No. 14-1869

In the United States Court of Appeals for the Seventh Circuit

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

KEVIN TRUDEAU,
DEFENDANT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, NO. 10-CR-886-1
HON. RONALD A. GUZMAN, PRESIDING

REPLY BRIEF FOR DEFENDANT-APPELLANT KEVIN TRUDEAU

KIMBALL R. ANDERSON
THOMAS L. KIRSCH, II
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

CHRISTOPHER M. BRUNO*
JEFF P. JOHNSON
Winston & Strawn LLP
1700 K Street NW
Washington, DC 20006
(202) 282-5000

**Counsel of Record*

Counsel for Defendant-Appellant Kevin Trudeau

Oral Argument Requested

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INTRODUCTION

The Government fails to show why Trudeau is not entitled to relief on each of his claims. It does not credibly refute that Trudeau's rights under the Speedy Trial Act ("Act") were violated when it gilded an offense where the time to try Trudeau had already elapsed. Nor does it show how the Act's text excludes his initial contempt from "offense."

On sufficiency, the Government never connects what was on screen in his infomercials to "what was in his brain." Gov. Br. 48. It had to, in order to demonstrate that Trudeau willfully violated Judge Gettleman's order. The Government's failure requires acquittal.

On the exclusion of the Natural Cures evidence and Trudeau's First Amendment beliefs, the Government does not explain how these were not relevant to demonstrating Trudeau's mindset when making the infomercials. After all, the Natural Cures infomercial was identified in Trudeau's presence as permissible conduct under the 2004 Consent Order he stands convicted of violating. And the First Amendment considerations arise from the 2004 Consent Order's text. The defense should have been allowed to present this evidence from which a jury could have inferred Trudeau's mindset.

On the willfulness instruction, the Government never resolves the conflict between the Supreme Court's precedent and Seventh Circuit precedent. Instead, the Government relies on the absence of an objection

that would have been futile anyway. The instruction was plain error requiring reversal.

Finally, the Government never explains how Trudeau's ten-year sentence is consistent with the alleged crime—a crime it admits was neither factually nor legally distinguishable from the "petty offense" six-month capped contempt that Judge Gettleman charged. Exercising its special authority, this Court should modify his sentence to six months.

ARGUMENT

I. The Government Violated the Speedy Trial Act by Not Trying Trudeau Within 70 Days.

The trial court held that the Government did not violate the Act for two reasons: *first*, "the defendant [was] not charged either in an information or an indictment," and, *second*, "the Act simply doesn't apply to any criminal proceeding for which ***the maximum penalty*** is no more than six months." App. 6-7 (emphasis added). Reversing its second pretrial position,[1] the Government abandons the lower court's first rationale:[2] "[F]or the purposes of the Act[,] … an order to show cause should be treated as an information or

[1] The Government first said that the Speedy Trial Act did apply. *See infra* at Part I.C (describing judicial estoppel).

[2] The Government discarded the district court's rationale for good reason: it leads to absurd results and is contrary to a wealth of jurisprudential guidance. *See* Opening Br. 26-31.

indictment." Gov. Br. 18.

The Government's defense of the court's second rationale is internally inconsistent. The Government acknowledges that, "for contempt, the controlling factor is 'the severity of the penalty actually imposed,'" not, as the district court held, "the maximum penalty." *Compare id.* at 19 *with* App. 7. Yet, in defending the court's decision, the Government returns to the "maximum penalty test," rendering the six-month-capped contempt a "petty offense" akin to a "Class B misdemeanor." Gov. Br. 20. But the "penalty actually imposed" was ten years plus five years of supervised release. Therefore, whether classifying contempt by the statutory maximum (life imprisonment), the actual penalty imposed (ten years), or the upper bounds of judicial discretion (25 years),[3] the result is the same. The Gettleman Order charged an Act-applicable contempt. And the Government does not dispute that the Government blew the 70-day deadline for prosecuting Trudeau. Gov. Br. 13 ("By … April 7, 2011, 154 days had passed since time was last excluded on November 6, 2010.").

With no reasonable dispute whether the Act applied, and faced with a manifest violation, the Government is left arguing that the district court

[3] The Ninth Circuit's approach limits judicial discretion to the ceiling under the Sentencing Guidelines. *See* Opening Br. 32.

somehow "cured" the prejudice to Trudeau by amending the Gettleman Order, issuing the Guzman Order, and removing the six-month cap. It is hard to see how the court's decision denying Trudeau's motion and instead threatening a greater sentence—life imprisonment—gave Trudeau the remedy he requested.

Moreover, the Government's proposed "cure" actually created another violation under the gilding doctrine and the Act's text. On appeal, no one disputes that the Act applies to the contempt charged in the Guzman Order. *See* Gov. Br. 22. The Government halfheartedly argues that this Court should not apply gilding, but cites no decision invalidating the doctrine. And its only justification for the difference in accusatorial dates is the presence of a new judge. That cannot be a "reasonably explicable" distinction worth trampling a defendant's speedy trial right, especially when it was the Government's motion that created the new show cause order. Nor does the Government explain how the Act's statutory gilding mechanism does not apply here. It does, and a violation occurred.

Even if the Act would not otherwise apply, the Government's position that it did—expressed through four granted requests for exclusion—judicially estopped it. The Government claims it obtained no victory and that its position was equivocal. But that is contradicted by the time exclusions it gained. Having prevailed, the Government should not now be heard to deny

the Act's application.

Presented with the same violation twice (under the Gettleman and Guzman orders), this Court should find that a dismissal with prejudice is the only appropriate remedy.

A. The Government committed an unremedied violation of the Act by not timely prosecuting Trudeau under the Gettleman Order.

1. The contempt charged under the Gettleman Order was an offense.

Whether applying a plain language or "analogy-by-sentence" approach, Trudeau's contempt charge under the Gettleman Order was an "offense." The Government concedes that an "offense" includes "any federal criminal offense which is in violation of any Act of Congress" other than a Class B or C misdemeanor or infraction, or certain military crimes. Gov. Br. 18. It also concedes that contempt is *sui generis*, *i.e.*, not a misdemeanor, infraction, or felony. *Id.* at 19. So, criminal contempt charged under 18 U.S.C. § 401 is a "federal criminal offense" which is "in violation of an[ ] Act of Congress," and is "other than a Class B or C misdemeanor or infraction." It is thus an "offense" under Section 3172(2) and subject to the Act. Therefore, by the plain terms of Section 3161(c)(1), Trudeau was entitled to a speedy trial.

Though the Government urges that the Act "by its terms … does not apply" to "petty offense[s]," that argument lacks textual support. *See id.* at 9, 18, 20. "Petty offense" is a defined term, but Congress did not use it. *See* 18

U.S.C. § 19. Because the "statute's language is plain, the sole function of the courts is to enforce it." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (internal quotations omitted).

The Government fares no better under its preferred, "analogous sentencing" approach. It states that, "for contempt, the controlling factor is 'the severity of the penalty actually imposed.'" Gov. Br. 19. And in defense, the Government cites contempts with ***imposed*** sentences of six months as "petty offenses." *Id.* at 20 n.7.

But here, the court ultimately imposed a ten-year sentence, rendering the contempt analogous to a Class C felony. *See* 18 U.S.C. § 3559. And Trudeau's five-year supervised release sentence suggests treatment as a Class A or B felony. *See id.* § 3583(b)(1). So, the Government's cases are inapposite because Trudeau received a felony-level punishment. Given Trudeau's ultimate punishment, the Gettleman Order contempt charge is an "offense" by analogy.

The Government's proposed outcome relies on a position its own brief rejects. The Gettleman Order is a petty offense only by analogizing the "status of the offense ... [to] the maximum penalty authorized." Gov. Br. 19. The Government admits that standard applies only to "ordinary crimes," *id.*, but then applies it to contempt just two pages later. *Id.* at 21 ("[T]he original order to show cause expressly capped ***the potential penalty*** at six months in

prison, making Trudeau's original contempt charge a petty offense.") (emphasis added). When discussing the Guzman Order, the Government admits that "the classification of his new offense depended on the penalty the court would ultimately impose." *Id.* at 22. The Government cannot explain why a different test applies to the initially charged contempt, which was *amended* to remove the cap. *See* Dkt. 24.

By claiming Trudeau agreed that his six-month capped contempt charge was a Class B misdemeanor, the Government misrepresents Trudeau's position. Trudeau stated, "the government's shifting position on what should be the maximum sentence does not change the alleged underlying conduct or make the alleged offense any more 'serious,' for Speedy Trial Act purposes, than a Class B misdemeanor." R. II 63-64. In other words, he argued that his non-violent conduct should be treated as not serious under the Gettleman Order for the purposes of a dismissal with prejudice. *Id.*

Accordingly, the Gettleman Order charged an "offense" triggering the speedy trial clock, and the Government's failure to promptly try Trudeau violated the Act.

2. Amending the Gettleman Order does not cure the Court's failure to dismiss for an Act violation.

The Government argues that Trudeau got exactly what he wanted by facing the same show cause order, with a new threat of life imprisonment. That makes no sense.

It is also unsupported by the record. When Judge Guzman amended Judge Gettleman's order, he "denied" the "Motion by Kevin Trudeau to dismiss pursuant to the Speedy Trial Act." Dkt. 24. And the court confronted, and ultimately granted, the "Government's Motion to Amend Order to Show Cause," not a hypothetical "Government's Motion to Dismiss." R. II 12, Dkt. 8, 24; *see* 12/7/2011 Tr. 2:11-15 (both counsel agreeing that court "ha[d] [before it] a speedy trial issue, the double jeopardy challenge and the government['s] … motion to amend"). That means the court issued a superseding indictment, not a dismissal and new indictment.

Accordingly, it failed to undertake the prejudice inquiry the Act mandates. App. 5-9. But the court had to, and its "failure to make the prescribed findings" violates "the Act's categorical terms." *See Zedner v. United States*, 547 U.S. 489, 508 (2006). And that cannot be "harmless error." *Id*.

Even if the Government's motion to amend somehow cured the violation under the Gettleman Order, it provides no comfort against

Trudeau's appeal of the violation under the Guzman Order (*see infra* at Part I.B). Throughout the December 12 hearing, defense counsel argued that the Government violated Trudeau's rights under the Act based on both the contempt as charged and if the court issued a show cause order without the cap. 12/7/2011 Tr. 3:21-4:02 ("But if [the Act] applies to show cause orders, which it clearly does, then it would apply if this Court was to grant its motion to amend and subject Trudeau to a jury trial and a possible enhanced penalty…. That's entirely unfair and inconsistent with the Speedy Trial Act."). The Government cannot identify a meaningful difference between the Speedy Trial Act violations: after all, the same period is challenged, and there is no factual distinction. It ignores reality to pretend that this outcome—an amended order with a higher potential penalty—is the relief Trudeau sought.

B. The Government's proposed "cure"—the Guzman Order—"gilded" Trudeau's offense and violated the Act.

The Government cannot save its prosecution by rewinding the clock with a new indictment. But that is precisely what the Government urges.

Because the Guzman Order merely gilds the Gettleman Order, the speedy trial clock began running from the first accusatorial date: April 29, 2010. Gilding occurs when (1) the crimes are the same and (2) the difference between accusatorial dates is not "reasonably explicable." *United States v. DeTienne*, 468 F.2d 151, 155 (7th Cir. 1972). The Government concedes that

the crimes are identical, but argues that the difference between Judge Gettleman's six-month charge and Judge Guzman's ten-year charge is "reasonably explicable" because "[o]ne judge issued a petty offense charge without the government's involvement, and when Trudeau asked for and received a different judge, the new judge issued a felony charge." Gov. Br. 25. But that does not demonstrate that the new accusatorial date was "reasonably explicable," for two reasons.

First, it is factually incomplete. When the Government entered the case, it could have asked Judge Gettleman to lift the six-month cap and transform Trudeau's charge to a life-imprisonable contempt. Instead, "[t]he government agreed to prosecute the case and later informed Judge Gettleman that it would 'not contest' his decision to impose the six-month cap." *Id.* at 11. And careful deliberation preceded that decision. *E.g.*, 12/7/11 Tr. 7:14-20; R. II 200. Thus, the resulting delay is the Government's fault.

Second, the Government pretends it was Trudeau's fault that gilding occurred because "he chose to ask for a different judge." *See* Gov. Br. 24. But ***the Government*** filed the motion to amend and sought the sentencing enhancement that created the second accusatorial date. Though it disavows claims of "prosecutorial manipulation," the specter of such gamesmanship is real. The Government does not and cannot justify transforming a six-month capped contempt into life-imprisonable contempt based on a change in

presiding judge. So nothing ***reasonably*** explains the difference in accusatorial dates.

Moreover, the Government fails to explain why it has not also violated the Act's statutory gilding mechanism. *See* 18 U.S.C. §§ 3161(d)(1) & (h)(5). On appeal, the Government agrees that (1) show cause orders fall within the Act's purview, and (2) the Act applied to Trudeau's contempt after the Guzman Order. Under the Act, the clock does not reset if the "same offense or an offense based on the same conduct" is re-charged. *Id.*; *see United States v. Rojas-Contreras*, 474 U.S. 231, 239 (1985) (Blackmun, J. concurring). The Government re-charged the same offense and missed its window, so the Act requires dismissal.

Stuck with an obvious gilding, the Government attempts to avoid dismissal by arguing that the doctrine is obsolete. But this Court has taken gilding as a given, and the Government cites no case, *anywhere*, categorically rejecting the doctrine. *See DeTienne*, 468 F.2d at 155 ("Of course, if the crimes for which a defendant is ultimately prosecuted really only gild the charge ...."). Instead, the Government reaffirms what Trudeau acknowledges: Courts rarely apply gilding because ordinarily the charged crimes differ. *See* Gov. Br. 23. But here, the crimes are identical, and the Government presents no reason to abandon gilding—an important safeguard against sidestepping a criminal defendant's speedy trial guarantee.

Relying on Trudeau's actions ***after*** he lost his speedy trial motion (which are irrelevant to his pre-motion intentions), the Government claims Trudeau "never actually wanted a speedy trial" because he did "nothing to assert his right." Gov. Br. 25. That is not how the Speedy Trial Act works, because the *Government* carries "the obligation" "to ensure compliance." *See United States v. Saltzman*, 984 F.2d 1087, 1091 (10th Cir. 1993). A defendant waives the Act's protection only by failing to object before trial. 18 U.S.C. § 3162(a)(2). Trudeau timely objected, under both orders. R. II 39-40 & 40 n.2, 61, 101.

The speedy trial clock under the Guzman Order began running when the prosecution commenced under the Gettleman Order; therefore, gilding occurred and dismissal is appropriate.

C. After receiving four time exclusions, the Government was judicially estopped from arguing that the Act did not apply.

Calling its statements "tentative," "equivocal," "wrong," "inadverten[t]," and "mistake[n]," Gov. Br. 26-27, the Government argues that judicial estoppel does not apply because its statements before Judge Gettleman were not admissions. These characterizations, and the Government's theory that it "won nothing" by asserting the Act applied, are belied by its ***four*** requests for exclusions.

There is no serious question that the Government took different

positions before Judge Gettleman and Judge Guzman. *Compare* Sep. App. 41-42 ("I think because this is a criminal proceeding, the Speedy Trial Act would also apply") *with id.* at 62 ("we don't believe the Speedy Trial Act applies in this case because this is a rule to show cause."). But it tries to avoid estoppel by arguing that its initial statement was not "deliberate, clear, and unambiguous" enough. Gov. Br. 27. The facts do not support that claim. The Government obtained an exclusion under the Act—which *a priori* the court could grant only if the Act applied. And the Government should not be permitted to transform an otherwise clear position into an "equivocal" statement by using the magic phrase, "I think."

This case is not even close to the one the Government cites in support. In *United States v. Hallahan*, 756 F.3d 962 (7th Cir. 2014), the prosecutor hedged a response when the court asked him to predict a pending Supreme Court case outcome with eight expressions of uncertainty in three consecutive sentences. *Id.* at 975. That's a far cry from what happened here, in a statement the prosecutor *volunteered* and confirmed with a question about docketing the basis for the exclusion. *See* Sep. App. 41-42.

Even ignoring the first, supposedly indefinite statement—itself questionable—the Government admitted that "[i]n the proceedings before Judge Gettleman, the government sought, and the Court granted, exclusions of time ***under the Speedy Trial Act***." R. II 178 n.4 (emphasis added); *see*

also FTC Dkt. 325 ("request[ing] that this Court … exclude time through that date for the filing of pretrial motions and in the interests of justice."); Sep. App. 45-46, 48-49. It does not explain how those later exclusions are not admissions that the Act applies. In short, the Government's requests occurred on four separate occasions, through two prosecutors, with three oral motions and one court filing. That's not the type of "inadvertence or mistake" that excuses applying judicial estoppel here. *New Hampshire v. Maine*, 532 U.S. 742, 753 (2001). Nor does the Government really rely on "inadvertence" anyway; its own briefing explains that it took these positions in an "abundance of caution." Gov. Br. 27. Cautionary actions are not accidental.

Despite receiving its exclusions, the Government claims that it obtained no "triumph." *Id.* at 28. That is the wrong standard. For estoppel to apply, the Government only "must have convinced the first court to adopt its position." *Levinson v. United States*, 969 F.2d 260, 264 (7th Cir. 1992). The Government did that, and received the benefit of 38 non-chargeable days.

The Government attempts to diminish its success by arguing that the exclusions were inevitable because they were "automatic" "whether the government asked for it or not." Gov. Br. 28. Not true: "[N]either subparagraph (D) nor subsection (h)(1) automatically excludes time granted ***to prepare*** pretrial motions." *Bloate v. United States*, 559 U.S. 196, 214 (2010) (emphasis added). Thus, the Government had to (and did) ask for time

exclusion in the interests of justice. *See* Dkt. 356; Sep. App. 41-42.

Contrary to the Government's claim that "Trudeau did not assert estoppel in the district court," Gov. Br. 25-26, Trudeau asked the Court to hold the Government to its four-times-stated position several times: Trudeau explained in writing that "the [G]overnment's recent position is inconsistent with the position it repeatedly took ... under the … Act," that "the April 7, 2011 status hearing" was the "first time" the Government posited "that the … Act does not apply to this prosecution," and orally that "the [G]overnment's very conduct in this case"—*i.e.*, taking "the position [that the Act applied] in front of Judge Gettleman when it consistently asked that the time be excluded"—"demonstrates why" the Act applies. R. II 60-62 & 61 n.2; 12/7/2011 Tr. 3:15-19, 20-24. These statements "alert[ed] the court and the [Government] as to the specific grounds for [his] objection." *United States v. Harris*, 271 F.3d 690, 700 (7th Cir. 2001).

This is a perfect case to apply judicial estoppel.[4] The Government's inconsistent positions caused Judges Gettleman and Guzman to enter conflicting rulings in the same case—both in the Government's favor—with

[4] The Government implies that a "prosecutorial exception" exists, Gov. Br. 26, but this Court has never created one before when analyzing judicial estoppel claims against the Government in criminal cases. *E.g.*, *United States v. Christian*, 342 F.3d 744, 749 (7th Cir. 2003); *United States v. Hook*, 195 F.3d 299, 307 (7th Cir. 1999); *Levinson*, 969 F.2d at 265.

no change in facts or circumstances. Thus, its conduct violated "the truthseeking function of the court," undermined the integrity of judicial process, and warrants judicial estoppel. *Levinson*, 969 F.2d at 265.

D. The Act demands dismissal with prejudice for either or both violations of the Act.

The Government argues that dismissing without prejudice was appropriate because (1) "Trudeau's offense was serious," (2) "[t]he non-excluded period of delay resulted from an administrative error," (3) "Trudeau did nothing to assert his right to a speedy trial," and (4) the result would be a windfall. None of these holds water.

First, the Government contradicts itself on the seriousness of Trudeau's offense. In the Speedy Trial context, it identifies his contempt, as initially charged in the Gettleman Order, as a mere six-month-imprisonable "petty offense." Gov. Br. 21. Certainly, Judge Gettleman, who managed Trudeau's FTC litigation, did not think the crime was serious: he instituted a six-month cap after holding a show cause hearing, despite finding the contempt was "like a misdemeanor" and ordering multimillion-dollar restitution. Sep. App. 27, 37-39.

Because nothing relevant changed between the Gettleman and Guzman Orders, neither did the contempt's seriousness. The Government even admitted that Trudeau's "background and nature of the offense ha[d] not

changed since the case was assigned to [Judge Guzman.]" R. II 318; *see also* Gov. Br. 24-25. But "[w]hat has changed is that the case was assigned to this court." R. II 318. Hopefully, the Government does not contend that moving to recuse should increase a defendant's potential sentence. Yet, that is the only explanation for the Government's change in position here.

Second, the Government minimizes its role in the violation by calling it an "administrative error." Gov. Br. 33. Even ignoring the time that elapsed when the Government was unaware that a new case had been opened, it still violated Trudeau's speedy trial rights. *See* Opening Br. 12 n.2. The Government's attempt to blame the court rather than accept its own lack of diligence demonstrates the importance of sending a strong message. After all, more than 214 days accrued from the Government's negligence alone.

Third, the Government improperly demands warning before it violates Trudeau's rights. Trudeau bears no such duty. *See* 18 U.S.C. § 3162(a)(2). To the extent Trudeau's diligence matters, he raised the violation at the first status hearing after the violation occurred. Sep. App. 56. The Government identifies no precedent requiring Trudeau to notify it. Gov. Br. 33-34. None exists.

Nor is the Government's assertion that Trudeau "did not want a speedy trial" more than speculation. Trudeau's continuances *after* the court denied his speedy trial motion say nothing about his wishes *before* he filed it.

Besides, absent an affirmative waiver, the Government bore the responsibility to try him promptly. It failed by 154 days.

Finally, the Government's claim that Trudeau receives a "windfall" with a dismissal with prejudice could be boilerplate for every speedy trial violation. But by its nature, a dismissal with prejudice on procedural grounds always elevates important public interests above the court's truthseeking function. And when Congress passed the Act, it knew the dismissal with prejudice sanction was necessary to "give[] the prosecution a powerful incentive to be careful about compliance." *Zedner*, 547 U.S. at 499. But a dead letter sanction is no sanction at all. Thus, "the threat of dismissal"—a "critical element"—is necessary to "ma[k]e the time limits more than merely precatory" here. A. Partridge, Legislative History of Title I of the Speedy Trial Act 31-32 (1980). Dismissal with prejudice is appropriate to avoid subjecting Trudeau to yet another trial after serving more than nine months in prison—more than the maximum sentence he could have received had Judge Gettleman retained the case.[5]

[5] Trudeau did not, as the Government contends, waive a challenge to the dismissal. At the district court and here, Trudeau argued that the court should dismiss *with prejudice*. R. II 69; Opening Br. 37.

II. The Government's Failure to Adduce Any Evidence of Actual Willfulness Requires Acquittal.

Presented with no evidence of Trudeau's state of mind, no rational juror could have found that Trudeau *willfully* violated the 2004 Consent Order. The Government accepts its burden to prove (1) Trudeau knew his infomercial misrepresented his book and (2) that he "was breaking the law." Opening Br. 48 (citing *Dixon v. United States*, 548 U.S. 1, 5 (2006)); Gov. Br. 48. And as *United States ex rel. Porter v. Kroger Grocery & Baking Co.*, 163 F.2d 168 (7th Cir. 1947), holds, an act alone is insufficient to prove willfulness. Yet the Government relied on nothing else.

Taking the second inquiry first, the Government never explains how it demonstrated that Trudeau knew he was violating the order. *See* Gov. Br. 50. At best, it says that the order clearly prohibited misrepresenting his book. But it never shows that Trudeau intended to violate the order. It presented no evidence, such as a witness who interacted with Trudeau, to disprove Trudeau's good faith. R. III 247. Therefore, the Government's evidence fails the *Dixon* standard.

Nor did the Government show that, to the extent the *Weight Loss Cure* infomercial and book conflicted, Trudeau knew it. Instead, the Government misconstrues Trudeau's *mens rea* chart, claiming it gives "other explanations for his performances in the infomercials." Gov. Br. 49. This misses the point.

The key is not that the jury had to accept any of those four conclusions, but that the Government's meager evidence supported these "few of many equally plausible inferences." *See* Opening Br. 49. This demands acquittal. *See United States v. Johnson*, 592 F.3d 749, 755 (7th Cir. 2010) (reversing when circumstantial evidence equally supported two theories, only one of which results in guilt).

Equally incorrect is the Government's view that if Trudeau's statements were "blatantly false and misleading," they must have been willfully made. Gov. Br. 49. A colorblind witness may be grossly wrong in identifying a red car as green, but that does not mean she lied. The same logic applies here.

Trudeau's desire to make money does not fill the evidentiary gap. "A profit motive, ... without proof otherwise, can only be attributed to a desire to make legal profits." *Porter*, 163 F.2d at 176. The Government did not prove that Trudeau, a #1 *New York Times* bestselling author, believed when he made his infomercials that lying about his book would enhance profits. So without more, the profit motive means nothing.

Finally, the Government complains that Trudeau "criticizes the government for failing to call a witness to explain what was in his brain when he made the infomercials" "[a]t a trial in which Trudeau did not testify." Gov. Br. 48. But the Government's burden under *Bryan v. United States*, 524 U.S.

184 (1998), is to ***prove*** an "evil-meaning mind." Not doing so warrants a judgment of acquittal.

III. The Court Improperly Prohibited Trudeau from Presenting Relevant Evidence Showing His Good Faith.

By excluding the *Natural Cures* evidence and Trudeau's First Amendment beliefs, the court ignored that willfulness—the difference between civil and criminal contempt—made that evidence material.[6] *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949); App. 17. The Government presses that "this Court has already concluded" the *Natural Cures* evidence and Trudeau's First Amendment beliefs "were irrelevant to Trudeau's contempt arising from *The Weight Loss Cure* book and infomercials." Gov. Br. 51. The district court shared that same mistaken view. App. 22-23 ("[T]hat template testimony is relevant only if there is evidence to suggest that defendant's use of the FTC-approved Natural Cures infomercial was reasonable."); Sep. App. 69 (Trudeau's "understanding of what the order meant is not relevant … and doesn't go to willfulness or good faith."). But excluding evidence circumstantially reflecting Trudeau's good faith understanding of the 2004 Order was error.

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[6] That difference also renders the Government's reliance on this Court's findings in *Trudeau I* and *Trudeau II* throughout improper. The record before the Court was different because, *inter alia*, Trudeau did not testify here. R. III 72-73.

A. The Court erred by excluding the *Natural Cures* evidence, which would have supported finding that Trudeau believed the 2004 Consent Order permitted his conduct.

As explained *supra* at Part II, the Government could not prove wrongful intent by relying just on the book and infomercials. But if it could, then Trudeau could negate willfulness with a book and infomercials. Unlike in the district court, the Government now acknowledges that willfulness requires that Trudeau "knew he was violating the court order." *Compare* Gov. Br. 50 *with* R. III 73. But the court excluded the *Natural Cures* evidence under an objective standard, holding it was "relevant only if there is evidence to suggest that defendant's use of the FTC-approved *Natural Cures* infomercial was reasonable." App. 23. Yet, the parties agree that a defendant's claimed belief need not be "objective[ly] reasonable" to negate willfulness. *Cheek v. United States*, 498 U.S. 192, 202 (1991); Gov. Br. 41-42. Thus even under the Government's view, the court applied the wrong standard.

Per *Cheek*, the jury could have reasonably inferred that the *Natural Cures* evidence showed that Trudeau wanted his *Weight Loss Cure* infomercial to conform to the 2004 FTC Consent Order. When the court approved the consent order that Trudeau stands convicted of violating, the *Nature Cures* infomercial was specifically identified as "the first tangible example of something acceptable under [the same infomercial] provision."

Sep. App. 35. Even without corroborating testimony, a jury could still have found that approval informed his understanding of the order.

The Government focuses on subject matter differences between the *Natural Cures* and *Weight Loss Cures*. It certainly could have argued that Trudeau did not base the *Weight Loss Cures* infomercial on his *Natural Cures* infomercial. Likewise, the court should have allowed Trudeau's counsel to argue that the books and infomercials share 26 recommendations, use many of the same products, and have a common design. Instead, the court improperly transformed this classic factual dispute "into a legal one and prevented the jury from considering it" by "[c]haracterizing [Trudeau's] belief as not objectively reasonable." *Cheek*, 498 U.S. at 203.

The court's fallback position is that this comparison was too complicated under Rule 403. But the parties presented the *Weight Loss Cure* evidence succinctly with competing visual aids. The *Natural Cures* evidence deserved the same treatment.

Handicapping Trudeau's good faith defense was not harmless. Counsel could have presented the substantial similarities between *Natural Cures* and *Weight Loss Cures* and the FTC approval of *Natural Cures* to demonstrate Trudeau's good faith belief that his conduct was FTC-condoned. This exclusion demands a new trial.

B. The Court erred by prohibiting defense counsel from arguing that Trudeau believed the First Amendment protected his infomercial statements.

The Government, like the district court, mischaracterizes Trudeau's First Amendment argument. Unlike the protestors in *Walker v. City of Birmingham*, 388 U.S. 307 (1967), Trudeau does not contend that the law illegally deprived him of his First Amendment rights. 10/15/2013 Tr. 78:20-24. Instead, Trudeau sought to present the defense that he believed his conduct conformed to the 2004 Consent Order—under the First Amendment reservation—by expressing First Amendment protected opinions and experiences. *Id.* 79:5-7. Even if that belief was wrong or objectively unreasonable, a jury could still find Trudeau held it in good faith. *Cheek*, 498 U.S. at 202.

The Government appears to agree: "*Cheek* held that a defendant may negate willfulness by claiming ignorance of the law or a good-faith belief that he was not violating the law." Gov. Br. 56. Because Trudeau's First Amendment claim "is ... that he believed he complied with the order," his belief was probative to willfulness. *Id.*; *see* R. II 564-65.

Considering that the Government introduced the entire, unredacted 2004 Consent Order, its position is surprising. Even though the jury received the First Amendment reservation, the court forbade the defense from mentioning it. *See* App. 17. But, just as the Government had the right and

opportunity to comment on the evidence, so too should the defense, especially where it went directly to Trudeau's beliefs about what the order permitted. Therefore, the failure to give Trudeau a "reasonable opportunity to meet [the charges] by way of defense or explanation" is reversible error. *See In re Oliver*, 333 U.S. 257, 275 (1948).

IV. The District Court's Instruction Allowing the Jury to Impute Willfulness Knowledge Was Plain Error.

The district court's willfulness instruction, though accurately reflecting Seventh Circuit law, included a recklessness knowledge standard that conflicts with Supreme Court precedent requiring the prosecutor to "prov[e] beyond a reasonable doubt that [Trudeau] knew [he] was breaking the law." *Dixon*, 548 U.S. at 5. The Government appears to agree. When discussing *Bryan*, it admits that criminal willfulness requires proving, "at a minimum, that the defendant knew his conduct was unlawful." Gov. Br. 41. Without resolving the conflict, the Government merely asserts that the instruction "conformed to longstanding precedent in this Court and other courts of appeals, which the Supreme Court has never overruled." *Id.* The Government smartly avoids this issue: the instruction is wrong.

Trudeau's opening brief presented multiple Supreme Court precedents casting doubt on the Seventh Circuit standard. *See* Opening Br. 41-43 (collecting cases). The Government's decision consigning *Safeco Ins. Co. of*

Am. v. Burr, 551 U.S. 47 (2007) and *Dixon* to a footnote because they "repeat the teaching of *Bryan*, *Ratzlaf*, and *Cheek*" was a mistake. Gov. Br. 42 n.14. In *Safeco*, the Court expressly identified willfulness "in a criminal statute" as generally limited to "knowing violations," not "reckless ones," 551 U.S. at 57 n.9, going beyond the so-called "statute-specific" case holdings. *See* Gov. Br. 41-42. It rejects *Farmer v. Brennan*'s "criminal recklessness"—the same standard this Court has expressly incorporated—as showing criminal willfulness. 511 U.S. 825 (1994); Gov. Br. 41-42.; *see United States v. Mottweiler*, 82 F.3d 769, 771 (7th Cir. 1996). And, in *Dixon*, the Court required a two-pronged showing: actual knowledge of the underlying conduct *and* of its unlawfulness. 548 U.S. at 5. These cases set up a clear conflict with the Seventh Circuit's criminal willfulness standard.

Rather than reconcile *Seale-Greyhound* with the Supreme Court caselaw, the Government cites some circuits and this Court's decision in *United States v. Hoover*, 240 F.3d 593 (7th Cir. 2001), which postdates *Bryan*, *Cheek*, and *Ratzlaf v. United States*, 510 U.S. 135 (1994). None of these are availing. First, the Government omits circuits requiring the higher, actual knowledge standard. *E.g.*, *United States v. Mourad*, 289 F.3d 174, 180 (1st Cir. 2002); *United States v. Vezina*, 165 F.3d 176, 178 (2d Cir. 1999); *United States v. Cheeseman*, 600 F.3d 270, 281 (3d Cir. 2010); *United States v. Straub*, 508 F.3d 1003, 1012 (11th Cir. 2007). Second, unlike here, *Hoover*

applies a recklessness standard without considering whether the *Seale-Greyhound* standard should be overruled. 240 F.3d at 596. So no reason exists why this Court should not revisit *Seale-Greyhound*.

Unable to defend the instruction on its merits, the Government relies on defense counsel's alleged waiver. But at most, Trudeau forfeited his objection because even had he objected, the district court was powerless to act. "A waiver is the manifestation of an intentional choice not to assert a right." *United States v. Turner*, 651 F.3d 743, 747 (7th Cir. 2011) (internal quotations omitted). Under binding circuit precedent, Trudeau had no right to strike the "reasonable awareness" language from the willfulness instruction. Because the Supreme Court has never decided the criminal contempt willfulness standard, this Court still has interpretive work before it.[7] And so the district court could not have fixed the standard, for it could not be "almost certain that [this Court] would repudiate [*Greyhound*] if given a chance to." *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731, 734 (7th Cir. 1986); *see United States v. Cephus*, 684 F.3d 703, 709 (7th Cir. 2012) (explaining that lower courts cannot overrule higher courts).

[7] The Government seems to agree: it identifies *Bryan* as holding that willfulness "requires the same knowledge [that conduct was unlawful] when used in [ ] other statutes" and explains that, unlike other criminal statutes, willfulness was judicially engrafted. Gov. Br. 42.

Therefore, no waiver occurred.

Finding no waiver comports with this Court's policy of "constru[ing]" "waiver rules ... liberally in favor of the defendant." *United States v. Natale*, 719 F.3d 719, 729 (7th Cir. 2013). For jury instructions, this Court has acknowledged that its "waiver cases [may] have drawn too confining a line by viewing affirmative approval so expansively as to include 'no objection' in response to a trial court's inquiry." *Id.* And "[w]here the government cannot proffer any strategic justification for a decision, [the Court] can assume forfeiture." *United States v. Vasquez*, 673 F.3d 680, 684 (7th Cir. 2012). Here, an objection "would not have afforded the trial judge an opportunity … to make adjustments in the instruction," and thus would have been futile. *United States v. Holmes*, 93 F.3d 289, 292 (7th Cir. 1996). Failing to make futile objections cannot be strategic.

The Government overstates by contending that Trudeau "proposed" the instruction he now challenges. It, not Trudeau, proposed the "willful element" instruction containing the recklessness standard and the reasonable awareness language. Gov. Br. 37. Trudeau objected, and changed other parts of the instruction. *Id.* Trudeau did not seek to remove the element he now challenges, but the Government's position—that he proposed the language—is too much. Unlike the cases the Government cites, Trudeau did not propose an entirely new instruction, affirmatively argue in favor of the

instruction, or agree to the instruction both before and after trial. *See Ryan v. United States*, 645 F.3d 913, 915 (7th Cir. 2011); *United States v. Darif*, 446 F.3d 701, 711 (7th Cir. 2006); *United States v. Sanders*, 520 F.3d 699 (7th Cir. 2008); *United States v. Anifowoshe*, 307 F.3d 643 (7th Cir. 2002). So no waiver occurred.

The Government's other arguments—that the good faith instruction cured any harm and that the error did not affect the verdict—fall flat. The good faith and willfulness instructions created an unresolvable conflict. Opening Br. 45-46. Unlike other examples of "cured" error, a more complete instruction did not fix the willfulness instruction. *E.g., Jones v. United States*, 527 U.S. 373, 391 (1999).

Similarly, the lower, recklessness standard must have impacted the verdict—the willfulness element strikes at the heart of criminal contempt. *See Holmes*, 93 F.3d at 293 ("failure to instruct accurately with respect to an essential element of the offense is a serious matter requiring the careful scrutiny of the court."). With no evidence that Trudeau actually knew his conduct violated the consent order, the jury must have convicted on the improper "recklessness" standard. The Government's reliance on attorney argument to cure this defect is misplaced as "juries are presumed to follow their instructions." *Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *see* 11/12/2013 Tr. 560:14-16 (court instructing that counsel argument is not

instruction on law).

Because the jury received a wrong instruction that likely affected the verdict, this Court should find plain error.

V. Trudeau's Sentence Is Excessive and Inconsistent with Judge Gettleman's Determination and the Government's Acquiesence to a Six-Month Sentencing Cap.

The conflict between the Government's positions on the Act and sentencing is pronounced. The Government argues that the initial contempt was a mere "petty offense" falling outside the Act because "Trudeau's sentence was capped at six months," yet also argues that a ten-year sentence was appropriate based on no change in circumstances other than the case reassignment. *See* Gov. Br. 22. This Court should not allow the Government to rely on the six-month cap to avoid the Speedy Trial Act violation, only to abandon it to justify a longer sentence. Trudeau's conviction should be overturned, but if it is not, this Court should reduce his sentence to six months. *United States v. Bukowski*, 435 F.2d 1094, 1110 (7th Cir. 1970) (reducing contempt sentence on appeal).

This Court should not toss Judge Gettleman's judgment that Trudeau's contempt warranted a six-month cap aside lightly. Sep. App. 48. Unlike Judge Guzman's decision to remove the cap, Judge Gettleman's sentencing judgment was based on managing the decade-old FTC-Trudeau saga and a show cause hearing about the order he approved. Sep. App. 1, 38-39. Even

after ordering $37.6 million of civil restitution, Judge Gettleman still believed the contempt "really [wa]s like a misdemeanor." *Id.* 48. Affirming Judge Guzman's sentence effectively condones a twentyfold sentencing multiplier for a change in presiding judge. Judicial fairness requires better.

Trudeau's sentence starkly contrasts with similar *contempt* cases. *See* Opening Br. 60-61. Ignoring that it neither charged not proved fraud at trial, the Government cites blockbuster fraud convictions to support its claim that Trudeau's sentence is substantively reasonable. Gov. Br. 58. It is undisputed that Trudeau's allegedly willful contumacious behavior cost each consumer only $29.95 at most. R. III 293-94. Indeed, decreasing the "harm" to consumers further, some purchasers also received the #1 *New York Times* bestselling *Natural Cures* book—a book still advertised by infomercial and commercially available for purchase today. *Id.* But "for criminal contempt the sentence is … to vindicate the authority of the court." *Doe v. Maywood Hous. Auth.*, 71 F.3d 1294, 1297 (7th Cir. 1995). That goal is satisfied by far less than ten years in prison. *Bukowski*, 435 F.2d at 1110 (in contempt cases, courts should use "the least possible power adequate to the end proposed"). Trudeau's sentence is tied for second longest criminal contempt sentence in the Seventh Circuit, just behind a defendant who received an enhancement for terrorism. *United States v. Ashqar*, 582 F.3d 819, 822 (7th Cir. 2008). That is far too long.

CONCLUSION

For these reasons and those in Trudeau's opening brief, this Court should dismiss with prejudice,[8] grant a judgment of acquittal, order a new trial, or reduce Trudeau's sentence, as appropriate.

Respectfully submitted,

/s/ Christopher M. Bruno

KIMBALL R. ANDERSON
THOMAS L. KIRSCH, II
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600

CHRISTOPHER M. BRUNO*
JEFF P. JOHNSON
Winston & Strawn LLP
1700 K Street NW
Washington, DC 20006
(202) 282-5000

**Counsel of Record*

Counsel for Defendant-Appellant Kevin Trudeau

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[8] If the Court requires factfinding, it should remand to determine whether dismissal with prejudice is warranted.

CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 32(A)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I, Christopher M. Bruno, an attorney, certify that I have complied with the above-referenced rule, and that according to the word processor used to prepare this brief, Microsoft Word, this brief contains 6,993 words and therefore complies with the type-volume limitation of Rule 32(a)(7)(B) and (C).

Dated: December 18, 2014

/s/ Christopher M. Bruno
Christopher M. Bruno

CERTIFICATE OF SERVICE

I, Christopher M. Bruno, an attorney, certify that on this day I caused the foregoing Reply Brief for Defendant-Appellant Kevin Trudeau, to be served via ECF and e-mail on the following:

Marc Krickbaum
Assistant United States Attorney
110 E. Court Avenue, Suite 286
Des Moines, IA 50309
(515) 473-9305

Dated: December 18, 2014

/s/ Christopher M. Bruno
Christopher M. Bruno