

No. _____

IN THE
Supreme Court of the United States

OLE HOUGEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 6 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

OLE HOUGEN,

Defendant-Appellant.

No. 21-10369

D.C. No.

5:20-cr-00432-EJD-1

Northern District of California,
San Jose

ORDER

Before: GOULD and IKUTA, Circuit Judges, and KORMAN,* District Judge.

Appellant's petition for rehearing *en banc* has been circulated to the full court and referred to this panel pursuant to Ninth Circuit General Orders 5.4(a) and (b). Judge Gould would deny Appellant's petition for rehearing *en banc*, Judge Korman would recommend denial, and Judge Ikuta would grant the petition.

The full court has been advised of Appellant's petition for rehearing *en banc*, and no judge of the court has requested a vote on it.

Appellant's petition for rehearing *en banc*, Docket No. 70, is DENIED on behalf of the full court.

* The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.

76 F.4th 805

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Ole HOUGEN, Defendant-Appellant.

No. 21-10369

|

Argued and Submitted March 28,

2023 San Francisco, California

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Filed August 1, 2023

Synopsis

Background: After his motion to dismiss indictment was denied, 529 F.Supp.3d 1072, defendant was convicted in the United States District Court for the Northern District of California, Edward J. Davila, J., 2021 WL 5630680, of attempting to commit racially motivated violence, and his post-trial motion for acquittal and a new trial was denied. Defendant appealed.

Holdings: The Court of Appeals, Gould, Circuit Judge, held that:

[1] although denial of defendant's right to public trial was error, countervailing factors were present that demonstrated reversal was unnecessary to preserve fairness, integrity, and public reputation of the proceedings, and

[2] statute prohibiting attempts to cause bodily injury to any person through the use of dangerous weapon because of actual or perceived race is a constitutional exercise of Congress' enforcement authority under Thirteenth Amendment.

Affirmed.

Ikuta, Circuit Judge, filed dissenting opinion.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion; Post-Trial Hearing Motion.

West Headnotes (12)

[1] **Criminal Law** 🔑 Course and conduct of trial in general

Because defendant did not raise public trial issue before the district court, he forfeited his public trial claim for purposes of appeal, and as such, plain error review applied; all the evidence on which defendant relied on appeal to support his claim was available to defendant before and during his trial, and defendant had ample opportunity to timely assert his claim that the district court violated his public trial right, but he did not do so. U.S. Const. Amend. 6.

[2] **Criminal Law** 🔑 Presentation of questions in general

"Forfeiture" is failure to make timely assertion of right and subjects argument to plain error review.

[3] **Criminal Law** 🔑 Necessity of Objections in General

Under plain error review, defendant must establish the following three prongs to be eligible for relief, namely (1) error, (2) that is plain, and (3) that affects substantial rights, and satisfaction of these three prongs is only prerequisite to possibility of relief because, even if defendant establishes all three prongs, that only establishes appellate court's discretion to grant relief; under the fourth prong of plain error review, appellate court has discretion to grant relief, but only if defendant can demonstrate that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

[4] **Criminal Law** 🔑 Necessity of Objections in General

Purpose of the fourth prong of plain error review, namely that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings, is to reduce wasteful reversals by

demanding strenuous exertion to get relief for unpreserved error.

2 Cases that cite this headnote

[5] **Criminal Law** 🔑 Necessity of Objections in General

Any exercise of discretion under the fourth prong of plain error review, namely that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings, inherently requires a case-specific and fact-intensive inquiry.

1 Case that cites this headnote

[6] **Criminal Law** 🔑 Necessity of Objections in General

Even when there are clear, prejudicial errors that satisfy the first three prongs of plain error review, namely that there is (1) error (2) that is plain and (3) that affects substantial rights, countervailing factors may satisfy appellate court that the fairness, integrity, and public reputation of the proceedings will be preserved absent correction pursuant to fourth prong of plain error review which asks whether error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

2 Cases that cite this headnote

[7] **Criminal Law** 🔑 Course and conduct of trial in general

Although denial of defendant's right to public trial was error, under fourth prong of plain error review, countervailing factors were present that demonstrated reversal was unnecessary to preserve fairness, integrity, and public reputation of proceedings; despite lacking contemporaneous visual access, public had contemporaneous audio access to defendant's trial, and public could hear argument, listen to testimony, and evaluate court's rulings as they were made, public could obtain full transcripts of proceedings after fact on public docket, media coverage offered public access, purposes of public trial right were met by giving

assurance that public could ascertain whether defendant was fairly dealt with and not unjustly condemned, and costs of reversal and remand for new trial would be substantial. U.S. Const. Amend. 6.

1 Case that cites this headnote

[8] **Criminal Law** 🔑 Requisites of public trial; definitions

Visual access is vital to public trial right, and if such contemporaneous visual access is not available, alternate avenues of access are insufficient for purposes of the public trial right. U.S. Const. Amend. 6.

[9] **Human Trafficking and Slavery** 🔑 Power to Enact; Validity

Congress' power under the Thirteenth Amendment is broad. U.S. Const. Amend. 13.

[10] **Human Trafficking and Slavery** 🔑 Power to Enact; Validity

Human Trafficking and Slavery 🔑 Badges and incidents of slavery

Thirteenth Amendment gives Congress the power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States. U.S. Const. Amend. 13.

[11] **Civil Rights** 🔑 Power to enact and validity
Human Trafficking and Slavery 🔑 Power to Enact; Validity

Human Trafficking and Slavery 🔑 Badges and incidents of slavery

Statute prohibiting attempts to cause bodily injury to any person through use of dangerous weapon because of actual or perceived race or color of any person, and defendant's prosecution thereunder, passed deferential test set forth in  *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189; under deferential test, appellate court had to ask whether Congress could rationally have

determined that acts of violence covered by the law imposed badge or incident of servitude on their victims, Congress rationally concluded that racial violence imposed badge and incident of slavery on its victims, white defendant's prosecution arose out of instance of attempted racial violence against Black victim and fell under statute's clear prohibition on racially motivated violence. *U.S. Const. Amend. 13*;  18 U.S.C.A. § 249(a)(1).

[12] Civil Rights Power to enact and validity
Human Trafficking and Slavery Power to Enact; Validity

Statute prohibiting attempts to cause bodily injury to any person through the use of dangerous weapon because of actual or perceived race, color, or national origin of any person is a constitutional exercise of Congress' enforcement authority under Thirteenth Amendment. *U.S. Const. Amend. 13*;  18 U.S.C.A. § 249(a)(1).

***807** Appeal from the United States District Court for the Northern District of California *Edward J. Davila*, District Judge, Presiding, D.C. No. 5:20-cr-00432-EJD-1

Attorneys and Law Firms

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Before: *Ronald M. Gould* and *Sandra S. Ikuta*, Circuit Judges, and *Edward R. Korman*,^{*} District Judge.

Opinion by Judge *Gould*;

Dissent by Judge *Ikuta*

OPINION

GOULD, Circuit Judge:

This appeal arises from Appellant Ole Hougen's conviction after a jury trial of one count of attempting to commit racially motivated violence, in violation of  18 U.S.C. § 249(a)(1). On appeal, Hougen contends that he is entitled to a new trial because the district court held his trial in violation of the public trial right, under  *United States v. Allen*, 34 F.4th 789 (9th Cir. 2022). Hougen also contends that his prosecution was unconstitutional because  18 U.S.C. § 249(a)(1) exceeds Congress' authority under Section Two of the Thirteenth Amendment.¹ For the reasons set forth herein, we affirm Hougen's conviction.

I

A

On July 5, 2020, three eyewitnesses observed Hougen, a white man, repeatedly and aggressively slashing a knife at the throat and chest of a Black man (“S.B.”) at an intersection in Santa Cruz, California. Two of these witnesses called 9-1-1, and Santa Cruz police officers responded to the scene.

On the scene, law enforcement officers interviewed the eyewitnesses, S.B., and Hougen. According to S.B., Hougen had approached S.B. on the street and asked to buy marijuana. When S.B. declined, Hougen followed S.B., harassing him with racist and homophobic slurs and then charging at him with a knife. S.B. got away without sustaining injury.

No eyewitness saw the beginning of the fight, but all witnesses identified Hougen as the aggressor during the fight. One eyewitness told officers that he heard Hougen repeatedly yelling the N-word at S.B. while attacking him.

***808** For his part, Hougen told officers that S.B. had a knife, which officers confirmed. However, S.B. told officers that it

had fallen out of its sheath during the fight, and no eyewitness reported seeing S.B. with a knife.

Officers arrested Hougen and took him to the Santa Cruz Police Department. At the station, Hougen directed racial slurs at Officer Joshua Garcia, who is Hispanic, while Officer Garcia filled out Hougen's arrest paperwork. Officer Garcia then attempted to give *Miranda* warnings to Hougen, but Hougen responded by denigrating Officer Garcia as a "colored" person, a racist, and a liar before saying he did not want to speak to Officer Garcia. Garcia was unable to complete the *Miranda* warnings and stopped talking to Hougen. Another officer, Kevin Bailey, then tried to give *Miranda* warnings to Hougen. Hougen continued to respond belligerently and then requested his lawyer, at which point Officer Bailey stopped trying to talk to him.

B

Around October 2020, the FBI took over Hougen's case. FBI agents transferred Hougen to federal custody. During this trip, Hougen admitted to using the N-word in his fight with S.B.

In November 2020, a federal grand jury indicted Hougen on one count of attempting to commit racially motivated violence under  18 U.S.C. § 249(a)(1).

C

Jury selection for Hougen's trial began on April 2, 2021, and his trial lasted until April 9, 2021. Hougen's trial was held in the Northern District of California. At that time, the Northern District was operating under General Orders concerning public access to the courthouse, which had been issued in response to the COVID-19 pandemic. As relevant here, General Order 73 provided that: "only persons having official court business authorized by ... a presiding judge of this court[] may enter any Northern District of California courthouse property." N.D. Cal. General Order 73: Continuing Temporary Restrictions on Courthouse Access due to COVID-19 Public Health Emergency (as amended May 21, 2020). This Order defined "persons having official court business" to include "attorneys, parties, witnesses, or other persons who are required or permitted to attend a specific in-person court proceeding." *Id.* General Order 73 also provided that "[m]embers of the press and public may

observe proceedings by telephone or videoconference." *Id.* General Order 72-6 provided that "[j]ury trials may proceed in accordance with the logistical considerations necessitated by the Court's safety protocols." N.D. Cal. General Order 72-6: IN RE: Coronavirus Disease Public Health Emergency (Sep. 16, 2020). The only reference to public access in the record for Hougen's case comes in a Clerk's Notice entered on the docket before trial. This Clerk's Notice provided, among other things, dial-in information to be used for public access to the trial through an audio conference line (the "AT&T Line").

Neither Hougen nor anyone involved in his trial objected to, or otherwise discussed on the record, the General Orders, Clerk's Notice, or public access to his trial at any time before this appeal.

D

At trial, the prosecution argued to the jury that Hougen had long harbored violent racial animus toward Black people and assaulted S.B. because of that animus. The prosecution's evidence at trial consisted of: *809 (1) testimony² from four witnesses regarding three prior incidents where Hougen had committed racially motivated acts of violence, admitted under [Federal Rule of Evidence 404\(b\)](#) over Hougen's objection; (2) testimony by the three eyewitnesses that saw the incident between Hougen and S.B.; (3) testimony by Santa Cruz police officers regarding this incident, along with recordings of Hougen's statements made to Officers Garcia and Bailey; and (4) testimony by FBI Special Agent Elizabeth Green regarding her involvement in the investigation and the statements Hougen made while being transported to federal custody.

Hougen argued in response that S.B. was the aggressor, that Hougen acted in self-defense and not on account of S.B.'s race, and that law enforcement did not properly investigate the incident. In support of this theory, Hougen elicited testimony on cross-examination: (1) that none of the eyewitnesses saw the beginning of the fight; (2) that one of the eyewitnesses knew S.B. to be an aggressive person; and (3) that one of the responding officers knew that S.B. always carried a knife with him. Hougen called two Santa Cruz police officers involved in the incident to highlight alleged failures to investigate whether S.B. was the aggressor. Hougen also sought to admit evidence that, nine months after the incident with Hougen and in the weeks leading up to trial, S.B. had assaulted a separate person and misled police about the incident. The

district court precluded this evidence under [Federal Rules of Evidence 404\(b\)](#) and [403](#) but permitted the victim to testify to S.B.'s reputation for aggression. The district court gave a self-defense instruction to the jury at Hougen's request.

The jury convicted Hougen of one count of attempting to commit racially motivated violence in violation of [18 U.S.C. § 249\(a\)\(1\)](#) after the jury had deliberated for less than two hours.

E

After trial, Hougen filed a motion for acquittal and for a new trial and/or to dismiss the indictment for lack of subject matter jurisdiction. He raised issues concerning: (1) the sufficiency of the evidence; (2) the admission of Hougen's prior bad acts; (3) the admission of Hougen's statements in response to the *Miranda* warnings by Officers Garcia and Bailey; (4) the exclusion of evidence concerning S.B.'s alleged pre-trial assault; and (5) the asserted unconstitutionality of [18 U.S.C. 249\(a\)\(1\)](#) as applied to his case. The district court denied his motion in all respects.

This timely appeal followed. We have jurisdiction under [28 U.S.C. § 1291](#), and we affirm Hougen's conviction of attempting to commit racially motivated violence in violation of [18 U.S.C. § 249\(a\)\(1\)](#).

II

[1] Hougen first contends that the district court barred in-person public access to his trial, limited public access to the AT&T Line, and that this limitation violated his right to a public trial under [Allen](#). [34 F.4th 789](#). In [Allen](#), we held that a district court's "decision to allow only audio access to the trial ... effected a total closure" that violated the defendant's Sixth Amendment right to a public trial. [Id.](#) *810 Hougen relies on the General Orders and Clerk's Notice in place during his trial as evidence that the courtroom was unconstitutionally closed and notes that these same Orders were in place during the trial at issue in [Allen](#) (which also took place in the Northern District of California).

However, in sharp contrast to the defendant in [Allen](#), Hougen did not raise this public trial issue before the district

court. This distinguishes Hougen's case from [Allen](#) and raises a threshold issue of what standard of review applies to Hougen's claim. We hold that Hougen forfeited his public trial claim, that plain error review applies, and that reversal is not warranted under these circumstances.

A

We first address the standard of review. The government argues that Hougen, at least, forfeited his public trial claim and that plain error review applies. Hougen counters that we ought to review his public trial claim *de novo* because he did not have the opportunity to raise this issue before the trial court.

[2] We agree with the government that Hougen forfeited this claim. "[F]orfeiture is the failure to make the timely assertion of a right and subjects an argument to plain error review." [United States v. Lopez](#), [4 F.4th 706](#), [719 n.3](#) (9th Cir. 2021) (citation and internal quotation marks omitted), *cert. denied*, — U.S. —, [143 S. Ct. 121](#), [214 L.Ed.2d 33](#) (2022). It is undisputed that Hougen did not raise his public trial claim at any time before or during his trial. All evidence on which he now relies to support his claimed violation, including the General Orders and the Clerk's Notices, was available to Hougen at that time. Although Hougen had ample opportunity to "timely assert[]" his claim that the district court violated his public trial right, *id.*, he did not do so. That is forfeiture, and plain error review therefore applies. *Id.*; [United States v. Ramirez-Ramirez](#), [45 F.4th 1103](#), [1108–09](#) (9th Cir. 2022) (applying plain error review to forfeited public trial claim).

B

Because of Hougen's forfeiture, we do not review this issue *de novo* and [Allen](#) does not control this case. Instead, we turn to the standard issues that control review for plain error. Hougen contends that he is entitled to reversal even under plain error review. For the reasons set forth below, we conclude that relief is not warranted in his case.

1

Because the Supreme Court has made clear that relief under plain error review "is to be 'used sparingly, solely in

those circumstances in which a miscarriage of justice would otherwise result.’ ” *United States v. Johnson*, 979 F.3d 632, 636–37 (9th Cir. 2020) (emphasis added) (quoting *United States v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)), Hougen's path to relief is narrow.

[3] Under the familiar plain error review test, Hougen must establish the following three prongs to be eligible for relief: “(1) error, (2) that is plain, and (3) that affects substantial rights.” *United States v. Depue*, 912 F.3d 1227, 1232 (9th Cir. 2019) (en banc) (citation omitted). Those three prongs impose a “heavy burden” on Hougen, but their satisfaction is only a prerequisite to the possibility of relief. *United States v. Sager*, 227 F.3d 1138, 1145 (9th Cir. 2000). That is so because even if Hougen establishes all three necessary prongs for plain error relief, that only establishes our discretion to grant relief. Under the fourth prong of plain error review, we have the “discretion to grant *811 relief,” but only if Hougen can demonstrate that the error “seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Depue*, 912 F.3d at 1232 (emphasis added) (citation omitted).

[4] [5] [6] The purpose of the fourth prong is “to ‘reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error.’ ” *Johnson*, 979 F.3d at 636 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 82, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004)). “[A]ny exercise of discretion” under this prong “inherently requires ‘a case-specific and fact-intensive’ inquiry.” *Rosales-Mireles v. United States*, — U.S. —, 138 S. Ct. 1897, 1909, 201 L.Ed.2d 376 (2018) (quoting *Puckett v. United States*, 556 U.S. 129, 142, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009)). Even where there are clear, prejudicial errors that satisfy the first three prongs, “countervailing factors [may] satisfy [us] that the fairness, integrity, and public reputation of the proceedings will be preserved absent correction.” *Id.*

2

[7] In this case, we need not address in any detail whether Hougen's claim meets the first and third prongs of plain error review, which are not contested by the government. Nor do we need to address the parties' dispute as to the second prong of

plain error review—whether the district court clearly violated *Allen*. That is because, even if Hougen could establish the second prong, Hougen has not demonstrated that if we decline in our discretion to give relief for the claimed public trial error, that will seriously impugn the fairness, integrity, or public reputation of the court.

“[C]ountervailing factors” are present in this case that demonstrate reversal is unnecessary to preserve the fairness, integrity, and public reputation of the proceedings. *Rosales-Mireles*, 138 S. Ct. at 1909. The most obvious, and important, countervailing factor is that despite lacking the contemporaneous visual access required under *Allen*, the public had substantial means of monitoring Hougen's trial. The AT&T Line provided the public with contemporaneous audio access to Hougen's trial. Through this audio line, the public could hear argument, listen to testimony, and evaluate the district court rulings as they were made by the district court. Second, the public could obtain full transcripts of the proceedings after the fact on the public docket. Finally, media coverage of the trial offered still another avenue of public access.³ Together, the AT&T Line, available transcripts of proceedings, and the documented media access served (albeit imperfectly) the central purposes of the public trial right by giving assurance that the public could ascertain whether Hougen was “fairly dealt with and not unjustly condemned” and “keep[ing] his triers keenly alive to a sense of their responsibility and to the importance of their functions.” *Waller v. Georgia*, 467 U.S. 39, 46, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (cleaned up).

[8] Hougen stresses how critical visual access is to the public trial right, as we set forth in *Allen*. We do not disagree that visual access is vital to this right. Assuming such contemporaneous visual access was not available here, the above-mentioned alternate avenues of access are insufficient for purposes of the public trial right.

*812 But Hougen faces a higher burden on plain error review than merely making out a constitutional error under *Allen*. He must show how the lack of this access seriously affected the fairness, integrity, or public reputation of the proceedings. We do not believe it did. Hougen indeed offers no evidence that anyone was denied access to the trial, that anything material (let alone any misconduct) occurred at trial that did not come through on the AT&T Line or transcripts,

nor that the proceedings, or our review thereof, were affected at all by the lack of visual access. “There has been no showing [] that the potential harms flowing from a courtroom closure came to pass in this case.”  *Weaver v. Massachusetts*, 582 U.S. 286, 304, 137 S.Ct. 1899, 198 L.Ed.2d 420 (2017). The harms of the alleged district court error appear to be limited to the fact of the error itself. But “[f]rom the defendant’s standpoint,” the trial itself proceeded fairly.  *Id.* at 299, 137 S.Ct. 1899.

Against this minimal showing of harm to the fairness of Hougen’s trial, we must balance “the costs to the fairness, integrity, and public reputation of judicial proceedings that would alternatively result from noticing the error.”  *United States v. Williams*, 974 F.3d 320, 345 (3d Cir. 2020). In this case, the costs of reversal and remand for a new trial would be substantial. First, the Supreme Court has stated that a “high degree of caution” should be taken before reversing for retrial on plain error review.  *Rosales-Mireles*, 138 S. Ct. at 1909. The rationale for this heightened caution is plain as day in this case. Retrial would require the parties, witnesses, and district court to duplicate all the work they put in to hold this trial in the first place. And this was no small feat: Hougen’s trial lasted a week, involving numerous witnesses on both sides. Reversal would not only undo all prior work on the trial but require trial to be held anew. Starting the trial over with memories of the underlying incident fading would pose a degree of risk for the prosecution, which has the burden of proof and needs to show guilt beyond a reasonable doubt. Moreover, there is still some remaining threat of COVID-19, though the pandemic has been steadily receding, even if it is not now totally absent.

There is another cost to be balanced, that of public perception. Here, reversal would seem more likely to impugn the public’s perception of the judiciary than would denial of relief. Reversal here would plainly reward Hougen for withholding an objection and “depriv[ing the district court] the chance to cure the [alleged] violation.”  *Weaver*, 582 U.S. at 302, 137 S.Ct. 1899. Only after a jury found Hougen guilty beyond a reasonable doubt of attempting to commit racially motivated violence did he elect to raise the issue. Reversal under these circumstances would come close to rewarding the type of sandbagging that plain error review seeks to avoid, *see Chess v. Dovey*, 790 F.3d 961, 971 (9th Cir. 2015), and in any event strikes us as precisely the kind of “windfall for the defendant” that the Supreme Court has cautioned is “not in

the public interest.”  *Waller*, 467 U.S. at 50, 104 S.Ct. 2210. Any risk of harm to the perception of fairness, integrity, and reputation of the Court caused by limited public access during a dangerous pandemic is not likely as grave as the damage to fairness, integrity, and reputation that would be caused by vacating an otherwise fair conviction. If anything, “[t]he real threat ... to the ‘fairness, integrity, and public reputation of judicial proceedings’ would be” throwing out all the work that went into trying and convicting Hougen on the basis of an alleged error that was “never objected to at trial.”  *813 *United States v. Cotton*, 535 U.S. 625, 634, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). Under plain error review, we need not grant such a windfall and we do not here.

3

Hougen counters that our holdings in *United States v. Ramirez-Ramirez* and *United States v. Becerra* preclude an individualized fourth prong analysis in cases implicating a structural error, like this one. Neither case does so.

In *Ramirez-Ramirez*, the district court issued a written finding of guilt in lieu of publicly announcing the finding in open court. 45 F.4th 1103, 1110 (9th Cir. 2022). While the defendant did not object, we held the district court had clearly committed a public trial error and remanded for a public hearing where the district court would re-issue its findings. *Id.* In so doing, we held that the fourth prong of plain error was “satisfied” by the demonstration of a public trial right violation because such errors are “structural.” *Id.* (citing  *Weaver*, 582 U.S. at 296, 137 S.Ct. 1899 and *United States v. Becerra*, 939 F.3d 995, 1005–06 (9th Cir. 2019)). *Becerra*, likewise, held that “[t]he same reasoning that justified categorizing [an] error as structural”—in that case, issuing jury instructions in writing as opposed to orally —“supports th[e] conclusion” that prong four is “satisf[ied].” 939 F.3d at 1006 (granting relief under plain error review for violation of requirement that jury be instructed orally).

Fatally for Hougen’s appeal of his conviction, however, both *Ramirez-Ramirez* and *Becerra* affirmed that the decision to notice an error under prong four is an exercise of discretion. *Ramirez-Ramirez*, 45 F.4th at 1109 (“[W]e have ‘discretion to notice such error, but only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.’ ” (emphasis added) (citation omitted)); *Becerra*, 939 F.3d at 1006 (“[W]e exercise our discretion to

notice the plain error committed by the district court in this case.” (emphasis added)). That is in line with the binding Supreme Court precedent set forth earlier in this opinion. It would be in irreconcilable tension with this authority to read *Ramirez-Ramirez* and *Becerra* to require the exercise of our discretion to afford relief under plain error review every time there has been a structural error, regardless of any and all case-specific facts relevant to the fairness, integrity, and reputation of the proceedings. We do not do so here.

Moreover, both cases presented case-specific concerns weighing in favor of relief that are absent here. In both *Becerra* and *Ramirez-Ramirez*, the errors walled off all contemporaneous public access to the proceeding in question. In *Becerra*, the district court issued its jury instructions in writing, hiding “a key aspect of the trial [...] from public observation.” 939 F.3d at 1005. Likewise, in *Ramirez-Ramirez*, the district court issued its finding of fact in writing, and the public again “lost the ability to contemporaneously monitor proceedings.” *Ramirez-Ramirez*, 45 F.4th at 1111. Here, by contrast, the public undisputedly had some contemporaneous access to the entirety of the proceedings through the AT&T Line. This at least ensured that Hougen's trial was conducted before the public ear, ensuring that the fairness, integrity, and public reputation of the proceedings were not “fatally compromised.” *Becerra*, 939 F.3d at 1005.

C

In sum, the balance of costs in this case counsels against reversal. In the absence of evidence of any harm to the fairness of Hougen's trial flowing from the alleged public trial error and in light of the costs that would be imposed by reversal, we *814 conclude that the drastic relief that Hougen seeks is unwarranted. For these and all of the foregoing reasons, we decline to reverse on this ground.⁴

III

Next, Hougen argues that § 249(a)(1), as applied to his case, exceeds Congress' authority under the Thirteenth Amendment. Hougen raised this issue in his post-trial motion to dismiss for lack of subject matter jurisdiction, which the district court denied. Reviewing *de novo*, *United States v. Chi Mak*, 683 F.3d 1126, 1133 (9th Cir. 2012), we affirm the district court.

A

[9] [10] Congress' power under the Thirteenth Amendment is broad. Section Two of the Thirteenth Amendment gives Congress the “power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States.” *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968) (citation omitted). Under *Jones*, this power is subject only to a deferential test: “We must ... ask whether Congress could rationally have determined that the acts of violence covered by [the law] impose a badge or incident of servitude on their victims.” *United States v. Allen*, 341 F.3d 870, 884 (9th Cir. 2003) (citation omitted) (hereafter “*Allen II*”).

Acting under this broad authority, Congress passed § 249(a)(1). As relevant here, § 249(a)(1) prohibits “attempts to cause bodily injury to any person” “through the use of ... a dangerous weapon ... because of the actual or perceived race, color, religion, or national origin of any person.” 18 U.S.C. § 249(a)(1). In enacting § 249(a)(1), Congress concluded that “[s]lavery and involuntary servitude were enforced ... through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry” and that “eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.” 34 U.S.C. § 30501(7).

B

[11] We have no trouble concluding that § 249(a)(1), and Hougen's prosecution thereunder, passes the deferential *Jones* test. The rationality of concluding that violence (or attempted violence) perpetrated against victims on account of the victims' race is a badge or incident of slavery is well established. Every other circuit that has addressed this issue has upheld § 249(a)(1)'s constitutionality. *United States v. Roof*, 10 F.4th 314, 392 (4th Cir. 2021), cert. denied, — U.S. —, 143 S. Ct. 303, 214 L.Ed.2d 132 (2022) (“[C]oncluding there is a relationship between

slavery and racial violence is not merely rational, but inescapable.” (cleaned up)); *United States v. Diggins*, 36 F.4th 302, 311 (1st Cir. 2022), cert. denied, — U.S. —, 143 S. Ct. 383, 214 L.Ed.2d 187 (2022); *United States v. Metcalf*, 881 F.3d 641, 645 (8th Cir. 2018); *United States v. Cannon*, 750 F.3d 492, 502 (5th Cir. 2014); *United States v. Hatch*, 722 F.3d 1193, 1205 (10th Cir. 2013).⁵ Neither Hougen nor the dissent *815 offers any persuasive reasoning for why these decisions got it wrong under *Jones*. And while the Ninth Circuit has not yet addressed this statute, we upheld a similar criminal prohibition on racially motivated violence interfering with the use of public facilities as a valid exercise of Congress' Thirteenth Amendment power. *Allen II*, 341 F.3d at 884. In so doing, we endorsed the Second Circuit's reasoning that “there exist[s] [an] indubitable connection[] ... between American slavery and private violence directed against despised and enslaved groups[.]” *United States v. Nelson*, 277 F.3d 164, 190 (2d Cir. 2002) (agreed with by *Allen II*, 341 F.3d at 884). We draw upon this same unassailable reasoning—which parallels that of Congress in enacting § 249(a)(1)—in confirming that Congress rationally concluded that racial violence imposes a badge and incident of slavery on its victims. *See generally* A. Leon Higginbotham, Jr., *In the Matter of Color: Race and the American Legal Process* 254–55 (1978) (summarizing legal protections for private violence, including murder, against slaves in the colonial period); Michael J. Klarman, *From Jim Crow to Civil Rights* 29–30 (2004) (reviewing widespread violence by white Southerners against newly-freed Black people in the aftermath of the Civil War). Hougen's prosecution arose out of an instance of attempted racial violence squarely prohibited by § 249(a)(1). Under this authority, and under the various Circuit precedents cited *supra* at 814–15, his challenge falls short under *Jones*.

C

Hougen contends that § 249(a)(1) is subject to heightened scrutiny apart from the *Jones* test. He offers two alternative tests that he says govern his claim. We reject his argued position.

First, Hougen argues that the constitutionality of § 249(a)(1) is governed by the more stringent test(s) purportedly announced by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) and *Shelby County v. Holder*, 570 U.S. 529, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013). Those cases arose from laws Congress passed under its Fourteenth Amendment authority. Other defendants have relied on these cases to challenge § 249(a)(1), and their arguments have been consistently rejected. *Roof*, 10 F.4th at 393–395; *Diggins*, 36 F.4th at 311–317; *Metcalf*, 881 F.3d at 645; *Cannon*, 750 F.3d at 505; *Hatch*, 722 F.3d at 1204–05. We need go no further than reiterate what has been said by the First Circuit: these Fourteenth Amendment cases do not “mention either *Jones* or the Thirteenth Amendment. Rather, the cases concern two different amendments, each with its own unique history, structure, and caselaw.” *Diggins*, 36 F.4th at 313. Hougen “furnishes no reason to believe that [these cases'] examination of the Fourteenth Amendment's Enforcement Clause displaces *Jones's* separate analysis of the Thirteenth Amendment.” *Id.* at 313. The Supreme Court has clearly said that *Jones* is the test under the Thirteenth Amendment. Absent clear contrary precedent or guidance to the contrary, we join our fellow circuits in rejecting Hougen's argument.

Second, Hougen contends that the Supreme Court announced a separate test for Congress' authority to enact criminal statutes under the Thirteenth Amendment in *United States v. Kozminski*, 487 U.S. 931, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988). This argument, again, misses the mark. In *Kozminski*, the Supreme Court did not address the validity of Congress' Thirteenth *816 Amendment power in enacting the statutes at issue. To the extent it touched on this issue in *dicta*, it affirmed that *Jones* governs that question. *See* 487 U.S. at 962 n.8, 108 S.Ct. 2751 (citing *Jones*, 392 U.S. at 437–44, 88 S.Ct. 2186).

Instead, the Court addressed whether application of two broadly worded criminal statutes, whose language tracked the substantive prohibitions of the Thirteenth Amendment, comported with judicial doctrines of fair notice in the criminal context. *See id.* And while § 249(a)(1)

must comply with these doctrines, the fair notice concerns present in [Kozminski](#) are absent here. [Section 249\(a\)\(1\)](#)'s prohibitory language is clear and tracks other statutes prohibiting conduct based on race, including that which we upheld in [Allen II](#). And there can be no serious question or surprise that Hougen's attempted assault of S.B. fell under [§ 249\(a\)\(1\)](#)'s clear prohibition on racially motivated violence. [Kozminski](#) is inapposite to the issues present in this case.

D

[12] In sum, we hold that [§ 249\(a\)\(1\)](#) is a constitutional exercise of Congress' enforcement authority under Section Two of the Thirteenth Amendment. We affirm the district court's denial of Hougen's motion to dismiss his prosecution thereunder for lack of subject matter jurisdiction.

IV

For the foregoing reasons, we conclude that Hougen has not identified any error warranting relief from his conviction at trial.

AFFIRMED.

[IKUTA](#), Circuit Judge, dissenting:

Ole Hougen was convicted under [18 U.S.C. § 249\(a\)\(1\)](#), which criminalizes, among other things, willfully causing bodily injury to a person on account of that person's race, color, religion, or national origin. Because Congress could not rationally determine that assault or battery motivated by a victim's race, color, religion, or national origin is a badge or incident of slavery, or that [§ 249\(a\)\(1\)](#) is an appropriate remedy for a violation of the Thirteenth Amendment's eradication of slavery and involuntary servitude, [§ 249\(a\)\(1\)](#) was not a valid exercise of Congress's authority under the Thirteenth Amendment. Thus, Hougen was convicted under an unconstitutional statute, and his conviction must be overturned. Therefore, I dissent.

I

[Section 249\(a\)\(1\)](#) attaches criminal liability to those who,

whether or not acting under color of law, willfully cause[] bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempt[] to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person.

[18 U.S.C. § 249\(a\)\(1\)](#).¹

Congress passed [§ 249\(a\)\(1\)](#) under § 2 of the Thirteenth Amendment. See National *817 Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111–84, § 4702, 123 Stat. 2190, 2836 (2009).

The Thirteenth Amendment was the first of three Reconstruction-era amendments ratified between 1865 and 1870 in the wake of the Civil War (collectively, the Reconstruction Amendments). It states:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

Thus, Section 1 announces the Amendment's substantive guarantee: “that slavery or involuntary servitude shall not exist in any part of the United States.” [The Civil Rights Cases](#), 109 U.S. 3, 20, 3 S.Ct. 18, 27 L.Ed. 835 (1883). And Section 2 vests in Congress the power to enforce that guarantee.

The Fourteenth and Fifteenth Amendments have similar structures. Section 1 of each Amendment sets forth its

“substantive guarantees,” *Tennessee v. Lane*, 541 U.S. 509, 518, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004), and each Amendment also has an enforcement clause largely identical to Section 2 of the Thirteenth Amendment, *see* U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); U.S. CONST. amend. XV, § 2 (“The Congress shall have power to enforce this article by appropriate legislation.”)).

Under the enforcement clauses of the Reconstruction Amendments, “Congress may enact ... prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct,” meaning the conduct prohibited by the clause containing each Reconstruction Amendment’s substantive guarantee. *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 727–28, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003); *see also* *City of Boerne v. Flores*, 521 U.S. 507, 536, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). Congress’s power to enact prophylactic legislation, though broad, “is not ... unlimited.” *Lane*, 541 U.S. at 520, 124 S.Ct. 1978. “While Congress must have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions, those measures may not work a ‘substantive change in the governing law.’ ”

Id. (quoting *City of Boerne*, 521 U.S. at 519, 117 S.Ct. 2157). “The Court has never deviated from” the principle “that prophylactic legislation designed to enforce the Reconstruction Amendments,” *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 225, 129 S.Ct. 2504, 174 L.Ed.2d 140 (2009), “must be an appropriate remedy for identified constitutional violations, not ‘an attempt to substantively redefine ... [the] legal obligations’ ” imposed by the Amendments, *Hibbs*, 538 U.S. at 728, 123 S.Ct. 1972 (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000)). Accordingly, “substantive redefinition of the [constitutional] right at issue” is not “appropriate prophylactic legislation.” *Id.*; *see also* *818 *City of Boerne*, 521 U.S. at 519, 117 S.Ct. 2157 (“Congress does not enforce a constitutional right by changing what the right is.”).

For purposes of assessing prophylactic legislation passed pursuant to Section 5 of the Fourteenth Amendment, the Supreme Court has adopted a type of means-end test. *See* *Hibbs*, 538 U.S. at 728, 123 S.Ct. 1972. For Congress’s

action to fall within its Section 5 authority, “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *City of Boerne*, 521 U.S. at 520, 117 S.Ct. 2157.² Because Section 5 of the Fourteenth Amendment is worded almost identically to Section 2 of the Thirteenth Amendment, scholars and jurists have argued that the congruence-and-proportionality test is salient to determining the constitutionality of prophylactic Thirteenth Amendment legislation. *See* Jennifer Mason McAward, *The Scope of Congress’s Thirteenth Amendment Enforcement Power after City of Boerne v. Flores*, 88 Wash. U. L. Rev. 77, 142 (2010); *United States v. Cannon*, 750 F.3d 492, 511–12 (5th Cir.) (Elrod, J., concurring), *cert. denied*, 574 U.S. 1029, 135 S.Ct. 709, 190 L.Ed.2d 445 (2014). But the Supreme Court has not, as yet, applied the test in the Thirteenth Amendment context. Rather, it has long held that “the province and scope of the Thirteenth and Fourteenth Amendments are different,” and that “[w]hat Congress has power to do under one, it may not have power to do under the other.” *The Civil Rights Cases*, 109 U.S. at 23, 3 S.Ct. 18.

II

Because we cannot rely on Fourteenth Amendment jurisprudence to determine the scope of Congress’s legislative authority under the Thirteenth Amendment’s enforcement clause, we must instead discern the test for that clause from the Thirteenth Amendment’s text and history, as interpreted by the Supreme Court.

A

Section 2 of the Thirteenth Amendment authorizes “appropriate legislation” to enforce Section 1. U.S. CONST. amend. XIII, § 2. Thus, it is necessary to start by examining Section 1’s substantive guarantee.

Section 1 states that “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” U.S. CONST. amend. XIII, § 1. The clause “abolished slavery, and established universal freedom” in the United States. *The Civil Rights Cases*, 109 U.S. at 20, 3 S.Ct. 18; *see also* *id.*

at 24, 3 S.Ct. 18 (“The Thirteenth Amendment has respect, not to distinctions of race, or class, or color, but to slavery.”).

The language in Section 1 was well understood at the time of the Thirteenth Amendment's enactment. The clause “reproduced the historic[] words” of the Northwest Ordinance of 1787.³ *819 *Bailey v. Alabama*, 219 U.S. 219, 240, 31 S.Ct. 145, 55 L.Ed. 191 (1911). “The framers of the [Thirteenth] Amendment intentionally used this text precisely *because* it was well known and had a narrow historical meaning. As used in the Ordinance, the terms ‘slavery and involuntary servitude’ referred to a specific and legally codified ‘private economical relation’ between a ‘master’ and a ‘servant.’ ” Kurt Lash, *Roe and the Original Meaning of the Thirteenth Amendment*, 21 Geo. J.L. & Pub. Pol'y, 131, 132 (2023). Section 1 's eradication of slavery eliminated “a state of affairs which had existed in certain states of the Union since the foundation of the government.”

Robertson v. Baldwin, 165 U.S. 275, 282, 17 S.Ct. 326, 41 L.Ed. 715 (1897); *see also* *Butler v. Perry*, 240 U.S. 328, 332, 36 S.Ct. 258, 60 L.Ed. 672 (1916) (stating that the Thirteenth Amendment “was adopted with reference to conditions existing since the foundation of our government”).

“[T]he words ‘involuntary servitude’ were ... intended to cover” other conditions “which might have been a revival of the institution of slavery under a different and less offensive name,” *Robertson*, 165 U.S. at 282, 17 S.Ct. 326, such as “those forms of compulsory labor akin to African slavery which, in practical operation, would tend to produce like undesirable results,” *Butler*, 240 U.S. at 332, 36 S.Ct. 258. “It was very well understood” that involuntary servitude referred to “any state of bondage” in “which the personal service of one man is disposed of or coerced for another's benefit.”

Bailey, 219 U.S. at 241, 31 S.Ct. 145 (citation omitted). In *United States v. Kozminski*, the most recent Supreme Court decision interpreting the Thirteenth Amendment, the Court confirmed that “ ‘involuntary servitude’ necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.” 487 U.S. 931, 952, 108 S.Ct. 2751, 101 L.Ed.2d 788 (1988). One form of involuntary servitude that is forbidden by the Thirteenth Amendment is peonage, which “may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to master.”

Clyatt v. United States, 197 U.S. 207, 215, 25 S.Ct. 429, 49 L.Ed. 726 (1905); *see also* *Taylor v. Georgia*, 315 U.S. 25, 29, 62 S.Ct. 415, 86 L.Ed. 615 (1942) (holding that “coerced labor is peonage” and that it “is of course clear that peonage is a form of involuntary servitude within the meaning of the Thirteenth Amendment”).

Therefore, Section 1 of the Thirteenth Amendment provides a substantive guarantee that slavery (a private economic relation between a master and a servant), as well as any other state of bondage where one person is forced to labor for another, are eradicated. Any legislation enacted by Congress must be at least rationally related to remedying a violation of this constitutional right. *See* *Nw. Austin*, 557 U.S. at 204, 129 S.Ct. 2504.

B

Having explained Section 1 's substantive guarantee, we must next ascertain the limits on how Congress can enforce that guarantee. Section 2 of the Thirteenth Amendment states that “Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XIII, § 2. Addressing the scope of Congress's enforcement power under

Section 2 for the first time in the *Civil Rights Cases*, the Supreme Court stated that “the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United

*820 States.” 109 U.S. at 20, 3 S.Ct. 18. Nearly a century later, the Court clarified the scope of Congress's prophylactic legislative authority under Section 2, holding that “Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation.” *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968). This power is broad, and “the varieties of private conduct that it may make criminally punishable or civilly remediable extend far beyond the actual imposition of slavery or involuntary servitude.” *Griffin v. Breckenridge*, 403 U.S. 88, 105, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). But Congress's authority is nevertheless constrained by the requirement that “prophylactic legislation” passed by Congress not effect a “substantive redefinition” of the rights granted by the

Thirteenth Amendment.  *Hibbs*, 538 U.S. at 728, 123 S.Ct. 1972; see also  *Allen v. Cooper*, — U.S. —, 140 S. Ct. 994, 1004, 206 L.Ed.2d 291 (2020) (“Congress cannot use its ‘power to enforce’ the [Thirteenth] Amendment to alter what that Amendment bars.” (citation and quotation marks omitted)).

In the context of Thirteenth Amendment jurisprudence, the phrase “badges and incidents of slavery” has a specific meaning set by history and Supreme Court interpretation. An incident of slavery, as that term was used in antebellum commentary, “was any legal right or restriction that necessarily accompanied the institution of slavery,” particularly “the aspects of property law that applied to the ownership and transfer of slaves” and “the civil disabilities imposed on slaves by virtue of their status as property.” Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. Pa. J. Const. L. 561, 575 (2012); see also *id.* at 570–71 & 571 n.38 (stating that, in 1867, an “incident” was defined as “[a] thing depending upon, appertaining to, or following another, called the principal”) (citing BOUVIER'S LAW DICTIONARY (7th ed. 1867)). Judicial decisions from the antebellum period reflect this understanding of an “incident” of slavery as something necessarily tied to a master's property rights in the slave. See  *Prigg v. Pennsylvania*, 41 U.S. 539, 613, 16 Pet. 539, 10 L.Ed. 1060 (1842) (stating that because the Constitution's Fugitive Slave Clause “contains a positive and unqualified recognition of the right of the owner in the slave then all the incidents to that right attach also”); see also *In re Archy*, 9 Cal. 147, 162 (1858) (“[W]here slavery exists, the right of property of the master in the slave must follow[] as a necessary incident.”). Thus, “incident” “has [a] clear, finite, historically determined meaning” that refers to the legal aspects of the system of slavery. McAward, *Defining the Badges and Incidents of Slavery* at 575. Such legal aspects, comprising “the inseparable incidents of the institution” of slavery, included “[c]ompulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities.”  *The Civil Rights Cases*, 109 U.S. at 22, 3 S.Ct. 18.

Whereas the term “incident” of slavery has a narrow historical meaning, the meaning of the term “badge” of slavery is broader. “In its most general sense, the term ‘badge of slavery’ ... refers to indicators, physical or otherwise, of

African Americans' slave or subordinate status.” McAward, *Defining the Badges and Incidents of Slavery* at 575; see also  *United States v. Hatch*, 722 F.3d 1193, 1198 (10th Cir. 2013) (stating that “‘badge,’ in antebellum legal discourse, was sometimes *821 used as shorthand for ‘evidence permitting an inference from external appearances to legal status’ ” as a slave (citation omitted)), *cert. denied*, 572 U.S. 1018, 134 S. Ct. 1538, 188 L.Ed.2d 561 (2014). For example, one such physical badge was the requirement, “[i]n slave times[,] in the slave states,” that a freed slave “carry with him a copy of a judicial decree or other evidence of his right to freedom or be subject to arrest.”  *Hodges v. United States*, 203 U.S. 1, 19, 27 S.Ct. 6, 51 L.Ed. 65 (1906), *overruled by*  *Jones*, 392 U.S. at 441 n.78, 88 S.Ct. 2186. Following the end of the Civil War and the abolition of slavery, “[s]kin color was no longer a badge of slavery,” and the term instead came “to reference ways in which southern governments and white citizens endeavored to reimpose upon freed slaves the incidents of slavery or, more generally, to restrict their rights in such a way as to mark them as a subordinate brand of citizens.” McAward, *Defining the Badges and Incidents of Slavery* at 577–78.

Building on this understanding, the Supreme Court has defined the badges and incidents of slavery as the denial of “those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.”  *The Civil Rights Cases*, 109 U.S. at 22, 3 S.Ct. 18; see also  *Griffin*, 403 U.S. at 105, 91 S.Ct. 1790. Such a denial of fundamental civil rights imposes on its victims a “form of stigma so severe” that it is akin to marking them as a legally inferior group (*i.e.*, a badge of slavery), and thus violates the Thirteenth Amendment.  *City of Memphis v. Greene*, 451 U.S. 100, 128, 101 S.Ct. 1584, 67 L.Ed.2d 769 (1981). The Court has most often characterized these “fundamental rights[,] which are the essence of civil freedom,” in terms of economic and legal parity with white people—specifically, ensuring that black people have “the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property, as is enjoyed by white citizens.”  *The Civil Rights Cases*, 109 U.S. at 22, 3 S.Ct. 18; see also  *Alma Soc'y Inc. v. Mellon*, 601 F.2d 1225, 1238 (2d Cir. 1979) (stating that “[t]he Supreme Court has never considered that the ‘badges or incidents’ went beyond” a lack of these fundamental rights).

Therefore, the Court has held that “racial discrimination [that] herds men into ghettos and makes their ability to buy property turn on the color of their skin” is a badge or incident of slavery, as is denying black people “the freedom to buy whatever a white man can buy [and] the right to live wherever a white man can live.” *Jones*, 392 U.S. at 442–43, 88 S.Ct. 2186. The Court has similarly concluded that “racial discrimination that interferes with the making and enforcement of contracts for private educational services” is a badge or incident of slavery. *Runyon v. McCrary*, 427 U.S. 160, 179, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976).

For the same reasons, the use of violence to deprive a person of the fundamental rights of citizenship is a badge or incident of slavery. Historically, “unrestrained master-on-slave violence [w]as one of slavery's most necessary features.” *Hatch*, 722 F.3d at 1206; see also *United States v. Nelson*, 277 F.3d 164, 189–90 (2d Cir. 2002) (“[I]n several States[,] ‘legislators expressly deprived slaves who were violently abused by whites of the protections of the common law of crimes by passing exculpatory acts that granted ... slave masters ... legal rights to beat, whip, and kill bondsmen.’ ” (citation omitted)). Thus, the Supreme Court has held that conspiratorial, racially discriminatory private actions using “force, violence and intimidation” to deprive individuals of basic rights is a badge or incident of slavery that Congress can legislate against to enforce the Thirteenth *822 Amendment's substantive guarantee. *Griffin*, 403 U.S. at 90, 91 S.Ct. 1790. But such force, violence, or intimidation must have been committed for the purpose of preventing the victims:

from seeking the equal protection of the laws and from enjoying the equal rights, privileges and immunities of citizens under the laws of the United States and [state law], including but not limited to their rights to freedom of speech, movement, association and assembly; their right to petition their government for redress of their grievances; their rights to be secure in their persons and their homes; and their rights not to be enslaved nor

deprived of life and liberty other than by due process of law.

Id.; see also *id.* at 105, 91 S.Ct. 1790.

Accordingly, not every act of private discrimination or violence—however ugly it might be—is a badge or incident of slavery. “Mere discriminations on account of race or color were not regarded as badges of slavery.” *The Civil Rights Cases*, 109 U.S. at 25, 3 S.Ct. 18.⁴ Actions with only “symbolic significance” are not badges or incidents of slavery either. *Greene*, 451 U.S. at 128, 101 S.Ct. 1584. Therefore, the Court has held that neither a private actor's refusal of “admission to an inn, a public conveyance, or a place of public amusement, on equal terms with all other citizens,” *The Civil Rights Cases*, 109 U.S. at 24, 3 S.Ct. 18, nor a city's decision to close swimming pools rather than attempt to operate them on a desegregated basis, see *Palmer v. Thompson*, 403 U.S. 217, 226, 91 S.Ct. 1940, 29 L.Ed.2d 438 (1971), nor the closing of a city street that would “have a disparate effect on an identifiable ethnic or racial group,” *Greene*, 451 U.S. at 128, 101 S.Ct. 1584, are badges or incidents of slavery. Similarly, the Court has never held that an assault or battery—when committed without an intent to deprive a person of fundamental rights of citizenship—was a badge or incident of slavery, even if there is evidence that the perpetrator was motivated by animus against a person's protected characteristic.

C

Summarizing the relevant principles, Section 2 of the Thirteenth Amendment authorizes Congress to develop appropriate remedies to vindicate the substantive constitutional guarantee of Section 1, which is to eradicate slavery and involuntary servitude. In order to do so, Congress has the authority to identify the badges and incidents of slavery and to enact appropriate legislation to abolish them.

See *Jones*, 392 U.S. at 440, 88 S.Ct. 2186. Although Congress enjoys broad prophylactic legislative authority in this area, its power “is not ... unlimited,” *Lane*, 541 U.S. at 520, 124 S.Ct. 1978, because the determination of “what are the badges and incidents of slavery,” *Jones*,

392 U.S. at 440, 88 S.Ct. 2186, must be rationally related to the constitutional right at issue—the right to “universal civil freedom,” *Bailey*, 219 U.S. at 241, 31 S.Ct. 145, via the eradication of slavery and involuntary servitude. Supreme Court precedent has made clear that Congress’s “authority to translate that determination into effective legislation,” *823 *Jones*, 392 U.S. at 440, 88 S.Ct. 2186, does not “empower Congress to address all modern forms of injustice, or even all modern manifestations of racial bias,” McAward, *Defining the Badges and Incidents of Slavery* at 569–70. Although Congress could rationally determine that conduct intended to deprive individuals of the rights of citizenship, whether through legislation or private action, is a badge or incident of slavery, the Thirteenth Amendment does not authorize legislation that prohibits private discriminatory conduct that was not committed with such an intent, even if the conduct was motivated by animus. Legislation criminalizing such conduct goes “beyond redressing actual constitutional violations” of the Thirteenth Amendment, *Allen*, 140 S. Ct. at 1004, and so is not appropriate prophylactic legislation, *Hibbs*, 538 U.S. at 728, 123 S.Ct. 1972.

III

Under these principles, in order to determine if § 249(a)(1) is an appropriate remedy to vindicate the Thirteenth Amendment’s substantive guarantee, we must assess whether Congress could rationally determine that the conduct criminalized by the statute is a badge or incident of slavery.

The conduct criminalized by § 249(a)(1) is willfully causing bodily injury to a person because of that person’s protected characteristic (race, color, religion, or national origin). Therefore, the question is whether Congress could rationally determine that an assault or battery (which is a state-law criminal offense regardless of the victim’s race, color, religion, or national origin) is a badge or incident of slavery, solely because the perpetrator committed the crime on account of the victim’s protected characteristic.

Under the Supreme Court’s caselaw, this type of conduct is not a badge or incident of slavery. Assault or battery that is carried out due to animus against persons with a protected characteristic is akin to mere private discrimination, which the Court has long made clear is not a badge or incident

of slavery. See *The Civil Rights Cases*, 109 U.S. at 25, 3 S.Ct. 18. Such a crime is unlike violence intended to deprive persons of their fundamental rights as citizens, which the Supreme Court held was a badge or incident of slavery in *Griffin*. See 403 U.S. at 105, 91 S.Ct. 1790. The distinction between the legislation at issue in *Griffin* and in this case is clear. In *Griffin*, two white defendants mistakenly believed that the driver of a car was a civil rights worker, and conspired to block the passage of the car upon the public highways and attack the plaintiffs with deadly weapons for the purpose of preventing the plaintiffs and other black people, “through such force, violence and intimidation, from seeking the equal protection of the laws and from enjoying the equal rights, privileges and immunities of citizens under the laws of the United States and the State of Mississippi.” *Id.* at 90, 91 S.Ct. 1790. The defendants were charged under 42 U.S.C. § 1985(3), which criminalizes a conspiracy, “on the highway or on the premises of another,” that is committed “for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.” *Id.* at 92, 91 S.Ct. 1790 (citation and quotation marks omitted). The Supreme Court upheld the statute, “conclud[ing] that Congress was wholly within its powers under § 2 of the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men,” including but not limited to “the right of interstate travel.” *Id.* at 105, 91 S.Ct. 1790.

*824 By contrast, § 249(a)(1) lacks the key element of § 1985(3), in that it does not require the government to show that the purpose of the assault or battery was to deprive the victim of the fundamental civil rights of citizenship. Rather, it requires the government to show only that the defendant perpetrated the assault or battery because of the victim’s protected characteristic. This type of criminal enactment falls short in two ways.

First, it is not rationally related to the substantive guarantee of Section 1, which is the eradication of slavery and involuntary servitude. There is no constitutional right to be free from private acts of violence, even if they are committed due to a discriminatory motive. Congress could not rationally

determine that private violence, which is motivated by neither a master-servant relationship between the perpetrator and victim nor a desire to deprive the victim of the fundamental rights of a free citizen, is a badge or incident of slavery. To the contrary, the Supreme Court has made clear that Congress does not possess a “general federal police power,”

 *United States v. Lopez*, 514 U.S. 549, 564, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), and that “the suppression of violent crime and vindication of its victims” is a quintessential example of “[state] police power, which the Founders denied the National Government,”  *United States v. Morrison*, 529 U.S. 598, 618, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000).

 Section 249(a)(1) therefore represents an improper federal exercise of state police power, both by converting ordinary state-law battery and assault into a federal crime, and by imposing an enhanced penalty for such assaults if committed with a “discriminatory motive, or reason, for acting.”⁵

 *Wisconsin v. Mitchell*, 508 U.S. 476, 487, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993). The Supreme Court has warned Congress against adopting remedial measures, such as  § 249(a)(1), that work a “substantive redefinition of the [constitutional] right at issue.”  *Hibbs*, 538 U.S. at 728, 123 S.Ct. 1972.

Second,  § 249(a)(1) is overbroad, as demonstrated most clearly by the fact that convictions could be (and have been) entered and upheld under the statute, even where the violence at issue was perpetrated against persons belonging to demographic groups that have never experienced or been at risk of slavery in this country. See  *Cannon*, 750 F.3d at 512 (Elrod, J., concurring) (“[T]he plain language of  § 249(a)(1) reaches even racial violence against white persons when those acts are based on race.”). For example, in  *United States v. Maybee*, the Eighth Circuit upheld a  § 249(a)(1) conviction for a racially motivated attack against Mexicans.  687 F.3d 1026, 1030–32 (8th Cir. 2012).

*825 And in *United States v. Earnest*, the defendant was convicted under  § 249(a)(1) for shooting at Jews inside of a synagogue. 536 F. Supp. 3d 688, 718 (S.D. Cal. 2021). Although Congress could rationally determine that private conduct subjecting a victim to peonage, see  *Taylor*, 315 U.S. at 29, 62 S.Ct. 415, or “serious [human] trafficking,”

 *United States v. Dann*, 652 F.3d 1160, 1170 (9th Cir.

2011) (citing 18 U.S.C. § 1589), is a badge or incident of slavery, there is no rational basis for determining that a state-law assault committed because the victim was a Jew, a Catholic, a Muslim, a Korean, an Argentinian, a Mexican, or a white person (to name just a few of the many demographic groups that were never enslaved in this country) vindicates the Thirteenth Amendment's ban on slavery and involuntary servitude.

Because  § 249(a)(1) bears no rational relationship to any determination that the conduct it criminalizes is a badge or incident of slavery, the law fails to implement the “substantive guarantee” of the Thirteenth Amendment.  *Lane*, 541 U.S. at 518, 124 S.Ct. 1978. Thus, Congress exceeded its prophylactic legislative authority in enacting  § 249(a)(1), and it must be struck down.

IV

In holding to the contrary, the majority relies on congressional findings, out-of-circuit cases, and precedent analyzing a different statute,  18 U.S.C. § 245(b)(2). Maj. Op. at 814–15. The majority's reliance is misplaced.

Congress's findings related to  § 249(a)(1), codified at 34 U.S.C. § 30501, do not provide a basis on which Congress could find that the conduct criminalized by  § 249(a)(1) is rationally related to eradicating slavery or involuntary servitude as a badge or incident of slavery. Maj. Op. at 814. First, Congress stated that because “[s]lavery and involuntary servitude were enforced ... through widespread public and private violence directed at persons because of their race, color, or ancestry[,] ... eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.” 34 U.S.C. § 30501(a)(7).⁶ As explained above, slavery was historically enforced through legally sanctioned violence by masters against slaves or—once the former slaves were freed—through violence that was intended to prevent them from exercising their fundamental rights as citizens. See *supra* pp. 810–13. Congress, however, fails to explain how it rationally determined that “eliminating racially motivated violence” writ large, without an element requiring the government to prove a connection between such violence

and the deprivation of civil rights, is addressed to either eradicating slavery or its badges and incidents.

Congress's findings as to religious and national origin groups are also inadequate to support the majority's holding. *See* 34 U.S.C. § 30501(a)(8).⁷ Congress found that, *826 because at the time the Reconstruction Amendments “were adopted, and continuing to date, members of certain religious and national origin groups were and are perceived to be distinct ‘races,’ ” eliminating the badges and incidents of slavery renders it “necessary to prohibit assaults on the basis of real or perceived religions or national origins.” *Id.* Again, Congress does not explain why the identification of certain individuals as members of groups with the same religion or national origin gives rise to a rational inference that private violence against such individuals relates to eradicating slavery or involuntary servitude, or constitutes a badge or incident of slavery. Such a broad enactment may be authorized by the Fourteenth Amendment (subject to principles of congruence and proportionality, *see* *City of Boerne*, 521 U.S. at 520, 117 S.Ct. 2157), but it bears no rational relation to vindicating the substantive guarantee of the Thirteenth Amendment.

Next, the majority relies on the fact that the other circuits to have addressed this issue have upheld § 249(a)(1) as a valid exercise of Congress's Thirteenth Amendment power. Maj. Op. at 814–15. However, these decisions, like the majority opinion, involve limited reasoning, excessive deference to Congress under *Jones*, or both. *See United States v. Diggins*, 36 F.4th 302, 311 (1st Cir.), *cert. denied*, — U.S. —, 143 S. Ct. 383, 214 L.Ed.2d 187 (2022); *United States v. Roof*, 10 F.4th 314, 392 (4th Cir. 2021) (per curiam), *cert. denied*, — U.S. —, 143 S. Ct. 303, 214 L.Ed.2d 132 (2022); *United States v. Metcalf*, 881 F.3d 641, 645 (8th Cir.), *cert. denied*, — U.S. —, 139 S. Ct. 412, 202 L.Ed.2d 339 (2018); *Cannon*, 750 F.3d at 502–03; *Hatch*, 722 F.3d at 1205–06.

Finally, the majority relies, Maj. Op. at 814–15, on our decision in *United States v. Allen*, in which we upheld a similarly worded statute against a Thirteenth Amendment challenge. *See* 341 F.3d 870, 884 (9th Cir. 2003). That statute, 18 U.S.C. § 245(b)(2)(B), imposes criminal liability on an individual who:

whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with ... any person because of his race, color, religion or national origin because he is or has been ... participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof.

Allen held that “Congress could rationally have determined that the acts of violence covered by § 245(b)(2)(B) impose a badge or incident of servitude on their victims,” but provided little analysis to support this conclusion. 341 F.3d at 884 (citation omitted).

Allen's affirmance of § 245(b)(2)(B) does not support the majority's conclusion that § 249(a)(1) is constitutional.

Section 245(b)(2)(B) prohibits private violence that deprives an individual of a fundamental right of citizenship, “participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof.” 18 U.S.C. § 245(b)(2)(B).

This *827 formulation of the offense brings § 245(b)(2)(B) in line with precedent: the Supreme Court has indicated that similar violence aimed at preventing the free exercise of one's civil rights constitutes a badge or incident of slavery and that Congress can validly legislate against such violence. *See* *Griffin*, 403 U.S. at 105, 91 S.Ct. 1790. But § 249(a)(1) is missing this crucial component. Thus, § 245(b)(2)(B) is distinguishable, and *Allen* does not control the outcome of this case.

V

Because Congress could not have rationally determined that the conduct proscribed in § 249(a)(1) is a badge or incident

of slavery, or that the remedy for private discriminatory violence is related to ensuring that slavery or involuntary servitude ceases to exist in the United States, Congress was not authorized under the Thirteenth Amendment to enact that statute. By drafting § 249(a)(1) to apply to violence motivated by an overbroad range of protected characteristics, Congress redefined the Thirteenth Amendment's substantive guarantee—to eradicate slavery and involuntary servitude—as a guarantee of protection against any private violence by a person with discriminatory animus. Such substantive redefinition of a constitutional right, unsupported by the Thirteenth Amendment's text and history or Supreme Court caselaw, is not “appropriate prophylactic legislation.”

Hibbs, 538 U.S. at 728, 123 S.Ct. 1972. Thus, to the extent § 249(a)(1)'s constitutionality is based on the Thirteenth Amendment, the statute is invalid.⁸ Therefore, Hougen's “conviction under this statute must be reversed as the statute is unconstitutional.” *Cox v. Louisiana*, 379 U.S. 536, 552, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965). Because the majority nevertheless affirms Hougen's conviction under § 249(a)(1), I dissent.

All Citations

76 F.4th 805, 2023 Daily Journal D.A.R. 7859

Footnotes

- * The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.
- 1 Hougen raises other issues on appeal that we address in the memorandum disposition filed contemporaneously with this opinion. We conclude he is not entitled to relief on any of these issues.
- 2 The jury also received a stipulation from the parties that Hougen had been criminally convicted for each of these three occurrences. For each occurrence, these convictions included, respectively: (1) exhibiting a deadly weapon; (2) malicious harassment, misdemeanor harassment, and fourth degree assault; and (3) violating civil rights by force or threat, making criminal threats, resisting a peace officer, and battery.
- 3 See, e.g., Christina Carrega, *Man sentenced to nearly 7 years for attacking Black man with knife was repeat hate crime offender*, CNN, Dec. 3, 2021, <https://www.cnn.com/2021/12/03/us/california-man-hate-crime-sentence/index.html>.
- 4 Because we decline to grant relief on plain error review, we need not and do not reach the government's alternative contention that Hougen waived appellate review of this claim entirely.
- 5 Even the dissent, which summarily dismisses these decisions, *see* Dissent 826, agrees with the *Hatch* court's indisputable conclusion that “unrestrained master-on-slave violence [w]as one of slavery's most necessary features.” Dissent 821 (citing *Hatch*, 722 F.3d at 1206).
- 1 Section § 249(a)(1) provides in full:
 - (a) In General.—
 - (1) Offenses involving actual or perceived race, color, religion, or national origin.—Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person—

(A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—

(i) death results from the offense; or

(ii) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

 18 U.S.C. § 249(a)(1).

2 The Supreme Court has not expressly adopted the congruence-and-proportionality test for prophylactic legislation passed under the Fifteenth Amendment, see  *Nw. Austin*, 557 U.S. at 204, 129 S.Ct. 2504, although the Court has stated that Congress has “parallel power to enforce the provisions” of the Fourteenth and Fifteenth Amendments,  *City of Boerne*, 521 U.S. at 518, 117 S.Ct. 2157; see also  *Allen v. Milligan*, — U.S. —, 143 S. Ct. 1487, 1539 n.19, 216 L.Ed.2d 60 (2023) (Thomas, J., dissenting).

3 Article VI of the Northwest Ordinance states that “[t]here shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted[.]”

4  *Jones* noted that “the present validity of the position taken by the [ *Civil Rights Cases*] majority” that private discrimination was not a badge or incident of slavery was “rendered largely academic by Title II of the Civil Rights Act of 1964,” enacted under the Fourteenth Amendment.  392 U.S. at 441 n.78, 88 S.Ct. 2186 (citing  *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) and  *Katzenbach v. McClung*, 379 U.S. 294, 85 S.Ct. 377, 13 L.Ed.2d 290 (1964)). Nevertheless,  *Jones* did not overrule the  *Civil Rights Cases* on this point, and it remains good law.

5 Title 18, Chapter 7 of the U.S. Code lists the federal assault crimes. Unlike  § 249(a)(1)'s general prohibition on private, animus-motivated assault (and battery), each federal assault statute contains a nexus to the federal government or to interstate commerce. See  18 U.S.C. §§ 111 (assaulting a federal officer or employee), 112 (assaulting a foreign official or official guest), 113 and 114 (assaulting or maiming within the special maritime and territorial jurisdiction of the United States), 115 (assaulting a member of the immediate family of a United States official, a United States judge, or a federal law enforcement officer), 116 (female genital mutilation, if the defendant or victim traveled in interstate or foreign commerce), 117 (domestic assault within the special maritime and territorial jurisdiction of the United States), 118 (interference with a federal law enforcement agent, engaged, within the United States or the special maritime and territorial jurisdiction of the United States, in the performance of protective functions for a federal officer or employee), and 119 (knowingly making public restricted personal information about a federal officer or employee with the intent to threaten, intimidate, or incite the commission of a crime of violence against that person or a member of that person's immediate family).

6 34 U.S.C. § 30501(a)(7) provides:

For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color,

or ancestry. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.

7 34 U.S.C. § 30501(a)(8) provides:

Both at the time when the 13th, 14th, and 15th amendments to the Constitution of the United States were adopted, and continuing to date, members of certain religious and national origin groups were and are perceived to be distinct “races[.]” Thus, in order to eliminate, to the extent possible, the badges, incidents, and relics of slavery, it is necessary to prohibit assaults on the basis of real or perceived religions or national origins, at least to the extent such religions or national origins were regarded as races at the time of the adoption of the 13th, 14th, and 15th amendments to the Constitution of the United States.

8 Neither party argues that  § 249(a)(1) was authorized by the Fourteenth Amendment, the Commerce Clause, or any other constitutional provision. Any such argument is therefore forfeited. See  *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994).

2023 WL 4887318

Only the Westlaw citation is currently available.

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Ole HOUGEN, Defendant-Appellant.

No. 21-10369

|

Argued and Submitted March 28,

2023 San Francisco, California

|

FILED AUGUST 1, 2023

Appeal from the United States District Court for the Northern District of California, [Edward J. Davila](#), District Judge, Presiding, D.C. No. 5:20-cr-00432-EJD-1

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Before: [GOULD](#) and [IKUTA](#), Circuit Judges, and [KORMAN](#),* District Judge. Dissent by Judge [IKUTA](#).

MEMORANDUM**

*1 Hougen appeals his 2021 conviction on one count of attempt to commit racially motivated violence, in violation of [18 U.S.C. § 249\(a\)\(1\)](#). We have jurisdiction under [28 U.S.C. § 1291](#), and we affirm.¹

1. Hougen contends that his conviction should be overturned because the admission into evidence of certain statements that he made to Santa Cruz police officers, and testimony and argument referring to the same, violated his Fifth Amendment right to silence. In these statements, Hougen made several

racist and belligerent comments before he said he did not want to talk to the officers and asked for a lawyer.

We disagree that reversal is required. “[R]egardless whether the *Miranda* warnings [are] actually given, comment on the defendant’s exercise of his right to remain silent [is] unconstitutional.” [United States v. Bushyhead](#), 270 F.3d 905, 912 (9th Cir. 2001) (citing [United States v. Whitehead](#), 200 F.3d 634, 638 (9th Cir. 2000) (alterations in original)). Any such error “requires reversal unless the prosecution demonstrates, beyond a reasonable doubt, that the error was harmless.” [United States v. Caruto](#), 532 F.3d 822, 827 (9th Cir. 2008) (citation omitted). However, “when the defense does not object to the prosecutor’s conduct during trial, we review for plain error,” even where, as here, the defendant raised the challenge post-trial. [United States v. Atcheson](#), 94 F.3d 1237, 1244 (9th Cir. 1996), *as amended on denial of reh’g* (Oct. 3, 1996).

Hougen did not object, before or during trial, to the admission of his statements, nor to testimony or argument referring to the same (apart from one piece of testimony discussed separately below). Reviewing these unpreserved challenges for plain error, *see id.*, we decline to reverse Hougen’s conviction. Hougen must show that the error affected his substantial rights—in other words, that it “affected the outcome of the district court proceedings.” [United States v. Olano](#), 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Hougen has not done so. “When deciding whether a prosecutor’s reference to a defendant’s post-arrest silence was prejudicial, we consider the extent of comments made by the witness, whether an inference of guilt from silence was stressed to the jury, and the extent of other evidence suggesting defendant’s guilt.” [United States v. Lopez](#), 500 F.3d 840, 845 (9th Cir. 2007) (citation omitted). The prosecution did not ask the jury to infer Hougen’s guilt from any invocation of his right to silence or failure to make a statement to police. Instead, the prosecution stressed Hougen’s hostile and racist language to police, as well as evidence of Hougen’s racist and aggressive demeanor on the day in question. The prejudice from any implied reference to Hougen’s silence was minimal.

Likewise, Hougen’s sole preserved challenge—to testimony from a law enforcement officer referring to Hougen’s failure to give a statement as a reason that the officer concluded that Hougen was the aggressor—does not entitle Hougen to relief

because it was harmless beyond a reasonable doubt. The trial court immediately gave a curative instruction reminding the jury about Hougen's right to silence, the prosecution did not rely on this stray comment in closing, and the other evidence of Hougen's guilt was overwhelming. See [Lopez](#), 500 F.3d at 845. Reversal is not warranted.

*2 2. Hougen next contends that the district court erroneously admitted evidence and testimony regarding three prior incidents in which Hougen assaulted Black men while using racist language. Reviewing for abuse of discretion, [United States v. Flores-Blanco](#), 623 F.3d 912, 919 (9th Cir. 2010), we affirm.

Rule 404(b) prohibits the introduction of evidence of “other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity therewith,” but permits such evidence to be introduced for other purposes, including “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Fed. R. Evid. 404(b). Even if the evidence is admissible under Rule 404(b), it “may still be excluded” under Federal Rule of Evidence 403 if “its probative value is substantially outweighed by the danger of unfair prejudice.” [Flores-Blanco](#), 623 F.3d at 919 (citation omitted).

Here, the other acts evidence was offered and admitted for the purpose of showing that Hougen's motive in assaulting the victim in this case (“S.B.”) was because S.B. is Black. Hougen's motive was relevant to Hougen's prosecution under [18 U.S.C. § 249\(a\)\(1\)](#). The district court did not abuse its “wide discretion” in concluding that this evidence made it more likely than Hougen was motivated to commit violence against Black men, and did so against S.B., because of race. *Id.*; c.f. [United States v. Curtin](#), 489 F.3d 935, 951 n.5 (9th Cir. 2007) (en banc). It likewise did not abuse its discretion in refusing to exclude the evidence under Rule 403. Any prejudice to Hougen was inherent in the prior incidents' relevance to Hougen's motive and not unfair under Rule 403. That is not the kind of unfair prejudice requiring exclusion under Rule 403. See [United States v. Cruz-Garcia](#), 344 F.3d 951, 956 (9th Cir. 2003).

3. Hougen next asserts that the district court abused its discretion in precluding evidence that S.B. assaulted another person and misled the police about it nine months after the incident with Hougen.

Hougen argues that the evidence of S.B.'s assault on a third party is admissible because it corroborates Hougen's self-defense theory that S.B. was the initial aggressor. We disagree. Evidence of a victim's violent acts is admissible to support a self-defense theory only if it tends to show the defendant's “state of mind—specifically, to show that [the defendant] had good reason to fear [the victim].” [United States v. Garcia](#), 729 F.3d 1171, 1178 (9th Cir. 2013). Where, as here, the defendant did not know of the violent acts by the victim, which post-dated the crime, then the violent acts “could not have affected the defendant's state of mind” and therefore are not relevant. *Id.* at 1178–79 (citing [United States v. Keiser](#), 57 F.3d 847, 853 (9th Cir. 1995)).

Hougen also contends that this evidence demonstrates bias on Hougen's part and investigative failure. However, the second incident took place in very different circumstances and well after the one with Hougen. If S.B. improperly assaulted a different person in this other incident, that had minimal relevance to what happened six months before that between S.B. and Hougen. It was not an abuse of discretion for the district court to conclude that the risk that this evidence would confuse the real issues at trial substantially outweighed its limited relevance under Rule 403. See [United States v. Espinoza-Baza](#), 647 F.3d 1182, 1190 (9th Cir. 2011).

*3 4. Finally, Hougen argues that reversal is warranted because of cumulative error. “In some cases, although no single trial error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant.” [United States v. Frederick](#), 78 F.3d 1370, 1381 (9th Cir. 1996). We conclude such prejudice is absent here. The evidence of Hougen's guilt was heavy and not undermined by any isolated errors that may have occurred in his trial.

AFFIRMED.

IKUTA, Circuit Judge, dissenting:

I dissent for the reasons set forth in my dissent to the published opinion filed concurrently with this memorandum disposition. See [United States v. Hougen](#), No. 21-10369, — F.4th —, 2023 WL 4875895 (9th Cir. 2023).

All Citations

Not Reported in Fed. Rptr., 2023 WL 4887318

Footnotes

- * The Honorable Edward R. Korman, United States District Judge for the Eastern District of New York, sitting by designation.
- ** This disposition is not appropriate for publication and is not precedent except as provided by [Ninth Circuit Rule 36-3](#).
- 1 We set forth the factual background of Hougen's appeal in the opinion filed contemporaneously with this memorandum disposition and do not repeat it here.

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2021 WL 5630680

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United States District Court, N.D. California,
San Jose Division.

UNITED STATES of America, Plaintiff,

v.

Ole HOUGEN, Defendant.

Case No. 20-cr-00432-EJD-1

|

Signed 12/01/2021

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**ORDER DENYING MOTION FOR A NEW TRIAL
OR TO DISMISS FOR LACK OF JURISDICTION**

Re: Dkt. No. 205

EDWARD J. DAVILA, United States District Judge

*1 Before the Court is Defendant Ole Hougen's ("Hougen") post-trial motion for acquittal and a new trial, pursuant to [Federal Rules of Criminal Procedure 29](#) and [33](#) respectively, or to dismiss the indictment for lack of jurisdiction. Def.'s Mot. for New Trial [or] to Dismiss for Lack of Jurisdiction ("Mot."), Dkt. No. 205. The Government filed an opposition, Dkt. No. 206 ("Opp'n"), and Hougen filed a reply, Dkt. No. 207 ("Reply"). Having considered the parties' papers, the record in this case, and the relevant legal authority, the Court **DENIES** Hougen's motion for the reasons stated below.

I. BACKGROUND

On July 5, 2020, Hougen was arrested in Santa Cruz, California, after an altercation with S.B., a black man. Mot. at 1. This led to a federal grand jury indictment charging Hougen with committing a hate crime against S.B., in violation of

 [18 U.S.C. § 249\(a\)\(1\)](#), for a "racially-motivated knife attack." Indictment, Dkt. No. 13; Opp'n at 1.

Pretrial, the Court ruled it would "admit evidence of three prior incidents of Hougen's racially-motivated violence and the resulting convictions as relevant to Hougen's motive" for the attack at issue in this case. Opp'n at 1 (citing March 22, 2021 Minute Entry, Dkt. No. 118, at 3). The parties later stipulated to the convictions resulting from the three prior incidents. Amended Stipulation and Order re: Prior Convictions, Dkt. No. 156.

A six-day jury trial followed. April 2, 2021 Minute Entry, Dkt. No. 150. At trial, the Government presented testimony from ten witnesses, recordings of 911 calls, as well as other evidence. There were three eyewitnesses to the attack, Wendy Campbell ("Campbell"), Carlos Nunez ("Nunez"), and Casey Steen ("Steen"). Each of the eyewitnesses testified that Hougen was the aggressor and that S.B. was not holding any type of weapon. Over a hearsay objection, Campbell, testified that S.B. told her Hougen used the n-word during the November 17th attack. Mot. at 2 (citing Trial Tr., Dkt. No. 195 at 401:14-15). Steen heard a white man yell that S.B. was a "nigger."

The Government also offered testimony from FBI Special Agent Elizabeth Green, who interviewed Hougen while she and her partner transported him to custody. Opp'n at 4. Hougen told her he initiated the encounter with S.B. and that he had used racial slurs. *Id.* The Government also offered testimony from two police officers who responded to the scene of the attack: Officer Joshua Garcia and Officer Becerra. S.B. identified Hougen as the man who attacked him with a knife after S.B. refused to sell Hougen marijuana ("weed"). *Id.* at 5 (citing Tr. at 429, 444). S.B. also had a knife, but he told Officer Garcia he had not used it during the altercation. *Id.* (citing Tr. at 480, 484). As Officer Garcia completed arrest paperwork, Hougen called him "bean dip," "spico," and "Mexico." *Id.* at 5. Officer Garcia attempted to read Hougen his *Miranda* rights, but Hougen interjected "Garcia, you're a colored person and I'm a white person. This is racist. I don't understand it from you at all." Gov. Ex. 8.

*2 Officer Becerra testified that at the time of arrest, Hougen volunteered, "I can tell you right now, nothing happened." Opp'n at 5 (citing Tr. at 509). Officer Becerra did not hear Hougen make any claims of self-defense until he was told he was being arrested and was being placed into a patrol car. *Id.* at 5-6 (citing Tr. at 509-10). Four additional witnesses

testified about three prior incidents involving Hougen. Mot. at 2, 9. In each instance, Hougen threatened or attacked Black men while using racial slurs. Opp'n at 6-7.

During the defense case, Hougen sought to introduce evidence that on March 23, 2021, S.B. had allegedly assaulted a man identified as Darren Barthel ("Barthel"). Mot. at 2-3. The Court excluded evidence of S.B.'s arrest for felony assault with a deadly weapon (and other crimes), but permitted Barthel to testify as to S.B.'s reputation "for aggression in the community." *Id.* at 3, n. 1. The defense also called two officers to testify: Sergeant David Forbus, who interviewed S.B., and Officer Dylan Dewees, who interviewed Steen. On April 9, 2021, the jury returned a guilty verdict. April 9, 2021 Minute Entry, Dkt. No. 170.

Hougen now seeks acquittal and a new trial, or dismissal for lack of jurisdiction. *See* Mot. at 4-25. Hougen asserts the Court should grant him a new trial because (1) there was insufficient evidence to convict him, (2) prejudicial evidence was improperly admitted, (3) relevant evidence was improperly excluded, and (4) the Government "impermissibly relied" on his invocation of his Fourth Amendment right to remain silent. *Id.* at 4-19. In the alternative, Hougen argues the Court should dismiss the indictment for lack of jurisdiction because the provision of the statute under which Hougen was convicted was an unconstitutional exercise of Congress' power under the Thirteenth Amendment. *Id.* at 19-25. The Government opposes the motions, arguing that the evidentiary rulings were correct, that there was sufficient evidence to support the conviction, and that the jurisdictional argument is without merit.

Sentencing is set for December 2, 2021. Clerk's Notice Continuing Hr'g, Dkt. No. 217.

II. LEGAL STANDARDS

A. Motion for Acquittal

Federal Rule of Civil Procedure 29 provides that "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." **Fed. R. Crim. P. 29(a)**. "In determining whether evidence was insufficient to sustain a conviction, we consider whether, 'after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *United States v. Gagarin*, 950 F.3d

596, 602 (9th Cir. 2020) (quoting *United States v. Nevils*, 598 F.3d 1158, 1163-64 (9th Cir. 2010) (*en banc*)). When evaluating the sufficiency of the evidence, "it is not the district court's function to determine witness credibility when ruling."

United States v. Alarcon-Simi, 300 F.3d 1172, 1176 (9th Cir. 2002).

B. Motion for a New Trial

Federal Rule of Criminal Procedure 33 provides that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." **Fed. R. Crim. P. 33(a)**. The defendant has the burden of justifying a new trial. *United States v. Endicott*, 869 F.2d 452, 454 (9th Cir. 1989). Although this burden is not as demanding as the one for a motion for acquittal, motions for a new trial are generally disfavored and should only be granted in exceptional cases. *See United States v. Del Toro-Barboza*, 673 F.3d 1136, 1153 (9th Cir. 2012). "A motion for new trial is directed to the discretion of the judge." *United States v. Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981). When considering a motion for a new trial, the court is not obliged to view the evidence in the light most favorable to the verdict, and it is free to weigh the evidence and evaluate for itself the credibility of the witnesses." *United States v. Kellington*, 217 F.3d 1084, 1097 (9th Cir. 2000) (citation omitted). "If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury." *United States v. Alston*, 974 F.2d 1206, 1211-12 (9th Cir. 1992) (quoting *United States v. Lincoln*, 630 F.2d 1313, 1319 (8th Cir. 1980)).

III. DISCUSSION

A. Motion for Acquittal and a New Trial

***3** To convict Hougen of committing a hate crime, the Government had to prove, beyond a reasonable doubt, that "[t]he defendant willfully caused bodily injury and attempted to cause bodily injury using ... a dangerous weapon" and "acted because of the actual or perceived race or color of" the victim. **18 U.S.C. § 249(a)(1)**. The Government also had to prove, beyond a reasonable doubt, that Hougen did not act in self-defense. Final Jury Instrs. ("Jury Instrs."), Dkt. No.

167, at 21. Force likely to cause death or great bodily harm is justified in self-defense only if a person reasonably believes that such force is necessary to prevent death or great bodily harm. *See id.* at 17-21.

Hougen raises four grounds for a new trial: (1) the Government presented insufficient evidence regarding the beginning of the attack, (2) evidence of Hougen's prior acts was overly prejudicial, cumulative, and confusing, and likely considered as evidence of guilt for the charged crime by the jury, (3) the Government allegedly impermissibly relied on Hougen's invocation of his right to remain silent, and (4) evidence of the March 23rd incident should have been admitted. Mot. at 5-19. Hougen also argues that the cumulative impact of the allegedly insufficient evidence and other errors deprived him of a fair trial.

1. Lack of Evidence Regarding Initial Phase of the Alleged Attack

Hougen claims the Government failed to present evidence regarding the initial phase of the alleged attack, and therefore there was insufficient evidence to prove (1) that he did not act in reasonable self-defense, and (2) that he attacked S.B. because S.B. was Black or African American. He reasons that in the absence of evidence regarding the initial phase of the attack, the jury likely rendered its verdict based on improper speculation regarding his mental state. The arguments are unpersuasive.

Although none of the witnesses saw how the attack began, the record includes ample evidence from which the jury could infer that Hougen did not act in self-defense. All three witnesses to the attack saw Hougen as the “aggressor” and S.B., unarmed, and backing away and “defending himself” against Hougen's attack. Tr. at 404, 491-92, 630, 634. Campbell saw Hougen not only shouting at S.B., but slashing and stabbing S.B. with a knife (going for S.B.'s head and chest) “approximately 10-20 times, coming within inches of striking him.” *Id.*; Tr. at 392:17-395:14, 404:8-20, 409:22-411:4. Nunez also testified he saw Hougen, the “aggressor,” attacking S.B., “swip[ing] and slash[ing] at S.B.'s midsection with a knife multiple times, trying to stab S.B., while S.B. was in a defensive posture with his hands up, trying to de-escalate the encounter and get across the street.” Tr. at 626-31, 634. Nunez said S.B. repeatedly tried to get away, but every time, Hougen stepped in S.B.'s way, continuing the attack. *Id.* at 636. Steen said the white man was the “aggressor,” and

S.B. tried to “defend himself,” though he was unarmed. Tr. at 491-92.

Hougen reported to law enforcement that he had acted in self-defense. Hougen told the police S.B. held his own knife during the attack (after it fell out of its sheath). Tr. at 469:7-15, 509:11-12, 519:6-7. However, none of the witnesses saw S.B. holding a knife. Even if S.B. had held a knife at some point during the attack, it does not follow that the Government failed to prove Hougen did not act in self-defense. As the Government points out, “[t]he mere fact that S.B. possessed a knife, without any indication that he used it against Hougen,” does not tend to show Hougen had a reasonable belief that he was in mortal peril. Opp'n at 9. Moreover, given the consistent testimony of the three eyewitnesses summarized above, the jury could readily find that Hougen did not reasonably believe the force he used was necessary to prevent death or great bodily harm.

*4 There was also overwhelming evidence that Hougen attacked S.B. because of S.B.'s race. When describing how the attack started, both S.B. and Hougen told the police said that after S.B. refused (with an expletive) to sell Hougen weed and walked away, Hougen followed S.B. and directed several racist slurs and expletives at him. Tr. at 652-56. Thus, although S.B.'s refusal to sell Hougen weed may have been the initial reason for the confrontation, Hougen's response was racially motivated. The attack ensued and Hougen continued making racist slurs. Steen heard a white man yell, calling S.B. a “nigger” at least five or ten times while swinging at S.B.'s chest and head “with an unknown object.” Tr. at 489-90. S.B. told Campbell that Hougen had called him a “fucking nigger” and was “trying to kill him.” *Id.* at 403. During his arrest, Hougen also directed racist language and slurs at Officer Joshua Garcia and Officer Becerra. Opp'n at 5-6 (citing Tr. at 346, 348, 439-41, 514-18).

Hougen attempts to minimize the significance of his repeated racist slurs, arguing that he uses the n-word as a universal insult meaning an “ignorant person.” Tr. at 655-56. The jury, however, was not required to accept this explanation. “[I]t is the jury's exclusive function to determine the credibility of witnesses, resolve evidentiary conflict and draw reasonable inferences from proven facts.” *United States v. Bernhardt*, 840 F.2d 1441,1448 (9th Cir. 1988) (citation omitted). Circumstantial evidence and reasonable inferences drawn from that evidence alone are sufficient to sustain a conviction.

See  *United States v. Reyes-Alvarado*, 963 F.2d 1184, 1188 (9th Cir. 1992); *see also United States v. Nelson*, 419 F.2d

1237, 1239 (9th Cir. 1969). A “reasonable” inference is one that is “supported by a chain of logic, rather than ... mere speculation.” *United States v. Navarrette-Aguilar*, 813 F.3d 785, 793 (9th Cir. 2015). Hougen's language is strong circumstantial evidence that Hougen attacked S.B. because S.B. was Black or African American.

Hougen cites several cases where courts have granted or upheld the granting of new trial motions when the Government “failed to present sufficient evidence of the defendant's mental state or intent to meet this high standard, requiring the jury to speculate regarding this element.” Mot.

at 7. For example, in *United States v. Kellington*, the Ninth Circuit affirmed the trial court's grant of a new trial where there was no direct evidence of the defendant's intent.

United States v. Kellington, 217 F.3d 1084, 1099 (9th Cir. 2000) (“[B]ecause there was no direct evidence of Kellington's mental state, the government asked the jury to infer from the overall circumstances that Kellington must have known MacFarlane was asking him to assist in the destruction and concealment of objects useful to an ‘official proceeding.’”).¹ Unlike the cases Hougen cites, there is substantial evidence upon which a rational trier of fact could find beyond a reasonable doubt that Hougen had the requisite intent without resorting to any speculation. As discussed above, three witnesses testified that Hougen was the aggressor, attacking an unarmed S.B. with a knife while S.B. backed away and tried to fend off Hougen's attack. Hougen made repeated racial slurs during the attack. Hougen's statements to the arresting officers, including the racist slurs, are also circumstantial evidence that he acted willfully, motivated by race, and not in self-defense. This is not “an exceptional case in which the evidence preponderates heavily against the verdict.” *United States v. Toro-Barboza*, 673 F.3d 1136, 1153 (9th Cir. 2012). The evidence presented at trial was sufficient to establish the essential elements of the crime beyond a reasonable doubt.

2. Evidence of Hougen's Prior Acts

*5 Hougen also argues the Government wrongfully introduced and relied on prejudicial, cumulative, and confusing testimony about his three prior acts of racial violence (which occurred over seven years) to make up for the “limited direct evidence” of the attack at issue here. Mot. at 9-10. He argues that in doing so, the Government made the

jury see the prior bad acts as evidence of his guilt (“spillover prejudice”). *Id.*

The Court already considered Hougen's argument during pretrial litigation and rejected it. In brief, under *Federal Rule of Evidence* 404(b), evidence of another crime, wrong, or act is admissible if it is “relevant to an issue in the case other than [the] defendant's criminal propensity.” *United States v. Meling*, 47 F.3d 1546, 1557 (9th Cir. 1995) (quoting *United States v. Green*, 648 F.2d 587, 592 (9th Cir. 1981)). “Unless the evidence of other acts only tends to prove propensity, it is admissible.” *United States v. Becerra*, 2000 U.S. App. LEXIS 8420 at *5, 216 F.3d 1084, 2000 WL 486268, at *2 (9th Cir. Apr. 25, 2000) (citing *United States v. Ayers*, 924 F.2d 1468, 1473 (9th Cir. 1991)).

Here, the Government presented evidence of the three prior acts to prove an essential element of the offense: that his attack on S.B. was motivated by race. Each of the witnesses testified that in the three prior attacks, an unprovoked and irate Hougen threatened or attacked Black men while yelling racial slurs (and in two of the three incidents, death threats) at them. Tr. at 355-66, 374-75, 688-99, 761-64. Similarly, in the attack at issue here, an unprovoked Hougen attacked an unarmed S.B. and hurled racial (and other) slurs at S.B. before and during the attack. “Evidence of past racial animosity is relevant to establish” someone acted because of the victims’ “race, color, religion[,] or national origin,” and therefore had a discriminatory motive. *United States v. Woodlee*, 136 F.3d 1399, 1410 (10th Cir. 1998). Therefore, “evidence of a previous racially motivated act is admissible under Rule 404(b) in the case of a criminal defendant charged with a racially motivated crime.” *Burke v. City of Santa Monica*, 2011 U.S. Dist. LEXIS 165475 at *49, 2011 WL 13213593, at *17 (C.D. Cal. Jan. 10, 2011) (citing *Woodlee*, 136 F.3d at 1410); see *United States v. Curtin*, 489 F.3d 935, 951 n.5 (9th Cir. 2007). The prior attacks were also relevant to disprove Hougen's claim that his use of the word “nigger” in this case had no racial meaning.

The Court also rejected Hougen's objection to the evidence of prior attacks under *Federal Rule of Evidence* 403. The prior attacks are highly probative of his motive and intent. *United States v. McInnis*, 976 F.2d 1226, 1231-32 (9th Cir. 1992) (affirming admission, pursuant to *Rule* 403, of a “poster with [a] swastika and the words ‘Niggers Get Out!’

Go Back to Your Slums!’ ” and other items imprinted with swastikas, including a flashlight that also bore the defendant’s nickname). The potential unfair prejudice of the prior acts was substantially mitigated by the Court’s limiting instructions to the jury to only consider the evidence as to Hougen’s motive and intent, not for any other purpose. Jury Instr. Nos. 6, 12. The Court also instructed the jury that it may not consider the prior attacks as evidence of guilt of the crime for which the defendant is now on trial.

The three prior acts were properly admitted.

3. Hougen’s Invocation of His Right to Remain Silent

*6 Hougen next argues that the Government improperly used Hougen’s “post-*Miranda* silence against him in court,” in violation of his Fifth Amendment right to remain silent. Mot. at 11-12 (citing Tr. at 513-16, 612-13; and  *Doyle v. Ohio*, 426 U.S. 610, 619-20, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)). The record indicates otherwise. The Government never referenced Hougen’s invocation of his right to remain silent. Instead, the Government permissibly relied on statements Hougen voluntarily made to officers on the scene of the crime and at the jail, all of which were made before Hougen asked to speak with a lawyer.

Hougen cites to the following exchange with Officer Garcia as evidence that he invoked his right to remain silence:

GARCIA: You have the right to remain silent....

HOUGEN (2:10:04): You don’t know about real rights. You’re a liar. You’re a racist.

...

GARCIA: Do you wish to speak with me?

HOUGEN: I don’t wanna speak to you.

Gov. Ex. 8. Second, Hougen cites on the following exchange with Officer Bailey:

BAILEY: Ole, ... I’m gonna read you your Miranda rights, alright?

HOUGEN: I don’t wanna hear it.... Go away. I don’t wanna hear it man.

...

BAILEY: Alright Ole, you have the right to remain silent, anything you say can and will be used against you in court. [overlapping]

HOUGEN: I don’t wanna hear it. Just go away. I don’t give a f***. It doesn’t matter if you say it or not. I don’t wanna hear it. Go away. Go the f*** away.

...

BAILEY: You have the right to talk to an attorney.

HOUGEN: I have the right to tell you to shut up. Get away from me. ... Go away. Let me talk to my lawyer.

Gov. Ex. 9. The statements relied upon by the Government, however, preceded Hougen’s request to talk to a lawyer. The Government elicited testimony that Hougen called S.B. a “nigger” and used racial slurs against Officer Garcia. When Hougen did express his desire to talk to a lawyer, the Officer stopped reciting the *Miranda* rights to Hougen and walked away. Tr. at 516.

Third, Hougen argues that the Government impermissibly relied on testimony from Officer Becerra that Hougen “was given an opportunity to make a statement when he was provided his *Miranda* warning and elected not to provide a statement.” Tr. at 612-13. This testimony, however, was elicited by defense counsel. On cross examination, counsel questioned Officer Becerra about whether Hougen’s self-defense claim would have prompted a further interview. *Id.* Officer Becerra responded:

A. An interview would have been conducted regardless. He would have been given an opportunity to have a statement documented so, you know, the statement that he made in that video I think is relevant to the statement he made later when he was being placed in the back of a police car that he was defending himself. So I guess the answer is that he was given an opportunity to make a statement when he was provided his *Miranda* warning and elected not to provide a statement.

Id. Contrary to Hougen's assertion, the Government did not use this testimony to argue that Hougen had an opportunity to exculpate himself and chose not to do so. The Government did not cite to the testimony in its closing argument.

Fourth, Hougen contends that the Government impermissibly relied on the following excerpts of Officer Becerra's testimony:

Q: And when the officers first arrived on scene and talked to him, did he say he had been attacked and acted in self-defense?

A. No. He just said nothing at all happened.

Tr. at 510. However, Hougen volunteered the response that "nothing happened."

Hougen also faults the Government for telling the jury during rebuttal closing to consider all of Hougen's statements admitted into evidence and determine whether any of those statements showed Hougen reasonably believed he was in danger during the altercation with S.B. However, the Government was not commenting on Hougen's silence, but rather on Hougen's voluntary statements and the lack of evidence to support a self-defense theory. This was permissible.  *U.S. v. Castillo*, 866 F.2d 1071, 1083 (9th Cir. 1988) ("a prosecutor may properly comment upon a defendant's failure to present witnesses so long as it is not phrased to call attention to defendant's own failure to testify."). "A comment on the failure of the defense as opposed to the defendant to counter or explain the testimony presented or evidence introduced is not an infringement of the defendant's Fifth Amendment privilege."  *Id.* (quoting  *United States v. Dearden*, 546 F.2d 622, 625 (5th Cir.), cert. denied, 434 U.S. 902, 98 S.Ct. 295, 54 L.Ed.2d 188 (1977)).

*7 The Government did not use Hougen's silence against him or violate his Fifth Amendment rights.

4. Exclusion of Evidence of S.B.'s Prior Alleged Attack

Finally, Hougen contends that pursuant to [Federal Rule of Evidence 404\(b\)](#), he should have been allowed to present evidence of the March 23rd incident in which S.B. allegedly beat Barthel. Mot. at 16-19. Hougen argues that this evidence

would have corroborated his assertion that he acted in self-defense. *Id.* at 16-17. The evidence was properly excluded.

[Rule 404\(b\)\(2\)](#) authorizes admission of other acts evidence only when it is used for a permissible purpose, such as proving motive, knowledge, intent, or plan, and where it is offered to prove a material issue before the jury.  *United States v. Romero*, 282 F.3d 683, 688 (9th Cir. 2002);  *United States v. Ayers*, 924 F.2d 1468, 1473 (9th Cir. 1991). The March 23rd incident occurred nine months after the attack at issue, and therefore does not show S.B.'s alleged motive, intent, or plan to attack Hougen months earlier. Nor is the March 23rd incident admissible evidence of "modus operandi" under [Rule 404\(b\)](#). Modus operandi evidence is typically used to explain repeated or complex patterns of criminal activity.  *United States v. Gil*, 58 F.3d 1414, 1422 (9th Cir. 1995) (permitting testimony about techniques used by large-scale narcotics traffickers, such as counter-surveillance, using vehicles registered in different names, and communicating via pay phones). Evidence that S.B. was involved in an unrelated assault months after the events at issue is not evidence of a complex or repeated criminal enterprise.

The one case relied upon by Hougen,  *Celaya v. Stewart*, 691 F. Supp. 2d 1046, 1058 (D. Az. 2010), is distinguishable.

In  *Celaya*, the defendant testified she shot the victim in self-defense, after the victim drove her to the desert and tried to rape her. The  *Celaya* court found that the trial judge impermissibly excluded witnesses who would have testified that the victim had a pattern of driving prostitutes to the desert and sexually assaulting them.  *Id.* at 1057-58. The  *Celaya* court reasoned that the government had "opened the door to such evidence" by arguing that the victim was a family man, and further that the evidence was admissible under [Rule 404\(b\)](#) to prove the victim had a design, plan, and intent to sexually assault the defendant.  *Id.* at 1081. Unlike in  *Celaya*, the Government did not open the door to the March 23rd incident, and as already discussed above, evidence of that incident does not show S.B.'s intent or plan to attack Hougen months earlier.

Additionally, evidence of the March 23rd incident was properly excluded under [Federal Rule of Evidence 403](#). The March 23rd incident had minimal probative value. It occurred well after the attack at issue and involved different parties

and different circumstances. Moreover, evidence of the March 23rd incident is character evidence, which pursuant to [Federal Rule of Evidence 404\(b\)](#), cannot be used to show S.B.'s propensity for violence. The minimal probative value of the incident was substantially outweighed by the risk of unfair prejudice and confusion of the issues.

*8 In sum, there was sufficient evidence to support Hougen's conviction and although Hougen argues otherwise, no errors occurred. Hougen's motion for acquittal and a new trial is DENIED.

B. Motion to Dismiss Indictment for Lack of Jurisdiction

Hougen alternatively moves to dismiss the indictment for lack of jurisdiction. Mot. at 19-25. Hougen claims Congress exceeded its authority in enacting the Shepard-Byrd Hate Crime Prevention Act ("Shepard-Byrd Act") under which Hougen was convicted. *Id.* He argues that Congress' authority under the Thirteenth Amendment to eliminate badges and incidents of slavery did not include the power to criminalize isolated, local incidents of racially motivated violence. *Id.* Hougen argues there needs to be "carefully tailored legislation" rather than the law as it exists now, which is unconstitutional, makes local private action a "federal assault crime" even though there is no indication that private action will return people to the conditions of slavery, and "effectively displace[s] California's exercise of its police power." *Id.* at 20-21, 23 (citing [Jones v. Alfred H. Mayer Co.](#), 392 U.S. 409, 440, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968); [City of Boerne v. Flores](#), 521 U.S. 507, 529, 117

S.Ct. 2157, 138 L.Ed.2d 624 (1997); and *Shelby County, Ala. v. Holder*, 570 U.S. 528 (2013)); Reply at 12-13.

Hougen's argument is unpersuasive. Congress has the power under the Thirteenth Amendment to pass all laws necessary to abolish the badges and incidents of slavery when it upheld the constitutionality of another federal hate crime statute.

[United States v. Allen](#), 341 F.3d 870, 884 (9th Cir. 2003). Additionally, as the Government points out, several other courts have rejected the very argument Hougen now raises. Specifically, courts have concluded that the Shepard-Byrd Act is a constitutional exercise of Congress' authority under the Thirteenth Amendment to determine what is a "badge" and "incident" of slavery. See *United States v. Metcalf*, 881 F.3d 641, 645 (8th Cir. 2018); [United States v. Cannon](#), 750 F.3d 492, 494-95 (5th Cir. 2014); [United States v. Hatch](#), 722 F.3d 1193, 1195 (10th Cir. 2013); *United States v. Henery*, 60 F. Supp. 3d 1126, 1132 (D. Idaho 2014); *United States v. Diggins*, 435 F. Supp. 3d 268, 273 (D. Me. 2019). This Court also rejects Hougen's argument.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** Hougen's motion.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2021 WL 5630680

Footnotes

- 1 See also [Juan H. v. Allen](#), 408 F.3d 1262, 1277 (9th Cir. 2005) (reversed and remanded where the "record contain[ed] manifestly insufficient evidence ... that Juan H. knew that Merendon planned to commit the first-degree murders ... and ... acted in a way intended to encourage or facilitate these killings"); *United States v. Henderson*, 318 F. Supp. 3d 1221, 1243 (E.D. Wash. 2018) (finding insufficient evidence to prove the defendant willfully "made a false statement in order to obtain funds ... to which he was not entitled"); [United States v. Lorenzo](#), 534 F.3d 153, 161-62 (2d Cir. 2008) (finding government provided "sparse" evidence to prove the requisite mental state as, "in the aggregate," the evidence presented "support[ed] at most an inference that [the defendant] knew that she was assisting suspicious behavior; [and was] also [] consistent with [her] providing hospitality to her nephew's girlfriend and regretting providing such assistance"); [United States v. McIntosh](#), 2014 U.S. Dist. LEXIS 6413 at *9, 2014 WL 199515 at *3 (S.D.N.Y. Jan. 17, 2014) (finding

government failed to provide “sufficient evidence for a reasonable juror to conclude beyond a reasonable doubt that defendant [] intended to” commit robbery when he assaulted Biggs, as it was “at least as likely [the defendant] assaulted Biggs because Biggs repeatedly put his mouth on the communal liquor bottle after [the defendant] told him not to, as it was that defendant intended to rob Biggs or his colleagues”).

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529 F.Supp.3d 1072
United States District Court, N.D. California,
San Jose Division.

USA, Plaintiff,
v.
Ole HOUGEN, Defendant.

Case No. 5:20-cr-00432-EJD-1

|
Signed 03/30/2021

Synopsis

Background: Defendant who was indicted for committing a federal hate crime filed motion to suppress witness statements and related evidence, or alternatively, to dismiss indictment.

Holdings: The District Court, [Edward J. Davila, J.](#), held that:

[1] law enforcement's misconduct in investigating defendant did not warrant dismissal of indictment on due process grounds;

[2] police officer's questions to witness about race did not support dismissal on supervisory authority grounds;

[3] officer's questioning of witness while victim was present did not support dismissal;

[4] communication between officers regarding their understanding of altercation between defendant and victim did not support dismissal;

[5] officer's leading questioning of and affirming responses to victim did not support dismissal;

[6] phone call between Federal Bureau of Investigation (FBI) agent and victim, in which agent hung up to avoid hearing about victim's criminal activity, did not support dismissal; and

[7] suppression of allegedly tainted portions of witness statements and evidence was not warranted.

Motions denied.

Procedural Posture(s): Pre-Trial Hearing Motion.

West Headnotes (13)

[1] **Constitutional Law** 🔑 Conduct of Police and Prosecutors in General

A district court may dismiss an indictment on the ground of outrageous government conduct if the conduct amounts to a due process violation. [U.S. Const. Amend. 5.](#)

[2] **Criminal Law** 🔑 Official Action, Inaction, Representation, Misconduct, or Bad Faith

A district court may use its supervisory powers to dismiss an indictment on the basis of outrageous government conduct even if the conduct does not rise to the level of a due process violation. [U.S. Const. Amend. 5.](#)

[3] **Federal Courts** 🔑 Supervisory powers

A district court's supervisory powers may be exercised for three reasons: to remedy a constitutional or statutory violation, to protect judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury, or to deter future illegal conduct.

[4] **Constitutional Law** 🔑 Conduct of Police and Prosecutors in General

Dismissal of an indictment on due process grounds applies only to conduct which is so grossly shocking and so outrageous as to violate the universal sense of justice. [U.S. Const. Amend. 5.](#)

[5] **Criminal Law** 🔑 Official Action, Inaction, Representation, Misconduct, or Bad Faith

To justify the extreme remedy of dismissal of an indictment on supervisory authority grounds, the government's conduct must have caused substantial prejudice to the defendant and been flagrant in its disregard for the limits of appropriate professional conduct.

[6] Criminal Law 🔑 Identity of Accused

Identification infected by improper police influence is not automatically excluded from trial; instead, the trial judge must screen evidence for reliability pretrial, and if there is a very substantial likelihood of irreparable misidentification, the judge must disallow presentation of the evidence at trial, but if indicia of reliability are strong enough to outweigh the corrupting effect of police-arranged suggestive circumstances, identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.

[7] Constitutional Law 🔑 Investigative activity in general

Constitutional Law 🔑 Third party's statements, confessions, and admissions

Criminal Law 🔑 Official Action, Inaction, Representation, Misconduct, or Bad Faith

Criminal Law 🔑 Intervention of Public Officers

Law enforcement's misconduct in investigating defendant, which consisted of asking leading and suggestive questions of witnesses and victim, questioning witness while victim was present, and ignoring issues with victim's credibility as a witness, did not warrant dismissal of defendant's federal hate crime indictment on due process grounds. U.S. Const. Amend. 5; 📄 18 U.S.C.A. § 249(a)(1).

[8] Criminal Law 🔑 Official Action, Inaction, Representation, Misconduct, or Bad Faith

Police officer's questions to witness about race while investigating an alleged federal hate crime did not support dismissal of defendant's indictment on supervisory authority grounds; officer asked witness, "you think this guy approached that guy just because of his race? Or was it a factor?", "but this guy brought up a whole bunch of racial stuff?", and "he say the N word? Hard R?" such questions were

not unreasonably suggestive given that witness had suggested that defendant and victim had exchanged verbal insults, and questions did not cause substantial prejudice since defendant retained ability to probe witness statements, and evidence derived therefrom, through cross-examination, attacks on witness credibility, and various defenses. 📄 18 U.S.C.A. § 249(a)(1).

[9] Criminal Law 🔑 Official Action, Inaction, Representation, Misconduct, or Bad Faith

Police officer's questioning of witness while victim was present did not support dismissal of defendant's federal hate crime indictment on supervisory authority grounds; officer's questioning did not constitute flagrant disregard for professional conduct, and, even if it did, the questioning did not cause substantial prejudice since alleged conferral between witness was minimal and involved how many times defendant attempted to stab victim, which was not particularly crucial to officer's investigation.

📄 18 U.S.C.A. § 249(a)(1).

[10] Criminal Law 🔑 Official Action, Inaction, Representation, Misconduct, or Bad Faith

Police officer's communication with other officers regarding their understanding of altercation between defendant and victim did not support dismissal of defendant's federal hate crime indictment on supervisory authority grounds; officer's statements that "as long as [victim] doesn't have a knife, we can corroborate the fact it's not self-defense" and "let's make sure we just clean that part up so that way there's no questions at all" did not rise to the level of flagrant disregard for professional conduct, and communication between officers did not cause substantial prejudice since defendant retained ability to probe witness statements, and evidence derived therefrom, through cross-examination, attacks on witness credibility, and various defenses. 📄 18 U.S.C.A. § 249(a)(1).

[11] Criminal Law 🔑 Official Action, Inaction, Representation, Misconduct, or Bad Faith

Police officer's leading questioning of and affirming responses to victim did not support dismissal of defendant's federal hate crime indictment; officer did not act with flagrant disregard for professional conduct by responding, "perfect," when victim stated that he did not reach for his knife during altercation with defendant because it had fallen to the ground or by asking victim, "so [defendant] never, in his experience, he, he never would assume that you were trying to stab him 'cause you put it away?"; and there was no substantial prejudice since defendant retained ability to probe witness statements, and evidence derived therefrom, through cross-examination, attacks on witness credibility, and various defenses. 📄 18 U.S.C.A. § 249(a)(1).

[12] Criminal Law 🔑 Official Action, Inaction, Representation, Misconduct, or Bad Faith

Phone call between Federal Bureau of Investigation (FBI) agent and victim, in which agent hung up when victim started to divulge information about involvement in criminal activity, did not support dismissal of defendant's federal hate crime indictment; agent's refusal to hear such information did not amount to flagrant disregard for professional conduct, victim texted agent with further information after phone call, and phone call did not cause substantial prejudice since defendant retained ability to cross-examine victim, attack his credibility, and make various defenses with regard to victim's testimony. 📄 18 U.S.C.A. § 249(a)(1).

[13] Constitutional Law 🔑 Investigative activity in general

Constitutional Law 🔑 Third party's statements, confessions, and admissions

Criminal Law 🔑 Equal protection and due process violations

Suppression of allegedly tainted portions of witness statements and evidence arising therefrom was not warranted in federal hate crime proceeding based on a substantial likelihood of irreparable misidentification; law enforcement's leading and suggestive questions to witnesses and victim, questioning of witness while victim was present, and ignoring issues with victim's credibility as a witness did not amount to violation of due process, and such conduct did not cause substantial prejudice since defendant retained ability to probe witness statements, and evidence derived therefrom, through cross-examination, attacks on witness credibility, and various defenses. *U.S. Const.*

Amend. 5; 📄 18 U.S.C.A. § 249(a)(1).

Attorneys and Law Firms

***1075** Marissa Harris, Assistant US Attorney, U.S. Attorney's Office, San Jose, CA, Michael Johnson Songer, Assistant US Attorney, U.S. Department of Justice, Washington, DC, for Plaintiff.

Severa Keith, Public Defender, Office of the Federal Public Defender San Jose Office, San Jose, CA, for Defendant.

**ORDER DENYING MOTION TO
SUPPRESS WITNESS STATEMENTS
OR DISMISS INDICTMENT**

Re: Dkt. No. 68

EDWARD J. DAVILA, United States District Judge

On November 17, 2020, Ole Hougen was indicted on one count of committing a hate crime in violation of 📄 18 U.S.C. Section 249(a)(1). Dkt. No. 13. On February 24, 2021, Hougen filed the current motion to suppress witness statements and related evidence, or, alternatively, to dismiss the indictment. Amended Motion to Dismiss [to Suppress Witness Statements or Dismiss Indictment, in Light of Fifth Amendment Due Process Violations Committed by Law Enforcement], Dkt. No. 68 ("Motion"). The Government filed an opposition, Dkt. No. 85 ("Opposition," "Opp'n") and

Hougen filed a reply, Dkt. No. 108 (“Reply”). For the reasons given below, the Court **DENIES** the motion.

I. Background

According to the Motion, on or about July 5, 2020, Hougen was involved in a physical and verbal altercation with S.B. at a public intersection in Santa Cruz, CA. *See* Motion at 1–8. This altercation gave rise to the hate crime charge now brought against Hougen. *See id.*

Santa Cruz Police Department (“SCPD”) officers arrived at the scene and conducted interviews with witnesses. *See id.* In the Motion, Hougen highlights three incidents that occurred as police officers carried out these interviews. *See id.* Hougen also highlights a separate incident when an FBI agent was having a phone conversation with one of the witnesses of Hougen's alleged hate crime. *See id.* These incidents are described further below.

Hougen argues that the cited conduct of the police officers violated his Fifth Amendment Due Process rights to a fair trial. *See id.* at 1. Specifically, Hougen argues that the SCPD engaged in “leading, biased, and improperly suggestive questioning ... of witnesses, including the alleged victim, giving rise to a substantial likelihood of tainted, false, and misleading testimony.” *Id.* at 1. Hougen argues that the Court should suppress certain “tainted” portions of the witness interviews, as well as any evidence obtained therefrom. *See id.* at 10–21.

Hougen argues in the alternative that the Court should use its inherent supervisory authority to dismiss the indictment because “the government's conduct ... caused substantial prejudice to the defendant and [was] flagrant in its disregard for the limits of appropriate professional conduct.” *See id.* at 21–24. In support of this argument, Hougen cites the conduct of the police officers, and also a separate incident in which an FBI agent, who was investigating the hate crime allegation, acted in a way that was “willfully blind” to a victim-witness's misconduct, raising the possibility that evidence regarding the victim-witness's credibility was effectively suppressed. *See id.*

*1076 A. First Highlighted Incident – C.S.’s

Interview

Hougen describes SCPD Officer Dewees's interview with C.S., who witnessed the altercation from a levee above the intersection. *See id.* at 2–3 (citing Exhibit A). During the

interview, C.S. stated that he “didn't hear much,” but that Hougen and S.B. “kept calling each other bitches.” *Id.* at 2. At the end of the interview, Officer Dewees asked whether C.S. had heard “anything like racially motivated.” *Id.* C.S. responded, “I just heard him say dumb nigger and fucking shit like shit like that. And he was like fuck you, dude. Like what'd I do to you? Like I didn't fucking do anything to you.” *Id.* Officer Dewees then asked, “You think this guy approached that guy just because ... of his race? Or was it a factor?” *Id.* C.S. responded, “Oh yeah ... yeah, or if he, may have just been in a bad mood and that ... he just threw that out there.” *Id.* at 2–3. Officer Dewees responded, “But this guy brought up a whole bunch of racial stuff? ... He say the N word? ... Hard R?” C.S. responded, “Uh, sounded like it. I couldn't hear very well.” *Id.*

Hougen argues that Officer Dewees's questioning of C.S. was biased, misleading, and improperly suggestive, with the result that C.S.'s statement became more focused on racial descriptions than it would have been otherwise. *Id.* at 14–15.

B. Second Highlighted Incident – W.C.’s Interview

Hougen describes Officer Garcia's interview with W.C. *Id.* at 3. S.B. was present during at least part of this interview. *See id.* Officer Garcia asked W.C. what she saw. W.C. responded, “Uh, well, I was just pulling up to make a right hand turn and I saw the guy [Hougen] ¹ trying to stab him [S.B.], um, and him just trying to walk through, and he [Hougen] was just coming after him with the knife.” *Id.* Officer Garcia asked W.C. how many times Hougen attempted to stab S.B. *See id.* W.C. responded, “Oh, te-, I mean he was bobbing and weaving.” *Id.* S.B. then interjected and said, “Probably like 7 and 8 [attempted stabbings].” *Id.* W.C. then said, “Yeah. Like 10. He was like ...” *Id.* Officer Garcia then said, “Oh, remember, separate statements.” *Id.*

Hougen argues that Officer Garcia's questioning of W.C. in the presence of S.B. was improper because it allowed for conferral between W.C. and S.B. during the interview, and because it allowed S.B. to hear W.C.'s accounting of the altercation before S.B. had been fully interviewed. *Id.* at 15–16.

C. Third Highlighted Incident – S.B.’s Interview

Hougen relates several parts of S.B.'s interview. *See id.* at 3–8. At certain points during this interview, Officers Forbus, Dewees, and Garcia conferred with each other regarding their understanding of the incident. *See id.* Hougen's description of

the interview highlights portions of the officers' questioning of S.B. as well as portions of the officers' conferrals with each other. *See id.* Two of the three cited parts of the interview involve the question of whether S.B. had a knife on his person during the altercation with Hougen, and, if so, whether he drew out the knife intentionally. *See id.*

Hougen cites an exchange between Officers Forbus and Dewees, regarding S.B. *See id.* at 4–5. Officer Forbus asked, "Is there a knife on him [S.B.]?" *Id.* at 4. Officer Dewees responded, "He didn't see *1077 any knife. I haven't searched him or anything." *Id.* Later during this exchange, Officer Forbus said, "As long as he doesn't have a knife, we can corroborate the fact it's not self-defense [i.e., we can corroborate the fact that Hougen's alleged attack against S.B. was not made in self-defense]." *Id.* Shortly after this exchange, Officer Forbus also stated to at least one other officer, "Okay. So as long as we can corroborate that he [S.B.] was the victim, he was the suspect and that guy was the defendant." *Id.* at 5. Officer Forbus went on to state, "So we have him, RP, and a witness saying that S[]'s the victim.... So let's make sure we just clean that part up.... So that way there's no questions at all that, uh...." *Id.* at 5–6.

Hougen cites an exchange during S.B.'s interview when Officer Forbus asked S.B., "[D]id you ever reach for that knife [the knife that was on S.B.'s person] at any point?" *Id.* at 6. S.B. responded that he did not reach for his knife during the altercation because his knife had fallen to the ground during the altercation. *See id.* After S.B. said "It fell on the ground while, during the whole thing that happened," *id.*, Officer Forbus responded, "Perfect." *Id.* Officer Forbus then asked the following: "So what I'm trying to do is, is understand, and I have a good idea of what happened, is you know I, it sounds like you were attacked. What I do is gotta make sure that during this process that a if this happened so rapidly that you weren't able to grab your knife in defense, it fell out. Um, I don't want him to claim that you pulled a knife on him if you didn't. And I don't have anyone saying that, but I just need you to kinda walk us through it." *Id.* at 6.

Hougen cites another exchange that occurred later during S.B.'s interview. Officer Forbus asked, "So the only time it [the knife] was in your hands is when you picked it up and put it back [in its holster][?]" *Id.* at 7. S.B. responded, "Yes." *Id.* S.B. also said, "And I admit the knife was in my hand like this for a second...." *Id.* Officer Forbus said, "Okay. But you're never charging him, you're never yelling anything, you just put it back in." *Id.* S.B. responded, "I was yell-, I was

yelling at him, but I didn't charge at him with the knife, no." *Id.* Officer Forbus responded, "Okay. Gotcha. So he never, in his experience, he, he never would assume that you were trying to stab him 'cause you put it away?" *Id.* S.B. responded, "Not that I ... think no." *Id.* S.B. later said that he put his knife away because he wanted to avoid stabbing someone. *See id.* Officer Forbus responded, "[I]t's a good decision.... Obviously worked out [for] the best.... He goes to jail. You know, we're gonna get you some resources and stuff." *Id.*

In sum, Hougen argues that "the police questioning with regard to S.B. was intended to ensure that S.B. would endorse the preferred narrative in which (1) race was the cause of Mr. Hougen's conduct; (2) S.B. did not draw his weapon, but merely picked it up off the ground when it fell out of the holster[;] and (3) Mr. Hougen was not acting in self-defense." *See id.* at 16–19.

D. FBI Agent Green's Telephone Conversation with S.B.

Hougen also cites a separate incident that occurred on September 1, 2020. *See id.* at 8. S.B. had previously expressed to FBI Agent Green that he had doubts about his ability to act as a witness in the trial against Hougen due to S.B.'s involvement with criminal activity. *See id.* In the phone call, S.B. "began to tell [Agent Green] about unspecific criminal activity in which he was involved," *id.*, and Agent Green hung up before S.B. could continue speaking, *see id.* Later on September 1, S.B. texted Agent Green that "he was *1078 getting into 's***' and couldn't be cooperating." *Id.*

Hougen argues that Agent Green was willfully blind to evidence potentially relevant to a witness's credibility. *See id.* at 22–24. Hougen argues that Agent Green avoided hearing what S.B. had to say in order to avoid *Giglio* obligations to share with the defense information that she learned from S.B. *See id.* Hougen argues that this willful blindness further indicates that the Government has conducted its investigation against him in a way that now prevents him from receiving a fair trial. *See id.*

II. Legal Standard

[1] [2] [3] "A district court may dismiss an indictment on the ground of outrageous government conduct if the conduct amounts to a due process violation."  *United States v. Barrera-Moreno*, 951 F.2d 1089, 1091 (9th Cir. 1991) (citations omitted). "If the conduct does not rise to the level

of a due process violation, the court may nonetheless dismiss under its supervisory powers.”  *Id.* “These powers may be exercised for three reasons: to remedy a constitutional or statutory violation; to protect judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; or to deter future illegal conduct.”  *Id.*

[4] “[T]he [dismissal on due process grounds] defense applies only to conduct which is so grossly shocking and so outrageous as to violate the universal sense of justice.” *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991) (internal citations omitted).

[5] “To justify [the] extreme remedy [of dismissal on supervisory authority grounds], the government’s conduct must have caused substantial prejudice to the defendant and been flagrant in its disregard for the limits of appropriate professional conduct.”  *United States v. Lopez*, 4 F.3d 1455, 1464 (9th Cir. 1993). “Dismissal under the court’s supervisory powers for prosecutorial misconduct requires (1) flagrant misbehavior and (2) substantial prejudice.”  *United States v. Kearns*, 5 F.3d 1251, 1253 (9th Cir. 1993).

[6] “An identification infected by improper police influence ... is not automatically excluded [from a trial].”  *Perry v. New Hampshire*, 565 U.S. 228, 232, 132 S. Ct. 716, 720, 181 L. Ed. 2d 694 (2012). “Instead, the trial judge must screen the evidence for reliability pretrial.”  *Id.* “If there is ‘a very substantial likelihood of irreparable misidentification,’ the judge must disallow presentation of the evidence at trial.”  *Id.* (citing  *Simmons v. United States*, 390 U.S. 377, 384, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)). “But if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.”  *Id.*

III. Discussion

A. Dismissal of Indictment

The Court first addresses the arguments to dismiss the indictment, as these arguments may make moot the arguments to suppress witness statements and related evidence.

Hougen raises two potential grounds for the Court to dismiss Hougen’s indictment: the grounds of due process, and the grounds of supervisory authority. *See id.* at 1. Hougen’s arguments focus on the latter. *See id.* at 21–24.

1. Due Process Grounds

[7] Hougen mentions but does not develop an argument that the Court should dismiss the indictment on due process *1079 grounds. *See, e.g., id.* at 1, 24. Hougen also does not cite any case law in support of such an argument. The Government’s opposition nevertheless focuses on this argument, and repeatedly analyzes the law enforcement misconduct alleged in the Motion under the high standard of *Restrepo*. *See, e.g.,* Opp’n at 8 (“Officer Garcia’s on-scene interview of eyewitness W.C. was not ‘so grossly shocking and so outrageous as to violate the universal sense of justice.’”). The Government refers to the following types of misconduct as examples that meet the *Restrepo* standard of outrageous conduct: the use of racial discrimination in selecting a grand jury, the exclusion of women from a grand jury, and the allowing of “a defendant to stand trial on an indictment which it knows to be based on perjured testimony material to the return of that indictment.” *Id.* at 7 (citing  *Bank of Nova Scotia v. United States*, 487 U.S. 250, 257, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988);  *United States v. Basurto*, 497 F.2d 781, 785 (9th Cir. 1974)). The Court agrees that the alleged law enforcement misconduct in the present case does not rise to the level of due process violations described in *Restrepo*. The Court therefore declines to dismiss the indictment on due process grounds.

2. Supervisory Authority Grounds

Hougen’s primary argument for dismissal is that the “Court has inherent supervisory authority to dismiss [an] indictment where ‘the government’s conduct ... caused substantial prejudice to the defendant and [was] flagrant in its disregard for the limits of appropriate professional conduct.’” Motion at 21–22 (citing  *Lopez*, 4 F.3d at 1464). In support of this argument, Hougen cites the three incidents of alleged SCPD misconduct described above, as well as the incident of

alleged FBI misconduct described above. *See id.* Hougen cites  *Lopez*, 4 F.3d at 1464 (holding that prosecutor's violation of ethical rule did not require dismissal of indictment pursuant to supervisory power where defendant was not prejudiced), as an example of a case where a court declined to use its supervisory authority to dismiss an indictment. *See id.* at 22 (using Hougen's parenthetical summary of the case verbatim). Hougen cites  *United States v. Marshank*, 777 F.Supp. 1507, 1519–20 (N.D. Cal. 1991) (ordering dismissal of indictment where defendant's attorney served as unpaid informant for government by providing government with confidential client information), as an example of a case where the court dismissed an indictment on supervisory authority grounds. *See id.* (using Hougen's parenthetical summary of the case verbatim).

In response, the Government argues that neither the “substantial prejudice” nor the “flagrant ... disregard for ... professional conduct” prongs of the supervisory authority argument are met. *See* Opp’n at 7–8, 14. The Government argues that the cited behavior exhibited by law enforcement, although imperfect, was within the bounds of professional conduct, especially considering the challenges of the conducting interviews at the site of the altercation. *See, e.g., id.* at 9. The Government points out that Hougen will have the ability at trial to cross examine witnesses, attack witness credibility, and assert various defenses. *See, e.g., id.* at 14. The Government also argues that the federal investigation of the hate crime is separate from the investigation conducted by the SCPD. *See, e.g., id.* at 9.

a. C.S.’s Interview

[8] The Court does not find that Officer Dewees acted with a “flagrant ... disregard for ... professional conduct” when he asked questions about race during the interview with C.S. *See* Motion at 2–3 (“You think this guy approached that guy just because ... of his race? Or was it a *1080 factor?” “But this guy brought up a whole bunch of racial stuff? ... He say the N word? ... Hard R?”). These questions were not unreasonably suggestive, especially given that C.S. had earlier suggested that Hougen and S.B. had exchanged verbal insults. *See id.* at 2. In any case, this kind of questioning is distinct from  *Marshank* (ordering dismissal of indictment where defendant's attorney served as unpaid informant for government by providing government with confidential client

information), the only case cited by Hougen as an example where a court dismissed an indictment on supervisory authority grounds. *See id.* at 22. Officer Dewees's conduct also did not cause “substantial prejudice.” Hougen retains the ability to probe the relevant witness statements and evidence derived therefrom by cross examining witnesses, by attacking witnesses’ credibility, and by making various defenses.

b. W.C.’s Interview

[9] The Court does not find that Officer Garcia acted with a “flagrant ... disregard for ... professional conduct” when the officer interviewed W.C. with S.B. present. *See id.* at 3. While this interview should have been conducted with W.C. having been separated from S.B., there is no apparent flagrant disregard for standards comparable to  *Marshank*. Even if there had been, Officer Garcia's conduct did not cause “substantial prejudice.” The alleged conferral between W.C. and S.B. is minimal and involves an issue that is not particularly crucial to the investigation (how many times Hougen attempted to stab S.B., according to W.C.; S.B. suggested seven or eight times immediately before W.C. suggested ten times). *See id.* Hougen is able to probe the relevant witness statements and evidence derived therefrom by cross examining witnesses, by attacking witnesses’ credibility, and by making various defenses.

c. S.B.’s Interview

[10] [11] Officer Forbus's communication with other officers, and his leading questioning of and affirming responses to S.B., do suggest that Officer Forbus was at least marginally pre-disposed to identify a certain narrative during his investigation. *See id.* at 3–8. But the officer's conduct nevertheless remains distinct from the “flagrant ... disregard for ... professional conduct” standard shown in  *Marshank*. Officer Forbus's conduct also did not cause “substantial prejudice.” Hougen retains the ability to probe the relevant witness statements and evidence derived therefrom by cross examining witnesses, by attacking witnesses’ credibility, and by making various defenses.

d. FBI Agent Green's Telephone Conversation with S.B.

[12] Regarding Agent Green's communication with S.B., Hougen cites no case law supporting the argument that, in a situation where a witness states an intention to divulge his or her own criminal activity to a law enforcement agent, the law enforcement agent's refusal to hear such information amounts to a "flagrant ... disregard for ... professional conduct." See *id.* at 21–24. Moreover, after Agent Green hung up on S.B. during the cited phone conversation, S.B. could have and did text Agent Green with further information. See *id.* at 8. The Government documented and disclosed the September 1, 2020, phone call, as well as the texting between Agent Green and S.B., and S.B.'s criminal record through February 26, 2021. See Opp'n at 12. Agent Green's hanging up on S.B. during the September 1, 2020, phone call did not cause the "substantial prejudice" required to dismiss an indictment on the grounds of the Court's supervisory authority. Hougen retains the ability to cross examine S.B., attack S.B.'s *1081 credibility, and make various defenses with regard to S.B.'s testimony.

Even when the separate instances of law enforcement conduct cited by Hougen are considered together as a whole, this conduct does not meet the required standard for dismissing an indictment on the grounds of the Court's supervisory authority.

For the reasons given above, the Court declines to dismiss the indictment on supervisory authority grounds.

For the reasons given above, the Court **DENIES** the motion to dismiss.

B. Suppression of "Tainted" Portions of Witness Statements and Evidence Arising Therefrom

[13] Hougen argues that the Court should suppress the "tainted" witness statements cited above as well as any evidence derived therefrom. See Motion at 10–14. Hougen cites *Perry* for the notion that "[if] there is a very substantial likelihood of irreparable misidentification, the judge must disallow presentation of the evidence at trial." 565 U.S. at 232, 132 S.Ct. 716 (internal citation omitted).

Hougen also relies on *Foster v. California*, 394 U.S. 440, 442 n.2, 89 S.Ct. 1127, 22 L.Ed.2d 402 (1969). Motion

at 11 ("[A]n identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identity violates due process of law, rendering the identification constitutionally inadmissible as a matter of law." (citing *Foster*, 394 U.S. at 442, 89 S.Ct. 1127)).

Perry and *Foster* address instances of alleged government misconduct involving pretrial identification procedures. See 565 U.S. at 232, 132 S.Ct. 716; 394 U.S. at 442, 89 S.Ct. 1127. Hougen argues that the application of *Perry* and *Foster* extend beyond identification procedures and can reach situations of "suggestive and overreaching police questioning." Motion at 12. In support of this notion, Hougen cites *Weimer v. County of Kern*, No. 1:06-CV-00735, 2007 WL 14353, at *3 (E.D. Cal. Jan. 3, 2007), *Bennett v. R&L Carriers Shared Services*, 744 F.Supp.2d 494, 515 (E.D. Va. 2010), *aff'd*, 492 F.App'x 315 (4th Cir. 2012), and *Miller v. Fenton*, 474 U.S. 104, 109, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). While these cases indicate that the admission of certain witness statements can amount to due process violations, the cases do not show clear support for the argument that the application of *Perry* and *Foster* can extend beyond pretrial identification procedures. Moreover, the tainting witness statements cited in *Weimer* and *Bennett* involve more extreme situations of unfairness than are present here. In *Weimer*, a defendant was convicted on child molestation charges, the crime was "late-reported," the "victim's testimony was the sole basis for conviction and was uncorroborated by any independent evidence introduced by the prosecution," and "[e]ach victim suffered from material credibility problems." 2007 WL 14353, at *1–3. A court determined that the testimony made against the defendant was "unreliable and so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at *1 (internal citation omitted). In *Bennett*, an "[informant] did not implicate [the suspect] until [the investigator] effectively fed [the informant] the information that he had received from [another informant]." 744 F.Supp.2d at 515. Hougen cites *Miller* only for the proposition that "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process

Clause of the Fourteenth Amendment.”  *Miller*, 474 U.S. at 109, 106 S.Ct. 445. The Court sees *1082 insufficient reason to find that such offensive interrogation techniques are present in the case at hand.

The Government argues that  *Perry* and  *Foster* are inapplicable here because they only apply to identification procedures. Opp'n at 14. The Government alternatively argues that even if  *Perry* is applied to the SCPD interviews, the suppression of the witness statements is not required, because “law enforcement committed no misconduct and there is no ‘substantial likelihood’ of irreparable prejudice to the defendant.” *Id.* (citing  *Perry*, 565 U.S. at 232, 132 S.Ct. 716). Without deciding that  *Perry* provides the correct framework for analyzing law enforcement questioning procedures, the Court agrees that, if the  *Perry* analysis framework is applied to the law enforcement questioning in the present case, the

requirements for suppression of the witness statements and evidence derived therefrom are not met. The Court relies on the same reasoning given above as to why the Court finds no “substantial prejudice” resulting from the officers’ interviews. *See supra*.

The Court therefore **DENIES** the motion to suppress witness statements and any evidence derived therefrom.

IV. Conclusion

For the reasons given above, and also for the reasons given at the hearing where this motion was discussed, the Court **DENIES** Hougen's motion to suppress witness statements or, alternatively, to dismiss the indictment.

IT IS SO ORDERED.

All Citations

529 F.Supp.3d 1072

Footnotes

- 1 Throughout this order, where the Court interprets a pronoun, term, or phrase, the Court has supplied in brackets the name of the individual to whom the Court understands the term to be referring, or else the understood meaning of the term or phrase.

U.S. Const. Amend. XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereby the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

18 U.S.C. § 249 - Hate crime acts (2020)

(a) In General.—

(1) Offenses involving actual or perceived race, color, religion, or national origin.—Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person—

(A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—

(i) death results from the offense; or

(ii) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(2) Offenses involving actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability.—

(A) In general.—Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B) or paragraph (3), willfully causes bodily injury to any person or, through the use of fire, a firearm, a dangerous weapon, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity, or disability of any person—

(i) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(ii) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if—

(I) death results from the offense; or

(II) the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(B) Circumstances described.—For purposes of subparagraph (A), the circumstances described in this subparagraph are that—

(i) the conduct described in subparagraph (A) occurs during the course of, or as the result of, the travel of the defendant or the victim—

(I) across a State line or national border; or

(II) using a channel, facility, or instrumentality of interstate or foreign commerce;

(ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A);

(iii) in connection with the conduct described in subparagraph (A), the defendant employs a firearm, dangerous weapon, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or

(iv) the conduct described in subparagraph (A)—

(I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or

(II) otherwise affects interstate or foreign commerce.

(3) Offenses occurring in the special maritime or territorial jurisdiction of the United States.—

Whoever, within the special maritime or territorial jurisdiction of the United States, engages in conduct described in paragraph (1) or in paragraph (2)(A) (without regard to whether that conduct occurred in a circumstance described in paragraph (2)(B)) shall be subject to the same penalties as prescribed in those paragraphs.

(4) Guidelines.—

All prosecutions conducted by the United States under this section shall be undertaken pursuant to guidelines issued by the Attorney General, or the designee of the Attorney General, to be

included in the United States Attorneys' Manual that shall establish neutral and objective criteria for determining whether a crime was committed because of the actual or perceived status of any person.

(b) Certification Requirement.—

(1) In general.—No prosecution of any offense described in this subsection may be undertaken by the United States, except under the certification in writing of the Attorney General, or a designee, that—

(A) the State does not have jurisdiction;

(B) the State has requested that the Federal Government assume jurisdiction;

(C) the verdict or sentence obtained pursuant to State charges left demonstratively unvindicated the Federal interest in eradicating bias-motivated violence; or

(D) a prosecution by the United States is in the public interest and necessary to secure substantial justice.

(2) Rule of construction.—

Nothing in this subsection shall be construed to limit the authority of Federal officers, or a Federal grand jury, to investigate possible violations of this section.

(c) Definitions.—In this section—

(1) the term “bodily injury” has the meaning given such term in section 1365(h)(4) of this title,

but does not include solely emotional or psychological harm to the victim;

(2) the term “explosive or incendiary device” has the meaning given such term in section 232 of this title;

(3) the term “firearm” has the meaning given such term in section 921(a) of this title;

(4) the term “gender identity” means actual or perceived gender-related characteristics; and

(5) the term “State” includes the District of Columbia, Puerto Rico, and any other territory or possession of the United States.

(d) Statute of Limitations.—

(1) Offenses not resulting in death.—

Except as provided in paragraph (2), no person shall be prosecuted, tried, or punished for any offense under this section unless the indictment for such offense is found, or the information for such offense is instituted, not later than 7 years after the date on which the offense was committed.

(2) Death resulting offenses.—

An indictment or information alleging that an offense under this section resulted in death may be found or instituted at any time without limitation.

(e) Supervised Release.—

If a court includes, as a part of a sentence of imprisonment imposed for a violation of

subsection (a), a requirement that the defendant be placed on a term of supervised release after imprisonment under section 3583, the court may order, as an explicit condition of supervised release, that the defendant undertake educational classes or community service directly related to the community harmed by the defendant's offense.

**PL. 11-84, Oct. 28, 2009, 123 Stat. 2190 § 4702.
Findings**

Congress makes the following findings:

- (1) The incidence of violence motivated by the actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of the victim poses a serious national problem.
- (2) Such violence disrupts the tranquility and safety of communities and is deeply divisive.
- (3) State and local authorities are now and will continue to be responsible for prosecuting the overwhelming majority of violent crimes in the United States, including violent crimes motivated by bias. These authorities can carry out their responsibilities more effectively with greater Federal assistance.
- (4) Existing Federal law is inadequate to address this problem.
- (5) A prominent characteristic of a violent crime motivated by bias is that it devastates not just the actual victim and the family and friends of the victim, but frequently savages the community sharing the traits that caused the victim to be selected.
- (6) Such violence substantially affects interstate commerce in many ways, including the following:
 - (A) The movement of members of targeted groups is impeded, and members of such groups are forced to move across State lines to escape the incidence or risk of such violence.

- (B) Members of targeted groups are prevented from purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activity.
 - (C) Perpetrators cross State lines to commit such violence.
 - (D) Channels, facilities, and instrumentalities of interstate commerce are used to facilitate the commission of such violence.
 - (E) Such violence is committed using articles that have traveled in interstate commerce.
- (7) For generations, the institutions of slavery and involuntary servitude were defined by the race, color, and ancestry of those held in bondage. Slavery and involuntary servitude were enforced, both prior to and after the adoption of the 13th amendment to the Constitution of the United States, through widespread public and private violence directed at persons because of their race, color, or ancestry, or perceived race, color, or ancestry. Accordingly, eliminating racially motivated violence is an important means of eliminating, to the extent possible, the badges, incidents, and relics of slavery and involuntary servitude.
- (8) Both at the time when the 13th, 14th, and 15th amendments to the Constitution of the United States were adopted, and continuing to date, members of certain religious and national origin groups were and are perceived to be distinct “races”. Thus, in order to eliminate, to the extent possible, the badges, incidents, and relics of slavery, it is necessary to prohibit assaults on the basis of real or perceived religions or national

origins, at least to the extent such religions or national origins were regarded as races at the time of the adoption of the 13th, 14th, and 15th amendments to the Constitution of the United States.

- (9) Federal jurisdiction over certain violent crimes motivated by bias enables Federal, State, and local authorities to work together as partners in the investigation and prosecution of such crimes.
- (10) The problem of crimes motivated by bias is sufficiently serious, widespread, and interstate in nature as to warrant Federal assistance to States, local jurisdictions, and Indian tribes.

**PL. 11-84, Oct. 28, 2009, 123 Stat. 2190 § 4710.
Rule of construction**

For purposes of construing this division and the amendments made by this division the following shall apply:

(1) In general

Nothing in this division shall be construed to allow a court, in any criminal trial for an offense described under this division or an amendment made by this division, in the absence of a stipulation by the parties, to admit evidence of speech, beliefs, association, group membership, or expressive conduct unless that evidence is relevant and admissible under the Federal Rules of Evidence. Nothing in this division is intended to affect the existing rules of evidence.

(2) Violent acts

This division applies to violent acts motivated by actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity, or disability of a victim.

(3) Construction and application

Nothing in this division, or an amendment made by this division, shall be construed or applied in a manner that infringes any rights under the first amendment to the Constitution of the United States. Nor shall anything in this division, or an amendment made by this division, be construed or applied in a manner that substantially burdens a person's exercise of religion (regardless of whether compelled by, or central to, a system of religious belief), speech, expression, or association, unless the Government demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest, if such exercise of religion, speech, expression, or association was not intended to-

(A) plan or prepare for an act of physical violence; or

(B) incite an imminent act of physical violence against another.

(4) Free expression

Nothing in this division shall be construed to allow prosecution based solely upon an individual's expression of racial, religious, political, or other beliefs or solely upon an individual's membership in a group advocating or espousing such beliefs.

(5) First amendment

Nothing in this division, or an amendment made by this division, shall be construed to diminish any rights under the first amendment to the Constitution of the United States.

(6) Constitutional protections

Nothing in this division shall be construed to prohibit any constitutionally protected speech, expressive conduct or activities (regardless of whether compelled by, or central to, a system of religious belief), including the exercise of religion protected by the first amendment to the Constitution of the United States and peaceful picketing or demonstration. The Constitution of the United States does not protect speech, conduct or activities consisting of planning for, conspiring to commit, or committing an act of violence.