No. 16-37

In the Supreme Court of the United States

KEVIN MARK TRUDEAU, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
JENNY C. ELLICKSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Speedy Trial Act's requirements apply to a show-cause order for criminal contempt that limits potential imprisonment to six months.

2. Whether a person satisfies the willfulness requirement of criminal contempt if he is conscious of a substantial and unjustifiable risk that violation of a specific court order will occur and disregards that risk.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 812 F.3d 578. The opinion of the district court denying petitioner's motion for acquittal (Pet. App. 40a-46a) is not published in the Federal Supplement but is available at 2014 WL 321373.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 2016. A petition for rehearing was denied on March 7, 2016 (Pet. App. 47a-48a). On May 6, 2016, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including July 6, 2016, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of criminal contempt, in violation of 18 U.S.C. 401(3). He was sentenced to 120 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1a-29a.

1. Beginning in the 1990s, petitioner repeatedly used TV infomercials to sell "miracle cures and self-improvement systems of dubious efficacy." Pet. App. 1a; Presentence Investigation Report (PSR) ¶ 10. The Federal Trade Commission (FTC) sued petitioner on multiple occasions for violating consumer-protection laws. To settle one of those suits, petitioner agreed in 2004 to the entry of a consent order in which he promised not to market products without FTC approval. Pet. App. 3a; PSR ¶¶ 11-12. As later modified, the consent order allowed petitioner to star in the infomercials for his books, so long as the infomercials did not misrepresent the content of the books. Pet. App. 3a.

In 2007, petitioner published a new book entitled "*The Weight Loss Cure 'They' Don't Want You to Know About*." Pet. App. 3a. The book described a complex regimen designed to reduce hunger by "resetting" the hypothalamus, a region of the brain. *Ibid.* The regimen consisted of four phases (two of which were "strongly recommended" but not obligatory), each with a strict list of dietary and lifestyle guidelines and restrictions. *Id.* at 4a. For example, most or all of the phases—including Phase 4, which lasted a lifetime—involved abstaining from prescription and over-the-counter medication, artificial sweeteners, chain restaurants, and food cooked in microwaves, as well as avoiding air conditioning and fluorescent lighting. *Ibid.* Pro-

gram participants were also instructed to walk an hour a day; eat only organic food; perform liver, parasite, heavy-metal, and colon cleanses; and undergo colonics, which are enema-like procedures performed by specialists. *Ibid.* Phase 2, which was mandatory and lasted between 21 and 45 days, entailed a 500-calorie-per-day diet and daily injections of human chorionic gonadotropin, a hormone that is available only by prescription and that is not designed for weight loss. *Ibid.*

Petitioner promoted *The Weight Loss Cure* in three different 30-minute infomercials staged as scripted conversations between an interviewer and himself. Pet. App. 4a. The weight-loss protocol described in the infomercials bore little resemblance to the one in his book. *Ibid.* In the infomercials, petitioner said that the protocol was "very inexpensive" and could be performed at home, and he described it as "the easiest [weight-loss] method known on planet Earth." *Ibid.* (brackets in original). He also represented that once the protocol was complete, dieters could eat "everything they want, any time they want." *Ibid.* Petitioner never mentioned the dietary or lifestyle restrictions, injections, cleanses, or colonics mandated in the book. *Id.* at 4a-5a.

Based on that conduct, the FTC filed a motion in the district court for an order to show cause why petitioner should not be held in civil contempt for violating the 2004 consent order. 567 F. Supp. 2d at 1017. The district court concluded that petitioner had violated the court's order, finding that the infomercials had misrepresented the content of the book. *Ibid.*; see Pet. App. 5a. The court therefore held petitioner in civil contempt and entered a $37.6 million judgment against him. Pet. App. 5a. The court of appeals af-

firmed the civil-contempt finding, 579 F.3d 754 at 768, and, after a remand, affirmed the monetary sanction as well, 662 F.3d at 949-950.

2. a. On April 16, 2010, the district court issued an order to show cause why petitioner should not be held in criminal contempt under Federal Rule of Criminal Procedure 42 for his violation of the consent order. Pet. App. 5a, 101a. The show-cause order stated that petitioner would "personally be given notice, pursuant to Rule 42(a)(1), that th[e] court w[ould] consider imposing a term of imprisonment not to exceed six months" for the deceptive infomercials. *Id.* at 106a. The order also requested that the United States Attorney for the Northern District of Illinois prosecute petitioner for criminal contempt. *Ibid.*

At the show-cause hearing on April 29, 2010, the U.S. Attorney's Office agreed to prosecute the case. A government attorney told the judge, "I think because this is a criminal proceeding, the Speedy Trial Act would * * * apply." Pet. App. 5a. Under the Speedy Trial Act of 1974 (Speedy Trial Act or the Act), 18 U.S.C. 3161 *et seq.*, "the trial of a defendant charged in an information or indictment with the commission of an offense" must generally begin within 70 days of his indictment or his appearance before a judicial officer, whichever occurs later. 18 U.S.C. 3161(c)(1). If the 70-day deadline is not met, the defendant is entitled to dismissal of the charges either with or without prejudice. 18 U.S.C. 3162(a)(2). Time can be excluded from the 70-day limit, however, for specified reasons. See 18 U.S.C. 3161(h).

Beginning on the day of the show-cause hearing, the government sought and received four exclusions of time from the Speedy Trial Act's 70-day clock. Pet.

App. 5a. Petitioner moved for the recusal of the district judge. No. 03-cv-3904 (N.D. Ill.), Docket entry No. (Civ. Doc.) 416 (Sept. 10, 2010). The days during which that motion was pending were excluded from the 70-day limit. Civ. Doc. 389 (June 16, 2010), 425 (Sept. 24, 2010), 432 (Sept. 29, 2010). On October 19, 2010, the district judge issued an order denying petitioner's motion to recuse and, in a separate minute entry, announced that he was exercising his prerogative as a senior judge pursuant to 28 U.S.C. 294(b) to transfer the criminal proceedings to the district's Executive Committee for reassignment to another judge. Civ. Doc. 435, 437. The case was reassigned to a new district judge, and neither the government nor petitioner received notice of the reassignment. Pet. App. 5a-6a. The case sat idle until the parties discovered the oversight, and by the time the district court convened a status hearing on April 7, 2011, more than 150 nonexcludable days had elapsed since the government agreed to prosecute the case. *Id.* at 6a.

At the status hearing, petitioner moved to dismiss this case for violation of the Speedy Trial Act. The government contended that the show-cause order was not subject to the Act. Pet. App. 6a. The Speedy Trial Act applies only to the prosecution of an "offense," which encompasses "any Federal criminal offense which is in violation of any Act of Congress and is triable by any court established by Act of Congress (other than a Class B or C misdemeanor or an infraction * * *)." 18 U.S.C. 3172(2). Under 18 U.S.C. 3559(a), an offense is a Class B misdemeanor if the "maximum term" of imprisonment for the offense is six months or less but more than 30 days. 18 U.S.C. 3559(a)(7). Because the show-cause order in petition-

er's case capped petitioner's potential sentence at six months, the government argued that the criminal-contempt charge was a Class B misdemeanor and therefore did not constitute an "offense" within the meaning of the Speedy Trial Act. No. 10-cr-886 Docket entry No. (Crim. Doc.) 13, at 3-5 (June 21, 2011). The district court agreed and therefore held that the delay had not violated the Speedy Trial Act. Pet. App. 6a.

At the same hearing, the government asked the district court to withdraw the initial show-cause order and issue an amended order without the six-month cap on potential imprisonment. Pet. App. 6a. On December 7, 2011, the court agreed to issue a new show-cause order and told the parties that the original order would be dismissed when the new one was entered. *Ibid.* An amended, the uncapped show-cause order issued the next day. *Id.* at 6a, 107a-108a.

b. Petitioner proceeded to trial on the contempt charge in the second show-cause order. Pet. App. 16a-17a. The parties and the district court agreed that this charge required the government to prove that petitioner's violation of the 2004 consent order was willful. Crim. Doc. 82, at 15 (Sept. 6, 2013); Crim. Doc. 94, at 4 (Sept. 23, 2013); Crim. Doc. 147, at 15 (Nov. 12, 2013); Crim. Doc. 153, at 239-240 (Dec. 9, 2013).

In its pretrial filings, the government proposed a jury instruction (Instruction No. 15) that addressed the meaning of willfulness in this context. D. Ct. Dkt. 82, at 16. Petitioner objected to the government's proposed instruction on the ground that it did not fully capture the definition of willfulness set forth in *United States* v. *Mottweiler*, 82 F.3d 769, 771 (7th Cir. 1996). Crim. Doc. 94, at 4-5. In *Mottweiler*, the Seventh Circuit stated that a defendant acts willfully in the

context of criminal contempt if he "knows or reasonably should be aware that [the] conduct is wrongful." 82 F.3d at 771. *Mottweiler* further stated that the "should have known" standard is the equivalent of criminal recklessness, which "is present only if the actor is conscious of a substantial risk that the prohibited events will come to pass." *Ibid.*; see also *ibid.* (citing Model Penal Code § 2.02(2)(c) (1962) for its statement that "[a] person acts recklessly * * * when he consciously disregards a substantial and unjustifiable risk that a material element exists or will result from his conduct") (brackets in original).

Invoking *Mottweiler*, petitioner proposed a revised willfulness instruction that stated in relevant part:

> A violation of a court order is willful if it is a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful. A person should reasonably be aware that his conduct is wrongful if he is conscious of a substantial and unjustified risk that the prohibited event (here violation of the September 4, 2002 Court Order) will come to pass and disregards that risk.

Crim. Doc. 94, at 5 (emphasis and boldface omitted). The government agreed to petitioner's proposal, except that the government noted that "unjustified risk" should be changed to "unjustifiable risk" to track the language in *Mottweiler*. Crim. Doc. 99, at 4 (Sept. 30, 2013); see Crim. Doc. 153, at 240-241.

During the final pretrial conference on the jury instructions, petitioner's counsel told the district court that the parties had "agreed to" petitioner's proposed willfulness instruction, with the government's requested modification. Crim. Doc. 153, at 241. The government then notified the court that petitioner's proposed

willfulness instruction stated the wrong date for the court order (September 4, 2002, rather than the correct date of September 2, 2004), and petitioner agreed that the date should be changed. *Ibid.* The court then stated, "So I take it, other than correcting the date of the court order and changing the word 'unjustified' to 'unjustifiable,' the parties are in agreement with the proposed Trudeau[] alternative to the government's proposed No. 15?" *Ibid.* The government's attorney responded, "Yes, Judge, we agree." *Id.* at 242. At the end of trial, the district court read petitioner's proposed willfulness instruction to the jury with the agreed-upon modifications. See Crim. Doc. 147, at 18.

c. In November 2013, following a six-day trial, the jury convicted petitioner on the criminal contempt charge in the second show-cause order. Pet. App. 7a.

After trial, petitioner filed a motion for judgment of acquittal on the ground that the government had failed to present sufficient evidence that his violation of the 2004 consent order was willful. Crim. Doc. 150, at 4 (Dec. 3, 2013). In the motion, petitioner asked the district court to apply the jury instruction's definition of willfulness when evaluating the sufficiency of the government's evidence. *Ibid.*; see p. 22, *infra*. In the last paragraph of his reply brief, however, petitioner for the first time suggested, in a parenthetical, that the willfulness element of criminal contempt required the government to prove that he voluntarily and intentionally violated a known legal duty. Pet. App. 133a (citing *Cheek* v. *United States*, 498 U.S. 192, 201 (1991)); see note 4, *infra*. Petitioner did not inform the court that he was now asking the court to apply a definition of willfulness other than the standard that the court had used in the jury instructions and that

petitioner had recounted at length in his motion for judgment of acquittal. The court denied petitioner's motion, concluding that "ample evidence," including the infomercials themselves, supported the inference that petitioner had acted willfully. Pet. App. 44a.

The district court later sentenced petitioner to 120 months in prison. That sentence was substantially below petitioner's advisory Guidelines range of 235 to 293 months. Pet. App. 7a.

3. The court of appeals affirmed. Pet. App. 1a-29a.

a. The court of appeals first held that the district court correctly denied petitioner's motion to dismiss for violation of the Speedy Trial Act. Pet. App. 2a. As relevant here, the court of appeals rejected petitioner's contention that because criminal contempt "carries no statutorily authorized maximum punishment," the initial show-cause order effectively charged him with "a crime punishable by up to life in prison" (and thus a Class A felony) despite the fact that it capped the penalty for the alleged contempt at six months in prison. *Id.* at 10a-11a; see *id.* at 9a-12a. The court explained that petitioner's argument "is hard to square with the approach the Supreme Court has taken in the analogous context of the right to trial by jury in contempt prosecutions." *Id.* at 11a. The court observed that under this Court's Sixth Amendment precedents, a criminal defendant is generally entitled to a trial by jury if the maximum punishment for the offense exceeds six months in prison, but that because criminal contempt has no statutory maximum punishment, a defendant is entitled to a jury trial only if the sentence actually imposed exceeds six months. *Ibid.* (discussing *Frank* v. *United States*, 395 U.S. 147 (1969)); see *Taylor* v. *Hayes*, 418 U.S. 488, 495 (1974). The court

of appeals reasoned that this Court's Sixth Amendment analysis has "a logical corollary" in the Speedy Trial Act context: "If the document initiating the contempt prosecution caps the sentence at six months or less, then it's not necessary to wait until sentencing to know whether the Speedy Trial Act will apply—it won't." Pet. App. 12a.

Because the first show-cause order in this case capped petitioner's potential penalty at six months, the court of appeals analogized the order to an indictment for a Class B misdemeanor, which carries a maximum penalty of six months. Pet. App. 12a. The court therefore held that the criminal-contempt charge in the first show-cause order, like a Class B misdemeanor, was not subject to the Speedy Trial Act. *Id.* at 2a, 12a.[1]

b. The court of appeals also rejected petitioner's claim, raised for the first time on appeal, that the jury instructions misstated the "willfulness" element of criminal contempt. Pet. App. 16a-20a. The court ruled that petitioner had affirmatively waived any challenge to the willfulness instruction in the district court. *Id.* at 18a-19a. The court explained that petitioner had "expressly approved the willfulness instruction after offering modifications that were accepted in toto." *Id.* at 18a. For that reason, the court held, "[h]e cannot now argue that the instruction was wrong." *Ibid.* (citing *United States* v. *Yu Tian Li*, 615 F.3d 752, 757 (7th Cir. 2010)). The court rejected his argument that he had merely "forfeited" rather than affirmatively waived the argument. *Id.* at 19a. The court held in

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[1] Petitioner agreed that if the speedy-trial clock started when the district court issued the second show-cause order (on December 8, 2011), the trial commenced within the time period required by the Speedy Trial Act. Pet. App. 7a-8a.

the alternative that even if the objection were merely forfeited, petitioner could not establish plain error because he could "point to no authority that makes the willfulness instruction used at his trial plainly erroneous." *Id.* at 20a; see *id.* at 19a-20a.

c. Finally, the court of appeals rejected petitioner's argument that the government did not present sufficient evidence that "he willfully violated the consent order." Pet. App. 21a; see *id.* at 20a-22a. Petitioner had suggested that the evidence supported innocent explanations for his misrepresentations in the infomercials, such as "the possibility that he left his glasses at home and misread the teleprompter." *Id.* at 21a. After noting "the obvious implausibility of these fanciful explanations," *ibid.*, the court determined that the trial evidence was "easily sufficient to convict," *id.* at 22a. The court explained that the evidence permitted a factfinder to conclude that "*The Weight Loss Cure* infomercials included 'blatant misrepresentations' that were 'patently false' and 'outright lies.'" *Ibid.* (quoting 579 F.3d at 766-768).

ARGUMENT

Petitioner first seeks (Pet. 16-25) review of the court of appeals' holding that the Speedy Trial Act's requirements do not apply to a show-cause order for criminal contempt that limits potential imprisonment to six months. That question does not warrant this Court's review. To the government's knowledge, no other circuit has considered that question in a precedential opinion, and the two circuits to address the question in nonprecedential opinions reached the same conclusion as the decision below. Although the decision below is in tension with decisions of other circuits addressing the classification of criminal-contempt of-

fenses in other statutory contexts, it does not squarely conflict with those decisions because the court of appeals limited its analysis and holding to the Speedy Trial Act context. And in any event, this case would be an unsuitable vehicle to resolve questions about the proper classification of criminal contempt, both because petitioner is differently situated from most criminal defendants challenging the classification of a criminal-contempt offense and because petitioner was ultimately prosecuted under a second show-cause order that would likely be unaffected by resolution of the question presented in his favor.

Petitioner also contends (Pet. 26-35) that the Court should grant certiorari to determine whether the willfulness requirement for criminal contempt under 18 U.S.C. 401(3) requires proof that the defendant knew that he was violating a court order and thus is not satisfied by proof that the defendant disregarded a substantial and unjustifiable risk that he was violating a court order. The court of appeals, however, did not reach that question. Rather, the court held that petitioner had affirmatively waived his claim that the district court had erred in instructing the jury on willfulness by expressly acceding to the relevant instruction in the district court. And the court of appeals' resolution of petitioner's sufficiency challenge did not depend on the view that a mental state less than knowledge suffices for criminal contempt. This case therefore does not provide an opportunity to address the legal question of the proper definition of willfulness for criminal-contempt prosecutions.

Accordingly, the petition should be denied.

1. The court of appeals' holding that the Speedy Trial Act does not apply to a criminal-contempt prose-

cution where the initial show-cause order caps punishment at six months of imprisonment does not warrant this Court's review.

a. As explained above, under the Speedy Trial Act, "the trial of a defendant charged in an information or indictment with the commission of an offense" must generally begin within 70 days of his indictment or his appearance before a judicial officer, whichever occurs later, subject to various periods of excludable time. 18 U.S.C. 3161(c)(1) and (h). The Speedy Trial Act, however, applies only to the prosecution of an "offense," and that term is defined to exclude Class B and C misdemeanors. 18 U.S.C. 3172(2). Under 18 U.S.C. 3559(a), an offense is a Class B misdemeanor if the "maximum term" of imprisonment for the offense is six months or less but more than 30 days. 18 U.S.C. 3559(a)(7). But an offense with a maximum term of life imprisonment is classified as a Class A felony. 18 U.S.C. 3559(a)(1).

The question decided by the court of appeals was whether, for Speedy Trial Act purposes, a contempt offense should be considered a Class B misdemeanor if the district court's show-cause order caps punishment at six months of imprisonment, or whether it should instead be deemed a Class A felony on the ground that the contempt statute has no maximum penalty (and thus authorizes a term of imprisonment of up to life imprisonment, see *United States* v. *Wright*, 812 F.3d 27, 32 (1st Cir. 2016), cert. denied, No. 15-9432, 2016 WL 2989966 (No. 15-9432) (Oct. 3, 2016)). The court of appeals reasoned that the Speedy Trial Act is designed to "appl[y] to all offenses more serious than a Class B misdemeanor," Pet. App. 10a, but that a contempt prosecution that is limited at the outset to a penalty of no more than six months is not

more severe than a Class B misdemeanor, and is therefore properly treated as a Class B misdemeanor for Speedy Trial Act purposes. See *id.* at 11a-12a.

To the government's knowledge, the decision below is the only precedential appellate decision to resolve the question whether the Speedy Trial Act applies to a criminal-contempt prosecution where the district court announces at the outset that the punishment will not exceed six months of imprisonment (and petitioner does not contend otherwise). Accordingly, no conflict exists on this issue. As the court of appeals noted, see Pet. App. 12a n.3, two other circuits have reached the same conclusion in nonprecedential opinions. See *United States* v. *Moncier*, 492 Fed. Appx. 507, 509-510 (6th Cir. 2012); *United States* v. *Richmond*, 312 Fed. Appx. 56, 57 (9th Cir. 2009); see also *United States* v. *Baker*, 641 F.2d 1311, 1319 (9th Cir. 1981) (concluding that the defendant's criminal-contempt offenses "were petty ones to which the Speedy Trial Act does not apply" (footnote omitted)).

Petitioner asserts (Pet. 24-25) that the decision below conflicts with *Klopfer* v. *North Carolina*, 386 U.S. 213 (1967). Petitioner is incorrect. *Klopfer* held that the Sixth Amendment right to a speedy trial applies to the States by virtue of the Fourteenth Amendment's Due Process Clause. *Id.* at 222-226. Although that decision discussed the importance of the Sixth Amendment speedy-trial right, *Klopfer* predated the 1974 enactment of the Speedy Trial Act. *Klopfer* thus did not construe the Speedy Trial Act, which is the only legal challenge at issue here. See Pet. App. 15a. Moreover, the aspect of the proceedings below that petitioner claims to violate *Klopfer*—that the district court issued a second, uncapped show-cause order after the

initial capped order—is not what petitioner challenges in his petition for a writ of certiorari. Rather, the petition challenges the court of appeals' holding that the Speedy Trial Act does not apply to show-cause orders that are capped at six months, see *id.* at 9a-12a, not its conclusion that it was permissible for the district court to issue a second, uncapped show-cause order, see *id.* at 12a-16a.

Accordingly, the decision below does not conflict with the decision of any other court of appeals or this Court, and the question of the Speedy Trial Act's applicability to criminal-contempt prosecutions does not appear to arise with any frequency. That question therefore does not warrant this Court's review.

b. Petitioner also contends (Pet. 16-23) that the decision below conflicts with decisions of other circuits that have adopted different approaches to classifying criminal-contempt offenses under statutes other than the Speedy Trial Act. For example, in order to determine the maximum term of imprisonment that can be imposed for violating a term of supervised release, a court must first classify the underlying offense of conviction under 18 U.S.C. 3559(a). See 18 U.S.C. 3583(e)(3). The Ninth Circuit has held that if the offense of conviction is criminal contempt, a court should classify the conviction based on the federal offense most analogous to the conduct that led to the contempt conviction. *United States* v. *Broussard*, 611 F.3d 1069, 1071-1073 (2010). In contrast, the First Circuit has held that for purposes of determining the maximum sentence for violating a term of supervised release, all criminal-contempt convictions should be treated as Class A felonies. *Wright*, 812 F.3d at 29, 32-35.

In addition to those decisions, the Third Circuit has concluded that, for the purpose of determining whether a criminal-contempt conviction is subject to the Sentencing Guidelines, a court must "look to the actual sentence imposed." *In re Solomon*, 465 F.3d 114, 119 (3d Cir. 2006); see *id.* at 120 ("Here, the sentence actually imposed by the district court was five months' imprisonment. It should therefore be classified a Class B misdemeanor [under Section 3559(a)(7)]. * * * Such offenses are specifically exempted from coverage under the Guidelines."). The Eleventh Circuit has held that for sentencing purposes criminal contempt "is best categorized as a *sui generis* offense" that "cannot be classified pursuant to § 3559." *United States* v. *Cohn*, 586 F.3d 844, 848-849 (2009) (per curiam). Finally, the Fifth Circuit has held that, because this Court "has never characterized contempt as either a felony or a misdemeanor, but rather has described it as 'an offense *sui generis*,'" the alternative-fines provisions in 18 U.S.C. 3623(a)(3) and (5), which apply respectively to felonies and to misdemeanors punishable by imprisonment for more than six months, do not "clearly apply" to criminal contempt. *United States* v. *Holmes*, 822 F.2d 481, 493 (1987) (quoting *Cheff* v. *Schnackenberg*, 384 U.S. 373, 380 (1966)).[2]

While the decision below is in tension with those decisions, it does not squarely conflict with them. The court of appeals did not state that it was adopting an

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[2] Petitioner also cites (Pet. 18) a nonprecedential decision of the Fourth Circuit. See *United States* v. *Myers*, 302 Fed Appx. 201 (2008). That decision did not establish the governing law of the Fourth Circuit and, in any event, did not address the Speedy Trial Act issue here.

approach for classifying criminal contempt for all purposes. Rather, the court limited its decision to the proper classification of criminal contempt under the Speedy Trial Act. See Pet. App. 9a (undertaking "the task of directly applying the [Speedy Trial] Act to contempt prosecutions"). The decision below would not compel a later Seventh Circuit panel to adopt the same approach for classifying criminal contempt for other purposes.

Moreover, a case presenting a Speedy Trial Act claim would be a particularly poor vehicle for resolving broader issues about the classification of criminal contempt. In the contexts discussed above, such as determining the maximum penalty for violation of a term of supervised release, criminal defendants would benefit from a criminal-contempt offense being classified at a lower level (*e.g.*, as a misdemeanor instead of a felony). In this unique context, however, petitioner favors classifying criminal contempt as a higher offense in order to trigger the protections of the Speedy Trial Act. That inversion of the typical position of a criminal defendant would make this case an idiosyncratic vehicle for addressing classification-of-contempt questions to the extent that they apply beyond the Speedy Trial Act.

c. In any event, the procedural posture of this case makes it a poor vehicle to resolve even the narrower question of the Speedy Trial Act's applicability to criminal-contempt prosecutions, much less any broader question about the classification of criminal contempt more generally. Even if this Court were to hold that the Speedy Trial Act applied to the first, capped show-cause order, it likely would not affect the outcome of petitioner's case. That is because a dismissal

under the Speedy Trial Act may be without prejudice to refiling the charges, see 18 U.S.C. 3162(a)(2), and petitioner was ultimately convicted under the second show-cause order, which he acknowledges complied with the Speedy Trial Act, not the first show-cause order, see Pet. App. 7a-8a. A ruling that the first show-cause order should have been dismissed without prejudice would not invalidate the second show-cause order and therefore would not result in a reversal of his conviction.[3]

It is very likely that either this Court or the courts below on remand would conclude that, if a Speedy Trial Act violation occurred, the dismissal of the prosecution should have been without prejudice. See Gov't C.A. Br. 31-36. In determining whether to dismiss a case with or without prejudice for a violation of the Speedy Trial Act, courts must consider, among other factors, "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the Speedy Trial Act] and on the administration of justice." 18 U.S.C. 3162(a)(2). Here, petitioner's conduct was serious, and the alleged Speedy Trial Act violation occurred only because the case sat idle for approximately five-and-a-half months after the parties failed to receive notice that the case has been reassigned to a new district judge. See Pet. App. 5a-

[3] Although the court of appeals concluded that the speedy-trial clock does not reset with the issuance of a second charge when the government moves for the dismissal of the first charge, Pet. App. 13a, that rule would not apply if the district court had dismissed the first show-cause order on petitioner's motion (or if an appellate court were to reverse the district court's denial of petitioner's motion to dismiss). See 18 U.S.C. 3161(d)(1).

6a. Petitioner has made no allegation that the government acted in bad faith, and during the period when the speedy-trial clock was allegedly running, petitioner was not in custody and did not attempt to assert a speedy-trial right. See *United States* v. *Fountain*, 840 F.2d 509, 513 (7th Cir.), cert. denied, 488 U.S. 982 (1988) ("A defendant who waits passively while the time runs has less claim to dismissal with prejudice than does a defendant who demands, but does not receive, prompt attention."). Indeed, after the district court denied his motion to dismiss the first show-cause order, petitioner sought or agreed to several continuances during the pendency of the second show-cause order. See Crim. Doc. 35 (Mar. 13, 2012), 57 (May 28, 2013); see also Crim. Doc. 77, at 24, 80 (July 31, 2013).

Given those circumstances, even if petitioner prevailed on the first question presented and obtained a reversal of the district court's denial of his motion to dismiss the prosecution under the Speedy Trial Act, he likely would receive only a dismissal without prejudice of the first show-cause order. As a result, his conviction under the second show-cause order would have to be affirmed.

2. Petitioner also seeks (Pet. 26) this Court's review of "the question whether the willfulness requirement of criminal contempt requires the government to prove knowledge, recklessness, or some other *mens rea*." See Pet. 26-35. That question is not properly presented here.

a. The court of appeals held that petitioner had expressly waived his objection to the jury instruction on willfulness by affirmatively acceding to the instruction in the district court. Pet. App. 19a-20a. That holding

was correct. See *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999) ("As the city itself proposed the essence of the jury instructions, it cannot now contend that these instructions did not provide an accurate statement of the law."). Petitioner does not challenge the waiver holding before this Court or otherwise seek review of any asserted instructional error.

b. To circumvent his affirmative waiver of any objection to the jury instruction on willfulness, petitioner presents his willfulness argument only through the lens of his challenge to the sufficiency of the evidence. In particular, he contends (Pet. 32) that "[t]he government presented no evidence that [petitioner] knew what he was doing was wrong." He suggests that the court of appeals rejected his sufficiency challenge on the ground that the record contained sufficient evidence of a reckless state of mind, but not necessarily knowing or intentional misconduct.

That argument misreads the court of appeals' sufficiency analysis. After noting that petitioner had offered up only "fanciful explanations" for his misstatements in the infomercials that were "obviously implausib[le]" (*e.g.*, that he had "misread the teleprompter"), Pet. App. 21a, the court explained that the "evidence was easily sufficient to convict" petitioner on the ground that petitioner had made "'blatant misrepresentations' that were 'patently false' and 'outright lies.'" *Id.* at 22a (quoting 579 F.3d at 766-768). That assessment of the trial evidence would suffice even under petitioner's newly asserted willfulness standard—*i.e.*, that petitioner "knew the infomercials misrepresented the contents of his book," Pet. 34. Contrary to petitioner's evident belief, the court of

appeals did not rest its sufficiency analysis on the view that the evidence permitted the jury to infer merely that petitioner "objectively disregarded a risk that he might misrepresent the content of his *Weight Loss* book," *ibid.* Rather, the court held that the evidence permitted the jury to infer that petitioner had blatantly lied in the infomercials, which would suffice to establish willfulness even under the strictest mental-state standard (given that petitioner does not contend that he was unaware that the 2004 consent order prohibited such intentional deception).

Because the court of appeals did not rest its sufficiency analysis on the recklessness standard, petitioner essentially seeks this Court's review of the court of appeals' case-specific evaluation of the trial evidence, not any legal question of general applicability. See Pet. 35 ("[T]here was no evidence from which a rational trier of fact could infer anything about [petitioner's] state of mind, let alone that he knew he was violating the 2004 Consent Order."). That factbound question does not warrant this Court's review. And in any case, petitioner's argument lacks merit. The evidence was more than sufficient for the jury to infer that petitioner knowingly violated the consent order's condition that any "infomercial * * * not misrepresent the content of the [relevant] book." Pet. App. 3a. Despite that clear condition, petitioner egregiously misrepresented the content of *The Weight Loss Cure* in the infomercials. See pp. 2-3, *supra*. A factfinder could "easily" conclude that his misrepresentations were intentional, not merely reckless or negligent. Pet. App. 22a.

c. Even if the question were otherwise properly presented here, petitioner has waived or forfeited any

argument that the evidence was insufficient to establish a knowing violation of the 2004 consent order. As discussed, petitioner repeatedly invited the district court to apply the definition of willfulness that he now claims is improper, which permitted conviction so long as he reasonably should have been aware that his actions would violate the consent order. In his objections to the government's initial proposed jury instructions, petitioner asked the district court to give a willfulness instruction that tracks the Seventh Circuit's definition of willfulness. Compare Crim. Doc. 94, at 5 (citing *United States* v. *Mottweiler*, 82 F.3d 769, 771 (7th Cir. 1996)), with Pet. App. 16a (citing same). Then, in his motion for a judgment of acquittal, petitioner invited the same alleged error by asking the district court to apply the jury instructions' definition of willfulness when evaluating the sufficiency of the evidence:

> The government failed to offer sufficient evidence to support a conviction of criminal contempt, at least because the government failed to offer sufficient evidence to prove the third element, that Trudeau willfully violated the court order. "A violation of a court order is wilful [sic] if it is a volitional act done by one who knows or should reasonably be aware that his conduct is wrongful. A person should reasonably be aware that his conduct is wrongful if he is conscious of a substantial and unjustifiable risk that the prohibited event (here, violation of the September 2, 2004 court order) will come to pass, and he disregards that risk." (Tr. at 677:10-16 (Jury Instructions).)

Crim. Doc. 150, at 4 (brackets in original). Because the district court adopted petitioner's proposed will-

fulness instruction and applied the definition of willfulness that petitioner had advocated in rejecting his sufficiency challenge, petitioner affirmatively invited the error of which he now complains.[4] As this Court has noted, invited error is a form of waiver. See *Johnston* v. *United States*, 318 U.S. 189, 200-201 (1943); see also *Shields* v. *United States*, 273 U.S. 583, 586 (1927) ("[A] court can not be asked by counsel to take a step in a case and later be convicted of error, because it has complied with such request.").

At most, this Court would review petitioner's claim that the evidence was insufficient because it did not establish a mental state higher than recklessness only for plain error because petitioner did not preserve that argument in the district court. See *United States* v. *Beaver*, 515 F.3d 730, 741 (7th Cir. 2008) ("[W]e review sufficiency-of-the-evidence arguments that were not presented in a motion for a judgment of acquittal under the plain-error standard."); but see *United States* v. *Torres*, 532 Fed. Appx. 867, 869 (11th Cir. 2013) ("A number of our sister circuits hold that * * * a defendant who seeks judgment of acquittal on specific grounds forfeits all other specific grounds on appeal.") (citing cases). But petitioner makes no argument in his petition for a writ of certiorari that the district

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[4] In his reply brief in support of his motion for acquittal, petitioner stated in a parenthetical accompanying a citation to *Cheek* v. *United States*, 498 U.S. 192 (1991), that "to establish willfulness, the government must prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." Pet. App. 133a. That parenthetical statement in passing was insufficient to apprise the district court that petitioner was contesting the definition of willfulness that he had previously agreed to and that he had cited in his opening brief supporting the motion.

court committed error that was "clear or obvious" or that the asserted error "affected [his] substantial rights" and "seriously affect[ed] the fairness, integrity or public reputation of the judicial proceedings." *Molina-Martinez* v. *United States*, 136 S. Ct. 1338, 1343 (2016); see Pet. App. 19a-20a (rejecting petitioner's claim of instructional error on the alternative ground that he could not establish plain error). He has therefore forfeited the argument that the asserted error would meet the requirements for reversal under the plain-error standard.

Any such argument would lack merit in any event. Indeed, petitioner contends (Pet. 26) that "[t]he circuits are intractably divided over the meaning of the willfulness requirement for criminal contempt" (boldface omitted). That assertion strongly suggests that the issue is "subject to reasonable dispute" and therefore that the district court did not commit plain error in adhering to governing Seventh Circuit precedent. *Puckett* v. *United States*, 556 U.S. 129, 135 (2009); cf. *United States* v. *Williams*, 469 F.3d 963, 966 (11th Cir. 2006) (no plain error when there is no controlling case law and circuits are in conflict); *United States* v. *Teague*, 443 F.3d 1310, 1319 (10th Cir.) (same), cert. denied, 549 U.S. 911 (2006).

In any event, petitioner's need to overcome waiver and then establish reversible plain error would make this a particularly unsuitable vehicle for resolving the legal question of the mental-state requirement for criminal-contempt liability.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
JENNY C. ELLICKSON
Attorney

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