No. 18-5960

IN THE

Supreme Court of the United States

IN RE KENNY G. ENTERPRISES, LLC,

Debtor,

KENNETH GHARIB,

Petitioner,

v.

THOMAS H. CASEY, CHAPTER 7 TRUSTEE,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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THE NEED FOR OBJECTIVE GUIDELINES GUARDING AGAINST INDEFINITE CIVIL CONTEMPT CONFINEMENT IS AN IMPORTANT FEDERAL QUESTION

The civil contempt power is exercised by courts throughout this nation, both state and federal. Civil contempt confinement may go on for years without any of the criminal procedural protections normally accorded before a person's liberty can be taken. As an example, H. Beatty Chadwick was incarcerated for fourteen years under Pennsylvania state law for failing to turn over proceeds from the marital estate in a divorce action. *See* Mitchell J. Frank, *Modern Odysseus or Classic Fraud - Fourteen Years in Prison for Civil Contempt Without a Jury Trial, Judicial Power Without Limitation, and an Examination of the Failure of Due Process*, 66 U. Miami L. Rev. 599, Spring 2012, at 614-26 (recounting state and federal court litigation over that time); *see also Chadwick v. Janecka*, 312 F.3d 597, 613 (3d Cir. 2002) (reversing the district court's grant of habeas corpus relief in the seventh year of Chadwick's incarceration and holding that this Court "has never endorsed the proposition that confinement for civil contempt must cease when there is 'no substantial likelihood" of compliance"). Martin Armstrong was incarcerated seven years by a United States district court in New York for failing to produce assets tied to a civil lawsuit by the U.S. Securities and Exchange Commission. Martha Graybow & Edith Honan, *U.S. Judge ends 7-Year Contempt Jailing of Trader*, Reuters, Apr. 27, 2007, *available at* https://www.reuters.com/article/armstrong-

contempt-idUSN2727681220070427 (last visited Dec. 13, 2018); *see also Armstrong v. Guccione*, 470 F.3d 89, 115 (2d Cir. 2006) (affirming the denial of Armstrong's impossibility defense nearly seven years into his incarceration). Importantly, in neither case did the length of confinement coerce the contemnor into compliance before his release.

The Trustee is in the unenviable position of arguing that indefinite civil contempt confinement is unimportant when in fact the liberty interest at stake is one of "transcending value." *In re Winship*, 397 U.S. 358, 364 (1970) (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)). It is therefore unsurprising that the Trustee cannot point to a statute or rule other than 11 U.S.C. § 105(a) that permits a court in the United States to confine a person indefinitely without proof beyond a reasonable doubt, the right to jury trial, the right to counsel, or protection from double jeopardy. *See Turner v. Rogers*, 564 U.S. 431, 445 (2011) (cataloguing the procedural protections the Constitution demands in criminal proceedings). And, although he argues there has been no abuse of discretion in this case, BIO at 9, 13, he nowhere claims that due process continues to be satisfied three years into Gharib's continued incarceration. Indeed, he hardly recognizes due process as a concern.

The Trustee is correct to state that—even if the law of some circuits does not permit an impossibility defense when that impossibility is self-induced—Gharib was merely required to meet a "very high burden of proof" to show "categorically and in detail" why he cannot comply with the turnover order after three years of

living in the Santa Ana City Jail. BIO at 5, 10. But that "very high burden of proof" is no less problematic than if there were no available defense at all. On the one hand, Gharib already faces the "next to impossible" burden to prove the negative. *Piedmont & Arlington Life Ins. Co. v. Ewing*, 92 U.S. 377, 378 (1875); *see Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 745 (2011) ("[I]t is never easy to prove a negative."). On the other hand, he has already been deemed by the bankruptcy court "not credible, not at all," as well as "ruthless[]," "defian[t]," "perjur[ious]," and "willful[]." Pet. App. E-5, E-7, E-8, E-12. Under these circumstances, the difference between a "very high burden of proof" and the unavailability of the impossibility defense is no difference at all.

The Trustee suggests that any limits on indefinite civil contempt confinement should be given time to "incubate in the lower courts." BIO at 12. However, since *Maggio* was decided seventy years ago, its holding that a contemnor may not "be held in jail forever if he does not comply," *Maggio v. Zeitz*, 333 U.S. 56, 76 (1948), has only rarely been acknowledged in the published decisions of the courts of appeal, much less applied as a due process limit on civil contempt confinement. *See United States v. Gerwin*, 759 F.3d 72, 83 (D.C. Cir. 2014) (holding that defendant's argument that his continued incarceration was no longer coercive forfeited); *Armstrong*, 470 F.3d at 114 (Sotomayor, J., concurring); *Sigety v. Abrams*, 632 F.2d 969, 975 (2d Cir. 1980) (holding the "[t]he simple passage of time in this case, 129 days, is not yet sufficient to disprove the continuing inference that may be drawn

from the initial findings [that Sigety had the ability to produce the missing documents]").

As the Trustee emphasizes, the bankruptcy court has held twelve hearings on Gharib's continued incarceration and twelve times Gharib has "continued to defy the Bankruptcy Court and continues to fail to provide any credible explanation as to the various transfers." BIO at 14. The Trustee asserts that, although Gharib's incarceration "has not yet proven wholly effective," "Gharib has failed to produce any support for his contention that the civil contempt has turned punitive." BIO at 13. In fact, Gharib's incarceration has not proven to be effective at all. The question remains, at what point does due process require Gharib's release or, in the alternative, the full panoply of criminal constitutional protections that would justify his continued incarceration? How to identify that point is an issue of first impression in this Court and one that may never be answered absent this Court's certiorari review.

THE QUESTION WAS PROPERLY RAISED BELOW

In the first judgment at issue in these proceedings, the Ninth Circuit held that "[a]t some point, due process considerations will require the bankruptcy court to conclude that Gharib's continued detention and the daily $1,000 sanctions have ceased to be coercive and instead have become punitive. When that occurs, Gharib must be released from custody." Pet. App. B-6. In the third judgment, the district court, presented with the question whether that point had come, stated

> This Court recognizes and shares the Ninth Circuit's concern that Appellant has spent a considerable amount of time incarcerated without the usual procedural due

> process rights afforded a criminal defendant. Unfortunately, the Court cannot locate any authority for the proposition that length of confinement, on its own, renders contempt punitive and criminal, as opposed to civil and coercive.

Pet. App. K-9.[1] After briefing in which Gharib argued that the standard for determining when a civil contempt becomes punitive was unacceptably vague, the Ninth Circuit affirmed the district court's conclusion. Ninth Circuit Case No. 18-55181, Docket No. 8 at 32-34; Pet. App. J.[2]

The due process limit on the length of Gharib's confinement was also raised in the bankruptcy court throughout the twelve continuing contempt proceedings the Trustee identifies in his BIO. *See* BIO at 5. Counsel raised the issue at the October 27, 2015 hearing, citing *Jackson v. Indiana*, 406 U.S. 715 (1972), and arguing that "[d]ue process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." U.S. Bankruptcy Court Docket No. 466 at 5, 7-9. The court did not engage counsel's due

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[1] The Trustee's assertion that this district court order is merely "[p]rocedural" and not the subject of Gharib's petition for certiorari, BIO at 1-2, is misleading. To the contrary, the order mistakenly held that the only means by which the contempt could become punitive would be based on a change in "the contemnor's ability to purge his or her contempt." Pet. App. K-9. This holding ignores the third path identified in Gharib's petition, Pet. at 12, and recognized in *Maggio*, 333 U.S. at 76 (holding that a contemnor may not "be held in jail forever if he does not comply"), as well as in then-Judge Sotomayor's concurrence in *Armstrong v. Guccione*, 470 F.3d 89, 115 (2d Cir. 2006) (Sotomayor, J., concurring) ("Whether the contemnor's failure to comply with the court's order is attributable to inability or resolute unwillingness, there is a limit to how long he or she can be incarcerated when such a sanction has no coercive power.").

[2] Similar briefing resulted in the second judgment. Ninth Circuit Case No. 18-55027, Docket No. 10 at 47-48; Pet. App. F.

process argument, and instead held that Gharib would "stay right where he is." *Id.* at 14.

At the next hearing on February 9, 2016, Gharib's counsel again raised the issue, relying on *In re Tate*, Case No. 12-20238, 2015 WL 1775519 (Bankr. S.D. Ga. Apr. 15, 2015), where a bankruptcy court released the contemnor from civil contempt confinement after concluding the confinement was no longer coercive even though the contemnor was "fully capable of compliance." *Id.* § I; U.S. Bankruptcy Court Docket No. 501 at 38. The bankruptcy court here responded: "This is a certain species of white collar crook in this minor world who laughs at all of us because our system is so formalistic and so concerned about due process that with even a modest amount of intelligence and vigilance they stay ahead of you pretty readily." U.S. Bankruptcy Court Docket No. 501 at 38. The court continued: "Don't cite to me the *Tate* case because it doesn't cut anything with me. . . . I've got Gharib and so long as I think he's got some ability to obey my order he's going to stay where he is." *Id.* at 39.

This has been the holding pattern in the bankruptcy court as Gharib continued to raise the absence of coercive effect on further incarceration as a pro se litigant. *See, e.g.*, U.S. Bankruptcy Court Docket No. 537 at 58-59; U.S. Bankruptcy Court Docket No. 597 at 54-55, 59; U.S. Bankruptcy Court Docket No. 667 at 3-5, 13-16, 39-40, 63-64 (discussing and rejecting petitioner's due process arguments); *see also* U.S. Bankruptcy Court Docket No. 601 at 8 (raising the argument in a motion to dismiss heard on January 24, 2017). Thus, the record reflects Gharib has

presented the issue below and should be permitted to proceed in this Court on certiorari review.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

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