

No. 18-5960

**In the Supreme Court of the United States**

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IN RE KENNY G ENTERPRISES, LLC,  
*DEBTOR,*

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KENNETH GHARIB,

*PETITIONER,*

v.

THOMAS H. CASEY, CHAPTER 7 TRUSTEE,

*RESPONDENT.*

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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## QUESTION PRESENTED

Whether the Recalcitrant Witness Statute's eighteen month cap on coercive confinements, or similar objective measure, should inform the due process limit on indefinite confinement arising from a judicial finding of civil contempt made in the absence of procedure normally required in the criminal setting, in order to guide the broad discretion accorded judges in defining such limits?

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### Other Authorities

None.

## OPINIONS BELOW

Kenneth Gharib (“Petitioner Gharib”) lists three separate judgments from the Ninth Circuit Court of Appeals as being addressed in this Writ of Certiorari. However, only one is actually applicable and reviewable as it relates to the questions presented in this Writ of Certiorari.

The first of the judgments involves the affirmation by the Ninth Circuit Court of Appeals of the orders of the Bankruptcy Court finding Petitioner Gharib in contempt of Court (“9<sup>th</sup> Circuit Affirmation of Contempt Findings”). *See, In re Kenny G. Enterprises, LLC*, No. 16-55007 (May 8, 2018), Petitioner Gharib Appendix (“Pet. App.”) A. The relevant judgments from the Ninth Circuit Court of Appeals, the District Court, and the Bankruptcy Court are included in Petitioner Pet. App. A-E (“Original Contempt Findings”).

The second judgment involves the affirmation by the Ninth Circuit Court of Appeals of two orders of the Bankruptcy Court holding that Petitioner Gharib should remain incarcerated for his civil contempt. The relevant judgments from the Ninth Circuit Court of Appeals, the District Court, and the Bankruptcy Court are included in Pet. App. F-I (“Continuing Contempt Findings”). It is the Continuing Contempt Findings which Petitioner Gharib takes issue with in the Writ of Certiorari. He contends that the Bankruptcy Court, the District Court and the Ninth Circuit Court of Appeals should have considered, analyzed, and reviewed, and decided his case using Recalcitrant Witness Statute when determining whether Petitioner Gharib should have remained incarcerated for his civil contempt. This

Court is an improper vehicle for this review as Gharib failed to raise any issue related to this statute in his briefing below. He cannot circumvent the correct pathway for review by doing an end run to this Court. This Court is not a Court of first resort but last resort. Gharib has raised an issue that none of the lower courts considered. For this basis alone, the petition must be denied or the floodgates would open parties wishing to jump to the front of the line to invite this Court to take up issues that were not properly raised in the inferior courts.

The third judgment involves the affirmation by the Ninth Circuit Court of Appeals of an order of the District Court dismissing one of Petitioner Gharib's many appeals ("Procedural Order"). After entry of the 9<sup>th</sup> Circuit Affirmation of Contempt Findings, the District Court had requested that the parties present their positions as to whether the District Court needed to further address the matter. The District Court determined no further action was needed by the District Court and dismissed the appeal. Petitioner Gharib appealed that decision and the Ninth Circuit Court of Appeals affirmed the ruling that a dismissal of the District Court matter was appropriate. The relevant judgments from the Ninth Circuit Court of Appeals and the District Court are included in Pet. App. J-K.

## JURISDICTION

The Ninth Circuit Court of Appeals' judgments were entered on May 8, 2018 and on June 21, 2018. A petition by Petitioner Gharib seeking an extension of time to file a Writ of Certiorari on or before September 5, 2018 was granted by this Court and the Writ of Certiorari was filed timely. This Court has jurisdiction under 28

U.S.C. § 1254(1).

## STATEMENT OF THE CASE

In an Order and a Memorandum of Decision of the Bankruptcy Court, both entered on March 23, 2015, after having provided the parties an opportunity for written discovery and depositions and after conducting extensive, multiple hearings, including the taking of live testimony of several witnesses, Petitioner Gharib was held to be in contempt by the Bankruptcy Court for failing to turnover property of the bankruptcy estate of Kenny G Enterprises, LLC (“Bankruptcy Estate”), in the form of \$1,420,043.70 in cash (“Bankruptcy Estate Funds”), to the Chapter 7 Trustee, Thomas H. Casey (“Trustee Casey”)(“Bankruptcy Court Finding of Contempt”). *See*, Pet. App. B at page 3, D and E at page 2.

The evidence presented to the Bankruptcy Court in these hearings included a photo of Petitioner Gharib with a cashier’s check in the amount of \$1,420,043.70 in his hands taken from the bank account holding the Bankruptcy Estate Funds. This photo was taken from the bank’s surveillance camera within a few hours after a hearing held on August 14, 2013 wherein the Bankruptcy Court had specifically directed that these very Bankruptcy Estate Funds were to be turned over to the trustee of the Bankruptcy Estate to be appointed and no one else. Instead of turning the funds over to Trustee Casey, who became the appointed trustee for the Bankruptcy Estate, Petitioner Gharib actually took that cashier’s check and deposited it into another bank account wherein he was the sole signatory. Then from that bank account, Petitioner Gharib transferred the Bankruptcy Estate

Funds again to two other accounts, again with himself as the sole signatory. *See*, Pet. App. C at page 3, E at pages 2-5, K at page 5.

The Bankruptcy Estate Funds were then transferred overseas then back again to the United States to another bank account with Petitioner Gharib as the sole signatory. All the while, small amounts were dissipated from the Bankruptcy Estate Funds through small withdrawals and checks from these various bank accounts.

The very day of the hearing held on March 12, 2015, wherein the Bankruptcy Court was determining whether to hold Petitioner Gharib in contempt for not following the Bankruptcy Court's directive to turn over the \$1,420,043.70 in cash, Petitioner Gharib again transferred \$604,875.00 of Bankruptcy Estate Funds, which were traceable from the original Bankruptcy Estate Funds, to another bank account in which he was the sole signatory. Shortly thereafter, and in May of 2015, the remaining \$604,875.00 of Bankruptcy Estate Funds were transferred to bank accounts under the control of Petitioner Gharib's brother and his girlfriend. *See*, Pet. App. H pages 4-8.

The Bankruptcy Court Finding of Contempt by Petitioner Gharib was affirmed by both the District Court and the Ninth Circuit Court of Appeals ("Original Contempt Findings"). *See*, Pet. App. A, B, and C. Petitioner Gharib is not questioning any aspect of these Original Contempt Findings. The question posed to this Court in this Writ of Certiorari does not take issue with the finding that Petitioner Gharib was properly held to be in civil contempt of Court.



A month and a half later, and on May 12, 2015, the Bankruptcy Court held another hearing to assess whether, during the interim period since being held in contempt on March 23, 2015, Petitioner Gharib had complied with the Original Contempt Findings and to consider further sanctions. At this hearing, it was determined that Petitioner Gharib continued to fail to comply with the Bankruptcy Court's directive to turn over the Bankruptcy Estate Funds of \$1,420,043.70 in cash to Trustee Casey and additional sanctions were levied against him in the form of incarceration for his civil contempt. The U.S. Marshal took Petitioner Gharib into custody that same day.

Thereafter, the Bankruptcy Court conducted many additional hearings to consider whether the continued incarceration of Petitioner Gharib for civil contempt was appropriate. Hearings were conducted on May 18, 2015, July 21, 2015, October 27, 2015, February 9, 2016, April 1, 2016, June 16, 2016, September 14, 2016, January 24, 2017, June 27, 2017, October 3, 2017, March 6, 2018 and September 25, 2018 ("Continuing Contempt Hearings").

At each of these twelve Continuing Contempt Hearings, Petitioner Gharib was given an opportunity to argue the law and present evidence. In addition, Petitioner Gharib was always offered the opportunity to come before the Bankruptcy Court on an expedited basis should he so desire. At these Continuing Contempt Hearings, the Bankruptcy Court considered Petitioner Gharib's claimed impossibility defense to civil contempt and determined that Petitioner Gharib had not meet his burden to show categorically and in detail why he was unable to

comply with the Bankruptcy Court's directive to turn over the \$1,420,043.70 in Bankruptcy Estate Funds to Trustee Casey. *See*, example Pet. App. H at page 8 regarding the September 14, 2016 hearing.

Petitioner Gharib appealed two of the orders entered after these Continuing Contempt Hearings: the Order entered on October 4, 2016 after the September 14, 2016 hearing and the Order entered on February 16, 2017 after the January 24, 2017 hearing ("Continuing Contempt Orders"). These Continuing Contempt Orders have been affirmed by the District Court and the Ninth Circuit Court of Appeals. *See*, Pet. App. F-I.

It is the Continuing Contempt Findings which Petitioner Gharib takes issue with in the Writ of Certiorari. He contends that the Bankruptcy Court, the District Court and the Ninth Circuit Court of Appeals should have considered *28 U.S.C. Section 1826(a)*, known as the Recalcitrant Witness Statute, when determining whether Petitioner Gharib should have remained incarcerated for his civil contempt.

### THERE IS NO COMPELLING REASON TO GRANT THE WRIT OF CERTIORARI

There is not a single compelling reason for this Court to address the question posed in the Writ of Certiorari filed by Petitioner Gharib. The Continuing Contempt Findings do not conflict with a decision of another United States Court of Appeals. There is no conflict between the Continuing Contempt Findings and a decision by a State Court of last resort. The Continuing Contempt Findings are not so far departed from the accepted and usual course of judicial proceedings as to call

for the exercise of this Court's supervisory power. The Continuing Contempt Findings do not contain an important question of federal law that has not been, but should be, settled by this Court. The Continuing Contempt Findings do not decide an important federal question in a way that conflicts with decisions of this Court.

**THE ISSUE PRESENTED HERE BY PETITIONER GHARIB  
HAS NEVER BEEN PRESENTED TO ANY  
LOWER COURT THAT HAS REVIEWED THIS MATTER**

*28 U.S.C. Section 1826(a)* is referred to as "The Recalcitrant Witness Statute" and provides as follows:

Whenever a witness in any proceeding before or ancillary to any Court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of (1) the court proceeding, or (2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

Petitioner Gharib is requesting that this Court establish a rule that the eighteen months provided in *28 U.S.C. Section 1826(a)* is a presumptively reasonable period of detention for any civil contemnor. Petitioner Gharib asks that the eighteen-month benchmark provided in the Recalcitrant Witness Statute affect the burden of proof necessary to justify the continued confinement of any civil contemnor. He is not asserting that all contemnors must be released after eighteen months of confinement, but merely that the burden of proof should shift after eighteen months of confinement.

Although the question presented herein seeks a determination regarding the burden of proof to be considered by a Court when determining the appropriateness of a continuing incarceration for civil contempt, Petitioner Gharib actually never asked the Bankruptcy Court, the District Court or the Ninth Circuit Court of Appeals which reviewed his case to consider such an application of the Recalcitrant Witness Statute.

Before bringing this matter to this Court, Petitioner Gharib should have presented the opportunity to consider his proposed shift in the burden of proof as proposed in his Writ of Certiorari to the Bankruptcy Court, the District Court or even the Ninth Circuit Court of Appeals. Petitioner Gharib never asked a single Court to include the Recalcitrant Witness Statute in their considerations regarding whether his continued incarceration for civil contempt was appropriate.

Therefore, there is no reason to grant this Writ of Certiorari based upon a position that the Court below made an erroneous decision. No Court was even asked to make a decision as to whether the Recalcitrant Witness Statute should be applied in this case.

**THE LIMITATIONS ON A COURT'S DISCRETION AS  
PROPOSED BY PETITIONER GHARIB SHOULD  
NOT BE IMPLEMENTED BY THIS COURT**

Petitioner Gharib asks that the eighteen-month benchmark provided in the Recalcitrant Witness Statute affect the burden of proof necessary to justify the continued confinement of any civil contemnor. Petitioner Gharib concedes that *28 U.S.C. Section 1826(a)* only applies to a witness who refuses to comply with a court

order to testify or provide other information and that he is not such a witness. Petitioner Gharib has not refused to testify or provide information. He has only refused to turn over the \$1,420,043.70 in Bankruptcy Estate cash to Trustee Casey as ordered by the Bankruptcy Court. In other words, Petitioner Gharib admits the Recalcitrant Witness Statute does not actually apply in this case.

Petitioner Gharib contends that the benchmark he proposes is needed for three reasons. None of these reasons are compelling.

Firstly, Petitioner Gharib contends that a civil contemnor's confinement is left to the broad discretion of the judge whose lawful order was originally violated and that such broad discretion is "liable to abuse". However, Petitioner Gharib does not even suggest that such abuse of discretion occurred in this case. He also fails to acknowledge that in this case, the Bankruptcy Court Judge, the District Court Judge and the three Judges on the panel of the Ninth Circuit Court of Appeals have all found that the continued confinement of Petitioner Gharib for his civil contempt was appropriate. Both the District Court and the Ninth Circuit Court of Appeals specifically found that the Bankruptcy Court did not in fact abuse its discretion. Petitioner Gharib is suggesting a very broad, drastic solution for a problem that does not even exist in this case.

Secondly, Petitioner Gharib contends that the law provides that the defense of self-induced impossibility to civil contempt is not allowed and, therefore, an objective benchmark is required to be established. *See*, Writ of Certiorari at page 13. In fact, in the case of *Federal Trade Commission v. Affordable Media, LLC*, 179

F.3d 1228 (9<sup>th</sup> Cir. 1999), the Ninth Circuit Court of Appeals held that it is possible to present a defense of self-induced impossibility, however, the contemnor's burden of proof of such a defense is very high. The Bankruptcy Court, the District Court and the Ninth Circuit Court of Appeals all acknowledged that Petitioner Gharib was able to present a defense of self-induced impossibility, but that he also failed to meet the very high burden of proof of such a defense. *See*, Pet. App. H at pages 3-11 Pet. App. K at pages 6-8 and Pet. App. F at page 2. Therefore, this second stated reason for the need for a benchmark based upon the Recalcitrant Witness Statute is not compelling.

The third and final of Petitioner Gharib's stated reasons for the claimed need for a benchmark for the Courts to consider when determining whether continued confinement for civil contempt is appropriate is the assertion that Courts "have struggled to define when extended confinements implicate due process concerns in the absence of objective criteria." *See*, Writ of Certiorari at page 14.

Petitioner Gharib implies that because the exercise of discretion by a Court when determining the point at which civil contempt confinement becomes punitive is a difficult task, this Court should establish a rule that the eighteen months provided in *28 U.S.C. Section 1826(a)* is a presumptively reasonable period of detention for any contemnor.

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THE *ARMSTRONG* CASE DOES NOT PROVIDE  
A COMPELLING REASON TO GRANT  
THE WRIT OF CERTIORARI

With regards to Petitioner Gharib's third stated reason for this Court to establish an objective rule, Petitioner Gharib's Writ of Certiorari relies heavily upon the Second Circuit Court of Appeals case of *Armstrong v. Guccione*, 470 F.3d 89 (2<sup>nd</sup> Cir. 2006)(writ of cert denied 552 U.S. 989 (2007)) and more specifically on the separate opinion of then Judge Sotomayor.

The Writ of Certiorari wrongly indicates that then Judge Sotomayor's opinion in the *Armstrong* case was a dissenting opinion when in fact her opinion was a concurring one. The Writ of Certiorari also fails to include the information that the losing party in the *Armstrong* case had filed a writ of certiorari with this Court which was denied. In the *Armstrong* writ of certiorari, this Court was already asked to review the exact legal question presented here and declined to do so. *See, Armstrong v. Guccione*, 552 U.S. 989 (2007).

In the *Armstrong* case, an officer of a corporation in receivership, Mr. Armstrong, refused to comply with a turnover order directing him to deliver assets totaling approximately \$16 Million to a Court appointed Receiver. At the time of the cited *Armstrong* ruling by the Second Circuit Court of Appeals, Mr. Armstrong had been incarcerated for seven years for his contempt.

Unlike Petitioner Gharib, Mr. Armstrong had actually raised several novel questions to the lower court, including whether his continued incarceration violated *28 U.S.C. Section 1826(a)*. The lower court and the Second Circuit Court of

Appeals, including then Judge Sotomayor, all concluded that *28 U.S.C. Section 1826(a)* did not apply when the civil contemnor was refusing to turnover property as opposed to refusing to testify.

However, in her concurring opinion in the cited *Armstrong* case, then Judge Sotomayor, expressed her belief that the eighteen-month maximum duration imposed on a civil contempt sanction should, however, be considered as a presumptive benchmark for all civil contempt incarcerations. She noted that her position is not that eighteen months is a limit upon the length of incarceration for civil contempt. Then Judge Sotomayor did not suggest in the cited *Armstrong* case that the lower court's exercise of its inherent contempt power is in any way bound by *28 U.S.C. Section 1826(a)*.

In the cited *Armstrong* case, Judge Sotomayor noted that she herself, in a previous appeal by Mr. Anderson, had ruled that Mr. Armstrong's continued incarceration for civil contempt, after already having been incarcerated for five years, was not an abuse by the lower court and the continuing incarceration still retained its coercive nature over Mr. Armstrong.

At this point in time, Petitioner Gharib has only been incarcerated for three years, as opposed to the five years of incarceration of Mr. Armstrong, which Judge Sotomayor held had not yet become punitive.

There is no circuit split and this issue needs to incubate in the lower courts correctly before burdening this Court's busy docket. Mr. Gharib does not get a line



pass to jump to the front of the pipeline of cases where those parties followed well plowed procedural rules that have been in place for 100 years.

All that Judge Sotomayor suggested was that the lower court should now conduct another evidentiary hearing to ensure that Mr. Armstrong's incarceration remained coercive now that he had been incarcerated for two more years since her prior decision.

Both the District Court and the Ninth Circuit Court of Appeal have determined that the mere two years of incarceration of Petitioner Gharib for his civil contempt in this case was not an abuse of discretion by the Bankruptcy Court and that such the continuing incarceration was still coercive. The District Court even noted that if Petitioner Gharib had been released after only two years he would have effectively profited in the sum of about \$700,000 per year by his act of taking and hiding an asset of the Bankruptcy Estate. Two years of incarceration was found by the District Court to continue to exert a coercive influence over Petitioner Gharib even though it had not yet proven wholly effective in actually obtaining compliance by Petitioner Gharib. *See*, Pet. App. K at page 10.

In the case at hand, Petitioner Gharib has had twelve separate opportunities to present his case to the Bankruptcy Court as to why his continuing incarceration is no longer coercive and has become punitive. At each of these twelve Continuing Contempt Hearings, Petitioner Gharib has failed to produce any support for his contention that the civil contempt has turned punitive.

In fact, instead of actually admitting that he did take and hide the Bankruptcy Estate Funds, Petitioner Gharib continues to tell fanciful stories that directly contradict the admitted documentary evidence. *See*, Pet. App. E at pages 5-8 and H at pages 4-6 and page 8, K at page 7 and 10.

Judge Sotomayor suggested in her concurrence in the cited *Armstrong* case that it is a good practice for Courts when there has been an incarceration for civil contempt to continue to review the matter to determine if the coercive nature of the civil contempt has become punitive. The Bankruptcy Court in this case follows this suggestion and continues to provide Petitioner Gharib with ample and expedient opportunities to challenge his continuing incarceration for civil contempt.

Yet, at each of these twelve hearings, Petitioner Gharib continued to defy the Bankruptcy Court and continues to fail to provide any credible explanation as to the various transfers. Petitioner Gharib continues to deny any connections with the shell corporations which the Bankruptcy Estate Funds passed through despite the fact the evidence that has been presented clearly demonstrating that Petitioner Gharib does in fact have such connections and control over the corporate bank accounts.

Petitioner Gharib is requesting that this Court effectively write a new statute extending the eighteen-month limitation of incarceration for a recalcitrant witness as stated in *28 U.S.C. Section 1826(a)* to include all cases involving the incarceration of civil contemnors. Respectfully, writing new laws is the duty of the

Congress not this Court, especially when the proposed new law would deprive the Courts of their ability to exercise their discretion.

Petitioner Gharib has failed to present a compelling reason for this Court to grant the Writ of Certiorari and take on a task of essentially writing a rule in the first instance, absent the benefit of lower court analysis and reasoning that the eighteen months provided in *28 U.S.C. Section 1826(a)* is a presumptively reasonable period of detention for any civil contemnor and that the eighteen month benchmark provided in the Recalcitrant Witness Statute affects the burden of proof necessary to justify the continued confinement of any civil contemnor. Mr. Gharib is free to assert his rights to any court below. It should also be noted that the trial court holding him in contempt has repeatedly told him that he can have a hearing at any time, promptly, on any new legal issues or facts he wants to bring forward. Mr. Gharib has always held the keys to his incarceration which is as simple as an admission that he or his agents spent the money or provide information as to its whereabouts. Instead, he has stuck to a concocted story that the money is in Iran in real estate and that he can't return it at this time.

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## CONCLUSION

This Petition provides no basis for immediate extraordinary relief and respectfully should be denied.

Respectfully submitted,

LAW OFFICES OF RONALD RICHARDS &  
ASSOCIATES, APC

Dated: November 29, 2018

By:



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Appellee Thomas H. Casey, Chapter 7  
Trustee of the Bankruptcy Estate of  
Kenny G Enterprises LLC