No. _____

In The
Supreme Court of the United States

KASSIM M. NAGI,

Petitioner,

vs.

STATE OF LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. A sentence, even within range, is excessive when it imposes punishment grossly disproportionate to the severity of the evidence, or constitutes nothing more than the needless infliction of pain and suffering.

   So, do the 8th Amendment and the proportionality test required by **Solem v. Helm**, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), bar as punitive a 90-year consecutive sentence – 30-year sentences each for racketeering and money laundering, and 15 years each for distribution of, and possession of, synthetic marijuana – as excessive and cruel and unusual punishment for a 33-year-old, first-time offender such that the term-of-year sentences, for constitutional purposes, constitute the same as a sentence of life imprisonment without the possibility of parole? *See, e.g.*, **Lockyer v. Andrade**, 538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

2. In order to prove a defendant guilty of racketeering, the state must prove the existence of an "enterprise" as a separate element from "pattern of racketeering activity."

   Therefore, does one commit racketeering when the state implicitly alleges by its indictment and fails to present evidence that the defendant knowingly participated in a prohibited pattern of racketeering activity, without proving the enterprise, separate elements required by **United States v. Turkette**, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528-29, 69 L.Ed.2d 246 (1981)?

QUESTIONS PRESENTED FOR REVIEW –
Continued

3. "Proceeds," as used in money laundering statutes, means profits rather than gross receipts. **United States v. Santos**, 553 U.S. 507, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008).

   Therefore, does a state fail to prove money laundering and create a "merger problem" when it seizes cash and credit card receipts from a convenience store business but fails to differentiate between the proceeds for milk and gasoline and synthetic marijuana?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

1. State of Louisiana, through the Terrebonne Parish District Attorney's Office.

2. Kassim Nagi, an individual convicted of and sentenced to 30 years at hard labor for racketeering, 30 years at hard labor for money laundering, 15 years for the distribution of a controlled dangerous substance, and 15 years for the possession with intent to distribute a controlled dangerous substance, each to be served consecutive to the previous charge.

CORPORATE DISCLOSURE

The State of Louisiana is a body politic. The Terrebonne Parish District Attorney's Office is a subdivision of the State of Louisiana.

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A non-unanimous Terrebonne Parish jury (10-2) found Nagi guilty of racketeering, money laundering, distribution of a controlled dangerous substance and possession with intent to distribute a controlled dangerous substance. The trial judge sentenced Nagi to 30 years at hard labor for racketeering, 30 years at hard labor for money laundering, 15 years for the distribution of a controlled dangerous substance, and 15 years for the possession with intent to distribute a controlled dangerous substance, each to be served consecutive to the previous charge. Appx. 47-50.

The Louisiana First Circuit Court of Appeal affirmed the conviction and sentence. **State v. Nagi**, 2017-1257, 2018 WL 1704253 (La. App. 1 Cir. 4/9/18) (unpublished). Appx. 1, *et seq*. The Louisiana Supreme Court denied a writ of certiorari. **State v. Nagi**, 2018-0739 (La. 3/25/19), 267 So.3d 602. Appx. 51.

JURISDICTION

This court has jurisdiction under 28 U.S.C. §1257(a). **Exxon Mobil Corp. v. Saudi Basic Indus. Corp.**, 544 U.S. 280, 125 S.Ct. 1517, 161 L.Ed.2d 464 (2005). (Appellate jurisdiction to reverse or modify a state-court judgment is lodged . . . by 28 U.S.C. §1257, exclusively in the Supreme Court).

RELEVANT CONSTITUTION PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The 90-year unconstitutionally excessive sentence imposed in this case emanates from Nagi's 10-2 state-court conviction for racketeering, money laundering, distribution of a controlled dangerous substance and possession with intent to distribute a controlled dangerous substance. Appx. 48.[1] Not only is the verdict based on weak evidence and the improper interpretation of state and federal law, but the sentence is unconstitutionally punitive. It results in a 33-year-old, first-time offender potentially spending all of his remaining life in prison. Because the Louisiana First Circuit Court of Appeal affirmed both the conviction and

[1] Nagi was found guilty 10-2. This court has granted certiorari to determine whether a non-unanimous verdict is constitutional. *See* **Ramos v. Louisiana**, 18-5924 (cert. granted March 18, 2019).

sentence and the Louisiana Supreme Court denied a writ of certiorari, Nagi's only opportunity for relief is here.

On three occasions, a Terrebonne Parish Grand Jury indicted Nagi and six others with a variety of criminal charges. The second amended indictment, or third indictment, alleged the defendant unlawfully and intentionally with others, on or about January 1, 2012 through June 30, 2013, engaged in (1) racketeering, in violation of La. R.S. 15:1352 and La. R.S. 15:1353; (2) money laundering, in violation of La. R.S. 14:230; (3) financial transactions involving drug proceeds, in violation of La. R.S. 40:1041; (4) illegal drug activity in a drug free zone, in violation of La. R.S. 40:981.3; (5) distribution of a controlled dangerous substance, to-wit: synthetic cannabinoids, in violation of La. R.S. 40:966(A)(1); and (6) possession with intent to distribute a controlled dangerous substance, to-wit: synthetic cannabinoids, in violation of La. R.S. 40:966(A)(1). Counts three and four were later dismissed.

In a pre-trial motion, the state sought to prevent the defendant from arguing "mistake of law." The court conducted hearings before granting the state's motion in limine preventing the defendant from arguing a mistake of law, but allowing the defendant to argue mistake of fact.

At trial, the state sought to prove that Nagi, through the Kee Foods convenience store, sold products that contained synthetic marijuana. The state presented the testimony of co-defendant Fuad Towfik,

a store clerk, who testified he sold synthetic marijuana in products called "Kush" and "Supernova." According to Towfik, the items were concealed from public view, but so were cigarettes, energy pills, cigars, and other products that were not accessible to children. Co-defendant and store cashier Lawanda Deville Gasery believed the "Kush" and "Supernova" were products containing synthetic marijuana. Gasery, however, believed Nagi's lab report that the products were negative for synthetic marijuana. And she noted that as soon as Nagi learned similar products, called "Rocket" and "Bob Narly" were illegal, Nagi removed them from the store's shelves. Finally, a third co-defendant and store cashier, Stacey Verdin, also testified the store sold "Kush" and "Supernova", which were kept in a cabinet near the register. She claimed Nagi instructed her on how to sell the product and how to register the sale. After seeing a video, Verdin acknowledged selling "Kush" to an undercover officer.[2]

The state called several officers with the Terrebonne Parish Sheriff's Office. Joseph Renfro, then assigned to the parish's narcotics task force, testified he oversaw the seizure of synthetic marijuana next to the store's register and in a cabinet next to the register. Renfro testified the deputies seized various packages of synthetic marijuana. On cross-examination, Renfro admitted the professionally packaged seized items were labeled, "Not intended for human consumption," and "Lab certified. This product contains no prohibited

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[2] These co-defendants were not brought to trial with Kassim Nagi.

chemicals or materials. This product is legal for sale in all 50 states as of September 1st, 2011." Renfro also explained the "Supernova" product was labeled, "Lab certified legal," "Cannabinoid free," and "[t]his product has been certified by laboratory analysis and does not contain JWH 18, JWH 73, JWH 200, CP 47, CP 497, HU 210, or any other chemical and/or plant ingredients prohibited by state or federal law." Renfro testified deputies also seized cash and store receipts, but could not state how the currency was generated or what the receipts indicated.

The parties stipulated that narcotics agent Lt. Danielle Lebouef purchased one four-gram packet of "Kush" synthetic marijuana from Deville at Kee Foods which tested as an illegal substance. Lebouef further conducted a financial investigation to determine if Kee Foods benefitted from the sale of synthetic marijuana. Lebouef oversaw the seizure of cash and bank records, which showed purchases of cashier checks by Nagi that were deposited into JP Morgan Chase Bank and credited to the Bank of Yemen. According to Lebouef, deputies seized in excess of $590,000 from a safety deposit box, and more than $400,000 from various bank accounts.

Lebouef admitted, however, investigators could not determine how much of the seized money was from the sale of synthetic marijuana or from the sale of items such as milk and gasoline and specifically made no effort to do so.

Narcotics agent Travis Sanford likewise made an undercover buy at Kee Foods and supervised the collection of synthetic marijuana from Nagi's room at his apartment. And, finally, Agent Shelly Liner, case agent for the investigation, oversaw controlled purchases using a confidential informant. According to Liner, purchases were made from January to June 2013. In February 2013, officers conducted a trash pull, retrieving cashier receipts, time cards, and other assorted documents. The receipts were used in conjunction with the interviews of store clerks to verify the synthetic marijuana sales. While Liner also testified that he tallied up register receipts and credit card receipts for the 2012 calendar year which totaled more than $750,000 he could not say what portion of the sales were synthetic marijuana.

Liner also admitted to having reviewed the Tulane Laboratory report upon which Nagi relied to demonstrate the products were not illegal. Liner claimed the document could be falsified and, over the objection of the defendant, was allowed to produce, and the state allowed to introduce, a similar document created by Liner, though he had no reason to believe, or evidence to show, that Nagi created a false document.

Nagi moved for a mistrial based upon prosecutorial misconduct, contending the state presented evidence (through Liner) that Nagi created the laboratory report upon which he based his defense of mistake of fact. Nagi argued the mistrial was mandated under Louisiana law since the state presented evidence suggesting Nagi committed or allegedly committed another

crime, that of falsifying a document, which ostensibly could result in a charge for obstruction of justice. The motion for mistrial was denied.

Nagi proffered testimony from Adam Chouest, who assisted Nagi to learn whether the products he was selling were legal. Chouest took the lab report and contacted the narcotics division of the Terrebonne Sheriff's Office, who advised him the synthetics seemed to be legal. Additionally, Nagi and the state stipulated that sometime in January 2012, Nagi's attorney, Rene Williams, contacted the Terrebonne Sheriff's Office narcotics division regarding products that had been seized from the Kee Foods store. The products were returned to Williams while the sheriff's office kept one packet of each product for testing, The narcotics division never replied.

The jury returned 10-2 verdicts on the remaining four counts.

Nagi thereafter filed a motion for post-verdict judgment of acquittal or, in the alternative, motion for new trial. At the hearing, Nagi again argued the trial was tainted by the state's gross prosecutorial misconduct by misleading the jury as to the validity of the Tulane lab report. Nagi argued because there was no evidence the report was fake, manipulated, or edited, the state should not have elicited testimony from Liner suggesting the report was false. The effect of Liner's testimony, according to Nagi, was that the state "cast dispersions [sic] on the defendant who did not testify." The court ultimately denied Nagi's motions.

Thereafter, the court sentenced Nagi to thirty years hard labor for racketeering; thirty years hard labor for money laundering; fifteen years hard labor for distribution; and fifteen years hard labor for possession with intent to distribute, all counts to run consecutive. The defendant's motion to reconsider sentence was denied.

The First Circuit Court of Appeal affirmed the jury verdict and the trial court's imposition of a 90-year consecutive sentence, while the state supreme court denied Nagi's writ of certiorari.

ARGUMENT

The unconstitutional, 90-year cumulative sentence only amplifies the unsupported 10-2 jury trial verdict of guilty to racketeering, money laundering, distribution of a controlled dangerous substance, and possession with intent to distribute a controlled dangerous substance: (1) the sentence violates the Eighth Amendment; (2) the state failed to prove an "enterprise" and a separate "racketeering activity;" and (3) the state failed to prove the essential elements of money laundering as defined by this court, requiring proof of a profit that Nagi took steps to conceal.

I. The 90-year consecutive sentence violates the Eighth Amendment.

A sentence is excessive when it imposes punishment grossly disproportionate to the severity of the

evidence or constitutes nothing more than the needless infliction of pain and suffering. In cases involving multiple offenses and sentences, the trial court has limited discretion to order that the multiple sentences are to be served concurrently or consecutive. The state appellate court erred in affirming the trial court's imposition of a 90-year consecutive sentence, particularly when the trial court failed to articulate specific reasons under La. C.Cr.P. art. 883. The trial court imposed an unconstitutional 90-year consecutive sentence. The sentence is grossly disproportionate to the severity of the evidence and constitutes nothing more than the needless infliction of pain and suffering.[3]

The Eighth Amendment to the United States Constitution and Article 1, §20 of the Louisiana Constitution prohibit the imposition of excessive or cruel punishment. A sentence is considered unconstitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. **State v. Bonanno**, 384 So.2d 355 (La. 1980). A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it shocks the sense of justice. **State v. Andrews**, 1994-0842 (La. App. 1 Cir. 5/5/95), 655 So.2d 448. In other words, a punishment may violate the Eighth Amendment if it is contrary to the "evolving standards of decency that mark the progress of a

[3] In **Robinson v. California**, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), this court first held that the Eighth Amendment is applicable to punishment imposed by state courts.

maturing society." **Trop v. Dulles**, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958).

Moreover, in cases involving multiple offenses and sentences, the trial court has limited discretion to order that the multiple sentences are to be served concurrently or consecutive. When two or more convictions arise from the same act or transaction, or constitute parts of a common scheme or plan, the terms of imprisonment shall be served concurrently unless the court expressly directs that some or all be served consecutively. La. C.Cr.P. art. 883. **State v. Darnell**, 2017 WL 3401352, 51,499 (La. App. 2 Cir. 8/9/17), 243 So.3d 1162. A presumption in favor of concurrent sentences applies when the defendant's conduct transpires within a short period of time at one location. **State v. Green**, 2016-0107 (La. 6/29/17), 225 So.3d 1033.

A judgment directing that sentences arising from a single course of conduct be served consecutively requires particular justification from the evidence or record. When consecutive sentences are imposed, the court shall state the factors considered and its reasons for the consecutive terms. Among the factors to be considered are: (1) the defendant's criminal history; (2) the gravity or dangers of the offenses; (3) the viciousness of the crimes; (4) the harm done to victims; (5) whether the defendant constitutes an unusual risk of danger to the public; and (6) the potential for the defendant's rehabilitation. **State v. Nixon**, 51,319, p. 5-6 (La. App. 2 Cir. 5/19/17), 222 So.3d 123; **State v. Craft**, 49,730, fn. 6 (La. App. 2 Cir. 2/26/15), 162 So.3d 539. As regards the imposition of consecutive sentences, the trial

court failed to articulate any specific reasons. This is an error under La. C.Cr.P. art. 883, **State v. Williams**, 2011-0414, p. 29 (La. App. 4 Cir. 2/29/12), 85 So.3d 759, 776, and requires remand for the trial court to articulate reasons for the consecutive terms. **Green**, 2016-0107, p. 14; 225 So.3d at 1042.

The trial court's imposition of consecutive sentences, which results in the defendant serving 90 years, is unconstitutionally excessive. Moreover, the trial court failed to articulate grounds for imposing consecutive sentences.

The Eighth Amendment to the United States Constitution and Article 1, §20 of the Louisiana Constitution prohibit excessive or cruel punishment. Even when a sentence is within statutory limits, it may be unconstitutionally excessive. **State v. Sepulvado**, 367 So.2d 762 (La. 1979). A sentence is unconstitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. **State v. Bonanno**, 384 So.2d 355 (La. 1980). A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it shocks the sense of justice. **State v. Andrews**, 1994-0842 (La. App. 1 Cir. 5/5/95), 655 So.2d 448. On review, the court employs a two-pronged test to review a sentence for excessiveness. First, the court reviews the record to determine if the sentencing court followed La. C.Cr.P. art. 894.1, which provides sentencing guidelines regarding the imposition of sentences of imprisonment. Second, the appellate court must determine

whether the sentence is constitutionally excessive, **State v. Nixon**, 51,319 (La. App. 2 Cir. 5/19/17), 222 So.3d 123, by determining whether the trial court abused its discretion. **State v. Williams**, 2003-3514 (La. 12/13/04), 893 So.2d 7. Though an imposed sentence may be within the statutory sentencing range and therefore "legal," it may still violate a defendant's constitutional right against excessive punishment. **State v. Dorthey**, 623 So.2d 1276, 1280 (La. 1993); **State v. Bartley**, 2017-0273 (La. App. 4 Cir. 10/11/17), writ denied, 2017-1924 (La. 4/22/19), 268 So.3d 296; **State v. Soraparu**, 1997-1027 (La. 10/13/97), 703 So.2d 608 (internal citations omitted).

And to be constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt. *See* **Emmund v. Florida**, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). Indeed, even a legislatively mandated sentence may violate the Eighth Amendment. **Rummel v. Estelle**, 445 U.S. 263, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980). This is one of the "rare" cases where a reviewing court can conclude that the extreme sentence(s) are grossly disproportionate to the crime. **Graham v. Florida**, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). *See* **Weems v. United States**, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910) (referring to the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense"). It is also the one case where it is unrealistic to think that a sentence of 90 years for a 33-year-old defendant is not equivalent to life in prison without parole.

The court sentenced Nagi to thirty years at hard labor for the racketeering charge (0-50) and thirty years at hard labor for the money laundering charge (0-99). It sentenced Nagi to 15 years for distribution of a controlled dangerous substance (5-30) and 15 years for the possession charges (5-30), each to be served consecutive to the previous charge. In large part, the court sentenced Nagi to the excessive sentences not because the defendant has prior convictions – he has none – but because the court believed Nagi's actions of selling synthetic marijuana were in effect selling "horrible poison" to many unsuspecting citizens. Moreover, the court believed Nagi's actions were solely profit-related, stating that the case was "all about money, money. . . ." *et seq*.

First, the trial court was incorrect in both assessments. The state never proved that the synthetic marijuana was a "horrible poison." The state only proved, by the state chemical analysis, that the product contained synthetic marijuana. It did not present the testimony of any person harmed by the product. Nor did the state present any evidence regarding the prevalence of similar product in Terrebonne Parish or the number of individuals arrested for either distributing or possessing the same or similar products.

Second, the trial court's analysis based upon the assumed financial gain to Nagi is wholly incorrect. While the verdict form indicates the jury found that Nagi earned $590,000.00 from selling synthetic marijuana, that figure is not supported by the evidence. Though the state seized a large amount of cash and

seized various bank accounts, it failed to demonstrate how much of these amounts, if any, was derived from the synthetic marijuana sales. This is a criminal case and not a civil forfeiture case. The burden remains on the state to prove each element of the charged offense. It was therefore incumbent upon the state to prove Nagi's financial gain.

The court failed to consider under La. C.Cr.P. art. 894.1 that Nagi has no past criminal behavior as an aggravating circumstance or that there is an undue risk that Nagi would commit another crime during a suspended sentence or probation. Moreover, the court did not find that the crimes were especially vicious or that Nagi did not have the potential for rehabilitation.

These sentences alone are excessive and serve no purpose other than to punish the defendant for the misconceived notions of the trial court that synthetic marijuana sales and usage is a problem in Terrebonne Parish. The sentence is not individual to Nagi based upon the facts of this case, but seems to reflect the court's attitude toward the drug problem in general.

And, despite the court's opinion, there is simply no evidence the incident herein was instituted for "money, money, money." While the evidence indicates Nagi may have generated some income from the sale of synthetic marijuana, the record fails to indicate precisely the amount. At no point did the state conduct or present a forensic accountant who traced the illegal sales. Nagi could have easily generated the amounts he did from the sale of gasoline and milk, along with any number

of other items sold at the store. Receipts alone that show a few sales, and bank accounts and a safety deposit box with cash alone, do not a drug dealer make. And while each individual sentence is excessive, ordering the sentences be served consecutively is extremely unconstitutionally excessive to the point of being cruel and unusual.

In cases involving multiple offenses and sentences, the trial court has limited discretion to order that the multiple sentences are to be served concurrently or consecutive. When two or more convictions arise from the same act or transaction, or constitute parts of a common scheme or plan, the terms of imprisonment shall be served concurrently unless the court expressly directs that some or all be served consecutively. La. C.Cr.P. art. 883. **State v. Darnell**, 51,499 (La. App. 2 Cir. 8/9/17), 243 So.3d 1162, writ denied, 2017-1526 (La. 5/25/18), 242 So.3d 1231. A presumption in favor of concurrent sentences applies when the defendant's conduct transpires within a short period of time at one location. **State v. Green**, 2016-0107 (La. 6/29/17), 225 So.3d 1033.

A judgment directing that sentences arising from a single course of conduct be served consecutively requires particular justification from the evidence or record. When consecutive sentences are imposed, the court shall state the factors considered and its reasons for the consecutive terms. Among the factors to be considered are: (1) the defendant's criminal history; (2) the gravity or dangers of the offenses; (3) the viciousness of the crimes; (4) the harm done to victims; (5) whether

the defendant constitutes an unusual risk of harm of danger to the public; and (6) the potential for the defendant's rehabilitation. **Nixon**, 51,319, p. 5-6; 222 So.3d at 127; **State v. Craft**, 49,730, fn. 6 (La. App. 2 Cir. 2/26/15), 162 So.3d 539.

This Court is also adverse to consecutive term-of-year sentences imposed without reason and regard to reduce recidivism. In **Solem**, supra, a recidivist defendant had been sentenced to life imprisonment without parole for passing a bad check in the amount of $100. In reviewing the defendant's Eighth Amendment challenge to his sentence, the Court identified the following "objective criteria" to use in conducting a full proportionality analysis: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. **Id.** at 292; 103 S.Ct. 3001. Because the bad check crime was "one of the most passive felonies a person could commit" and the punishment was "the most severe" non-capital sentence available, the Court inferred that the defendant's sentence was grossly disproportionate. **Id.** at 296-97, 103 S.Ct. 3001. Conducting any proportionality test, this Court concluded **Solem's** sentence was unconstitutional. **Id.** at 296-300, 103 S.Ct. 3001.

The state trial court failed to articulate any specific reasons and the appellate court strained to support the unconstitutional sentence. This is an error under La. C.Cr.P. art. 883, **State v. Williams**, 2011-0414, p. 29 (La. App. 4 Cir. 2/29/12), 85 So.3d 759, 776, and

requires remand for the trial court to articulate reasons for consecutive terms. **Green**, 2016-0107, p. 14; 225 So.3d at 1042. At the state level, the imposition of consecutive sentences requires particular justification when the crimes arise from a single course of conduct. **State v. Johnson**, 1999-0385 (La. App. 1 Cir. 11/5/99), 745 So.2d 217, writ denied, 2000-0829 (La. 11/13/00), 774 So.2d 971. *See also* **United States v. Golomb**, 754 F.2d 86 (2d Cir. 1985) (remand for consideration of extent to which sentences should run consecutively and to provide an adequate explanation for the decision reached upon such reconsideration).

And in imposing such a sentence, the court must consider the defendant's criminal history, the dangerousness of the offense, the viciousness of the crimes, the harm done to the victim, the potential for defendant's rehabilitation, and the danger posed by the defendant to the public safety. **Pierre v. Radar**, 2012 WL 3026790 (E.D. La. 2012). This Court also instructs that the proportionality test requires the consideration of like cases.

Most recently, the **Nixon** court found 20-year sentences at hard labor each for two counts of distribution of marijuana, 20 years at hard labor for one count of distribution of cocaine, the first two years to be served without the benefit of probation, parole, or suspension of sentence, proper, but found the imposition of those sentences to run consecutive unconstitutionally excessive. The court's order that the three terms be served consecutively "tripled the already 20-year sentences imposed for the single course of conduct, and thereby

rendered the sentence grossly disproportionate to the harm caused by the offenses." **Id.**, 51,319, p. 11; 222 So.3d at 130. *See also* **State v. Boudreaux**, 41,660 (La. App. 2 Cir. 12/13/2006), 945 So.2d 898 (56-year aggregate sentence – four-year terms on each of 14 counts of video voyeurism to be served consecutively – was "out of proportion to the offense" and imposed "needless infliction of pain and suffering"; thus appellate court vacated sentence and remanded for resentencing); **State v. Woods**, 2018-413 (La. App. 5 Cir. 12/19/18), 262 So.3d 455 (consecutive nature of defendant's sentence, essentially exposing him to a total of 150 years of incarceration, shocks sense of justice and is grossly disproportionate to severity of crime of three counts of distribution of heroin).

These cases are within the realm of proportional sentencing for proportional convictions and offenses. And they show just how afar the trial court went in sentencing Nagi, ostensibly for some underlying unstated purpose. The requirement that Nagi serve the already excessive sentences consecutively further renders the 90-year aggregate extremely excessive and effectively imposes a life sentence upon a defendant for his first conviction.

Nagi's sentences are cruelly and unusually excessive and violate the Eighth Amendment. This court should grant certiorari to determine whether the sentences are proportionally excessive under the Eighth Amendment jurisprudence of this court.

II. Racketeering requires proof of both an "enterprise" and "pattern of racketeering activity."

In order to prove a defendant guilty of racketeering, the state must prove the existence of an "enterprise" as a separate element from "pattern of racketeering activity." When the state implicitly alleges by its indictment and fails to present evidence that the defendant knowingly participated in a prohibited "pattern of racketeering activity," without proving the "enterprise," there is no racketeering.

The Louisiana Racketeering Act is contained in La. R.S. 15:1351-1356. The prohibited activities are set forth in La. R.S. 13:1353 and provide in pertinent part:

> B. It is unlawful for any person through a pattern of racketeering activity, knowingly to acquire or maintain directly or indirectly, any interest in or control of any enterprise or immovable property.
>
> C. It is unlawful for any person employed by, or associated, with any enterprise knowingly to conduct or participate in directly or in-directly, such enterprise through a pattern of racketeering activity.

And while not specifically charged, in this case "racketeering activity" means committing, attempting to commit, conspiring to commit or soliciting, coercing, or intimidating another person to commit any crime which is punishable under the Uniform Dangerous Substances Act, which would include La. R.S. 40:966(A).

La. R.S. 15:1532(A)(11). An "enterprise" is defined as "any individual, sole proprietorship, partnership corporation or other legal entity, or any unchartered association, or group of individuals associated in fact and includes unlawful as well as lawful enterprises and governmental as well as other entities." La. R.S. 15:1532(B). Further, the term "pattern of racketeering activity" means engaging in at least two incidents of racketeering activity that have the same or similar intents, results, principals, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one of such incidents occurs after August 21, 1992 and that the last of such incidents occurs within five years after the prior incident of racketeering. La. R.S. 15:1532(C).

In order to prove a defendant guilty of racketeering, the state must prove the existence of an "enterprise" as a separate element from "pattern of racketeering activity." **State v. Touchet**, 1999-1416 (La. App. 3 Cir. 4/5/00), 759 So.2d 194. Since the Louisiana statutes parallel the federal "RICO" legislation, the **Touchet** court said federal decisions are persuasive, citing **State v. Nine Sav. Accounts**, 553 So.2d 823 (La. 1989). Thus, in **United States v. Turkette**, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528-29, 69 L.Ed.2d 246 (1981), the U.S. Supreme Court explained:

> The enterprise is an entity . . . a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the

> other hand, a series of criminal acts as defined by the statute. §84 U.S.C. 1961(I) (1976 ed. Supp. 1111). The former is provided by evidence of ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by participants in the enterprise. . . . The "enterprise" is not separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.

Thus, in order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." **Turkette**, 452 U.S. at 583. In **Terrell v. Hancock Bank**, 7 F. Supp. 2d 812 (S.D. Miss. 1998), the plaintiff alleged the defendant bank and its holding company engaged in a pattern of racketeering activity by mail and wire fraud. The court, relying on **Turkette**, held that the plaintiff failed to show the bank and holding company were associated apart from bank activities. Since the mailings and wire communications at issue were themselves bank activities, the enterprise and the pattern of activity were not separate and distinct, as required by **Turkette**. **Touchet**, 1999-1416, p. 5; 759 So.2d at 197.

In **Touchet**, a group of individuals, including the defendant, transported marijuana from Texas for sale in Louisiana. Individuals in Texas supplied each other,

who supplied a Louisianan, who subsequently supplied Touchet. The defendant thereafter supplied other individuals for "street-level" distribution, consumed some of the marijuana, and gave some of it away. **Id.**, 1999-1416, p. 1; 759 So.2d at 195. On these facts, the appellate court found the state failed to prove the defendant engaged in racketeering. While the state presented the "enterprise" as the group of co-defendants organized to transport marijuana, the separate "racketeering activity" consisted of Touchet's acts of selling the marijuana. **Touchet**, 1999-1416, p. 7; 759 So.2d at 199. The court found the acts were the same activity and that the evidence did not show the co-defendants' association or alleged "enterprise" was an independent entity with members functioning as a continuing unit with a decision-making structure. **Id.**

The **Touchet** court further found, in light of **Turkette** and its progeny, that the state failed to prove the defendant was involved in an ongoing criminal enterprise which existed separate and apart from the pattern of activity at issue. The evidence which showed Touchet was engaged in an enterprise was the same evidence that showed he was involved in a pattern of illegal activity. **Id.** According to the appellate court, the group or chain of alleged racketeers involved could only be viewed as associates in the context of the drug-running activity. And apart from that activity, no unit, group, association, racket, or enterprise, was shown – or even suggested – to exist. Thus, racketeering was not proven. **Id.**

The separation between the association and the pattern of racketeering remains integral. In particular, the government must prove the existence of an association-in-fact enterprise: an association-in-fact enterprise must 1) have an existence separate and apart from the pattern of racketeering, 2) be an ongoing organization, and 3) have members functioning as a continuing unit as shown by a decision-making structure. **Id.** (citing **Crowe v. Henry**, 43 F.3d 198, 205 (5th Cir. 1995)). In addition, the court stated that "a RICO 'enterprise' must have an ongoing organization or be a continuing unit, such that the enterprise has an existence that can be defined apart from the commission of the predicate acts." **Touchet**, at 198 (citing **Montesano v. Seafirst Commercial Corp.**, 818 F.2d 423 (5th Cir. 1987)).

In this case, the evidence is even less compelling than under **Johnson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The state here failed to prove an "enterprise" and failed to prove a separate "racketeering activity." From the outset, the state implicitly conceded it could not prove what it desired. The indictment only alleges that Nagi "knowingly participated in a prohibited pattern of racketeering activity," ignoring its duty to prove the "enterprise." Even then the state only presented the testimony of three cashiers who worked at Kee Foods and sold synthetic marijuana to undercover officers and a confidential informant. The state presented no evidence that Nagi and the cashiers associated together for the common purpose of engaging in a course of conduct. Towfik,

Gasery, and Verdin were mere cashiers. They were not members of an enterprise with Nagi. Even so, they were not an independent entity with members functioning as a continuing unit for criminal purposes.

The cashiers and Nagi were not engaged in an ongoing criminal enterprise which existed separate and apart from a pattern of commercial activity. Thus, apart from the activity of sales occurring at Kee Foods – in the ordinary course and scope of the business of a convenience store – there is no racketeering or enterprise. The appellate court affirmation of this conviction violates the **Turkette** decision by associating sales staff with the alleged racketeering of the store owner. In other words, under this decision, Louisiana has now grouped the enterprise with the racketeering activity, violative of this court's pure directives.

III. A Money Laundering conviction requires proof of profits, not proceeds.

The state alleged Nagi violated sections (B)(1) and (B)(4) of La. R.S. 14:230, the money laundering statute. The particular provisions provide:

> B. It is unlawful for any person knowingly to do any of the following:
>
> (1) Conduct, supervise, or facilitate a financial transaction involving proceeds known to be derived from criminal activity, when the transaction is designed in whole or in part to conceal or disguise the nature,

> location, source, ownership, or the control of proceeds. . . .
>
> (4) Receive or acquire proceeds derived from any violation of criminal activity, or knowingly or intentionally engage in any transaction that the person knows involves proceeds from any such violations.

There are few Louisiana cases on money laundering and none on the specific subsections under which the state charged Nagi. Nonetheless, the Louisiana Supreme Court has instructed that a state court should not "conflate the federal law and related jurisprudence with the Louisiana statute," since the state crime requires "general intent" while the federal statute requires a transaction be conducted with "specific intent" to promote the carrying on of an unlawful activity. **State v. Lemoine**, 2015-1120, p. 4 (La. 5/3/17), 222 So.3d 688, 692.[4] But such a generalization should not keep the court from considering relevant federal jurisprudence, as the **Lemoine** court cited at least one federal case to support, not distinguish, its holding.

Here, the evidence is not sufficient to demonstrate that Nagi, with general or specific intent, conducted a financial transaction involving proceeds known to be derived from criminal activity when the transaction was designed to conceal or disguise the nature, location, source or ownership or control of the proceeds or receive or acquire proceeds from the violation of

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[4] In **Lemoine**, the defendant was charged with violating La. R.S. 14:230(B)(2).

criminal activity while knowing the proceeds were from such violations. Nagi never believed the products he was selling were illegal. He relied upon the lab report, his attorney, and the information he was given from persons who spoke with the Terrebonne Sheriff's Office to reasonably believe his products were legal. In other words, Nagi mistakenly believed the fact that the products were legal to sell.

Applying federal law as a guide,[5] the court must first begin by understanding that the term "proceeds" used in money laundering statutes, means profits, not gross receipts. **United States v. Santos**, 553 U.S. 507, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008). Although a plurality, the **Santos** court said because the term is ambiguous in the federal scheme, the court must apply lenity. And to adopt a receipts definition of "proceeds" would create a "merger problem" in certain cases. **Id.** at 515-517. (Any specified unlawful activity, an episode of which includes transactions which are not elements of the offense and in which a participant passes receipts on to someone else, would merge with money laundering. . . .). **Id.**

Applying this definition to the Louisiana money laundering statute, and thereafter to the facts of this case, there is no evidence to demonstrate the profits related to Nagi's facilitation of the sale of synthetic marijuana. While the state seized cash and credit card

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[5] In **State v. Dudley**, 2006-1087 (La. App. 1 Cir. 9/19/07), 984 So.2d 11, this court held that La. R.S. 14:230 was comparable to 18 U.S.C. §1956(a)(1)(B)(I), and thus federal law was instructive, again a reliance upon federal law by the state courts.

receipts from the business, it made no effort to differentiate between the proceeds for other items, such as milk and gasoline, and the synthetic marijuana. There is also no evidence to demonstrate how the jury arrived at a $590,000.00 figure as the amount of money laundered because the state failed to connect the money seized to true proceeds. Moreover, there is no evidence that Nagi sought to conceal the proceeds from the sales in his store. The so-called proceeds – which again include the gasoline and milk sales – were deposited and stored in a safety deposit box, both legitimate ways to store cash and for the safety of store sales.

There is no evidence Nagi sought to hide the money through the purchases of cars, boats, or other property. And the fact that he sent money to his father and family in Yemen is a non-starter and only meant to inflame the jury – especially since the amount sent, according to the record, is just mere thousands, a minuscule amount in relation to the amount alleged profited. These wired transfers were nothing but a son trying to assist his family in a war-torn country where civil war is present. It was not an effort to conceal money. These actions are not those of one committing a crime. *See* **United States v. Esterman**, 324 F.3d 565 (7th Cir. 2003) (money laundering criminalizes a transaction in proceeds, not the transaction that creates the proceeds; moreover, the mere transfer and spending of funds is not enough to sweep conduct within the money laundering statute – instead, subsequent transactions must be specifically designed to "hide the provenance of the funds involved"). **United States v. Sanders**, 928

F.2d 940 (10th Cir. 1991) (vehicle purchases with drug sale proceeds were insufficient to show money laundering. Defendants appeared themselves to purchase vehicles, the type of which did not evidence "typical money laundering transaction"); **United States v. Hodge**, 558 F.3d 630 (7th Cir. 2009). (Evidence of rent and utilities paid by "spa" that was a front for a prostitution business was insufficient to support a conviction for conspiracy to commit money laundering; such costs were not "proceeds" within meaning of money laundering statute).

Money laundering is not "money spending." Even if Nagi spent some of the money, he did so to support himself and his family. He took no steps to hide the sales, and the state took no time to differentiate between all other proceeds of the store and the alleged improper goods. The conviction on this charge must fall; it is unconstitutional as money laundering is explained by this Court. What is at issue here is just how afar the state courts will "conflate" the use of federal jurisprudence to define an offense, but fail to support the essential elements regarding the determination of the true proceeds from that alleged illegal activity.

CONCLUSION

Construing the verdict most favorable to the state, the evidence merely shows that Nagi sold synthetic marijuana from Kee Foods. He deposited proceeds from the sale into the business's accounts which was

ultimately deposited into the business's bank accounts. And he kept a large amount of cash in a safety deposit box. None of the deposits or cash were directly related to the synthetic marijuana sales and a sum certain of sales was never attempted.

That was the state's case, nothing less, nothing more. This evidence does not show beyond a reasonable doubt Nagi engaged in racketeering, laundered money, distributed a controlled dangerous substance, or possessed with intent to distribute a controlled dangerous substance. The convictions cannot withstand constitutional scrutiny.

What is not favorable or constitutional is that the trial court imposed a 90-year consecutive sentence upon a 33-year-old first offender in violation of the Eighth Amendment. Certiorari by this Court provides it the opportunity to determine whether such a term-imposed sentence remains viable under **Solem**.

Respectfully submitted:

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