

No. _____

In The
Supreme Court of the United States

KEE FOOD, INC., ET AL.,

Petitioners,

v.

STATE OF LOUISIANA,

Respondent.

**On Petition For Writ Of Certiorari
To The Louisiana First Circuit Court Of Appeal**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Before the state may deprive a party of a property interest, notice and a meaningful opportunity to be heard is required under the Fourth Amendment and Fifth Amendment as incorporated through the Fourteenth Amendment. Thus:

Is the meaningful hearing aspect of due process satisfied when a party – faced with state seizure and retention of property under civil forfeiture statutes – is physically excluded from the trial on the merits?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

1. State of Louisiana, through the Terrebonne Parish District Attorney's Office.
2. Kee Food, Inc., a Louisiana Corporation.
3. Mohamed Nagi, an individual and member of Southla, LLC.
4. Southla, LLC ("Southla"), a Louisiana Corporation.

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.

Kee Food, Inc. was a Louisiana corporation, authorized to do and doing business in the State of Louisiana, Parish of Terrebonne.

Mohmaed Nagi is an individual.

Southla, LLC was a Louisiana corporation, authorized to do and doing business in the State of Louisiana, Parish of Terrebonne.

LIST OF RELATED CASES

State v. Kee Food, Inc., 2020-00716 (La. 9/29/20), 301 So.3d 1197.

State v. Kee Food, Inc., 2019-0795 (La. App. 1 Cir. 5/11/20), 303 So.3d 672.

Nagi v. Louisiana, 18-1585, ___ S.Ct. ___ (2019).

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OPINIONS BELOW

The Louisiana First Circuit Court of Appeal affirmed a judgment of civil forfeiture and seizure in favor of the State of Louisiana of \$486,927.12 in cash plus the proceeds from the sale of a commercial building. The court failed to substantively address the due process issue error raised herein – whether a party is deprived due process when its agent, who happens to be incarcerated, is physically excluded from the court for a civil seizure and forfeiture trial – by finding that the issue was not objected to, and should have been, at trial. *State v. Kee Food, Inc.*, 2019-0795 (La. App. 1 Cir. 5/11/20), 303 So.3d 672, *writ denied*, 2020-00716 (La. 9/29/20), 301 So.3d 1197.

The Louisiana Supreme Court denied Petitioners' writ of certiorari. *State v. Kee Food, Inc.*, 2020-00716 (La. 9/29/20), 301 So.3d 1197.

JURISDICTION

This court has jurisdiction under 28 U.S.C. §1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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

No person shall [. . .] be deprived of life, liberty, or property, without due process of law [. . .].

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 [. . .].

STATEMENT OF THE CASE

The underlying issue – whether a trial court is empowered to deny due process by excluding from the courtroom, during trial and without just cause, a party to the proceedings – emanates from a judgment of forfeiture. The State of Louisiana initiated the matter by filing a petition for judgment of forfeiture and seizure of a gas station and its cash assets, all allegedly connected to illegal drug sales commingled with proceeds of legitimate sales. The state asserted claims totaling \$1,083,216.25, plus sought seizure of the commercial building.

An initial merits trial was held in May 2016; the state prevailed. Petitioners appealed, asserting in part that service of process made on Kassim Nagi, who had been granted general power of attorney by the other Petitioners, was improper. The Louisiana First Circuit Court of Appeal agreed, finding that while Kassim had power of attorney to represent Petitioners in judicial matters, the mandate did not specify Kassim Nagi as agent for service of process. It found the summary judgment valid as to the state's claim against Kassim individually, but annulled the judgment regarding the forfeiture as to claims against the remaining Petitioners. *State v. Kee Food, Inc.*, 2017-0127 (La. App. 1 Cir. 9/21/17), 232 So.3d 29, 33, *writ denied*, 2017-1780 (La. 12/5/17), 231 So.3d 632.

On remand, the trial court appointed an attorney to receive service of process and ostensibly to represent the absentee defendants. When the matter proceeded to trial, the court excluded their agent, Kassim Nagi, from the courtroom.¹ Petitioners, appearing solely through Kassim, were thus precluded from being present in court and coordinating a defense with their court-appointed attorney. The appointed attorney's inability to reach his clients was made known to the trial judge at the time Kassim was excluded from the courtroom.

¹ At the time of hearing, Kassim was serving a 90-year sentence. See *State v. Nagi*, 2017-1257 (La. App. 1 Cir. 4/9/18) (unreported), *writ denied*, 2018-0739 (La. 3/25/19). Kassim's conviction has since been vacated by this court. *Nagi v. Louisiana*, 18-1585, ___ S.Ct. ___, 2020 WL 1978921 (2020).

State District Court Proceedings

The trial following remand was conducted in September 2018. At the outset, the trial court decided that Kassim Nagi was merely present as a witness and could not act as agent because he was not an attorney. Despite the Louisiana First Circuit Court of Appeal's prior finding that Kassim Nagi was agent for Petitioners,² the trial court ruled Kassim, who was present in court pursuant to the state's writ of habeas corpus ad testificandum, could not remain in the courtroom. Citing alleged security reasons, Kassim was ordered to be returned to jail. The trial court additionally denied a motion for continuance that prevented the court-appointed attorney from meeting with Kassim and, minimally, attempting settlement discussions. These rulings immediately preceded trial.

The state presented lay and expert witnesses and considerable evidence. It further called, with the court's approval, Kassim Nagi as a witness. Kassim refused to answer any questions on Fifth Amendment grounds.³

Petitioners' court-appointed attorney, left without clients to consult, merely submitted notes of evidence regarding his appointment, acceptance of service, and attempt to notify the defendants. Unable to

² *State v. Kee Food, Inc.*, 2017-0127 (La. App. 1 Cir. 9/21/17), 232 So.3d 29, 33, *writ denied*, 2017-1780 (La. 12/5/17), 231 So.3d 632.

³ Kassim's appeal from his criminal convictions were still pending in September 2018.

communicate with his Petitioners or Kassim, the court-appointed attorney presented no defense.

The trial court once again ruled for the state, awarding it \$486,927.12, plus the proceeds from the sale of a commercial building.

State Appellate Court Proceedings

The Louisiana First Circuit Court of Appeal affirmed the judgment of civil forfeiture and seizure. The appellate court failed to substantively address the due process issue constituting structural error raised herein – whether a party is deprived due process when its agent is physically excluded from the court for a civil seizure and forfeiture trial – by finding that the issue was not objected to, and should have been, at trial. *State v. Kee Food, Inc.*, 2019-0795 (La. App. 1 Cir. 5/11/20), 303 So.3d 672. Appx. 1.

State Supreme Court Proceedings

The Louisiana Supreme Court denied Petitioners' writ of certiorari. *State v. Kee Food, Inc.*, 2020-00716 (La. 9/29/20), 301 So.3d 1197. Appx. 17.

ARGUMENT

Seizure of property implicates two “explicit textual source[s] of constitutional protection,” the Fourth Amendment and the Fifth. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 50, 114 S.Ct.

492, 499, 126 L.Ed.2d 490 (1993), *citing to Soldal v. Cook Cty., Ill.*, 506 U.S. 56, 70, 113 S.Ct. 538, 548, 121 L.Ed.2d 450 (1992). The Fourteenth Amendment incorporates these Bill of Rights constitutional protections and renders them applicable to the States. *Timbs v. Indiana*, 139 S.Ct. 682, 687, 203 L.Ed.2d 11 (2019). And, importantly, “[t]he government’s seizure and retention of property under civil forfeiture statutes, in the absence of a meaningful hearing at a meaningful time, raise serious due process concerns under the Fourteenth Amendment.” *Krimstock v. Kelly*, 306 F.3d 40, 51 (2d Cir. 2002).

As this Court explained in *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976), “some form of hearing is required before an individual is finally deprived of a property interest.” During that hearing, “[t]he ‘right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.’” *Id.* The right to be heard fundamentally requires the individual “to be heard ‘at a meaningful time and in a meaningful manner.’” *Id.* Indeed, “[t]he core of due process is the right to notice and a meaningful opportunity to be heard.” *LaChance v. Erickson*, 522 U.S. 262, 266, 118 S.Ct. 753, 756, 139 L.Ed.2d 695 (1998).

Furthermore, “it makes sense to scrutinize governmental action more closely when the State stands to benefit.” *Harmelin v. Michigan*, 501 U.S. 957, 978, 111 S.Ct. 2680, 2693, 115 L.Ed.2d 836 (1991).

Scrutiny by this Court, especially where the courts below passed upon the question presented, is merited.

1. The trial court allowed the state to seize more than one million dollars of cash and assets while denying Petitioners' right to have their legal agent appear in court to defend against the seizure.

Petitioners were faced with the State of Louisiana standing to benefit to the excess of one million dollars in addition to more than six hundred thousand earlier seized.⁴ Having already been granted retrial following ineffective service, Petitioners elected to have their agent,⁵ Kassim Nagi, appear on their behalf at the second trial. As if present themselves, Petitioners, through Kassim, had the fundamental right to be heard in a meaningful manner. *Mathews*, supra. The trial court, in excluding Kassim from the courtroom, denied due process to Petitioners by rejecting not merely their right to be heard in a meaningful manner

⁴ See *State v. Kee Food, Inc.*, 2017-0127 (La. App. 1 Cir. 9/21/17), 232 So.3d 29, 33, *writ denied*, 2017-1780 (La. 12/5/17), 231 So.3d 632.

⁵ The common law term agent is used herein. The Louisiana Supreme Court has explained that “the terms ‘mandatary’ and ‘agent’ are sometimes used synonymously. Cases have held that a mandatary or agent is one who acts in place of another by authority from him.” *Ross v. Ross*, 2002-2984 (La. 10/21/03), 857 So.2d 384, 397, fn. 9. The Louisiana Civil Code defines mandate as “a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal.”

but by rejecting their right to be heard in *any* manner. (Emphasis added). And while courts have recognized that the Fifth and Fourteenth Amendments do not grant a prison the right to attend court in order to carry on civil proceedings which *he initiates*, see *Moeck v. Zajackowski*, 541 F.2d 177, 180 (7th Cir. 1976) (Emphasis added), here, the state initiated the proceeding.

Thus, the lower court's denial of Petitioners' fundamental right to be heard is a denial of due process. The egregiousness of the due process denial is compounded by the trial court's actions subsequent to the exclusion of Kassim. After excluding Kassim and preventing him from assisting the court-appointed attorney to form any defense, the trial court actually permitted the state to call Kassim as a witness to support its case in chief. Appx. 8-9.

Any basis, rational or otherwise, for excluding Kassim evaporated once the court allowed him to remain solely to benefit the state over Petitioners. Kassim, by virtue of his mandate, was the party. Because the record reveals that the morning of trial was the court-appointed attorney's first opportunity for contact with his clients, Kassim's exclusion precluded the mounting of any defense.

2. The appellate court incorrectly based its denial of Petitioners' due process rights, through their legal agent, to be present in court on a purported failure to object.

The Louisiana First Circuit Court of Appeal based its entire decision on Kassim's alleged failure to contemporaneously object to the trial court's order removing him from the courtroom. *Kee Food, Inc.*, 2019-0795, p. 7. The record, albeit not clear, indicates otherwise. The trial court took the erroneous position that because the proceedings did not involve Kassim – a forfeiture judgment against him was affirmed by the First Circuit (*Kee Food, Inc.*, 2017-0127) – he “really don’t have the standing or the – I am trying to find words that I think you will understand, but you don’t really have the authority to ask this be postponed because you are no longer involved in this, do you understand?” Kassim Nagi responded by asking that he represent his father. The court, again erroneous, said “unless you are an attorney you can’t represent your father in this proceeding . . .”

But Kassim is the mandatary (attorney in fact) for his father and his father’s company – the Petitioners.⁶ That fact is not in dispute and was recognized by the First Circuit in a prior proceeding. As mandatary and attorney-in-fact, Kassim had the right and duty to be present during the entire forfeiture proceedings in order to assist the *ad hoc* attorney to defend against the

⁶ The Louisiana Supreme Court recognized “mandatary” or “attorney in fact” at least as early as 1845. *Mayo v. Stroud*, 12 Rob. 105 (1845).

forfeiture proceeding. Under Louisiana law, a mandate is a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs on his behalf. La. C.C. art. 2989. A mandatory's power or authority is composed of his actual authority, express or implied, together with the apparent authority which the principal has vested in him by his conduct. *Boulos v. Morrison*, 503 So.2d 1, 3 (La 1987). In *Kee Foods*, 2017-0127; 232 So.3d 29, 33, the First Circuit found:

The power of attorney executed by Mohamed in favor of Kassim allowed Kassim to act in the name of and on behalf of Mohamed “[t]o appear before all courts and to prosecute, defend, or compromise and settle by agreement, arbitration, or otherwise to sign all pleadings and do all things necessary to obtain writs of attachment, sequestration and injunction and to take appears, and in such instances, to furnish the requisite security bond.”

In other words, “Mohamed gave a power of attorney to Kassim that included the ability to assert claims on behalf of Mohammed. . . .” *Id.* That mandatary, or power of attorney, gives Kassim Nagi the right to be present in court at all proceedings regarding his father and his father’s businesses. Appx. 7-8. *See, e.g., State in Interest of Z.P.*, 52,354 (La. App. 2 Cir. 9/26/18), 255 So.3d 727 (BP was allowed to remain in the courtroom because she had power of attorney to handle AP’s legal matters and to help her understand the court proceedings).

3. Petitioners had a constitutional due process right to have their agent present in court.

Because the right to be present in court is a constitutional right and one that sounds in due process, *See La. Constitution Article I, §22* (providing that “[a]ll courts shall be open and every person shall have an adequate remedy by due process of law and justice, administered without denial, partiality, or unreasonable delay, for injury to him in his person, property, reputation, or other rights”), the lack of a contemporaneous objection does not preclude appellate review. *See, e.g., State v. McCasland*, 2016-1178 (La. App 1 Cir. 4/18/17), 218 So.3d 1118, *writ not considered*, 2017-0823 (La. 3/2/18), 269 So.3d 706 (despite the lack of a contemporaneous objection, jury instructions may be reviewed on appeal when the alleged error violates a fundamental due process right).

In *Zarek v. Sanders*, 1994-188 (La. App. 5 Cir. 10/12/94), 656 So.2d 1038, the appellate court affirmed a trial court judgment rendered when court proceeded with trial and dismissed a reconventional demand when defendants or their counsel failed to appear at the opening of trial, but reversed and remanded the portion of the judgment regarding the trial on a third-party demand. The appellate court held once the defendants or their counsel arrived, and all parties present, the court was obliged to allow counsel for defendants to participate in the remainder of trial. Citing La. Const. Art. I, §22, the court said:

. . . while it was within the discretion of the trial court to proceed with the trial in the absence of the defendant; but once defendants, or their counsel, appeared in court in the midst of trial, refusal to permit them to participate and present a defense constituted a denial of due process and of access to the courts, which requires reversal of the judgment in favor of the third party plaintiff. *Zarek*, 1994-188, pps. 7-8; 656 So.2d at 1041.

The right of access contains a concomitant right to be heard at a meaningful time and in a meaningful manner. *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1973). As stated by the Louisiana Supreme Court in *Wilson v. City of New Orleans*, 479 So.2d 891, 894 (La. 1985), "due process is not a technical concept with a fixed content unrelated to the time, place, and circumstances." Rather, it requires the implementation of flexible rules which may yield to the demands of the particular situation. *Morrissey v. Brewer*, 408 U.S. 417, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Like this Court, the Louisiana Supreme Court recognizes the fundamental right to be meaningfully heard in a meaningful way:

The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision when it acts to deprive a person of his possessions. The purpose of this requirement is to protect a person's use and possession of property from arbitrary

encroachment – to minimize substantially unfair or mistaken deprivations of property.

Wilson at 894 (citations omitted).

The trial court was authorized to and did appoint counsel for Petitioners under Louisiana law.⁷ Appointed counsel's duty did not end with accepting service and attempting to notify Petitioners of the matter. Rather, appointed counsel was bound to determine what defense, if any, Petitioners may have had and what evidence is available in support of the defense. *Id.* Legally, appointed counsel's obligations extended as far as if he had been retained directly by Petitioners.⁸

The structural deficiencies created by the trial court's denial of due process prevented the very counsel the court appointed from forming any defense. Appointed counsel's ability to properly represent the defendants was obstructed because the trial court denied Kassim, the defendants' appointed mandatory for judicial matters, the right to be present in court. Without access to Kassim at the forfeiture hearing, Pellegrin could not properly object and certainly could not present a defense.

In other contexts, this Court has repeatedly upheld the rights of parties whose rights could be affected

⁷ Louisiana Code of Civil Procedure article 5091, *et seq.*

⁸ Louisiana courts have recognized the duty of a curator ad hoc to represent the absent defendant and protect his interests for nearly two centuries. *Pontalba v. Pontalba*, 2 La. 467 (La. 1831); *Whitney v. O'Bearne*, 11 La. 266 (La. 1837); *Hewet v. Wilson*, 7 La. 75 (La. 1834).

are entitled to be heard. In *Goss v. Lopez*, 419 U.S. 565, 579, 95 S.Ct. 729, 738, 42 L.Ed.2d 725 (1975), for example, the Court found, minimally, “students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.” Similarly, in *Morrissey v. Brewer*, supra at 488, the Court ruled that parolees “must have an opportunity to be heard” prior to a revocation hearing.

CONCLUSION

The court summarily prevented Kassim’s presence based upon alleged security concerns. And the appellate court denied the Petitioners their right to have the trial court’s decision reviewed for abuse of discretion because the court believed no objection was made. But the right of access to courts, the inherent right of due process, and the unnecessary need to object to denial of a fundamental right, all require this Court to grant this writ of certiorari and reverse the appellate court, remanding this matter for a new hearing.

Respectfully submitted,

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