

APPENDICES

INDEX TO APPENDICES

Appendix A: U.S. Court of Appeals Ninth Circuit Order Denying Petition for Rehearing En Banc (Mar. 6, 2026)	App-1
Appendix B: U.S. Court of Appeals Ninth Circuit Memorandum Disposition Affirming Conviction and Sentence (July 10, 2025)	App-2
Appendix C: U.S. District Court Judgment (Mar. 6, 2023).....	App-9
Appendix D: U.S. District Court Order Denying Motion to Dismiss (June 8, 2022)	App-16

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

MAR 6 2026

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

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KAULANA ALO-KAONOHU,

Defendant - Appellant.

No. 23-373

D.C. No.

1:20-cr-00136-JMS-1

ORDER

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

KAULANA ALO-KAONOHU

Defendant - Appellee.

No. 23-635

D.C. No.

1:20-cr-00136-JMS-1

Before: W. FLETCHER, CHRISTEN, and DESAI, Circuit Judges.

Judge W. Fletcher recommends denying the petition for rehearing en banc, and Judge Christen and Judge Desai so vote. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition.

Defendant's petition for rehearing en banc (No. 23-373, Dkt. 111; No. 23-635, Dkt. 91) is **DENIED**.

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

JUL 10 2025

FOR THE NINTH CIRCUIT

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

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KAULANA ALO-KAONOHU,

Defendant - Appellant.

No. 23-373

D.C. No.

1:20-cr-00136-JMS-1

MEMORANDUM*

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

KAULANA ALO-KAONOHU

Defendant - Appellee.

No. 23-635

D.C. No.

1:20-cr-00136-JMS-1

Appeal from the United States District Court
for the District of Hawaii
J. Michael Seabright, District Judge, Presiding

Argued and Submitted June 6, 2025
Honolulu, Hawaii

Before: W. FLETCHER, CHRISTEN, and DESAI, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Defendant Kaulana Alo-Kaonohi appeals his conviction for committing a hate crime in violation of 18 U.S.C. § 249(a)(1), and the Government cross-appeals the district court's imposition of a 78-month sentence followed by three years of supervised release.¹ We review de novo questions of law, including the district court's interpretation of the Sentencing Guidelines. *United States v. Mongol Nation*, 56 F.4th 1244, 1250 (9th Cir. 2023); *United States v. Rivera-Gomez*, 634 F.3d 507, 512 (9th Cir. 2011). We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm the conviction, vacate the sentence, and remand for resentencing.

1. Defendant contends that a new trial is necessary because the Government submitted an invalid legal theory of guilt to the jury. During closing argument, the Government argued that, to satisfy the element of but-for causation in § 249(a)(1), the victim's race need only have constituted “a tiny, tiny factor” in, or “a really tiny reason” for, the assault. In *Burrage v. United States*, 571 U.S. 204 (2014), the Supreme Court explained that where a predicate factor “combines with other factors to produce the result,” that predicate factor qualifies as a but-for cause of that result “so long as the other factors alone would not have done so—if, so to speak, it was the straw that broke the camel's back.” *Id.* at 211. While *Burrage* did not expressly endorse the Government's argument that race need only have

¹ Because the parties are familiar with the facts, we do not recount them here.

been “a tiny, tiny factor” or “a really tiny reason,” we need not decide whether the Government misstated the applicable standard for causation because Defendant concedes that the jury instructions properly described that standard. “The jury is regularly presumed to accept the law as stated by the court, not as stated by counsel.” *United States v. Medina Casteneda*, 511 F.3d 1246, 1250 (9th Cir. 2008) (citation omitted). Because the instructions did not permit the jury to decide guilt under a legally insufficient theory, *see United States v. Turchin*, 21 F.4th 1192, 1202 (9th Cir. 2022), Defendant’s argument fails.

2. We reject Defendant’s contention that applying § 249 “to protect someone of the oppressing demographic” exceeds the scope of Congress’s enforcement authority under the Thirteenth Amendment. By enacting § 249(a)(1), “Congress rationally concluded that racial violence imposes a badge and incident of slavery on its victims,” and therefore acted within its broad enforcement authority under § 2 of the Thirteenth Amendment. *United States v. Hougen*, 76 F.4th 805, 814-15 (9th Cir. 2023). And that authority empowers Congress “to legislate in regard to ‘every race and individual.’” *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 288 n.18 (1976) (citation omitted); *see also Bailey v. Alabama*, 219 U.S. 219, 241 (1911) (noting that the Thirteenth Amendment is a “charter of universal civil freedom for all persons, of whatever race, color, or estate, under the flag”).

3. Defendant concedes that his facial challenge to § 249(a)(1) is foreclosed by our precedent. *See Hougén*, 76 F.4th at 814-16.

4. Section 249(a)(1) does not violate federalism principles. Because Congress enacted § 249(a)(1) pursuant to its power under the Thirteenth Amendment, its authority is limited by the test articulated in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), not the Commerce Clause precedents identified by Defendant. *See* 34 U.S.C. § 30501(7); *Hougén*, 76 F.4th at 814. Congress may legislate against the badges and incidents of slavery pursuant to the Thirteenth Amendment by “regulat[ing] the conduct of private individuals.” *Jones*, 392 U.S. at 438-39. Moreover, because § 249(a)(1) limits its reach by requiring that victims be harmed *because of* their race, Congress did not “create a general, undifferentiated federal law of criminal assault.” *See United States v. Allen*, 341 F.3d 870, 884 (9th Cir. 2003) (citation omitted).

5. The Government challenges the district court’s conclusion at sentencing that it could not apply the hate crime sentencing enhancement under U.S. Sentencing Guidelines Manual (USSG) § 3A1.1(a). The hate crime enhancement provides for a three-point increase “[i]f the finder of fact at trial or, in the case of a plea of guilty or *nolo contendere*, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim . . . because of the actual or perceived race[] [or] color . . . of any person.” USSG § 3A1.1(a).

Because Defendant was convicted at trial, the requisite finding of a hate crime motivation must have been made by the jury, not the district court. *See id.* The jury found Defendant guilty of violating § 249(a)(1), without a special finding on “intentional[] selection.” *See id.* Under our precedent, this finding suffices for imposition of the enhancement.²

In *United States v. Armstrong*, 620 F.3d 1172 (9th Cir. 2010), we considered a case in which a defendant argued that his co-defendant made the initial selection of the victim of a racially motivated assault, and held that the imposition of the enhancement was improper because the jury did not find that the defendant himself “selected” the victim. *Id.* at 1175. We concluded that a jury finding of guilt under 18 U.S.C. § 245(b)(2)(F),³ a hate crime, justified the imposition of § 3A1.1, and that a “separate finding as to *selection*” was unnecessary because the defendant

² The district court correctly recognized that the language of § 3A1.1 requires “the jury . . . to have necessarily found this element . . . for [the court] to apply the three-level enhancement,” and explained that “if there’s a jury trial you look at what the jury determined, and if there’s a plea you look -- the judge makes the determination.” The district court ultimately concluded, however, that the jury’s verdict did not necessarily encompass a finding of intentional selection and stated that the proper approach would have been to submit a special interrogatory to the jury. The district court acknowledged that “[i]f the finding under [§] 3A1.1 was [the court’s], [it] would have” imposed the enhancement, as Defendant “targeted [the victim], at least in part because of race.”

³ 18 U.S.C. § 245(b)(2)(F) makes it a crime to use force or the threat of force to willfully injure, intimidate, or interfere with a person because of his race or color and because of his use of a public establishment.

“selected” the victim of his actions in the relevant sense “by using force to injure, threaten, or intimidate [the victim] merely because of his race.” *Id.* at 1175-76. By finding the defendant guilty, the jury “was asked to and did find that [the victim] was the victim of [the defendant]’s attack because of his race.” *Id.* at 1176. This was “sufficient reason to impose the enhancement.” *Id.*⁴

Here, the jury found that Defendant committed his assault because of the victim’s race or color, § 249(a)(1), and thus necessarily found that Defendant intentionally selected the victim because of his race or color. *See Armstrong*, 620 F.3d at 1175 (holding that because the jury found the defendant “acted because [the victim] is African American,” the district court “acted properly in imposing the three-level enhancement”). The jury’s finding provided a sufficient basis to impose the enhancement, and the district court erred in its contrary interpretation of the Guidelines.⁵ We accordingly vacate the sentence and remand for

⁴ *See also United States v. Sherifi*, 107 F.4th 309, 319 (4th Cir. 2024) (holding that no special jury finding is required); *United States v. Pospisil*, 186 F.3d 1023, 1031 (8th Cir. 1999) (same).

⁵ We note that if § 3A1.1 did not apply, Defendant’s guideline calculation would begin with the base offense level for aggravated assault, with no additional penalty for committing a hate crime. The base offense level for a violation of § 249 is dictated by § 2H1.1, USSG app. A, which instructs to apply “the offense level from the offense guideline applicable to any underlying offense,” USSG § 2H1.1(a)(1). The underlying offense guideline for aggravated assault is § 2A2.2(a), which applies to all aggravated assaults and does not include any

resentencing.⁶

AFFIRMED in part, VACATED in part, and REMANDED.

additional penalties for assaults that target victims because of a protected characteristic.

⁶ Defendant's motion to take judicial notice of his state court sentencing transcript (No. 23-373, Dkt. 26; No. 23-635, Dkt. 18) is GRANTED. *See United States v. Raygoza-Garcia*, 902 F.3d 994, 1001 (9th Cir. 2018).

FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII**United States District Court**
District of HawaiiMAR 06 2023
at 2 o'clock and 48 min. P M
CLERK, U.S. District CourtUNITED STATES OF AMERICA
v.
(01) KAULANA ALO-KAONOH**JUDGMENT IN A CRIMINAL CASE**Case Number: 1:20CR00136-001USM Number: 12339-122

SALINA M. KANAI, PD

CRAIG W. JEROME, FAPD

Defendant's Attorney

THE DEFENDANT:

- ☐ pleaded guilty to count(s): ____.
- ☐ pleaded nolo contendere to counts(s) ____ which was accepted by the court.
- ☒ was found guilty on count 1 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 249	Hate Crime	02/13/2014	1

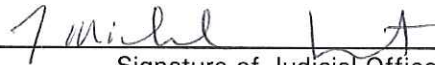
The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on counts(s) ____ and is discharged as to such count(s).
- ☐ Count(s) ____ (is)(are) dismissed on the motion of the United States.

It is further ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

March 2, 2023

Date of Imposition of Judgment



Signature of Judicial Officer

J. MICHAEL SEABRIGHT, United States District Judge

Name & Title of Judicial Officer

March 6, 2023

Date

AO 245B (Rev. 6/05) Judgment in a Criminal Case
Sheet 2 - Imprisonment

DEFENDANT: (01) KAULANA ALO-KAONOH
CASE NUMBER: 1:20CR00136-001

Judgment - Page 2 of 7

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: SEVENTY-EIGHT (78) MONTHS.

☒ The court makes the following recommendations to the Bureau of Prisons:

- 1) Safford FCI (for programming); and
- 2) Educational and Vocational Training.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district.

☐ at ____ on ____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on ____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

AO 245B (Rev. 2/18) Judgment in a Criminal Case
Sheet 3 - Supervised Release

DEFENDANT: (01) KAULANA ALO-KAONOH
CASE NUMBER: 1:20CR00136-001

Judgment - Page 3 of 7

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: THREE (3) YEARS.

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of commencement of supervision and at least two periodic drug tests thereafter but no more than 4 valid drug tests per month during the term of supervision.

☐ The above drug testing condition is suspended, based on the court's determination that you poses a low risk of future substance abuse. *(Check if applicable.)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(Check if applicable.)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(Check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location you reside, work, are a , or were convicted of a qualifying offense. *(Check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(Check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

AO 245B (Rev. 2/18) Judgment in a Criminal Case
Sheet 3A - Supervised Release

DEFENDANT: (01) KAULANA ALO-KAONOHI
CASE NUMBER: 1:20CR00136-001

Judgment - Page 4 of 7

STANDARD CONDITIONS OF SUPERVISION

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of the time you are released, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when to report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by the probation officer. Your legitimate invocation of the Fifth Amendment privilege against self-incrimination in response to a probation officer's question shall not be considered a violation of this condition.
5. You must live at a place approved by the probation officer. If you plan to change where you live or who lives with you, you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time reasonable under the circumstances at your home or elsewhere, and you must permit, to the extent you are able or authorized to do so, the probation officer to take any items prohibited by the conditions of your supervision that the officer observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or if there are substantial changes to your job responsibilities, you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. Unless you have received advance permission from the probation officer or the association is required by supervision conditions, you must not voluntarily and intentionally associate with any person you know is engaged in committing a federal, state, or local crime, not including traffic offenses, whether the crime is being committed in or outside of your presence. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, as defined in 18 U.S.C. § 921(a)(4), or dangerous weapon (that is, anything that was designed or was modified for the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to an organization or a person relating to your criminal record or personal history or characteristics, the probation officer may require, with the court's approval, that you notify that organization or person (or that person's parent, guardian, caretaker, or other individual responsible for the person's welfare) about the risk, and you must comply with that instruction. The probation officer may contact the organization or person that you were directed to notify and confirm that you notified that organization or person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation Officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see Overview of Probation and Supervised Release Conditions, available at : www.uscourts.gov.

Defendants Signature _____

Date _____

AO 245B (Rev. 2/18) Judgment in a Criminal Case
Sheet 3D - Supervised Release

DEFENDANT: (01) KAULANA ALO-KAONOH
CASE NUMBER: 1:20CR00136-001

Judgment - Page 5 of 7

SPECIAL CONDITIONS OF SUPERVISED RELEASE

1. You must participate in a mental health assessment as coordinated by the probation officer. Based on the results of that assessment, the probation officer may then request that the court order specific mental health treatment.
2. You must provide the probation officer access to any requested financial information and authorize the release of any financial information. The probation office may share financial information with the U.S. Attorney's Office.
3. You must apply all monies received from income tax refunds, lottery winnings, inheritance, judgments and any anticipated or unexpected financial gains to the outstanding court-ordered financial obligation, at the discretion and direction of the court.
4. You must not incur new credit charges, or open additional lines of credit, or apply for any loans without the prior approval of the probation officer. You must not borrow money or take personal loans from any individual without the prior approval of the probation officer.
5. You must submit your person, property, house, residence, vehicle, papers, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.
6. You are prohibited from having contact, directly, indirectly, or through third parties, with the victim, CK, or his family.

AO 245 B (Rev. 02/18) Judgment in a Criminal Case
 Sheet 5 - Criminal Monetary Penalties

DEFENDANT: (01) KAULANA ALO-KAONOH
 CASE NUMBER: 1:20CR00136-001

Judgment - Page 6 of 7

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

<u>Assessment</u>	<u>JVTA Assessment*</u>	<u>Fine</u>	<u>Restitution</u>
Totals: \$ 100.00	\$	\$	\$

☒ The determination of restitution is deferred until April 24, 2023. An *Amended Judgment in a Criminal Case* (AO245C) will be entered after such a determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. §3664(i), all non-federal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss**</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	---------------------	----------------------------	-------------------------------

TOTALS	\$ _	\$ _
---------------	------	------

☐ Restitution amount ordered pursuant to plea agreement \$ _

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

*Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 6 - Schedule of Payments

DEFENDANT: (01) KAULANA ALO-KAONOH
CASE NUMBER: 1:20CR00136-001

Judgment - Page 7 of 7

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A** ☐ Lump sum payment of \$ _ due immediately, balance due
☐ not later than _ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below, or
- B** ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C** ☐ Payment in equal _ (*e.g., weekly, monthly, quarterly*) installments of \$ _ over a period of _ (*e.g., months or years*), to commence _ (*e.g., 30 or 60 days*) after the date of this judgment ; or
- D** ☐ Payment in equal _ (*e.g., weekly, monthly, quarterly*) installments of \$ _ over a period of _ (*e.g., months or years*), to commence _ (*e.g., 30 or 60 days*) after the release from imprisonment to a term of supervision; or
- E** ☐ Payment during the term of supervised release will commence within _ (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F** ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number, Total Amount, Joint and Several Amount, and corresponding pay, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVT assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

1			
2			
3	UNITED STATES OF AMERICA,	)	CRIMINAL NO. 20-00136JMS
4		)	
5	Plaintiff,	)	Honolulu, Hawaii
6		)	June 8, 2022
7	vs.	)	
8		)	
9	KAULANA ALO-KAONOHU (01),	)	[52] DEFENDANT ALO-KAONOHU'S
10	and LEVI AKI, JR. (02),	)	MOTION TO STRIKE SURPLUSAGE
11		)	FROM THE INDICTMENT
12	Defendants.	)	[53] DEFENDANT ALO-KAONOHU'S
13		)	MOTION TO DISMISS
14		)	[54] MOTION FOR SEVERANCE OF
15		)	DEFENDANTS
16		)	[55] DEFENDANT ALO-KAONOHU'S
17		)	MOTION TO SEVER DEFENDANTS
18		)	FOR TRIAL
19		)	[57] DEFENDANT LEVI AKI, JR.'S
20		)	MOTION FOR JOINDER IN
21		)	CO-DEFENDANT ALO-KAONOHU'S
22		)	MOTION TO DISMISS
23		)	[58] DEFENDANT LEVI AKI, JR.'S
24		)	MOTION FOR JOINDER IN
25		)	CO-DEFENDANT ALO-KAONOHU'S
		)	MOTION TO STRIKE SURPLUSAGE
		)	FROM THE INDICTMENT
		)	[62] DEFENDANT ALO-KAONOHU'S
		)	MOTION IN LIMINE NO. 2
		)	(COMPLAINANT'S ALLEGED
		)	MOTIVATION IN PURCHASING HOME)
		)	[82] DEFENDANT LEVI AKI, JR.'S
		)	MOTION FOR JOINDER IN
		)	CO-DEFENDANT ALO-KAONOHU'S
		)	MOTION IN LIMINE NO. 2
		)	(COMPLAINANT'S ALLEGED
		)	MOTIVATION IN PURCHASING HOME)

TRANSCRIPT OF PROCEEDINGS CONDUCTED BY VIDEO TELECONFERENCE
BEFORE THE HONORABLE J. MICHAEL SEABRIGHT
CHIEF UNITED STATES DISTRICT JUDGE

1 APPEARANCES:

2 For the Government: CHRIS A. THOMAS, ESQ.
Office of the United States Attorney
3 PJKK Federal Building
300 Ala Moana Blvd., Suite 6100
4 Honolulu, Hawaii 96850

5
TARA ALLISON, ESQ.
6 Trial Attorney
Pennsylvania Avenue, NW
7 Washington, DC 20530

8
9 For Defendant SALINA M. KANAI, ESQ.
Alo-Kaonohi: CRAIG W. JEROME, ESQ.
10 Office of the Federal Public Defender
300 Ala Moana Boulevard, Suite 7104
11 Honolulu, Hawaii 96850

12
13 For Defendant Aki: LYNN E. PANAGAKOS, ESQ.
841 Bishop Street, Suite 2201
14 Honolulu, Hawaii 96813

15
KELLI K. LEE PONCE, ESQ.
16 1001 Bishop Street, Suite 710
Honolulu, Hawaii 96813
17

18

19

20 Official Court Cynthia Fazio, RMR, CRR, CRC
Reporter: United States District Court
21 300 Ala Moana Blvd., C-270
Honolulu, Hawaii 96850
22

23

24

25 Proceedings recorded by machine shorthand, transcript produced
with computer-aided transcription (CAT).

1 MS. ALLISON: Yes. No objection to that, Your Honor.

2 THE COURT: All right. So I'm going to deny the
3 motion. You know, I'll say without prejudice to the extent,
4 what I -- and what I mean by that is, you know, understanding
5 there's an issue that's lurking there that we may need to take
6 up during the course of the trial.

7 Okay. All right. The Motion to Dismiss. Mr. Jerome,
8 that's ECF 53.

9 MR. JEROME: Thank you, Your Honor. You know, there's
10 a couple points I want to make right off the bat. The first is
11 that, you know, we did raise a facial and an as-applied
12 challenge in this case. I think everyone, both parties agree
13 that the facial challenge is -- the Court's hands are sort of
14 tied by *Jones v. Mayer*. So, everyone agrees that the Court
15 really can't do anything with the facial challenge other than
16 deny it at this point based on Supreme Court precedent.

17 With regard to the as-applied challenge, you know,
18 first of all, I want to make clear that, you know, the
19 government sort of argued that this was a sufficiency of the
20 evidence challenge that we're raising, and that's not the case.
21 Even if the Court believes --

22 THE COURT: Well, it is sort of how it reads,
23 Mr. Jerome, your -- your motion.

24 MR. JEROME: You know, to clarify, even if the Court
25 believes everything CK says happened actually happened, we

1 still believe that this statute is unconstitutionally applied
2 in this case. And, you know, that's not based on the
3 sufficiency of the evidence.

4 THE COURT: Is it your view it doesn't apply to
5 Caucasians as victims? I mean what is the --

6 MR. JEROME: That's -- that's one of the things that
7 the government raises is, you know, us arguing that this could
8 never apply to any Caucasian in any context. And, you know,
9 while I think that that would actually be a perfectly
10 legitimate argument to make, I don't think we need to go that
11 far in this case. The sort of historical facts and
12 circumstances of this case go well beyond just being applied to
13 any Caucasian in any context.

14 You know, if we look back at *Jones*, which is the case
15 of course that raised the facial challenge, one of the things
16 the Tenth Circuit said in *Hatch* is the 18 U.S.C. 249(a)(1)'s
17 reach to aspects of race has to be limited to race as it was
18 understood in the 1860s when the Thirteenth Amendment was
19 adopted.

20 If we look at *Jones*, there's a very lengthy discussion
21 in *Jones* about the context under which the Thirteenth Amendment
22 was adopted as well as the context under which the Civil Rights
23 Act of 1866 was adopted. And in -- that historical context is
24 very clearly about protecting freed men from violence at the
25 hands of White people or putting freed men at the same sort of

1 socioeconomic status as White men.

2 The Thirteenth Amendment, the original Civil Rights
3 Act had nothing to do with protecting Caucasian people from the
4 actions of any other race.

5 And then we look at Hawaii, where if we understand
6 race as a sociopolitical system rather than something that's
7 inherent and natural, context and historical context under
8 which race was created is important. In Hawaii that context
9 and that history includes, you know, more than 200 years of the
10 impacts of American colonialism, the dispossession of Native
11 Hawaiians, and the history of plantation agriculture where
12 races were pitted against one another, immigrant races were
13 pitted against one another.

14 The history of race in Hawaii is not the same as the
15 history of race on the continental United States and certainly
16 not the same as the history of race in 1860s America,
17 particularly since Hawaii was not even a U.S. territory until
18 some almost 40 years after the Thirteenth Amendment was
19 ratified and didn't become a state until, you know, another 60
20 or 70 years after that.

21 So, in that context and considering how race was
22 understood in the 1860s at the time the Thirteenth Amendment
23 was adopted, it can't be that Congress could rationally view
24 violence committed in Hawaii by indigenous people against White
25 settlers as somehow abolishing the badges and incidents of

1 slavery. And that's what the Thirteenth Amendment gave
2 Congress the power to do was abolish the badges that are
3 incidents of slavery.

4 And the cases that are cited by the government in
5 support of the idea that every facial challenge to this statute
6 has failed actually make that point pretty well. All of those
7 cases involve racial attacks by Caucasians, mostly directed
8 towards African Americans, some others at other racial
9 minorities, they all involve situations where the racial animus
10 demonstrated by the perpetrators is far more clear than
11 anything the government argues in this case.

12 And, you know, I -- you know, if we look at the
13 history of Hawaii, if we look at the history, frankly, of the
14 United States, I can't find a single statute, a single law,
15 single rule wherein White settlers were ever denied any of the
16 rights that were given to either indigenous peoples or other,
17 quote/unquote, local people who came here as immigrants.

18 So, you know, frankly I think what the government's
19 done in this case is attempted to graft the context of race on
20 the continental United States dating back to the 1860s on to a
21 situation that's an extremely poor fit for that. And I don't
22 think this prosecution can said -- be said rationally to have
23 anything to do with badges or incidents of slavery. And if
24 this is what Congress intended this statute to do, then I think
25 it's unconstitutional as applied in this case.

1 THE COURT: All right. Okay. So who's --
2 Ms. Panagakos, do you have anything to add? I know you joined,
3 but --

4 MS. PANAGAKOS: Yes, Your Honor. Just I realize that
5 the facial challenge is here to preserve it for appellate
6 review, but in the context of the applied challenge, the cases
7 cited in Mr. Jerome and Ms. Kanai's motion, the *Shelby* and the
8 *Flores* cases that talk about other enforcement clauses and
9 principles of federalism. And I would just point out that
10 that -- that concept of the principles of federalism, I mean
11 this assault has been prosecuted in state court, as we all
12 know, but the -- the idea that applying this statute here
13 federally encroaches on principles of federalism given that the
14 conduct is already covered by state statutes.

15 THE COURT: All right. Okay. Thank you.
16 Who's going to be arguing this for the government?

17 MS. ALLISON: I will, Your Honor.

18 THE COURT: All right. Ms. Allison.

19 MS. ALLISON: So just to start briefly with the facial
20 challenge, I agree --

21 THE COURT: Don't -- don't bother with the facial. I
22 want to hear the as-applied argument.

23 MS. ALLISON: Okay. So as to the as-applied
24 challenge, it is well established that the Thirteenth Amendment
25 does not protect only some races but not others. And in

1 particular, it's well established that it doesn't protect only
2 previously enslaved races but not others. And the government
3 has listed on Page 5 of its motion a string cite to that
4 effect, and in particular the *Beebe* case specifically addressed
5 White victims in so holding.

6 And the Supreme Court in *Bailey v. Alabama* has
7 emphasized that the Thirteenth Amendment is not limited to
8 antebellum enslavement and instead the Thirteenth Amendment is
9 a charter of universal freedom for all persons of all races.

10 So, to the extent also that Mr. Jerome and Ms. Kanai
11 argued in their motion that the word *Haole* is not sufficient,
12 the government need not prove that an individual slur or an
13 individual phrase is itself a badger incident of slavery.
14 Instead Congress has already determined that racially motivated
15 violence is the badger incident.

16 And so to the extent there is an argument the
17 government has failed to show that this assault constituted
18 racially motivated violence, that is a premature challenge to
19 the sufficiency of the evidence.

20 THE COURT: All right. Mr. Jerome, I will give you
21 short rebuttal, if any.

22 MR. JEROME: No, Your Honor, I think that's sufficient
23 at this point.

24 THE COURT: All right. Well, I'm just going to rule.
25 So as far as the facial claim, I mean everyone understands that

1 the restrictions of *Jones versus*, I don't know if it's *Alfred*
2 *Mayer* or just *Mayer*, 392 U.S. 409, 1968, and the claim is
3 raised to preserve it for potential future review. So I deny
4 that.

5 The as-applied claim, you know, it's more interesting.
6 I do -- I will say that, Mr. Jerome, your brief does read as a
7 sufficiency claim. I mean it really does in many respects. It
8 may not be what you intended, but that's certainly how I read
9 it. And of course we don't have a, you know, summary judgment
10 process in criminal cases.

11 So to the extent you sort of talk about the use of the
12 term *Haole* and what it can mean and what it can't mean, you
13 know, I'm not here to judge the sufficiency of the evidence at
14 this stage. I can't do that.

15 As to the larger claim, I just think the Thirteenth
16 Amendment as interpreted is broader than what the defendants
17 are claiming here and not limited to just, you know, previously
18 enslaved individuals. And I think even if you take into
19 account the history of the state, I think Mr. Jerome's reading
20 is just too restrictive given the case law. So I'm going to
21 deny the as-applied challenge as well.

22 All right. So next we have the motions to sever.
23 Next in line is Mr. Aki's Motion to Sever. So I don't know,
24 Ms. Panagakos, if you or Ms. Ponce were going to be arguing
25 that?

1 COURT REPORTER'S CERTIFICATE

2

3 I, CYNTHIA FAZIO, Official Court Reporter, United
4 States District Court, District of Hawaii, do hereby certify
5 that pursuant to 28 U.S.C. §753 the foregoing pages is a
6 complete, true, and correct transcript of the stenographically
7 reported proceedings held in the above-entitled matter and that
8 the transcript page format is in conformance with the
9 regulations of the Judicial Conference of the United States.

10

DATED at Honolulu, Hawaii, October 26, 2022.

11

12

13

/s/ Cynthia Fazio
CYNTHIA FAZIO, RMR, CRR, CRC

14

15

16

17

18

19

20

21

22

23

24

25