No.

IN THE SUPREME COURT OF THE UNITED STATES

FELIPE NEVAREZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Speedy Trial Act clock was set to expire in this case on February 18, 2021. The day before, the parties appeared at a status conference during which the district court announced that the motion of the Government to extend the trial would be granted and that because of General Orders related to COVID, the earliest trial could commence would be April 12, 2021. Nevarez objected to this. His trial occurred on April 12, 2021, after the speedy trial clock had expired.

The Tenth Circuit did not reach the merits of the speedy trial claim, concluding that the objection by Nevarez was made one day too late, *i.e.*, the clock had not actually expired when he objected thus he had waived the issue. The question presented is:

Does the Speedy Trial Act require the accused to object to lack of speedy trial only after the time has lapsed, or can the accused assert this right prior?

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TO: The Honorable Chief Justice and Associate Justices of the United States Supreme Court:

Felipe Nevarez petitions respectfully for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The United States Court of Appeals for the Tenth Circuit decided this case by published opinion filed December 19, 2022. *See* attached Appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered December 19, 2022. Petitioner did not seek rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

> In all prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]

18 U.S.C. § 3161 provides, in part:

> (a) In any case involving a defendant charged with an offense, the appropriate judicial officer, at the earliest practicable time, shall, after consultation with the counsel for the defendant and the attorney for the Government, set the case for trial on a day certain, or list it for trial on a weekly or other short-term trial calendar at a place within the judicial district, so as to assure a speedy trial.
> ...
> (c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment[.]

STATEMENT OF THE CASE

On May 31, 2019, the Government filed a single-count indictment in the District Court of Colorado alleging that Nevarez had committed the crime of possession of 5 grams or more of meth with intent to distribute. ROA I at 14.

After protracted delays, jury trial commenced on April 12, 2021, presided over by the Hon. Robert E. Blackburn. ROA V at 47. After hearing testimony from seven Government witnesses, and one witness for the defense, the jury returned a verdict of guilty. ROA V at 386; ROA 1 at 371.

Formal sentencing commenced before the district court on August 10, 2021. ROA V at 6. After ruling on various issues related to the Guidelines, and after hearing argument from counsel and a short allocution statement from Nevarez, the district court imposed sentence of 120 months. ROA V at 28; ROA I at 414-15 (Judgment in a Criminal Case).

Nevarez filed notice of appeal on August 12, 2021. ROA I at 421.

STATEMENT OF THE FACTS

On April 3, 2019, in rural Alamosa County, Colorado, where deputies from the Alamosa County Sheriff's Office were dispatched to a reported fire. ROA V at 84. According to Lt. Yvonne Gonzales with the Sheriff's Office, Alamosa County is mostly a rural farming and agricultural county. *Id.* 83-84.

These things must be checked out, and Lt. Gonzales, along with Deputy Casey Pascoe, proceeded to investigate the reported fire. *Id.* 84. On the drive out to check the fire, Lt. Gonzales passed a black Cadillac that was sitting parked in one of the rural driveways. *Id.* 85.

The fire turned out to be a non-event, so she turned around and proceeded to drive back to the station, and she once again saw the Cadillac, which this time quickly accelerated back down the long driveway, which to Lt. Gonzales was "suspicious" so she decided to follow it. *Id.* 86. This is the bit that concerns Nevarez.

As she followed the Cadillac down the long rural driveway, she came to a bend in the drive and saw the Cadillac facing her patrol car, with the driver's side door open and a female passenger inside. *Id.* 87. She then saw a male–which turned out to be Nevarez–in dark clothing running. *Id.*

Nevarez ran through a gate and through a fenced area where an RV or camper trailer was located. She noticed that he had ditched a cell phone "near the gate" and she picked it up. *Id.* 88-89.

Other law enforcement officers arrived at the scene to search for Nevarez. This manhunt was prompted by the fact that, after interviewing the female passenger in the Cadillac (Madeline Flores), and conducting some quick police work, it was discovered that there were two active arrest warrants out for Nevarez. *Id.* 90-91.

The search, as it was, consisted of a five-member law enforcement search party walking

through a "big open field" on a day when it was windy and cold. *Id.* 91-92. It took only about twenty minutes to find Nevarez when Sgt. Paul Gilleland spotted a male dressed in black, which was of course Nevarez, who had swam through a water-filled ditch and lay there unable to move, shivering, cold, and wet. ROA V 94-95, 168.

Nevarez was not armed, put up no resistance, and police proceeded to collect his effects from his pockets and from the immediate area, which included: approximately $16,300.00 in cash found in his pockets, a plastic ziploc baggie with what appeared to be meth, an empty baggie, suboxone tablets (used by drug addicts to curb cravings) a cheap Bic lighter, a couple hollowed out plastic pens, some coins, and his wallet. *Id.* 95-98, 110, 121-27.

The meth was measured out at just under 26 grams. ROA V 126, 207.

Nevarez was taken to a local hospital, warmed up with some blankets from the exposure, and taken to jail. ROA V at 168. The investigation, as it was, continued and revealed some curiosities.

Police obtained a search warrant for the RV where Nevarez was staying. ROA V 101, 108-09. There was little sign that anyone had been living there, and there was no evidence at all of any drug dealing activity–no scales, book ledgers, drugs or weapons. ROA V at 116, 124. Nor was there any evidence of drug dealing activity at the scene where Nevarez was found. *Id.* 120.

SPEEDY TRIAL ISSUE

The Speedy Trial Act requires the Government to afford the accused a jury trial within seventy days of the filing of the indictment or initial appearance, whichever is later. 18 U.S.C. § 3161(c)(1). In this case, the indictment was filed on May 31, 2019, and Nevarez appeared before a magistrate on June 10, 2019. ROA I at 4. This triggered the speedy trial clock deadline of a jury trial to be held on or before August 19, 2019. ROA I at 29; 231.

However, as counsel stated below, he is unaware of any federal jury trial that has ever started within this 70-day window, and this case is no exception. Counsel for Nevarez filed a motion for a continuance and to exclude time under the Act, which was granted, with a jury setting of October 7, 2019. *See* ROA I at 39 (motion); 45 (order); 59 (jury trial set October 7, 2019).

In the meantime, Nevarez had been ordered detained pending trial on Jun 14, 2019, and thus had to sit in jail while the pre-trial wrangling proceeded. ROA I at 35.

Other normal events occurred which resulted in delay and speedy trial time exclusion, such as a motion to suppress filed by Nevarez which was later withdrawn, various motions to reschedule a planned change of plea and disposition of the case, and the fact that Nevarez went through four attorneys for various reasons during the course of the prosecution, with trial counsel ultimately entering his appearance on July 16, 2020. ROA I at 155.

During this time, on May 12, 2020, just as the COVID pandemic was beginning to bloom, Nevarez requested a bond and for the district court to reconsider the order of pre-trial detention. ROA I at 130. Nevarez asserted as a basis for bond that exposure to COVID might affect his physical health if he was incarcerated. *Id.* 131-32. On May 13, 2020, the district court denied the motion of Nevarez for bond and to reconsider the order of pre-trial detention. ROA I at 140.

Thus, Nevarez remained in jail.

The COVID pandemic emerged in March, 2020, when the President of the United States declared a national emergency. ROA I at 233. In response, Chief Judge Brimmer issued a series of general orders which essentially cancelled all scheduled jury trials; and pursuant to a General Order issued on June 15, 2020, Chief Judge Brimmer made findings to the effect that COVID was a national health emergency, that courthouse procedures were to be evaluated. *Id.* 233-34.

During this backdrop, the parties had been trying to work a plea agreement but were unsuccessful. Thus, at the scheduled change of plea hearing on August 26, 2020, all plea offers were withdrawn and Nevarez requested a jury trial. ROA I at 153.

This spurred a joint motion for speedy trial exclusions based on "ends of justice" filed on August 31, 2020, which outlined the COVID orders and the fact that the Chief Judge on August 19, 2020, had issued a supplemental General Order continuing all trials. ROA I at 154, 156.

This pattern continued for November 5, 2020, December 16, 2020, January 14, 2021, and then through February, 2021, where the Chief Judge ordered all trials continued with the certain exception of "pilot trials" of which Nevarez's case was not one. ROA I at 234.

Thus, trial was scheduled to begin at this point on February 18, 2021, which was the date upon which all the parties agreed would be the last day of the Speedy Trial clock. ROA I at 215, 232.

A status conference was held on February 17, 2021, the day before the scheduled trial date, at which the district court noted that the Speedy Trial clock was tolled through February 18, 2021, but this trial date had been vitiated by another General Order 2021-2 canceling all trials because of COVID, and that the earliest trial date at this point would be April 12, 2021. ROA V at 35-40.

At this point, trial counsel informed the district court that he had "extensive discussions" with Nevarez, who had been detained since day one and was in the LaPlata County Jail, and that Nevarez objected to any more continuances beyond the speedy trial calculation, which would be the next day. ROA V at 40.

The Government was directed to prepare and file a written motion concerning the speedy trial issue, which it did the next day. ROA I at 231. Nevarez filed an objection. ROA I at 249.

On March 2, 2021, the district court granted the Government's motion over the objection of Nevarez, and ordered a new trial date of April 12, 2021. ROA I at 259.

Thus, the trial in this matter was held on April 12, 2021, which was after the expiration of the February 18, 2021, speedy trial deadline and over the objection of the accused.[1] Thus, the case against Nevarez should have been, and must now be, dismissed pursuant to 18 U.S.C. § 3162(a)(2).

REASONS FOR GRANTING THE WRIT

All parties and the Tenth Circuit panel agree that Nevarez asserted his speedy trial rights at the pre-trial conference on February 17, 2021; and objected to any more extensions one day prior to the expiration of the Speedy Trial clock. *See* attached slip opinion at 6.

And just so the court is clear on what happened here, imagine the scene: the parties are present in court on February 17, 2021, just one day before the Speedy Trial Clock expires. The judge tells them that trial cannot begin on February 18, 2021 (in-time for Speedy Trial purposes) because of another General Order related to COVID that pushed all trials back and that the earliest the trial could be held would have been April 12, 2021–which is when the trial was actually held.

The Government had filed a motion for more exclusions and at this February 17, 2021, conference, Nevarez finally said enough. He objected to any more extensions.

Rather than rule on the merits whether a jury trial occurring on April 12, 2021, violates the Speedy Trial Act because the clock expired on February 18, 2021, the Tenth Circuit hijacked case law from other circuits and held that Nevarez–who stood in court on the day before the expiration

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[1] Although Nevarez asserted that the speedy trial clock expired on February 18, 2021, the district court pointed out that, pursuant to 18 U.S.C. § 3161(h)(1)(d), the clock was tolled through the date of the order on the Government's motion for the continuance. ROA I at 262. The Order was filed March 2, 2021, which is prior to the April 12, 2021, trial date; thus the speedy trial rights of Nevarez were violated in any event.

of the speedy trial clock and objected to further continuances–had actually waived any speedy trial legal claim. *See* attached slip opinion at 7.

The "rule" applied by the Tenth Circuit is simply that the speedy trial clock must have run out, and therefore an actual violation has occurred, before the accused may object to it. The Tenth Circuit claimed this rule from cases from the First, Sixth, and Ninth Circuits. *See* attached slip opinion at 6 (*citing United States v. Connor*, 926 F.2d 81 (1st Cir. 1991); *United States v. Sherer*, 770 F.3d 407 (6th Cir. 2014); *United States v. Wirsing*, 867 F.2d 1227 (9th Cir. 1989)).

In the usual course of appellate litigation, appellate courts are wont to punish criminal defendants for objecting too late. Here, Nevarez is being punished for objecting too soon.

None of which makes any rational sense.

This "rule" which is as nonsensical as it is bereft of any statutory or doctrinal bases, operated here to deprive Nevarez of a ruling on the merits of his claim. Nevarez was standing in court on February 17, 2021, with an outstanding Government motion to extend the trial past the expiration of the speedy trial clock the next day, and the trial court told him that trial on or before February 18, 2021, was impossible and that the earliest it could be is April 12, 2021–which violates the speedy trial clock.

Nevarez stood there in court, heard this, and instructed his counsel to object.

The "rule" from the First, Sixth, Ninth–and now apparently the Tenth Circuit–is that this is not good enough because the clock had not technically expired. It appears to not matter that in Nevarez's case it was going to expire the next day, and that the judge ruled that the Government's motion would be granted, and that a General Order related to COVID prevented a timely trial under the Act in any event, and that trial would be held on April 12, 2021–none of this seems to be relevant

to panels of appellate judges, although all parties and the trial court below knew exactly what was happening.

It must be noted, too, that the Government waived this argument both in the district court and in the Tenth Circuit. The Government never raised this alleged "waiver" rule imposed by the Tenth Circuit panel and in fact the Tenth Circuit panel simply took it upon itself to assert this rule on the Government's behalf, justifying its advocacy for the Government (clearly if the accused would have failed in this regard then waiver or at most plain error review would have been the order of the day) in a footnote, stating that it could affirm the decision of the lower court on any ground adequately supported in the record. *See* attached slip opinion at 5 n. 1.

Nevarez did not "waive" his right to a speedy trial. He asserted it. In open court, in response to action by the district court indicating that the trial was not going to be held within the speedy trial time frame. This is not waiver. The waiver "rule" imposed in this case and relied upon also by the First, Sixth, and Ninth Circuits is unjust, makes no sense it terms of the reasons for waiver rules (to apprize the district court of legal problems for resolution), and deprived Nevarez of his right to have his day in court on his speedy trial claim.

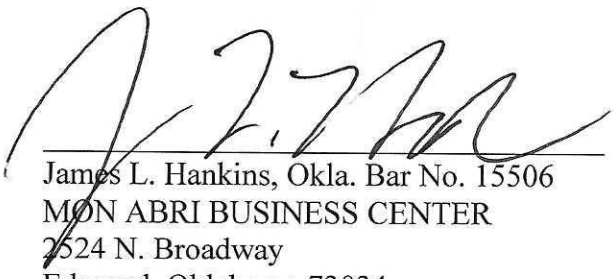
Nevarez asks this Court to accept review in order to examine whether the Speedy Trial Act requires assertion of the right to speedy trial only after the time has lapsed.

CONCLUSION

For the reasons stated above, the Petitioner prays respectfully that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

DATED this 18th day of March, 2023.

Respectfully submitted,



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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FELIPE NEVAREZ,

Defendant - Appellant.

No. 21-1286

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:19-CR-00271-REB-JMC-1)

Submitted on the briefs:*

James L. Hankins of Edmond, Oklahoma for Defendant - Appellant.

Karl L. Schock, Assistant United States Attorney (Cole Finegan, United States Attorney with him on the brief), of Denver, Colorado for Plaintiff - Appellee.

Before **McHUGH**, **BALDOCK**, and **MURPHY**, Circuit Judges.

BALDOCK, Circuit Judge.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument.

In April 2019, police found Defendant Felipe Nevarez in possession of approximately 26 grams of methamphetamine and $16,300 in cash. The Government sought and obtained an indictment charging Defendant with possession of methamphetamine with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(viii). Defendant's case was delayed numerous times, first through a series of pre-trial continuances resulting from motions, counsel withdrawals, and plea negotiations before the onset of the COVID pandemic prompted further delay. When Defendant's case eventually proceeded to trial in April 2021, Defendant conceded possession of methamphetamine and only put the Government to its burden of proof on the issue of intent to distribute. Unpersuaded by Defendant's argument that the Government's investigation failed to produce many of the traditional hallmarks of drug dealing, the jury convicted Defendant as charged. Thereafter, the district court sentenced Defendant to 120 months' imprisonment.

Now, Defendant appeals and asks us to reverse his conviction and dismiss the indictment based on a violation of the Speedy Trial Act or, in the alternative, remand his case for resentencing on the grounds that the district court erred by denying him an offense level reduction for acceptance of responsibility. Exercising jurisdiction under 28 U.S.C. § 1291, and for the reasons stated, we reject Defendant's arguments and **AFFIRM** the district court's judgment.

I.

We begin by considering Defendant's first challenge—that his conviction should be reversed and the indictment dismissed for Speedy Trial Act violations because the district

court inappropriately granted the Government's motion to exclude time related to COVID delays from the time restrictions imposed by the Act.

The Speedy Trial Act gives effect to a Defendant's Sixth Amendment right to a speedy trial. *See United States v. Lugo*, 170 F.3d 996, 1000–01 (10th Cir. 1999) (citing *United States v. Mora*, 135 F.3d 1351, 1354 (10th Cir. 1998)). To accomplish that objective, the Speedy Trial Act requires the district court to try a defendant's case within seventy days of either his indictment or first appearance, whichever is later. 18 U.S.C. § 3161(c)(1). The seventy-day requirement, however, is not violated by a straight count from the start date. Instead, numerous exceptions and exclusions may extend the actual time between the start date and the commencement of trial far beyond seventy days. 18 U.S.C. § 3161(h). Additionally, the Speedy Trial Act provides that the remedy for a violation of its requirements is dismissal of the defendant's indictment—either with or without prejudice. 18 U.S.C. § 3162(a)(2). But dismissal is not automatic. The Speedy Trial Act affirmatively places the burden on the defendant to seek dismissal of the indictment through a properly supported motion. "Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section." *Id.*

We review the district court's decision to grant an ends-of-justice continuance because of the COVID pandemic—as the district court did here—for abuse of discretion and its compliance with the Speedy Trial Act's procedures and legal standards de novo. *United States v. Watson*, 766 F.3d 1219, 1228 (10th Cir. 2014). Because we must first consider whether Defendant waived any objection to a Speedy Trial Act violation, our

initial review is de novo. The Government argues Defendant failed to comply with § 3162(a)(2)'s motion requirement because he did not file a formal motion to dismiss and "[n]either an opposition to a motion for continuance nor an assertion of the defendant's speedy trial right in such an opposition is sufficient." Appellee's Br. 15.

Defendant, however, believes he satisfied § 3162(a)'s motion requirement, at least as interpreted under our precedents. He contends that an exchange between his counsel and the district court at a status conference on February 17, 2021, is sufficient to overcome any waiver claim and preserve the issue for review on appeal. Appellant's Reply Br. 5–7. In that exchange, Defendant's counsel stated:

> Your Honor, I've had some extensive discussions with Mr. Nevarez . . . . I've explained to him the case law as I understand it, coming out of the Ninth Circuit and some other places that the appropriate emergency provision of the Speedy Trial Act that may or may not be implicated by the pandemic and the reality of Chief Judge Brimmer's orders. I will tell the Court that Mr. Nevarez objects to his trial being beyond speedy trial, *which, of course, is tomorrow*, but understands the situation. But I—essentially, what I'm maybe saying inartfully [sic], Your Honor, is I don't—he does object to that for the record and wants to preserve that issue, which I certainly understand and do on his behalf.

(emphasis added). The court responded by simply stating "[v]ery well." According to Defendant, this statement from his counsel complies with the requirements of our previous decision in *United States v. Arnold*, 113 F.3d 1146 (10th Cir. 1997), *abrogated in part on state-law grounds by State v. Gould*, 23 P.3d 801 (Kan. 2001). There, we broadened the definition of a "motion" under § 3162(a) to include more than formally filed motions to dismiss. *See Arnold*, 113 F.3d at 1149. We concluded that the defendant had satisfied the

motion requirement through an oral statement during an on-the-record conference where the defendant's counsel informed the district judge that:

> Your Honor, there is one other thing . . . . As I look through this file and as my client looked through, he thinks there's a speedy trial issue . . . From June 15th to August 24th is the passage of time which he believes should be counted towards violation of the Speedy Trial Act.

Id. at 1149. In reaching that conclusion, we also made clear that the district judge's *express acceptance* of that statement as a motion was a significant factor in our decision. *See id.* ("The district court itself acknowledged the adequacy of appellant's presentation."); *Lugo*, 170 F.3d at 1001 ("In *Arnold*, when the defendant brought up the Speedy Trial Act issue in chambers conference, the district court *explicitly acknowledged* that it would accept the discussion as a formal motion to dismiss." (emphasis added)).

Defendant's argument is straightforward. Because his counsel's statement closely resembles the statement we deemed acceptable in *Arnold*, he complied with § 3162(a) and the Speedy Trial issue has not been waived. Unsurprisingly, the Government urges us to reject Defendant's argument and would have us look to several of our other decisions and rely on them to conclude that the statements of Defendant's counsel were insufficient. We need not resolve the parties' disagreement on this front, however, because both parties ignore a simple, but dispositive fact about the statements in question:[1] Even if we assumed that the exchange between Defendant's counsel and the district judge at the status

[1] It is beyond question that "[w]e can affirm a lower court's ruling on any grounds adequately supported by the record, even grounds not relied upon by the district court." *Elwell v. Byers*, 699 F.3d 1208, 1213 (10th Cir. 2012) (citing *Dummar v. Lummis*, 543 F.3d 614, 618 (10th Cir. 2008)).

conference satisfied *Arnold's* generous standard, Defendant's argument fails to account for another requirement necessary to satisfy § 3162(a)(2)—timeliness. Meeting the requirements of § 3162(a)(2) is not simply a question of presenting a "motion" in a form that this Court deems satisfactory, it is also a question of presenting it at the right time. Premature motions will not suffice. An actual violation of the Speedy Trial Act must exist *at the time the motion is made*. *United States v. Sherer*, 770 F.3d 407, 411 (6th Cir. 2014) (Sutton, J.); *United States v. Tolliver*, 949 F.3d 244, 247 (6th Cir. 2020) (per curiam). After all, "a motion for dismissal [under the Speedy Trial Act] is effective only for periods of time which antedate [its] filing." *Sherer*, 770 F.3d at 411 (alterations in original) (quoting *United States v. Connor*, 926 F.2d 81, 84 (1st Cir. 1991)). When a defendant moves to dismiss an indictment based on a Speedy Trial Act violation that has yet to occur, that motion cannot succeed and "'[t]he right to challenge any subsequent delay is waived' unless the defendant brings a new motion to dismiss." *Id.* (quoting *United States v. Wirsing*, 867 F.2d 1227, 1230 (9th Cir. 1989)).

Here, Defendant's purported motion was premature. Defendant's counsel raised his Speedy Trial Act objection at a status conference on February 17, 2021. Both parties agree that, at the time the status conference was held, the Speedy Trial deadline had been tolled through February 18, 2021. Appellant's Br. 11–13; Appellee's Br. 8; Appellant's Reply Br. 5, 5 n.1. At a minimum, then, an actual violation of the Speedy Trial Act could not

have occurred until February 18, 2021, at the earliest.[2] Defendant nevertheless elected to raise the issue both before the violation occurred and before the Government moved to exclude additional time under § 3161(h)(7)(A). But "[t]he proper course was to challenge the continuance on day seventy-one (or later), a course [Defendant] never took." *Sherer*, 770 F.3d at 411. Defendant's failure to take the proper course of action precludes us from accepting the statements of his counsel at the February 17 status conference as a "motion" that complies with § 3162(a). Accordingly, we conclude Defendant waived his challenge under the Speedy Trial Act by failing to timely move to dismiss his indictment in a manner that complies with the statute and our precedents.

II.

We next consider Defendant's second claim—that the district court erred when it denied him an offense-level reduction under U.S.S.G. § 3E1.1(a) for "clearly demonstrat[ing] acceptance of responsibility for his offense." Before sentencing, Defendant objected to the Presentence Report ("PSR") because it did not include a two-level reduction in his offense level under § 3E1.1. Defendant argued he "admitted that he possessed the drugs at issue, thus accepting responsibility for a federal felony," and was therefore entitled to the offense-level reduction. The district court disagreed and found "both as a matter of fact and law that" the PSR was correct. In making this finding, the

[2] We need not determine the date when a violation of the Speedy Trial Act would have occurred in this case because it could not have been violated before February 18, 2021 and Defendant's "motion" preceded that date.

district court noted "the defendant mounted a defense around simple possession, and denied specifically one of the chief material and essential elements of the crime charged."

Now, Defendant renews his objection to the PSR on appeal. He acknowledges, however, that he faces an uphill battle on this front, because neither the Application Notes to § 3E1.1 nor the precedents of our Court favor his position. Both parties direct us to Application Note 2, which states "[t]his adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." U.S.S.G. § 3E1.1 cmt. n.2. At first blush, this statement appears to foreclose Defendant's argument entirely. But the Application Note goes on to explain that "[c]onviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial." § 3E1.1 cmt. n.2. Those "rare situations" may include going "to trial to assert and preserve issues that do not relate to factual guilt" such as challenging the constitutionality of a statute. § 3E1.1 cmt. n.2. Defendant argues his case represents one of the "rare situations" where the adjustment is appropriate because he sufficiently accepted responsibility for his criminal conduct by only contesting the intent to distribute rather than the possession of methamphetamine. Appellant's Br. 21.

Our precedents do not favor Defendant's argument. "Determination of acceptance of responsibility is a question of fact reviewed under a clearly erroneous standard." *United States v. Gauvin*, 173 F.3d 798, 805 (10th Cir. 1999) (citing *United States v. Mitchell*, 113

F.3d 1528, 1533 (10th Cir. 1997)). Moreover, "the determination of the sentencing judge is entitled to great deference on review" because of the judge's "unique position to evaluate a defendant's acceptance of responsibility." *United States v. Wooten*, 377 F.3d 1134, 1145 (10th Cir. 2004) (quoting U.S.S.G. § 3E1.1 cmt. n.5).

The simple truth is that because of this standard and the Application Notes to § 3E1.1, the type of relief Defendant seeks is rarer than hen's teeth. Defendant could only point us to one case where we have allowed a defendant to obtain an offense-level reduction for acceptance of responsibility despite putting the Government to its burden of proof at trial. *See Gauvin*, 173 F.3d 798. In that case, the district court granted the defendant the offense level reduction in question because, as we explained, he "admitted to all the conduct with which he was charged" and "simply disputed whether his acknowledged factual state of mind met the legal criteria of intent to harm or cause apprehension." *Id.* at 806. We held the district court's decision "was not clearly erroneous." *Id.* In reaching that conclusion, we made clear that while we "might not have reached the same decision . . . the deference afforded the sentencing judge" compelled us to affirm. *Id.* Our later decisions confirm that the main takeaway from *Gauvin* is not that a defendant is necessarily entitled to an offense level reduction under § 3E1.1 when they can present similar factual circumstances to that case, but that the deference we show sentencing judges will usually resolve such cases in favor of the district judge's conclusion. *United States v. McGehee*, 672 F.3d 860, 877 (10th Cir. 2012) ("We did not indicate that other sentencing courts would be obliged to reach the same conclusion on similar facts. In other words, giving other

sentencing courts the same degree of deference, we might well uphold their decisions on similar facts to *deny* the acceptance-of-responsibility adjustment.").

In line with this principle, we have affirmed district court decisions denying defendants offense level reductions under § 3E1.1 in circumstances that are factually analogous to Defendant's case. *United States v. Collins*, 511 F.3d 1276 (10th Cir. 2008) is particularly instructive. There, the defendant had been charged with possession of marijuana and cocaine with intent to distribute. *Id.* at 1277–78. The defendant offered to plead guilty to a lesser charge of simple possession, but the Government rejected his proposal. *Id.* at 1278. At trial, the defendant admitted possession and challenged intent to distribute. *Id.* Unlike the case we consider today, this strategy worked in *Collins* and the defendant was only convicted of simple possession. *Id.* at 1278, 1279. On appeal, the defendant argued that his offer to plead guilty to the lesser offense of simple possession (the offense of actual conviction) should have entitled him to the § 3E1.1 offense level reduction. *Id.* at 1279. We rejected that argument. We explained that "the district court could reasonably have concluded that [the defendant's] offer to plead guilty and his admissions at trial were strategic, rather than evidence of true acceptance responsibility." *Id.* at 1280. We also emphasized *Gauvin*'s principle that the sentencing judge's decisions are "entitled to great deference on review." *Id.* at 1281 (quoting *United States v. Hamilton*, 413 F.3d 1138, 1145 (10th Cir. 2005)).

Similarly, in *United States v. Alvarez*, we considered whether a defendant charged with possession of methamphetamine with intent to distribute and conspiracy to distribute methamphetamine was entitled to an offense level reduction under § 3E1.1 when he only

contested the existence of an agreement to distribute methamphetamine at trial. 731 F.3d 1101, 1102–03 (10th Cir. 2013). We concluded that the district court had not erred in denying the defendant the offense level reduction because the defendant had "never shown 'recognition and affirmative acceptance' . . . for all of the criminal conduct of which he was accused." *Id.* at 1104 (quoting *Mitchell*, 113 F.3d at 1534).

Defendant recognizes the weight of our precedent counsels against reversing the district court's decision. Nevertheless, Defendant contends that the district court erred in concluding he was not entitled to the § 3E1.1 offense level reduction as a matter of law. To support this argument, Defendant first attempts to factually distinguish our precedents. Our review of those precedents shows, however, that factual distinctions are unavailing when the key principle is that we defer to the sentencing judge's resolution of the issue in all but the most unusual of circumstances. We nevertheless disagree with the district court's finding that Defendant was not entitled to the § 3E1.1 offense level reduction "both as a matter of fact and law." While the conclusion that such a claim can fail as a matter of law appears to have support in at least one of our decisions, *see Alvarez*, 731 F.3d at 1104, we had already established that the question at hand is a factual one long before *Alvarez* was written. *See, e.g.*, *Gauvin*, 173 F.3d at 805; *Collins*, 511 F.3d at 1279; *United States v. Marquez*, 337 F.3d 1203, 1209 (10th Cir. 2003). Despite this error, the district court's mischaracterization is ultimately immaterial because the district court also made a factual finding that Defendant was not entitled to the offense level reduction. We cannot conclude that the district court clearly erred in making that finding based on Defendant's attempt to distinguish our precedents.

That leaves Defendant's second line of attack. Presenting us with a policy argument, Defendant asserts the decisions of our Court should promote conduct by defendants that eases the jury's burden rather than simply focusing on the "make-things-easier for the Government policy encompassed by the Guideline." Appellant's Br. 25. We cannot accept Defendant's contention that the district court "committed legal error in rejecting his request for" the offense level reduction because it did not consider an alternate policy rationale that finds no support in the Sentencing Guidelines. *Id.* As appellate judges, we are no more able to rewrite the policy rationales of the Sentencing Guidelines than we are able to put ourselves in the shoes of the sentencing judge and evaluate his decisions as a matter of first impression. Whatever merit Defendant's argument may have, we are the wrong audience to consider it. Accordingly, we conclude that Defendant's second argument misses the mark.

Because neither of Defendant's arguments demonstrate clear error, we affirm the district court's denial of the § 3E1.1 offense level reduction.

III.

For the foregoing reasons we reject Defendant's challenges and **AFFIRM** the district court's judgment.