No. 18-1585

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

REPLY BRIEF

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ARGUMENT IN REPLY

Kassim Nagi does not "spill[s] pages of ink." (Res. at 8). Nagi merely demonstrates the trial court's imposition of consecutive sentences – resulting in 90 years, the equivalent of life – is unconstitutional. He further demonstrates the confusing Louisiana jurisprudence on racketeering, which, while ostensibly relying upon federal case law, is itself in flux.[1]

The state makes no substantive argument in opposition. It merely wants this court to deny the writ of certiorari because it says so.

But the state overlooks that this court needs to (1) determine whether the Eighth Amendment bars as punitive the 90-year sentence imposed upon Nagi, despite the state's claim he may be eligible for parole; and (2) clarify if one commits racketeering in the absence of an "enterprise."

A. Nagi's sentence is unconstitutionally excessive.

The state argues Nagi's sentence is not unconstitutionally excessive because he is eligible for parole – in 30 years. (Res. at 7). But even a liberal parole policy, if indeed parole after 30 years is an event Nagi can look forward to, does not mitigate the harshness of

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[1] Nagi acknowledges not asserting the non-unanimity issue at the lower courts. Nonetheless, he notes the 10-2 verdict in his case, asserting he will be bound by this Court's decision in **Ramos v. Louisiana**, 18-5924.

an unconstitutionally excessive sentence. The Eighth Amendment prohibits sentences that are grossly disproportionate to the crime committed, and that proviso extends to noncapital sentences. **United States v. Nagel**, 559 F.3d 756 (7th Cir. 2009). Twenty-six years ago, in **Solem v. Helm**, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983), this Court declared:

> [W]e hold as a matter of principle that a criminal sentence *must be proportionate* to the crime for which the defendant has been convicted. Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as the discretion that trial courts possess in sentencing convicted criminals. But no penalty is *per se* constitutional. . . . [A] single day in prison may be unconstitutional in some circumstances.

463 U.S. at 290, 103 S.Ct. 3001 (emphasis added; footnote omitted). The court then elaborated:

> [A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

Solem, 463 U.S. at 292, 103 S.Ct. 3001.

While Louisiana law permits consecutive sentences, it imposes a high burden on trial courts which seek to impose such a harsh sentence. Before a court can statutorily impose consecutive penalties, it must find the offender's past criminality or other circumstances in his background justify treating the defendant as a grave risk to the safety of the community. **State v. Walker**, 2000-3200 (La. 10/12/01), 799 So.2d 461. Those factors include (1) the defendant's criminal history, (2) the gravity or dangerousness of the offense, (3) the viciousness of the crimes, (4) the harm done to the victims, (5) whether the defendant constitutes an unusual risk of danger to the public, (6) the potential for the defendant's rehabilitation, and (7) whether the defendant has received a benefit of a plea bargain. **State v. Van Nortrick**, 51,406 (La. App. 2 Cir. 1/10/18), 244 So.3d 810 (internal citations omitted).

Subsequent cases to **Solem** called into question, but did not overrule, the disproportionality test. Recently, in **Matthews v. Cain**, 337 F.Supp.3d 687 (E.D. La. 2018), a Louisiana district court examined the line of United States Supreme Court cases examining excessive sentencing. Citing **McGruder v. Puckett**, 954 F.2d 313 (5th Cir. 1992), the district court relied upon the United States Fifth Circuit approach, that the sentencing court must make a threshold comparison of the gravity of the offense against the severity of the sentence. The factors considered by this Court demonstrate the unconstitutional excessiveness of Nagi's sentence. The state of Louisiana merely proved Nagi sold synthetic marijuana. It did not show the marijuana

was a "horrible poison," as the trial court opined. It did not present the testimony of even one person harmed from use of the product. It did not show the product was prevalent in Terrebonne Parish. And, while it seized a fair amount of money, it never proved at the criminal trial how much was derived from the synthetic marijuana sales.

The consecutive sentence is excessive and not individualized to Nagi's crime; it is therefore unconstitutional.

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

State courts may be the final arbiter of state law. But when the state's highest court has failed to rule on a state law for which it claims reliance upon federal law, this court must clarify the law. The need is greatest when the federal law, itself in flux, is misapplied. *See* **Johnson v. Cain**, 2008 WL 11449312, p. 8 (E.D. La. 2008) (The two leading state appellate decisions on the meaning of "enterprise" under the state racketeering statute reached contrary results on the sufficiency of the evidence. The Louisiana Supreme Court has not decided the meaning of "enterprise," but has noted because the statute is patterned after 18 U.S.C. §1961, *et seq.*, federal decisions are persuasive. However, federal decisions in this area are less than helpful; the question of what must be shown to prove an "enterprise" at a criminal trial for violations of the federal RICO

statute has produced confusion and a definite circuit split among the federal courts of appeals).

Johnson says the two Louisiana appellate decisions interpret the Louisiana statute and federal law quite differently: one requiring the enterprise separate and apart from the pattern of racketeering activity, **State v. Touchet**, 1999-1416 (La. App. 3 Cir. 4/5/00), 759 So.2d 194 (the "enterprise" as the group of co-defendants organized to transport marijuana, the "racketeering activity" consisted of the defendant's act of selling the marijuana), and the other, **State v. Sarrio**, 2001-0543 (La. App. 5 Cir. 11/27/01), 803 So.2d 212, writ denied, 2002-0358 (La. 2/7/03), 836 So.2d 86, merging the two elements (the "enterprise" existed for no other purpose than drug dealing). While reviewing both decisions, the Louisiana First Circuit here adopted neither, simply concluding sufficient evidence for a jury to convict Nagi under either interpretation.

Yet, in **United States v. Turkette**, 452 U.S. 576, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981), this court held that to convict a party of violating the federal Racketeer Influenced and Corrupt Organizations Act [RICO], the prosecutor must prove the existence of an "enterprise" as a separate element from "pattern of racketeering activity." **Turkette** requires the government prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." 452 U.S. at 583. Yet as **Johnson** noted when issued in 2008, six federal circuits held the term "enterprise" rendered the element of the offense interchangeable with the "pattern of racketeering." **Johnson**, supra at 9. Two

circuits coalesced the organization constituting the enterprise to be no more than the sum of the predicate racketeering acts. **Id.**

Obviously whether "enterprise" and "pattern of racketeering" are one element or separate elements to be proven remains unclear. This is precisely why this issue falls within the ambit of this court's jurisdiction. While the Louisiana courts refer to federal law, the reference is not quite helpful given the split among the circuits. The necessity that the record evidence under **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) support a finding of a guilt beyond a reasonable doubt squarely places this case before this court. Here, the state failed to prove an "enterprise" separate from the "racketeering activity." The state conceded as much in its indictment, only alleging that Nagi "knowingly participated in a prohibited pattern of racketeering activity."

The state presented no evidence Nagi and his employees worked together for the common purpose of engaging in a racketeering course of conduct. Simply showing Nagi was involved in selling the synthetic marijuana is insufficient. Apart from the sales of Kee Foods – in the ordinary course and scope of the business of a convenient store – there is no racketeering enterprise, at least as this court now defines a RICO violation.

The Louisiana appellate court affirmation now groups the enterprise with the racketeering activity,

which is not what this Court's **Turkette** decision requires.

CONCLUSION

The petition for writ of certiorari should be granted. Regardless of the possibility of parole, a 90-year sentence for a first-timer is excessive. And given the obvious inconsistent interpretation of "enterprise" and "racketeering activity," the federal statutes which Louisiana insists upon relying requires this court to intervene to establish uniformity of decisions throughout the states. **Martin v. Hunter's Lessee**, 1 Wheat. 304, 4 L.Ed. 97 (1816).

Respectfully submitted:

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