hug from J.R. in which she was completely nude while Emmanuel was either fully dressed or shirtless in shorts. J.R. testified these naked hugs would happen at all of their living locations while in Texas, and she alleged Emmanuel found any reason to get these hugs from her, and he would make excuses, i.e. bringing her a towel after she got out of the shower. When the prosecution asked J.R. if Emmanuel had ever shown her pornography, she stated that he would ask her to come to his room while he was watching it on his Xbox or would send her links via a message through his phone. The videos J.R. claims that she was shown tended to be of the stepfather/stepdaughter genre.

During this line of questioning the prosecution asked J.R. if anything more happened than just the naked hugs while they were in Texas. J.R. stated that if she

misbehaved, Emmanuel would give her three choices (1) a naked hug, (2) a blow job, or (3) have sex. J.R. stated that she would try not to do either of the last two options and mainly stick with the naked hugs, however, there were be times Emmanuel would only give her the options of the last two. In those cases J.R. stated she would go with the blow job. J.R. was then asked if this happened at every location they lived at while in Texas, she said yes. J.R. was then asked to describe Emmanuel's penis, she stated it was uncircumcised and small, and that it needed to be cleaned multiple times or it would smell like rotten eggs and fish. J.R. was then asked when and where these blow jobs occurred. She first mention when they were at Emmanuel's mother's house which J.R. described as a trailer home. She said the blow jobs would happen in either the master bedroom, the living room or the small bedroom. J.R. was asked by the prosecution to describe a time a blow job happened in each location, and J.R. claimed that she performed oral sex on Emmanuel until he would ejaculate, and then she would run to the nearest sink to spit out his semen, or spit it out immediately onto herself. The follow up question was who was home at the time of these incidents, and J.R. stated that the incident that occurred in the small bedroom when all three of her brothers were in the living room, while her mom was working, and her grandma was grocery shopping. According to J.R., during the incident in the living room, everyone was sleeping, and in the master bedroom nobody else was home.

After talking about Emmanuel's mother's house, the prosecution then moved on to ask about J.R.'s great-great-grandmother's house. J.R. was again asked if she

was required to give Emmanuel blow jobs at this location. J.R. claimed that she had to give Emmanuel oral sex in a small bedroom and in a back living room where again there were individuals home at the time, and that she had to run to the nearest sink to spit out Emmanuel's semen and brush her teeth. After a short recess, J.R. returned to the witness stand and she was asked about events that occurred in the small one bedroom apartment where everyone slept in the living room. J.R. made the accusation that multiple times while they lived in that apartment she would be required to give Emmanuel a blow job while her brothers would be sleeping in the same room. J.R. also stated that Emmanuel had at one point pushed her head down farther than she had been used to, and at first, was unaware she could breathe through her nose so she was gasping for breath. All events up to this point as previously stated occurred outside the jurisdiction of Lancaster County, Nebraska, in the State of Texas.

Discussion:

The State cited *State v. Kelly*, 20 Neb. App. 871 (2013), in support of its argument the facts of the alleged Texas abuse was "inextricably intertwined." In *Kelly*, this Court stated it's "inextricably intertwined" rule:

> Includes evidence that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that forms part of the factual setting of the crime, or evidence that is so blended or connected to the charged crime that proof of the charged crime will necessarily require proof of the other crimes or bad acts, or if the other crimes or bad acts are necessary for the prosecution to present a coherent picture of the charged crime.

Id. at 881.

> Where evidence of other crimes is "so blended or connected, with the one[s] on trial [so] that proof of one incidentally involves the other[s]; or explains the circumstances; or tends logically to prove any element of the crime charged," it is admissible as an integral part of the immediate context of the crime charged. When the other crimes evidence is so integrated, it is not extrinsic and therefore not governed by [r]ule 404 . . . . As such, prior conduct that forms the factual setting of the crime is not rendered inadmissible for rule 404. . . . The State is entitled to present a coherent picture of the facts of the crime charged, and evidence of prior conduct that forms an integral part of the crime charged is not rendered inadmissible under rule 404 merely because the acts are criminal in their own right, but have not been charged. . . . A court does not err in finding rule 404 inapplicable and in accepting prior conduct evidence where the prior conduct evidence is so closely intertwined with the charged crime that the evidence completes the story or provides a total picture of the charged crime. . . .

Id. At 881-2, *quoting State v. Robinson*, 271 Neb. 698, 714 (2006).

In the case at bar, the testimony elicited through J.R. of the alleged sexual abuse in the State of Texas when she was 5 to 10 years of age does not meet the "inextricably intertwined" test as articulated in *Kelly* and *Robinson*. While the testimony may create a comprehensive story for the State's case, the acts charged are not so related and blended or connected, "with the one[s] on trial [so] that proof of one incidentally involves the other[s]; or explains the circumstances; or tends logically to prove any element of the crime charged." *Id.* The so-called abuse occurring in the State of Texas includes alleged touching and alleged acts of sexual intercourse. There was no connection in time, place, or circumstances with the abuse alleged in Nebraska, and the proof of the alleged Texas abuse does not "incidentally involve" proof of the crimes alleged in Nebraska. (*See*, T25)

Two United States Circuit Courts have done away with the "inextricably intertwined" theory. In *United States v. Green*, 617 F.3d 233, 249 (3rd Cir. 2010) and *United States v. Gorman*, 613 F.3d 711, 718 (7th Cir. 2010), the Third and Seventh Circuit Courts reject the "inextricably intertwined" test:

> If uncharged misconduct directly proves the charged offense, it is not evidence of some "other" crime. Second, "uncharged acts performed contemporaneously with the charged crime may be termed intrinsic if they facilitate the commission of the charged crime."

Green at 249.

> If evidence is not direct evidence of the crime itself, it is usually propensity evidence simply disguised as inextricable intertwinement evidence, and is therefore improper, at least if not admitted under the constraints of Rule 404(b).

Gorman at 718. The *Green* and *Gorman* courts find any other evidence must be subject to Neb. Rev. Stat. § 27-404(2). The basic gist of the *Green* and *Gorman* courts is the exceptions in Neb. Rev. Stat. § 27-404(2) are adequate to allow exceptions for evidence of prior bad acts; however, the "inextricably intertwined" standard is not necessary since Rule 404(2) carves out enough exceptions for such evidence, if it is related, that should allow its inclusion into evidence. What the Third and Seventh Circuit Courts have done is to ensure a criminal defendant is given the hearing required under Neb. Rev. Stat. § 404(2), and the protections afforded by Neb. Rev. Stat. § 27-403. The Third and Seventh Circuits are in opposition with the remaining Circuit Courts as to handling of such evidence. See, *United Sates v. Rodriguez-Estrada*, 877 F.2d 153, 156 (First Circuit 1989) (extrinsic offense evidence which is "inextricably intertwined" with the crimes charged is often

admissible under Rule 404(b)); *United States v. Romero-Padilla*, 583 F.3d 126, 128 (2nd Circuit 2009) (evidence of other crimes corroborated and proved participation in the conspiracy because it was "inextricably interetwined" with the charged offense); *United States v. Bush*, 944 F.3d 189, 196 (4th Circuit 2019) (other criminal acts are "intrinsic when they are inextricably intertwined or both acts are part of a single criminal episode); *United States v. Flores*, 640 F.3d 638, 643 (5th Cir. 2011) (the search is "inextricably intertwined" with other evidence used to prove the crime of aiding and abetting possession with intent to distribute); *United States v. English*, 785 F.3d 1052, 1059 (6th Cir. 2015) (where the challenged evidence is "intrinsic" to or "inextricably intertwined" with evidence of the crime charged, Rule 404(b) is not applicable) (*quoting, United States v. Marrero*, 651 F.3d 453, 471 (6th Cir. 2011)); *United States v. Bartunek*, 969 F.3d 860, 862 (8th Cir. 2020) (prohibition on evidence does not extend to evidence that is "intrisic" to the charged offense, including evidence that is "inextricably intertwined" with the alleged crime); *United States v. Loftis*, 843 F.3d 1173, 1177 (9th Cir. 2016) (evidence should not be considered "other crimes" or "other act" evidence within the meaning of Rule 404(b) if "the evidence concerning the 'other' act and the evidence concerning the crime charged are inextricably intertwined"); *United States v. Byfield*, 947 F.2d 954, 955 (10th Cir. 1993) (an act is not extrinsic if it is "inextricably intertwined" with the charged crime); *United States v. Nerey*, 877 F.3d 956, 974 (11th Cir. 2017) (evidence meets this exception when it is...inextricably intertwined with the evidence regarding the

charged offense); *United States v. Bowie*, 232 F.3d 923, 927 (D.C. Cir. 2000) (when evidence is "inextricably intertwined" with the charged crime, courts typically treat it as the same crime).

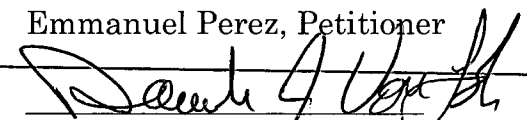
Since the evidence of the alleged abuse in Texas does not meet these tenets, including "inextricably intertwined" and those set out by the 3rd and 7th Circuit Courts, it should be subject to review and hearing under Neb. Rev. Stat. §§ 27-404(2) and 27-403. The alleged acts in Texas were completely different acts, were committed in another jurisdiction, were not related in time, and were not proof of the alleged crimes or alleged acts occurring in Nebraska the subject of this case. As such, the district court erred in finding the evidence "inextricably intertwined" and it should have overruled the State's motion to proffer the alleged Texas acts and grant a hearing under Neb. Rev. Stat. § 27-404(2).

CONCLUSION

For the above-stated reasons, the Petitioner requests you find the information of Texas acts were not admissible, and for Petitioner's case to be remanded for a new trial.

Respectfully submitted,

Emmanuel Perez, Petitioner

By: 

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