NO OBJECTION TO ORAL ARGUMENT
No. 11-2057

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

_____

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOHN GOULD,

Defendant-Appellant

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
THE HONORABLE JAMES O. BROWNING

_____

CORRECTED SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS APPELLEE

_____

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STATEMENT OF RELATED CASES

Pursuant to Tenth Circuit Rule 28.2(C)(1), I state that there are no related cases pending in this Court.

s/ Lisa J. Stark
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Attorney

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 11-2057

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOHN GOULD,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
THE HONORABLE JAMES O. BROWNING

CORRECTED SUPPLEMENTAL BRIEF
FOR THE UNITED STATES AS APPELLEE

STATEMENT OF JURISDICTION

Defendant appeals his convictions and sentence imposed under the laws of the United States. The district court had jurisdiction under 18 U.S.C. 3231. On March 16, 2011, the district court entered an order denying defendant's supplemental motion for a new trial. The following day, defendant filed a timely notice of appeal. See Fed. R. App. P. 4(b)(3)(A)(ii). This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in excluding three hearsay statements written by defendant that were cumulative of his testimony and other evidence.

2. Whether a 25-month delay between defendant's conviction and sentencing and subsequent 20-month lapse before entry of final judgment deprived defendant of his Sixth Amendment right to a prompt sentencing.

STATEMENT OF THE CASE

1. Pre-Trial Procedural History

In August 2004, a grand jury sitting in the District of New Mexico returned a five-count superseding indictment charging defendant and his wife, Violet Gould.[1] R. 91.[2] Counts One and Two, which pertain to an incident on October 16, 2002, at the Dona Anna County Detention Center (DACDC), charged defendant with

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[1] Because codefendant Violet Gould was charged in a separate, single count and ultimately found not guilty, we omit any further reference to her in this brief.

[2] "R. __" refers to the record number of a document listed on the district court docket sheet. "Br. __" refers to the page number of appellant's opening brief filed with this Court. "__Tr. __" refers to the volume and page number of the transcript from defendant's trial. "S.Tr. __" refers to the page number of the transcript from defendant's sentencing hearing on May 6, 2009. "R.S.Tr.__" refers to the page number of the transcript from the hearing on defendant's motions for reconsideration of sentence on February 23, 2011. "S.R.A. __" refers to the page number of the supplemental record on appeal filed by defendant with this Court on November 16, 2011.

assaulting and aiding others in using excessive force against inmate Tampico Verdin, resulting in bodily injury in violation of 18 U.S.C. 242 (deprivation of rights under color of law), and filing a false report to cover up that incident in violation of 18 U.S.C. 1512(b)(3) (witness tampering). R. 91 at 1-2. Counts Three and Four, which pertain to an incident on March, 22, 2004, at the Cibola County Detention Center (CCDC), charged defendant with using excessive force against inmate James Barber, resulting in bodily injury in violation of 18 U.S.C. 242 and filing a false report to cover up that incident in violation of 18 U.S.C. 1512(b)(3). *Id.* at 3-4. On April 2, 2007, following a nine-day jury trial, defendant was found guilty and incarcerated. R. 337.

2. Facts

A. Defendant was a lieutenant and shift leader at the DACDC in Las Cruces, New Mexico. On October 16, 2002, he responded to a radio call that officers, who were transferring inmate Tampico Verdin from a 7' x 10' segregated housing cell to the general population, needed assistance. 2Tr. 121-122, 129, 185-186; 3Tr. 122. When defendant arrived at Verdin's cell, Verdin was laying "helpless" face-down on the floor as five officers, who together weighed more than 1100 pounds, were on "top of him," punching, kicking, and doing knee drops on his back. 2Tr. 254; 3Tr. 243. See 2Tr. 137, 140, 142, 151, 156, 252-253, 256, 266; 3Tr. 49, 129, 131-132, 172, 184, 212-213, 242, 245, 248, 284-288.

Defendant "immediately" joined in the assault even though Verdin was never physically aggressive, did not pose a risk to the officers, and did not do anything to justify the use of force. 2Tr. 262; 3Tr. 246. See 2Tr. 158-159, 237, 258, 263, 278; 3Tr. 185, 212, 287. As officers continued to punch and do knee drops and "air * * * [was] being pushed out of Verdin[']s" lungs, defendant grabbed Verdin by the hair, sprayed him directly in the eyes with pepper spray from no more than an inch or two away, and then sprayed him again several seconds later. 2Tr. 262. See 2Tr. 153, 158-159, 237, 253, 278, 287, 289; 3Tr. 50, 52, 87, 185, 212, 284, 287. Defendant also stepped on, repeatedly slammed Verdin's head on the cement floor, and hit him on the forehead multiple times with the spray can. 2Tr. 136, 138, 153, 155-158, 174, 191, 237, 251, 254, 257-258, 261-263, 265, 283-284, 287; 3Tr. 49-50, 87, 107, 125, 127, 133-136, 138, 182, 184, 188, 212, 242-244, 246-248, 250, 284, 286-287. Verdin, who was 5'6" and weighed approximately 140 pounds, suffered three fractured ribs, a broken left elbow, a fractured right shoulder, bleeding in the eye, and multiples bruises and abrasions. 3Tr. 97, 103, 106, 110. After the incident, defendant and the officers who participated in the beating filed reports that falsely stated, *inter alia*, that Verdin was physically combative, refused to obey defendant's commands, and was attempting to bite an officer when defendant sprayed him with a chemical irritant. 2Tr. 164, 172, 174-177, 191, 197-198, 264, 286; 3Tr. 60, 149-151, 162, 247, 252.

Four officers, who pled guilty to various crimes for their actions testified as did Sergeant Lopez, who was not involved, but arrived at Verdin's cell about three feet behind defendant. 2Tr. 181, 274; 3Tr. 164, 256, 283. Sergeant Lopez explained that she reported the incident to internal affairs and Major Barela because she was "shock[ed]" and "disgusted" by the "inhumane" conduct. 3Tr. 286, 289. See *id.* at 290, 292-293. She also repeatedly stated that after the incident, defendant mentioned that "he felt that the * * * [other] officers were probably lying about what occurred" in Verdin's cell before he arrived. *Id.* at 295-296, 306. In response to questioning by defense counsel, Sergeant Lopez related that she was "very fearful [of] and intimidated" by defendant in part because, as a sergeant, he had participated in a practical joke with Lieutenant Schlender and then reported her to supervisors so that she got fired and he was promoted. *Id.* at 312.

Defendant testified and called several character witnesses. Defendant conceded that he twice pepper sprayed Verdin in the face approximately 60 to 90 seconds apart, but denied hitting or banging his head on the concrete floor. 7Tr. 273-276. Defendant maintained that Verdin sustained his injuries before defendant arrived at his cell and that no officer hit, punched, did knee drops, or harmed Verdin in his presence. 8Tr. 134-136, 157. Defendant repeatedly explained that after the incident, he emailed and wrote a memo to Major Barela in which he stated that he believed that the officers "were lying to [him]" about what happened in

Verdin's cell before he arrived and that the New Mexico State Police should investigate. *Id*. at 91-92. See 7Tr. 287, 296-297, 300. On cross-examination, defendant insisted that despite Verdin's fractured ribs and broken bones, it was necessary to pepper spray him twice because the first application "didn't [take] effect." 8Tr. 148. He testified that Verdin continued "fighting * * * hard" and "swinging" his arm, and was able to "roll[] over" and was "pushing up" with the other arm "half on his knees" while six officers were "on top" of him. 8Tr. 148-150, 153-154, 157-158. See *id.* at 138, 146, 152-153, 155-157. Defendant also described in detail an incident in September 2001, in which he reprimanded Lieutenant Schlender because she played a practical joke and failed to conduct training drills as required. 7Tr. 252-255.

B. On March 22, 2004, inmate James Barber, who had been arrested earlier that evening, was intoxicated, yelling, and dancing naked while locked in a 7' x 14' cell in the booking area at the CCDC in Grants, New Mexico. 5Tr. 68-69, 72, 85; 6Tr. 50, 60, 130, 134-135. Defendant, who was then the administrator of the facility, retrieved a semi-automatic weapon, which was not intended for short-range use. Nevertheless, he pointed the weapon through the chow port opening of Barber's cell, and in the presence of several officers fired all 15 rounds of plastic projectiles filled with metal pellets non-stop at Barber. 4Tr. 228, 263, 275; 5Tr. 102, 262; 6Tr. 53, 153-154, 193. When defendant was finished, Barber was lying

in a fetal position, had multiple lesions on his collar bone, back, buttocks, arm, and groin, and was ultimately hospitalized for four days due to a "large" "deep seated" infected wound on his thigh, which required aggressive IV antibiotic treatment and incision drainage. 5Tr. 26-27, 30. See *id.* at 17, 22, 24, 28, 33, 48-49, 111-112; 6Tr. 163-164. Afterwards, defendant and several officers filed reports that falsely stated, *inter alia*, that defendant fired the weapon at Barber, who had his pants wrapped around his neck, at the direction of the medical team and because there were an insufficient number of correctional officers present to safely remove him from his cell. 5Tr. 96-97, 102, 132-133, 274, 295; 6Tr. 31, 92, 94, 96, 103, 105, 153, 178. Four correctional officers who witnessed the incident testified that there was no need to remove Barber from his cell, or use any force against him. 5Tr. 88, 103, 258-260; 6Tr. 51, 53-54, 65, 73, 120, 139, 148, 156.

3. Post-Trial Procedural History

Eight days after the jury found defendant guilty, he filed a motion for a new trial pursuant to Federal Rule of Criminal Procedure 33(a). R. 345. On May 10, 2007, the United States filed a response and a hearing was set for May 24, 2007. R. 353, 355. The district court granted two defense motions for continuance (from July 6, 2007, until August 9, 2007, and from August 9, 2007, until September 7, 2007) and two government motions for continuance (from May 24, 2007, until July 6, 2007, and from September 7, 2007, until October 11, 2007). The court held a

hearing on October 12, 2007. R. 358, 359, 366, 370, 376, 378, 383-384. On January 2, 2008, the district court issued a 42-page memorandum opinion and order that denied defendant's motion for a new trial.

Shortly thereafter, defendant's sentencing was set for March 27, 2008. Defendant filed for a continuance and the court rescheduled his sentencing for April 18, 2008. R. 412. That date was vacated at the government's request when prosecutors represented that there was an additional piece of evidence relating to defendant's motion for a new trial, and that defense counsel intended to file a renewed motion for a new trial. R. 424. The parties agreed that the court should resolve that motion before defendant's sentencing. *Ibid*. Defendant did not file a renewed motion for a new trial and after eleven months the district court set his sentencing for May 6, 2009.

On the morning of May 6, 2009, defense counsel filed a sealed motion to supplement defendant's motion for a new trial. Defense counsel represented that he had no objection to the district court's proceeding with defendant's sentencing and deciding the new motion without an evidentiary hearing. S.Tr. 73.

On the afternoon of May 6, 2009, the district court sentenced defendant to a concurrent term of imprisonment of 97 months on each of his four counts of conviction. S.Tr. 83, 94, 100. On June 11, 2009, the government filed a response to defendant's supplemental motion for a new trial. R. 434.

In August 2009, the district court completed a 15-page memorandum opinion and order that explained its calculation of and rationale for defendant's sentence, which was considerably less than the guideline range of 135 to 158 months applicable to defendant's convictions. R. 437. The opinion and order was not filed until December 30, 2010, due to a clerical error. R. 437; R.S.Tr. 15.

On November 18, 2010, or more than 18 months after sentencing, defendant filed a motion for reconsideration of sentence pursuant to Federal Rules of Criminal Procedure Rule 32(b).[3] R. 435. Defendant argued that he should be "release[d]" and "sentence[d] [to] * * * time served" since he remained in administrative segregation at the county jail "in violation of the Eighth Amendment * * * because of []his status as a former correctional officer" and "the [district court's] failure to enter [final written] judgment" following imposition of his sentence. *Id.* at 1-2, 4.

On December 10, 2010, defendant supplemented his motion for reconsideration of sentence. R. 436. He claimed, *inter alia*, that his placement in administrative segregation to "ensure [his] personal safety" due to his former status as a correctional officer "without the timely imposition of his sentence amounted to a deprivation of his 'liberty' within the meaning of the Due Process Clause"

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[3] Federal Rule of Criminal Procedure 32(b)(1) provides that "[t]he court must impose sentence without unnecessary delay."

since it prevented his "transfer * * * to a facility" managed by the Bureau of Prisons where he could be part of the general population. *Id.* at 1, 3.

On January 13, 2011, defendant filed a second motion for reconsideration of sentence. R. 438. He argued that his placement in "administrative segregation * * * for his personal safety" since entry of the jury's verdict on April 2, 2007, constituted cruel and unusual punishment, which was "aggravated in degree by the delay between May 2009 [sentencing hearing] and December 2010," when the district court filed its sentencing memorandum. *Id.* at 1-2.

On January 19, 2011, the district court entered final judgment. R. 440. On February 7, 2011, the United States filed an opposition to defendant's motions for reconsideration of sentence. R. 443. The government argued, *inter alia*, that defendant had not "been denied due process by the 'delay' in the * * * entry of a written judgment" and that "release from a properly imposed sentence * * * is not a remedy for [his] claim that [he] has suffered cruel and unusual punishment *while* incarcerated." *Id.* at 1-2 (emphasis in original). The United States also maintained that since it is "speculative" that the "conditions of confinement might have been better * * * in federal prison," defendant was not entitled to relief. *Id.* at 3.

The following day, defendant filed a reply to the United States' response. R. 445. Applying the four-part balancing test set forth in *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972), defendant argued that his Sixth Amendment speedy trial rights

had been violated because the district court did not hold his sentencing hearing until two years after he was convicted and then waited 20 more months to enter final judgment. R. 445 at 3-9.

On February 22, 2011, the United States filed a supplemental opposition to defendant's motions for reconsideration of sentence. R. 447. The government contended, *inter alia*, that unconstitutional conditions of confinement do not entitle a defendant to release, and that, in any event, defendant repeatedly delayed resolution of his case, failed to assert his rights prior to November 2010, and failed to seek a prompt resolution of his pending supplemental motion for a new trial.

On February 23, 2011, defendant filed a reply to the United States' opposition and argued, *inter alia*, that he should either be released, or his sentence reduced "two months for every month" that he has been in administrative segregation. R. 448 at 13. Defendant noted that even though he "and defense counsel have nothing but respect for the integrity and professionalism each and every one of the prosecutors [has] displayed * * * and * * * does not claim purposeful delay, * * * only twenty-two days [of] * * * delay[] before [his] sentencing hearing" on May 6, 2009, "can be attributed to him." R. 448 at 4-5.

That same day, the district court held a hearing on defendant's motions for reconsideration of sentence. The district court explained that the 20-month delay

in entering final judgment was due to a clerical error in not filing its August 2009 sentencing memorandum until December 2010. R.S.Tr. 15. See *id.* at 12, 14.

Defense counsel represented that defendant was raising only a Sixth and not an Eighth Amendment challenge and repeatedly conceded that the government did not deliberately postpone defendant's sentencing to gain a tactical advantage. R.S.Tr. at 7-10, 18. Defense counsel stated, "I don't believe that – you, know [the government] certainly didn't intentionally – this was not purposeful delay * * * to achieve some sort of a benefit. This is just simple inadvertence and crowded calendars * * * [that] doesn't count as heavily as * * * purposeful delay." *Id.* at 10-11. See *id*. at 14 (explaining that the delay should be attributed to the "Government, and not necessarily the prosecution, [because] the Government also includes the court system").

Defense counsel also acknowledged that he "underst[oo]d [the court's] concern that the defendant did[] n[o]t assert his [Sixth Amendment] right[s] as much as he should have, and I think that's a fair finding * * *, but I think that's far short of saying the defendant acquiesced in this delay." R.S.Tr. at 19. In addition, defense counsel admitted that he "could[] n[o]t swear" that he contacted the court during the 18 months between defendant's sentencing on May 6, 2009, and his filing defendant's motion for reconsideration of sentence on November 18, 2010. *Id.* at 12. See *id*. at 13.

The United States argued that defendant was not entitled to modification of his sentence due to his conditions of confinement and that "[n]obody knows" in any event, what circumstances he would have faced had he been incarcerated at a BOP facility. R.S.Tr. 26. See *id.* at 32. The prosecutor also noted that unlike defense counsel, she was "willing to swear" that she "periodic[ally]" telephoned the court to find out when final judgment would be entered. *Id.* at 27-28. She also maintained that defendant was not entitled to relief since he sought numerous continuances, never requested that final judgment be entered, or that his supplemental motion for a new trial be resolved, and his confinement in administrative segregation at the county jail, rather than a BOP facility does not establish substantial prejudice as required for a Sixth Amendment violation. See *id.* at 25-31.

On March 16, 2011, the district court issued a 57-page memorandum opinion and order and denied defendant's motions for reconsideration of sentence. R. 452. That same day, the district court also issued a separate 24-page memorandum opinion and order and denied defendant's supplemental motion for a new trial. R. 453.

4. The District Court's Decision Denying Defendant's Motions For Reconsideration Of Sentence

The district court ruled that it lacked authority to modify defendant's sentence under Federal Rule of Criminal Procedure 35 because defendant did not

seek relief "[w]ithin 14 days after sentencing" and the United States did not move for reduction of his sentence based on his "provid[ing] substantial assistance." R. 452 at 22 (quoting Fed. R. Crim. P. 35(a) and (b)). See *id.* at 21-24. It nonetheless considered whether the delay between defendant's conviction and sentencing and subsequent lapse in entry of final judgment violated defendant's constitutional rights.

Applying the four-part test set forth in *Barker* v. *Wingo*, 407 U.S. at 530, the district court held that the 25-month delay between defendant's conviction and sentencing did not violate defendant's Sixth Amendment rights because all but the first factor weigh against defendant. The court explained, "although the [length of the] delay was presumptively prejudicial, [defendant's] actions were the primary cause of the delay, [defendant] did not assert his speedy trial right, and [he] has not demonstrated substantial prejudice." R. 452 at 2.

The court concluded that the second factor, the cause of the delay, weighs against the defendant because he does not "assert intentional delay" by the government and "approximately 481 * * * of the 764 days of delay * * * are attributable" to his repeated requests for continuances and its "wait[ing] for approximately eleven months for [his renewed] motion for a new trial. R. 452 at 30, 32. The court emphasized that the third factor also weighs against defendant since he did not assert his speedy trial right prior to his sentencing on May 6, 2009,

and waited until November 2010, or 43 months following his convictions to raise his claim. *Id.* at 34.

With regard to the fourth factor, the district court, relying on this Court's precedent, ruled that defendant's incarceration in administrative segregation at the local jail is legally insufficient to demonstrate the "substantial and demonstrable" prejudice required for relief. R. 452 at 37. The court explained that the alleged comparative "'amenities and benefits a convicted felon might receive in one prison but not another'" are "speculative" and fail to establish the harm required for a violation of the Sixth Amendment. *Id.* at 40 (quoting *Perez* v. *Sullivan*, 793 F.2d 249, 257 (10th Cir.), cert. denied, 479 U.S. 936 (1986)); R. 452 at 40. The court also emphasized that defendant has not offered evidence that he suffered psychological, emotional, or physical harm from his placement in administrative segregation, which was "for his personal safety," and in any event, defendant "was content to stay at the local facility" because he "wanted to be near family or for some other reason." R. 452 at 37, 38 n.22.

Moreover, the court ruled that the 20-month delay between defendant's sentencing and entry of final judgment did not violate defendant's constitutional rights. The court explained that because the "Sixth Amendment * * * requires * * * a defendant to be physically present" when a sentence is orally pronounced, but not "[w]hen a judgment of conviction * * * is officially entered of record," its

protection against unreasonable delay does not extend to entry of judgment. R. 452 at 16 n.14 (quoting *United States* v. *Towsend*, 33 F.3d 1230, 1231 (10th Cir. 1994)).

The court nonetheless applied *Barker's* four-part test and concluded that defendant was not deprived of his speedy trial or due process rights even though the 20-month delay was presumptively prejudicial and attributable to the government. R. 452 at 42-57. The court explained that the second factor, the cause of delay, is "attributable to the government" and weighs in defendant's favor, but "not * * * heavily" since it resulted from a "clerical error in not entering the sentencing memorandum opinion and order" until December 2010. *Id.* at 48. The court emphasized that the third factor weighs against defendant since he did not assert his rights until two months before entry of final judgment, never asked for a speedy ruling on his supplemental motion for a new trial, and his counsel conceded that a finding that he "didn't [assert] his right as much as he should have" would be "fair." *Id.* at 50 (quoting R.S.Tr. at 18). The fourth factor, the court explained likewise weighs against defendant since he failed, as previously discussed, to make the required showing of particularized and substantial prejudice. R. 452 at 51-56. Accordingly, because the first and second factors "do not compensate for [defendant's] failure to timely assert his right or allege substantial prejudice, [defendant] has failed to establish the delay [in entry of final

judgment] deprived him of a speedy trial or due process of the law." *Id.* at 56-57 (quoting *United States* v. *Yehling*, 456 F.3d 1236, 1246 (10th Cir. 2006)).

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in refusing to admit three hearsay reports written by defendant pursuant to Federal Rule of Evidence 106. Defendant's claims were not properly preserved for review for a variety of reasons. Even if they were, their exclusion was not an abuse of discretion and was, in any event, harmless since they were not necessary to clarify or explain any evidence previously admitted by the government and were merely cumulative and consistent with other witnesses' testimony and evidence.

The district court correctly concluded that the 25-month delay between defendant's conviction and sentencing and subsequent 20-month lapse in entering final judgment did not violate defendant's Sixth Amendment rights. Because the district court properly applied the four-part balancing test set forth in *Barker* v. *Wingo*, 407 U.S. 514 (1972), this Court should affirm.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY EXCLUDED THREE HEARSAY STATEMENTS WRITTEN BY DEFENDANT

Defendant argues (Br. 8) that the district court erroneously applied Federal Rule of Evidence 106 when it refused to admit during his direct examination three

"hearsay * * * reports": (1) a handwritten memorandum (defense exhibit Z) that he wrote to Major Barela regarding shift drills at the Dona Ana County Detention Center (DACDC) on September 10 and 11, 2001; (2) a memorandum (defense exhibit AA) that defendant wrote to Major Barela stating that "some of the officers are deliberately deceiving me about the events leading up to the use of force against" inmate Verdin; and (3) an email (defense exhibit AB) that defendant wrote to Major Barela "calling for an external investigation by the New Mexico State Police" of that incident. S.R.A. 1; 7Tr. 295. See S.R.A. 3-6; 7Tr. 252-254, 287, 293-294.[4] Defendant's claims were not properly preserved for review. Even if they were, the district court's exclusion of the exhibits was not an abuse of discretion and was, in any event, harmless. Consequently, this Court should affirm.[5]

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[4] On November 16, 2011, in response to this Court's orders granting defendant's motion to supplement the record on appeal, defendant filed three documents with this Court. Defendant did not include exhibit AB, or his email to Major Barela, as one of the three documents. Rather, a memorandum from defendant to Major Barela dated August 21, 2002, regarding the Use of Force Policy at DACDC was included. S.R.A. 2. That is not the document that defendant sought to have admitted at trial and appears not to pertain to the issue he raises on appeal. See 7Tr. 294-295.

[5] Because defendant was sentenced to a concurrent term of 97 months on each count and this argument relates solely to Counts One and Two, it does not impact his convictions and sentence as to Counts Three and Four, or the term of his sentence.

This Court reviews the exclusion of evidence for an abuse of discretion. See *United States* v. *Phillips*, 543 F.3d 1197, 1203 (10th Cir. 2008), cert. denied, 129 S. Ct. 946 (2009); *United States* v. *Bautista*, 145 F.3d 1140, 1151 (10th Cir.), cert. denied, 525 U.S. 911 (1998). Because a "trial court [is] familiar with the evidence," this Court will "decline to second-guess [a district court's] judgment as to whether the excluded exhibits were necessary to provide context or completeness" within the meaning of Federal Rule of Evidence 106. *Echo Acceptance Corp.* v. *Household Retail Servs., Inc.*, 267 F.3d 1068, 1088 (10th Cir. 2001).

Rule 106, which partially codifies the common law rule of completeness, seeks to avoid unfairness in "the misleading impression created by taking matters out of context." Fed. R. Evid. 106, Advisory Committee Note.[6] "[I]ts purpose is to prevent a party from intentionally misleading the jury by introducing a written or recorded statement in an inaccurate or unfair manner." *United States* v. *Lopez-Medina*, 596 F.3d 716, 734 n.12 (10th Cir. 2010). Consequently, it allows an adverse party to introduce a part of, or other writing "*only* [when] * * * relevant to

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[6] Rule 106 in relevant part provides:

"When a writing * * * is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing * * * which ought in fairness to be considered contemporaneously with it."

an issue in the case and *necessary* to clarify or explain a [document, or] portion [thereof that has] already [been] received." *Id.* at 735 (internal quotation marks and citation omitted, emphasis added).[7]

When applying Rule 106, a trial court should consider whether a proffered document: (1) explains previously admitted evidence; (2) places it in context; (3) avoids misleading the trier of fact; or (4) insures a "fair and impartial understanding of the evidence." *Lopez-Medina,* 596 F.3d at 735 (citation omitted). Because the Rule allows a party to introduce otherwise inadmissible hearsay only to the extent necessary to dispel, clarify, or avoid a misimpression created by previously admitted evidence, a court does not abuse its discretion when it excludes hearsay statements that merely corroborate, or are cumulative of other testimony.[8] Indeed, a court is well within its discretion when it refuses to admit

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[7] See *Echo Acceptance Corp.*, 267 F.3d at 1089 (quoting J. Weinstein & M. Berger, *Weinstein's Evidence* 106[02] at 106-18 (1986) ("*Only* if the evidence by one party needs to be met or explained away by the other side does its mere introduction provide independent warrant for introduction of other evidence.") (emphasis added)). See, *e.g.*, *United States* v. *Wright*, 826 F.2d 938, 946 (10th Cir. 1987) (Admission is not required for "portions of a writing which are neither explanatory of the previously introduced portions nor relevant.").

[8] See, *e.g.*, *Ahlberg* v. *Chrysler Corp.*, 481 F.3d 630, 636 (8th Cir. 2007) (no abuse of discretion in excluding hearsay statement merely "consistent" with witness's testimony); *United States* v. *Khan*, 508 F.3d 413, 417 (7th Cir. 2007) (no abuse of discretion in not allowing questioning under Rule 106 that would have elicited information that was "cumulative and thus did not add anything"); *United States* v. *Simms*, 385 F.3d 1347, 1359 (11th Cir. 2004) (no error in not playing the

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statements that are merely "self-serving,"[9] or offered solely to "bolster" a witness's credibility by restating what has already been said. *United States* v. *Wilkerson*, 411 F.3d 1, 5 (1st Cir. 2005); *United States* v. *Ramos-Caraballo*, 375 F.3d 797, 807 (8th Cir. 2004).

A. Defendant's Claim Was Not Properly Preserved For Review

For the first time on appeal, defendant argues (Br. 9) that defense exhibit Z, a memorandum he wrote regarding "shift drills" on September 10 and 11, 2001, or more than a year before inmate Verdin's beating, should have been admitted pursuant to Rule 106. S.R.A. 3. When seeking to introduce that exhibit, defendant never mentioned Rule 106, or argued that it was admissible on any ground after the district court sustained the government's objection that it was hearsay. See 7Tr. 252-254. Consequently defendant's newly raised claim that the district court erred

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remainder of videotape that "would be cumulative to what had already been seen"), cert. denied, 544 U.S. 988 (2005).

[9] See *United States* v. *Lentz*, 524 F.3d 501, 526 (4th Cir.) (Rule 106 does not "require the admission of self-serving exculpatory statements made by a party which are being sought for admission by that same party.") (internal quotation marks and citations omitted), cert. denied, 129 S. Ct. 303 (2008). See, *e.g.*, *United States* v. *Jackson*, 180 F.3d 55, 73 (2d Cir. 1996) (no abuse of discretion in refusing to admit defendant's "self-serving" statements); *United States* v. *Branch*, 91 F.3d 699, 728 (5th Cir. 1996) (same).

in refusing to admit exhibit Z pursuant to Rule 106, is forfeited and should be reviewed for plain error only.[10]

Defendant's claim that the district court abused its discretion in refusing to admit defense exhibits AA and AB pursuant to Rule 106 is likewise not properly preserved for appeal. This Court, relying on Rule 106's plain language requires a party seeking to admit a document for the sake of completeness, to object and request its introduction "at th[e] time" the opposing party offers evidence that is allegedly misleading or incomplete. *United States* v. *Larranaga*, 787 F.2d 489, 500 (10th Cir. 1986) (quoting Fed. R. Evid. 106). Defendant, as the district court noted, (7Tr. 289), did not do so here. He failed to object when the government offered his incident (gov. ex. 6B) and use of force (gov. ex. 6A) reports about Verdin's beating (see 2Tr. 172, 174-175) and instead waited until he testified to request the admission of defense exhibits AA and AB. Consequently, "defendant's reliance on Rule 106" to admit those reports "is misplaced." *Larranaga*, 787 F.2d at 500. (defendant not entitled to admission of portion of grand jury testimony pursuant to Rule 106 since he did not object when the government introduced part

[10] To be entitled to relief under plain error review, defendant must show: "(1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Vasquez-Alcarez*, 647 F.3d 973, 976 (10th Cir. 2011) (quoting *Richison* v. *Ernest Group, Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011)).

of grand jury testimony and waited until he testified on re-direct to seek its admission). See *Jamison* v. *Collins*, 291 F.3d 380, 387 (6th Cir. 2002) (applying *Larranaga* and holding no abuse of discretion in refusing to expand post-trial record and admit entire police file under Rule 106).

Defendant's claim regarding defense exhibits AA and AB is also waived since defendant concedes (Br. 13) that "the documents introduced by the government" were not "misleading" and defense exhibits did not go "in a different direction" from them. Since defendant admitted (7Tr. 294) in the district court that defense exhibit AB, his memo to Major Barela, "solidif[ied]" his testimony and now merely (Br. 13) (emphasis added) contends that the government's "*interpretation* of * * * his writings" and not the writings themselves were "misleading," he has effectively conceded that defense exhibits AA and AB do not qualify for admission under the rule of completeness.[11] Consequently, defendant's claim should be automatically rejected, or at a minimum reviewed for plain error only.

[11] To the extent that defendant contends on appeal that the district court abused its discretion in refusing to admit defense exhibits AA and AB in their entirety, he has forfeited that claim since he agreed in the district court that he "would[] n[o]t" mind" if he were allowed to introduce merely a single sentence from each document. 7Tr. 293. See *id.* at 292, 295.

B. The District Court Did Not Abuse Its Discretion In Excluding Three Exhibits That Were Cumulative Of Defendant's Testimony And Other Evidence

1. Defendant's Report Relating To Shift Drills At DACDC

The exclusion of defense exhibit Z was proper for a number of reasons. First, the report fails to meet the Rule's threshold requirement that it be relevant to the charges. According to defendant's testimony (7Tr. 252-255), the memorandum describes alleged misconduct by Lieutenant Schlender in allowing officers to "play[] [a practical] joke" during shift drills on September 10 and 11, 2001, or more than a year before inmate Verdin was beaten. 7Tr. 253. See S.R.A. 3-6. Neither Lieutenant Schlender nor Major Barela, to whom defendant submitted the report, testified or witnessed the assault. Consequently, based on defendant's summary and description of exhibit Z during the trial, it clearly was irrelevant and inadmissible.

To the extent that defendant maintains (Br. 9) for the first time on appeal that the report is relevant as "evidence of bias" because the officers who participated in Verdin's beating and "testified against" him "received written reprimands from him in their official employment files," he is wrong. While exhibit Z reflects that two of the officers who participated in inmate Verdin's beating participated in a prank during shift drills approved by Lieutenant Schlender, defendant never asked those officers during the trial anything about that incident, including whether they were involved, reprimanded, or had knowledge of

his report. There also is no evidence in the record that any of the officers who participated in Verdin's beating knew that defendant was even aware of the prank, or that information contained in the memorandum was in fact included in any of their employment files. Accordingly, because defendant never claimed at trial, and there is no evidence to suggest that the officers who participated in Verdin's beating were biased against him because of the memorandum, or their participation in the prank approved by Lieutenant Schlender, exhibit Z has no possible "relevan[ce] to an issue in the case." *Lopez-Medina*, 596 F.3d at 735 (internal citations and quotation marks omitted). See, *e.g.*, *United States* v. *Wright*, 826 F.2d 938, 946 (10th Cir. 1987) (no abuse of discretion in excluding portions of diary that "were not demonstrably relevant to the issues at trial").

Even assuming *arguendo* that defense exhibit Z were relevant, the report was nonetheless inadmissible pursuant to Rule 106 since defendant has not identified any evidence offered by the government that required clarification, or explained why exhibit Z's admission was necessary to achieve that objective. Defendant cannot rely on Sergeant Lopez's testimony relating to Lieutenant's Schlender's alleged misconduct since defense counsel, and not the government elicited (3Tr. 312) that information during cross-examination. See *Echo Acceptance Corp.*, 267 F.3d at 1089 ("[R]ule [106] does not allow a party to introduce otherwise inadmissible hearsay on the coattails of its own" evidence.).

Even if he could and exhibit Z were relevant, the district court could easily have excluded it under Rule 403 – as it did (3Tr. 148) with a report about prior, unrelated misconduct by defendant – because its "probative value [was] substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Lopez-Medina*, 596 F.3d at 736 (quoting Fed. R. Evid. 403). Accordingly, defendant's belated reliance on Rule 106 to argue that the district court wrongly excluded exhibit Z is misplaced.

2. Defendant's E-Mail And Memo Relating To What Occurred In Verdin's Cell Before Defendant Arrived

The district court also did not abuse its discretion in excluding defendant's memo (defense exhibit AA) and email (defense exhibit AB) to Major Barela since it correctly found that they were "offered not for completeness or fairness, but [because they are] consistent [with defendant's] testimony today." 7Tr. 289. See *id.* at 294-295.[12] First, the record reflects that defendant's accounts of what happened in Verdin's cell were not misleading, incomplete, unfair, or in need of clarification. During its case in chief, the government introduced (2Tr. 172, 174-

[12] With regard to defendant's memo to Major Barela, defendant argues that the district court abused its discretion in refusing to admit the first sentence of that exhibit. Because defendant does not contend that the remaining portion of his memo, which consists of hearsay within hearsay, should have been admitted, we address defendant's claim only with respect to the first sentence of the memo.

175) two documents – an incident (gov. ex. 6B) and use of force report (gov. ex. 6A) – in which the defendant described what he allegedly "observed and * * * did" once he arrived at Verdin's cell. 7Tr. 292. Each is complete and separate by itself and was offered in its entirety without objection from the defense.[13]

The government's exhibits also do not address what occurred in Verdin's cell *before* defendant arrived – or the purported subject matter of his email and memo to Major Barela. See 2Tr. 172-178. Neither writing to Major Barela modifies or amplifies anything that defendant observed or did during the beating.[14] Nor does defendant's purported motivation for contacting Major Barela – "concerns about what happened * * * in [Verdin's] cell prior to [his] arrival" – alter what occurred, explain what he previously reported, or excuse his criminal

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[13] See, *United States* v. *Lewis*, 954 F.2d 1386, 1392 & n.4 (7th Cir. 1992) (defendant's failure to object to a portion of his written statement when admitted, "weakened" claim that "the remainder of his statement should have been admitted * * * to place [it] in context or to avoid misleading the jury"); *United States* v. *Boylan*, 898 F.2d 230, 257 (1st Cir.) (no need to admit other evidence when admitted items are "complete in and of themselves"), cert. denied, 498 U.S. 849 (1990).

[14] See, *e.g.*, *United States* v. *Velasco*, 953 F.2d 1467, 1475 (7th Cir. 1992) (no abuse of discretion in excluding portion of defendant's post-arrest statement, which addressed involvement of other coconspirators, since it did not "explain, qualify, or place" defendant's admission that there was cocaine in his trunk "in context").

conduct during or after the incident. 7Tr. 296.[15] Accordingly, the district court did not abuse its discretion in excluding defendant's email and memo to Major Barela because it correctly found that they were "offered not for completeness or fairness." 7Tr. 289.

The district court was also entitled to exclude defendant's email and memo since it allowed (7Tr. 290, 294) defendant to fully testify about the substance and creation of those documents. Defendant testified that on the morning following Verdin's beating, he wrote a memo to Major Barela expressing concerns that the officers who participated in the beating were not telling him the truth about what had occurred prior to his arrival at Verdin's cell. 7Tr. 296. *Id.* at 286-287. See S.R.A. 1. Defendant explained that his memo was consistent with his use of force report, which was admitted into evidence, that stated that "due to conflicting reports, I did not know what transpired prior to my arrival." 7Tr. 285. See 2Tr. 173. Defendant also related that in a subsequent email to Major Barela he recommended that the "New Mexico State Police * * * come out for a criminal

[15] See *e.g.*, *Lopez-Medina*, 596 F.3d at 735 (no abuse of discretion in excluding government's promise in plea agreement offered to explain accomplice's motive for pleading guilty to drugs jointly possessed with defendant); *United States* v. *Dorrell*, 758 F.2d 427, 435 (9th Cir. 1985) (defendant's "motivations for his actions" properly excluded because it "did not change the meaning of the portions of [defendant's] confession" already admitted).

investigation because [an] internal investigation was not really going to be adequate." 7Tr. 296-297. *Id.* at 289, 300.

Defendant's memo and email to Major Barela were also cumulative of evidence besides defendant's testimony. Sergeant Lopez repeatedly testified that after the incident defendant stated that he believed that the officers who had participated in the beating were not telling him the truth about what happened in Verdin's cell before he arrived. 3Tr. 295-296, 306. In addition, several of the officers who were involved in Verdin's beating and cover-up acknowledged that defendant initiated the investigation that ultimately led to their firing and each was cross-examined about his potential for bias against defendant specifically because he took that action. See 2Tr. 195-196, 286-288; 3Tr. 180-181, 183, 187, 262. Accordingly, because the district court did not clearly err in finding that defense exhibits AA and AB were cumulative and "consistent" with defendant's testimony, add no new information, and merely corroborate the testimony of several other witnesses, as well as defendant's use of force report, the district court did not abuse its discretion in excluding them. 7Tr. 289. See *id.* at 294-295 (noting that defendant "has already testified" that he "went to his superiors [and] * * * began to accuse the other people of doing wrong [and] that he wrote a memo. * * * [T]he testimony is already there. [Defendant] has testified on these things."). See also *id.* at 284, 294-295.

Assuming *arguendo*, that the district court should have admitted the three reports, the error was harmless and does not warrant reversal. "A non-constitutional error, such as the * * * exclusion of * * * evidence * * * 'is harmless unless it had a "substantial influence" on the outcome or leaves one in "grave doubt" as to whether it had such effect.'" *United States* v. *Clifton*, 406 F.3d 1173, 1179 (10th Cir. 2005) (quoting *United States* v. *Griffin*, 389 F.3d 1100, 1104 (10th Cir. 2004)).

In this case, the exclusion of the three hearsay reports was harmless since the evidence of defendant's guilt was overwhelming and defendant's exhibits, as previously discussed, provide no new information and merely corroborate other evidence.[16] Defendant admitted that he twice pepper sprayed Verdin in the face and his justification – that Verdin continued to fight even though he had a broken shoulder, cracked ribs, a fractured elbow and five officers, who weighed in excess of 1100 pounds, were on top of him – was unbelievable. See 2Tr. 142; 3Tr. 97, 110, 243; 7Tr. 275; 8Tr. 148, 154, 157. Five officers unanimously agreed that no use of force was necessary and the four that participated filed false reports about the incident. See 2Tr. 164, 172, 174-177, 191, 197-198, 264; 3Tr. 60, 153-154,

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[16] See, *e.g.*, *United States* v. *Bowling*, 619 F.3d 1175, 1184 n.4 (10th Cir. 2010); *United States* v. *McHorse*, 179 F.3d 889, 903 (10th Cir.), cert. denied, 528 U.S. 944 (1999); *United States* v. *Bindley*, 157 F.3d 1235, 1240 (10th Cir. 1998), cert. denied, 525 U.S. 1167 (1999).

162. Since the evidence of defendant's guilt was overwhelming and defendant's exhibits add nothing to the case, this Court should affirm regardless of the merits of defendant's claim.

II

DEFENDANT WAS NOT DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO A PROMPT SENTENCING

Defendant contends (Br. 1, 14) that he was denied his "Sixth Amendment right of due process and speedy trial" because his sentence was "pronounced" 25 months after he was convicted and final judgment was not entered for another 20 months. Because the district court correctly ruled that defendant's Sixth Amendment rights were not violated, this Court should affirm.

This Court reviews de novo the district court's legal conclusions regarding a Sixth Amendment violation and the district court's underlying factual findings for clear error. See *United States* v. *Dirden*, 38 F.3d 1131, 1135 (10th Cir. 1994).

This Court has held that the Sixth Amendment right to a speedy trial extends through sentencing. *United States* v. *Yehling*, 456 F.3d 1236, 1243 (10th Cir. 2006); *Perez* v. *Sullivan*, 793 F.2d 249, 252-253 (10th Cir. 1986).[17] To determine

[17] While the United States does not disagree with this proposition for purposes of this appeal, we preserve the issue in the event of further review since it has not been decided by the Supreme Court and at least one court of appeals recently reached a contrary conclusion. See *Pollard* v. *United States*, 352 U.S. 354 (1957) (assuming without deciding that the imposition of "sentence is part of the

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whether a defendant has been denied his constitutional right to a prompt sentencing, this Court applies the four-part balancing test set forth in *Barker* v. *Wingo*, 407 U.S. 514 (1972), and considers: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant. See, *e.g.*, *Yehling*, 456 F.3d at 1243 (applying factors and concluding that four-year delay in deciding defendant's motion for a new trial did not violate due process or speedy trial rights); *Perez*, 793 F.2d at 252-258 (applying factors and ruling that 15-month sentencing delay did not offend Sixth Amendment). No one factor is "either * * * necessary or sufficient" to demonstrate a constitutional violation; all four factors are to be assessed in light of the facts and circumstances of the case. *Yehling*, 456 F.3d at 1243; *Perez*, 793 F.2d at 254. Because the district court here properly applied *Barker's* four factors and correctly concluded that the 25-month delay between defendant's conviction and sentencing and subsequent 20-month lapse in entering final judgment did not violate defendant's constitutional right to a prompt sentencing, this Court should affirm.

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trial for purposes of the [Speedy Trial Clause of the] Sixth Amendment"). See *United States* v. *Ray*, 578 F.3d 184, 195-197 (2d Cir. 2009) (Sixth Amendment does not provide defendant with the right to a prompt sentencing), cert. denied, 130 S. Ct. 2401 (2010).

A. The 25-Month Delay Between Defendant's Conviction And Sentencing Did Not Deprive Defendant Of His Sixth Amendment Rights

"The first factor, length of delay, functions as a 'triggering mechanism'" that ensures that the length of the delay is "presumptively prejudicial," or sufficiently long to consider the remaining factors. *Yehling*, 456 F.3d at 1244 (quoting *Barker*, 407 U.S. at 530). In this case, the jury returned its guilty verdict on April 2, 2007, and the district court sentenced defendant on May 6, 2009. Consequently, the United States does not dispute that the 25-month delay (765 days) between defendant's conviction and sentencing warrants consideration of the other three factors. See, *e.g.*, *Perez*, 793 F.2d at 255 (15-month sentencing delay "provoke[s] * * * inquiry into the other factors identified in *Barker*").

With regard to the second factor, the reasons for the delay, "different weights should be assigned to different reasons" and a "valid reason" will "justify [an] appropriate delay." *Vermont* v. *Brillon*, 129 S. Ct. 1283, 1289 (2009) (quoting *Barker*, 407 U.S. at 531 & n.32); *United States* v. *Larson*, 627 F.3d 1198, 1208 (10th Cir. 2010). "Delays attributable to the defendant do not weigh against the government" and in the post-conviction context, typically include defense motions for continuances and new trial, as well as lapses for failing to file pleadings. *Larson*, 627 F.3d at 1208 (quoting *United States* v. *Abdush-Shakur*, 465 F.3d 458,

465 (10th Cir. 2006)), cert. denied, 549 U.S. 1238 (2007).[18] While "intentional delay by the government" weighs strongly against the prosecution, "more neutral reasons such as negligence or overcrowded courts * * * weigh[] less heavily but nevertheless should be considered." *Yehling*, 456 F.3d at 1244 (quoting *Barker*, 407 U.S. at 531). As this Court has explained, "the possibility" that the government or court could have proceeded "more expeditious[ly]" and thus "saved several months time, raises no constitutional violation, * * * even if there [was] negligence." *Perez*, 793 F.2d at 255.

In this case, the district court correctly found that the second factor weighs against defendant because he was "the primary cause of the [25-month] delay between his conviction and sentencing." R. 452 at 30, 32-33. See *id.* at 29-32. Defendant concedes (Br. 4-5) that he is responsible for the approximately four months of delay (129 days), resulting from his three motions for continuance (85

[18] See, *e.g.*, *Perez*, 793 F.2d at 255 (15-month sentencing delay, which included "more than two months * * * prompted by defendant's motion to dismiss" was "entirely justifiable and proper"); *United States* v. *Casas*, 425 F.3d 23, 36 (1st Cir. 2005) (31-month sentencing delay that "g[a]ve defendants the opportunity" to file motions for acquittal and new-trial and "might have mooted the[ir] [sentencing and] appeal had they been successful" "not without good reason"), cert. denied, 546 U.S. 1199 (2006); *United States* v. *Habhab*, 132 F.3d 410, 416 (8th Cir. 1997) (19-month sentencing delay that allowed for the adoption of new sentencing guidelines "to benefit the defendant" "weigh[ed] against finding a violation of the speedy trial right"); *Burkett* v. *Fulcomer*, 951 F.2d 1431, 1450 (3d Cir. 1991) (Alito, J., dissenting) (23 months during which defense failed to file supporting brief attributable to defendant).

days) and the time that elapsed from his filing his original motion for a new trial until the first scheduled evidentiary hearing on that motion (44 days).

Defendant is also responsible for the approximately three months (82 days) following the hearing until the district court denied him relief and issued its 42-page memorandum opinion and order (October 12, 2007, to January 2, 2008). Since defendant's new trial motion could have made sentencing unnecessary, the court addressed the motion first. Therefore, the approximate three months time between the hearing (October 12) and disposition (January 2) of the motion, and the consequent delay in sentencing, are attributed to the defendant. And, defendant does not dispute that his sentencing was further delayed when the district court waited approximately 11 more months (341 days), or from April 18, 2008, until March 25, 2009, for defendant to file his renewed motion for a new trial. Accordingly, because defendant was "the primary cause" of nearly 18 of the 25 months (552 of 765 days) of delay between his conviction and sentencing, the second factor "'weighs heavily against' him." *Larson*, 627 F.3d at 1208 (quoting *United States* v. *Toombs*, 574 F.3d 1262, 1274 (10th Cir. 2009)).

Contrary to defendant's claim (Br. 15), a "clerical error by the Courtroom Deputy" played no part in the delay between his conviction and sentencing. The district court orally announced and thus imposed the sentence on May 6, 2009. See *United States* v. *Townsend*, 33 F.3d 1230, 1231 (10th Cir. 1994) ("in light of

the Sixth Amendment" "sentence is imposed * * * when the [district] court orally pronounces sentence from the bench") (citation omitted). See Fed. R. Crim. P. 35(c) ("'sentencing' means the oral announcement of the sentence"). The clerical error that caused the district court's sentencing memorandum and opinion to be filed in December 2010, rather than August 2009, and delayed entry of final judgment until January 19, 2011, occurred several months *after* defendant was sentenced. Consequently, contrary to defendant's claim, a clerical error is not responsible for any part of the delay *between* defendant's conviction and sentencing.

Nor did the government, as defendant suggests (Br. 15), "purposeful[ly]" delay his sentencing "to gain a tactical advantage." Defendant has waived that claim since the district court correctly found that he conceded and asserted that he was "not claim[ing]" that the government had engaged in "purposeful delay." R. 452 at 30 (quoting supplemental reply at 5). See R.S.Tr. 11-12 (defense counsel conceding that the "prosecution * * * certainly did[] n[o]t intentionally * * * or purposeful[ly] delay to achieve some sort of benefit"). Nor is there "one iota [of evidence] of [any] real advantage the government gained or could reasonably have been expected to gain by a delay in [defendant's] sentencing." *Perez*, 793 F.2d at 255.

Moreover, to the extent that defendant insinuates (Br. 15) that the prosecutor "confess[ed] [to] purposeful delay," he mischaracterizes the record. At the hearing on defendant's motions to reconsider his sentence, government counsel explained that she "periodic[ally]" telephoned the court to find out "when the judgment would be entered," and did not "fil[e] anything" because she "fear[ed] [it] would * * * induce [defense counsel] to file a motion * * * that would necessitate further proceedings." R.S.Tr. 28 (internal quotation marks omitted). That comment does not suggest anything about the delay between defendant's conviction and sentencing since it relates only to matters that occurred *after* defendant was sentenced. The remark, in any event, read in context merely emphasized that unlike defendant, who "acquiesce[d]" in the delay and "did not make any efforts" to get his pending supplemental new trial motion resolved, the prosecutor properly contacted the court to determine when final judgment would be entered. *Id.* at 27. In addition, to accuse (Br. 15) the United States of "prosecutorial complicity" because it did "*not* * * * file a pleading," ignores well-established precedent that requires a defendant, not the government, to alert a court as to impermissible delay. See discussion, pp. 38-39, *infra*. Accordingly, because defendant has failed to demonstrate that the district court erred in finding that he conceded that the government did not purposefully postpone his sentencing to gain a tactical

advantage, and that he was the primary cause of delay, the second factor weighs against him.

The third factor, which assesses whether a defendant has promptly asserted his speedy trial right, "is entitled to strong evidentiary weight in determining whether [he] is being deprived of that right" since "[t]he more serious the deprivation, the more likely [he] is to complain." *Toombs*, 574 F.3d at 1274 (quoting *United States* v. *Dirden*, 38 F.3d 1131, 1138 (10th Cir. 1994)); *Yehling*, 456 F.3d at 1245 (quoting *Barker*, 407 U.S. at 531). Defendant's obligation "is not satisfied merely by [a defendant's] moving to dismiss after the delay has already occurred." *Yehling*, 456 F.3d at 1243 (quoting *United States* v. *Batie*, 433 F.3d 1287, 1291 (10th Cir.), cert. denied, 548 U.S. 934 (2006)). As this Court has recognized, a defendant's failure to file a formal motion requesting sentencing, see, *e.g.*, *Perez*, 793 F.2d at 256, or a prompt resolution of a pending motion, see, *e.g.*, *Yehling*, 456 F.3d at 1244, is "indicative of [a] defendant's acquiescence" in the delay. *Ibid*. The third factor also "weighs against a defendant who requests continuances and waits for months to assert his speedy trial right." *Larson*, 627 F.3d at 1208. See, *e.g.*, *Batie*, 433 F.3d at 1292 (defendant's "persistent requests for continuances * * * scarcely demonstrate a desire for a speedier process"). Accordingly, "absent extraordinary circumstances, *Barker* counsels not to find a

violation of the right to a speedy trial when the defendant's actions indicate he had no desire for a speedy" resolution of his case. *Id.* at 1293.

In this case, the district court correctly found that the third factor weighs against defendant because he did not assert his right to a prompt sentencing until November 2010, or more than 43 months *after* he was convicted and 18 months *after* he was sentenced. At his sentencing, defendant did not complain about delay, or his conditions of confinement. He also sought numerous continuances, never moved for a prompt resolution of his motions for a new trial, and failed to promptly file his supplemental motion for a new trial. Accordingly, there is ample evidence to support the district court's finding that the third factor weighs against defendant.

Finally, the fourth *Barker* factor considers whether a defendant has suffered prejudice from the delay. Once a jury has found a defendant guilty, "the balance between the interests of the individual and those of society shift proportionately." *Perez*, 793 F.2d at 254. That is because "the traditional interests the speedy trial guarantee is designed to protect * * * diminish or disappear altogether once there has been a conviction." *Id.* at 256. As a result, "[p]ost-conviction prejudice therefore must be substantial and demonstrable" and "the necessity of showing" such "dominate[s] the four-part balancing test." *Toombs*, 574 F.3d at 1275 (quoting *Yehling*, 456 F.3d at 1245); *Perez*, 793 F.2d at 256.

Moreover, this Court has repeatedly held that the "amenities and benefits a convicted felon might receive in one prison but not another" are insufficient to establish the requisite prejudice for a Sixth Amendment violation in a post-conviction setting. See *Perez*, 793 F.2d at 257 (no prejudice from defendant's confinement in county jail rather than state penitentiary); *United States* v. *Cone*, No. 06-5166, 2008 WL 3861201 (10th Cir. Aug. 20, 2008) (no prejudice from defendant's incarceration in high security prison instead of low security prison camp); *United States* v. *Young*, No. 97-1345, 1998 WL 883203 (10th Cir. Dec. 18, 1998) (no harm from defendant's being held in a county jail rather than a federal facility), cert. denied, 526 U.S. 1165 (1999). As this Court has explained, the Sixth Amendment speedy trial right protects against "restraints on liberty, not restraints on a choice of prisons" and a claim as to the alleged availability of more favorable conditions at one institution over another is "entirely speculative" and does not "r[i]se to the level of a constitutional violation." *Perez*, 793 F.2d at 258, 257.

Applying precedent, the district court correctly ruled that defendant's placement in administrative segregation at a local jail rather than the general population at a Bureau of Prison's (BOP) correctional facility is legally insufficient to establish the substantial and demonstrable prejudice required to demonstrate a Sixth Amendment violation for a convicted felon. R. 452 at 39-40. Consequently, precedent dictates that the fourth factor weights against defendant.

Moreover, defendant has failed to establish the "causal relationship between the delay and the prejudice" required to demonstrate a Sixth Amendment violation. *Perez*, 793 F.2d at 257. After all, the district court correctly emphasized that defendant repeatedly conceded that he was placed in administrative segregation immediately after his conviction "for his personal safety" due to his status as a correctional officer. R. 452 at 37. Accordingly, since delay in imposing defendant's sentencing is clearly not the cause of defendant's "placement in administrative segregation," that circumstance "[can] not demonstrate substantial prejudice." *Id.* at 53.

Further, defendant is also unable to establish prejudice because the district court explicitly rejected his claim that he would have preferred to be imprisoned at a BOP facility. The district court found that "whether * * * [defendant] wanted to be near family or for some other reason," he "was content to stay at the local facility." R. 452 at 38 n.22. Thus, the district court did not err in concluding that the fourth factor weighs against defendant. Accordingly, because all but the first factor weigh against defendant, the district court correctly concluded that the 25-month delay between defendant's conviction and sentencing did not violate defendant's Sixth Amendment right to a prompt sentencing.

B. 20-Month Delay From Defendant's Sentencing Until Entry Of Final Judgment Did Not Violate Sixth Amendment

While defendant does not explicitly argue that his Sixth Amendment right to a prompt sentencing extends until entry of final judgment, he apparently presumes that it does, since he maintains (Br. 8) (emphasis added) that "imposition of his sentence [was delayed] for *1,388 days*," or presumably from the date of conviction until entry of final judgment (April 2, 2007, until January 19, 2011). This Court's precedent disproves defendant's presumption.

It is well settled that a "sentence is imposed upon a criminal defendant[] * * * when the court orally pronounces * * * from the bench," and not when judgment is entered, since "the Sixth Amendment * * * requires that a defendant be physically present at sentencing" and "only members of the clerk's office" are there when "judgment * * * is officially entered." *Townsend*, 33 F.3d at 1231. Consequently, the district court's delay in entering final judgment could not have violated defendant's Sixth Amendment rights.

Even if that were not the case, defendant is not entitled to relief since the district court applied *Barker's* four-part test and correctly concluded that the additional 20-month delay until entry of final judgment did not violate defendant's constitutional rights to a prompt sentence. As the district court explained, while the length and cause of the delay, which was due to inadvertent court error, weigh in defendant's favor, they "do not compensate for [defendant's] failure to timely

assert his right or allege substantial prejudice." R. 452 at 56-57 (quoting *Yehling*, 456 F.3d at 1246). *Ibid.* (four-year delay in deciding motion for new trial did not offend due process or speedy trial rights even when "first two *Barker* v. *Wingo* factors * * * weigh[ed] in favor of finding a constitutional violation * * * [since defendant] did not timely assert his right to [a timely] decision * * * and [he] failed to allege particularized and substantial prejudice").[19]

Finally, even if there were undue delay defendant would not be entitled to reduction of his sentence or release since he has failed to establish any prejudice. As this Court has explained, "[o]nly when * * * delay 'prejudice[s] [defendant's] due process rights so as to make his confinement constitutionally deficient,' would * * * relief based on * * * delay be appropriate for a [defendant] whose conviction has been affirmed." *Harris* v. *Champion*, 15 F.3d 1538, 1566 (10th Cir. 1994) (quoting *Diaz* v. *Henderson*, 905 F.2d 652, 653 (2d Cir. 1990)).

In this case, because a violation of a defendant's right to a speedy sentencing does not by itself invalidate defendant's conviction, defendant's confinement is not

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[19] While the Fifth Amendment right to due process also provides protection against unreasonable delay, see *Yehling*, 456 F.3d at 1243, defendant, does not seek relief on that basis. Even if he did, his claim would fail since no liberty interest protected under the Due Process Clause is implicated when a defendant is placed in a higher security facility, see *Wilkinson* v. *Austin*, 545 U.S. 209, 221 (2005); *Sandin* v. *Conner*, 515 U.S. 473, 484 (1995), and this Court applies *Barker's* four-part test to evaluate such a challenge. See *Yehling*, 456 F.3d at 1243; *Harris* v. *Champion*, 15 F.3d 1538, 1559 (10th Cir. 1994).

constitutionally deficient. See *Cody* v. *Henderson*, 936 F.2d 715, 722 (2d Cir. 1991). Thus, regardless of the outcome of defendant's Sixth Amendment claim, defendant is not entitled to be released. *Ibid.* (reversing order granting state prisoner relief even though 8-year delay in processing appeal violated his due process rights). Accordingly, this Court should affirm the judgment and sentence below and order defendant to finish serving his sentence.

CONCLUSION

WHEREFORE, defendant's convictions and sentence should be affirmed.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The United States has no objection to Defendant's request for oral argument if the Court believes it would be helpful in resolving this case.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains no more than 10,607 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I further certify that the electronic version of this brief, prepared for submission via ECF, complies with all required privacy redactions per Tenth Circuit Rule 25.5, is an exact copy of the paper copies submitted to the Tenth Circuit Court of Appeals, and has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

s/ Lisa J. Stark
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Date: November 30, 2011

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2011, I electronically filed the foregoing CORRECTED SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS APPELLEE with the Clerk of the Court for the Tenth Circuit Court of Appeals via the CM/ECF system. I further certify that all participants are ECF-registered, and service will be achieved through the CM/ECF system.

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