Nos. 23-373, 23-416, 23-635

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee/Cross-Appellant

v.

KAULANA ALO-KAONOHI AND LEVI AKI, JR.,

Defendants-Appellants/Cross-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

REPLY BRIEF FOR THE UNITED STATES AS APPELLEE/CROSS-APPELLANT

CLARE E. CONNORS
United States Attorney
District of Hawaii

CRAIG S. NOLAN
Assistant U.S. Attorney
United States Attorney's Office
Room 6-100
PJKK Federal Building
300 Ala Moana Blvd.
Honolulu, Hawaii 96850
(808) 541-2850

KRISTEN CLARKE
Assistant Attorney General

ERIN H. FLYNN
ELLEN NOBLE
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 598-1479

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

STATUTES:

SENTENCING GUIDELINES:

MISCELLANEOUS: **PAGE**

The government's cross-appeal concerns the district court's determination that it lacked authority to apply the three-level hate-crime enhancement under Sentencing Guidelines § 3A1.1(a), despite defendants' hate-crime conviction under 18 U.S.C. 249(a)(1). The district court had authority to apply the hate-crime enhancement because a jury found, beyond a reasonable doubt, that defendants violated Section 249(a)(1), and the elements of a Section 249(a)(1) offense satisfy the elements of the enhancement. *See* Gov't Br. 54-61.[1] In arguing otherwise, defendants misconstrue the text of Section 3A1.1(a), overlook its commentary, and fail to distinguish controlling precedent. Nor is the court's error harmless. The district court stated that if it had the legal authority to apply the hate-crime enhancement, it would have done so. *See* 5-ER-968.

ARGUMENT

The district court erred in holding that it could not apply Sentencing Guidelines § 3A1.1(a) without a special jury finding.

The Guidelines' text and commentary, and binding Ninth Circuit precedent, confirm that the hate-crime enhancement applies where the jury finds beyond a

[1] Citations to "Gov't Br. __" refer to the Government's Opening and Response Brief. Citations to "Resp. Br. __" and "Aki Resp. Br. __" are to page numbers in defendant-appellant Alo-Kaonohi's Response and Reply Brief (Third Brief) and defendant-appellant Aki's Response and Reply Brief (Third Brief), respectively. Citations to "__-ER-__" refer to the volume and page numbers in Alo-Kaonohi's Excerpts of Record. Citations to "SER-__" refer to the page numbers in the United States' Supplemental Excerpts of Record filed with its Opening and Response Brief.

reasonable doubt, as it did here, that defendants intentionally assaulted the victim because of his race. No additional findings are required.[2]

A. Defendants misconstrue the text of the hate-crime enhancement.

The text of Section 3A1.1(a) supports the government's position that no additional jury findings were needed for the hate-crime enhancement to apply. Section 3A1.1(a) applies a three-level upward adjustment when "the finder of fact at trial . . . determines beyond a reasonable doubt that the defendant intentionally selected any victim . . . as the object of the offense of conviction because of the actual or perceived race . . . of any person." Here, the jury made such a determination when it found, beyond a reasonable doubt, that defendants willfully caused bodily injury to C.K. because of his race in violation of the federal hate-crime statute, 18 U.S.C. 249(a)(1).

1. Defendants contend that the language "intentionally selected" in Section 3A1.1(a) imposes a higher standard of causation than that required for a Section 249(a)(1) conviction. *See* Resp. Br. 20-21; Aki Resp. Br. 24-25. But the

[2] This Court should review the district court's decision not to apply the hate-crime enhancement *de novo* and not, as Aki suggests (Aki Resp. Br. 15-16), for an abuse of discretion. The district court's decision rested on a legal interpretation of the Guidelines, which courts review *de novo*, and not on an application of the Guidelines to particular facts, which courts review for an abuse of discretion. *See United States v. Blackshire*, 98 F.4th 1146, 1155 (9th Cir. 2024). In fact, the district court stated that if it had the legal authority to make the finding itself, it *would* have applied the three-level enhancement given the facts of the case. *See* 5-ER-968.

operative language governing causation in Section 3A1.1(a) is "*because of* the actual or perceived race" of the victim. Sentencing Guidelines § 3A1.1(a) (emphasis added). That same language is used in Section 249(a)(1) and in the corresponding jury instructions. *See* 18 U.S.C. 249(a)(1); SER-43. The language "because of" requires but-for causation, *see* Gov't Br. 24-26, and is the standard for both a Section 249(a)(1) conviction and a Section 3A1.1(a) enhancement.

In arguing otherwise, defendants improperly conflate the requirement that the defendant's conduct be intentional with the standard of causation. Section 249(a)(1)'s requirement that the defendant act "willfully"—*i.e.*, "voluntarily and intentionally"—when causing bodily injury does not mean a heightened causation standard applies in assessing the degree to which the victim's race caused the attack. *See* Gov't Br. 25-27. The word "willfully" modifies the act of causing bodily injury and does not modify "because of." *See ibid.*

The same is true for the hate-crime enhancement. The provision requires that the defendants' conduct—their selection of the victim—be intentional, but with respect to causation, it is enough that defendants would not have taken the same intentional action but for the victim's race. *See* Gov't Br. 25-27; *see also Bostock v. Clayton Cnty.*, 590 U.S. 644, 656-657 (2020) (holding traditional but-for causation applies even where statute requires the defendant to act intentionally because of a protected characteristic).

By finding that race played a "determinative role" in defendants' decision to assault the victim, the jury also made the proper causation finding needed to apply Sentencing Guidelines § 3A1.1(a). There is "no textual basis for applying a different standard to the sentencing than to the conviction for hate crimes." *United States v. Smith*, 365 F. App'x 781, 788 (9th Cir. 2010).

2. Nor does the term "selected" require a jury to make additional findings regarding defendants' conduct beyond those already required for a Section 249(a)(1) conviction. Defendants argue that just because race was a but-for cause of their conduct does not mean that they *selected* the victim because of race. *See* Resp. Br. 23; Aki Resp. Br. 25. Defendants, however, are focused on the wrong element of a Section 249(a)(1) offense. The phrase "intentionally selected" in Section 3A1.1(a) is satisfied by the first element of Section 249(a)(1)—that the defendant willfully caused bodily injury to the victim. *See* SER-43. By finding that the defendants willfully caused bodily injury to the victim, the jury necessarily found that defendants intentionally selected—or chose—the victim. *See United States v. Armstrong*, 620 F.3d 1172, 1176 (9th Cir. 2010) (explaining that the defendant "selected" the victim "by using force to injure, threaten, or intimidate" him).

The plain meaning of "select" does not require premeditation. As Aki stated, the term means "to choose" or "pick out in preference to another." Aki

Resp. Br. 19 (citing Oxford English Dictionary).[3] The definition does not require that the choice of victim—the decision to inflict harm on a particular person—be made in advance or be solely motivated by race. To the contrary, the Ninth Circuit has held that a defendant selects a victim by intentionally harming them, regardless of whether the defendant initially targeted them.

In *Armstrong*, for instance, the defendant aided and abetted an attack on a Black man who happened to be shopping at the same time as him, and it was the defendant's companion—not the defendant—who made the initial "selection" and decision to fight the victim. *See* 620 F.3d at 1174-1175. Nonetheless, the Court applied the hate-crime enhancement, holding that "[a]lthough the jury was not asked to find that [the defendant] personally selected [the victim] Smith in the first instance, it was asked to and did find that Smith was the victim of Armstrong's attack because of his race. That is sufficient reason to impose the enhancement." *Id.* at 1176.

In other words, to intentionally harm a person is to intentionally select them as a victim. Because the jury found that defendants Alo-Kaonohi and Aki intentionally assaulted C.K., *see* SER-43, no additional jury finding regarding the

[3] Aki also states the word means "specially chosen," Aki Resp. Br. 19, but that is the definition for the adjective form of "selected," and is not applicable here. *See selected*, Oxford English Dictionary, https://perma.cc/D4JV-9AXH.

act of "selection" was required for the district court to apply the hate-crime enhancement.

3. Defendants further contend that if Section 3A1.1(a) was meant to apply to every Section 249(a)(1) conviction, then its language would closely track the language of the statute. *See* Resp. Br. 23; Aki Resp. Br. 24-25. However, with respect to the standard of causation, Section 3A1.1(a) does directly track the language in Section 249(a)(1), using the same phrase: "because of [a victim's] actual or perceived race." *Compare* 18 U.S.C. 249(a)(1), *with* Sentencing Guidelines § 3A1.1(a).

And the reason that the Guidelines use the phrase "intentionally selected" instead of the specific intentional conduct required under Section 249(a)(1) ("willfully caused bodily injury") is because the enhancement applies to multiple hate-crime offenses that criminalize different types of conduct. *See, e.g.*, 18 U.S.C. 245(b)(2) (prohibiting intimidating or interfering with various activities, like attending school, because of the victim's race); 42 U.S.C. 3631 (prohibiting injuring, intimidating, or interfering with a person, through force or threat of force, because of the victim's race). The language "intentionally selected" ensures that the hate-crime enhancement applies to different types of hate crimes where the victim is selected because of their race or other protected characteristic.

4. The government's reading of Section 3A1.1(a) is also consistent with the structure of the Guidelines and the purpose of the enhancement. Defendants never respond to the fact that their base offense levels came from Sentencing Guidelines § 2H1.1, which instructs a sentencing court to apply the guideline applicable to any underlying offense—here, Section 2A2.2 (aggravated assault). *See* Gov't Br. 58-59. This means that, without the hate-crime enhancement, defendants "would incur no additional penalty for the 'discrete harm' of targeting [the] victim[] based on their [race]." *Ibid.* (alterations in original) (quoting *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 153 (2d Cir. 2008)).

Such a cabined reading of the hate-crime enhancement makes little sense given the statutory scheme and corresponding structure of the Guidelines. It also would undermine the purpose of Section 3A1.1(a), which is "to punish those who have a hate crime motivation and to deter future hate crimes." *Armstrong*, 620 F.3d at 1176; *cf. United States v. Scheu*, 83 F.4th 1124, 1128 (9th Cir. 2023) (interpreting a sentencing enhancement by considering the structure of the Guidelines and purpose of the underlying enhancement).

Thus, Section 3A1.1(a) does not require a special jury finding regarding "intentional selection" where the jury already found that defendants intentionally attacked the victim because of his race.[4]

B. Even if the text of Section 3A1.1(a) were ambiguous, the Guidelines' commentary confirms that the hate-crime enhancement applies.

The text of the hate-crime enhancement is clear, and its requirements are satisfied by the jury's verdict that defendants intentionally assaulted C.K. because of his race. But even if defendants' arguments muddied the waters as to what it means to "intentionally select," the Guidelines' commentary confirms the government's interpretation is correct. Where the Sentencing Guidelines are ambiguous, this Court defers to the Guidelines' commentary. *See United States v. Castillo*, 69 F.4th 648, 662 (9th Cir. 2023). The commentary to Section 3A1.1(a) makes clear that the hate-crime enhancement "applies to offenses that are hate crimes." Not a certain subset of hate crimes, but "hate crimes." Sentencing Guidelines § 3A1.1, comment. (n.1). And a Section 249(a)(1) offense—enacted into law via the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act—is a hate crime. *See* 18 U.S.C. 249 (entitled "Hate crime acts"). The commentary further states that the purpose of the hate-crime enhancement is "to

[4] Not only is a special jury finding unnecessary but requiring one would create significant jury confusion because juries would be tasked with making two findings that mean essentially the same thing. *See* Gov't Br. 60.

provide an enhancement . . . when the finder of fact at trial determines beyond a reasonable doubt that the defendant had a hate crime motivation." Sentencing Guidelines § 3A1.1, comment. (backg'd.).

In response, Aki misapplies the "general-specific" canon of statutory interpretation. Aki argues (Resp. Br. 22-24) that where there is an apparent conflict between a specific provision and a more general one, the more specific one governs, and that this should resolve any conflict between the text of Section 3A1.1(a) and its commentary. Yet his argument incorrectly assumes that Section 3A1.1(a) unambiguously applies to only a subset of hate crimes under Section 249(a)(1)—that is those that involve intentional selection beyond a reasonable doubt. As explained above, the text, structure, and purpose of the hate-crime enhancement all support the government's position that the jury's findings needed to convict under Section 249(a)(1) are the same findings needed to satisfy the hate-crime enhancement. *See* pp. 2-7, *supra*. And if there were any ambiguity in the text, the commentary clarifies that the hate-crime enhancement applies to hate crimes. There is no conflict between Section 3A1.1(a) and its commentary. Instead, the commentary directly confirms the government's reading of the text: the hate-crime enhancement applies where, as here, the defendants were convicted of a hate crime.

C. Defendants fail to distinguish binding Ninth Circuit precedent.

Not only do defendants misinterpret the text and commentary of the hate-crime enhancement, but they disregard binding Ninth Circuit precedent holding that a jury need not make a special finding regarding "intentional selection" for the enhancement to apply. *See Armstrong*, 620 F.3d at 1175-1176. In *Armstrong*, this Court rejected the defendant's argument that "the district court should have been required to make a separate finding as to *selection* [of the victim] before imposing the enhancement" because it "misses the point of" the enhancement—namely, "to punish those who have a hate crime motivation and to deter future hate crimes." *Ibid.* "[I]t is enough" that the defendant "selected" the victim "by using force to injure, threaten, or intimidate" him "because of his race." *Id.* at 1176.[5]

Defendants do not explain why this Court's analysis in *Armstrong* does not apply with equal force here. Aki does not even discuss *Armstrong*. Alo-Kaonohi merely quotes the district court's statement that the case is not helpful because it "clearly involved a defendant that intentionally selected someone because of race" and "involved a statute that requires a motivating factor not because of causation."

[5] The Ninth Circuit also rejected defendants' argument in its unpublished decision in *Smith*. *See* Gov't Br. 56. And other circuits have likewise rejected it. *See* Gov't Br. 57-58.

Resp. Br. 23 (quoting 5-ER-922-925). But neither of these arguments is grounds for distinguishing *Armstrong*.

First, contrary to the district court's analysis, whether the defendant had "intentionally selected" the victim was very much in dispute in *Armstrong*. The defendant had argued that he did not "personally select" the victim and the court recognized that the defendant's companion—not the defendant—was the one who "initially chose" the victim. *See Armstrong*, 620 F.3d at 1175. Nonetheless, the Court concluded that those facts did not matter because "[a]lthough the jury was not asked to find that Armstrong personally selected Smith in the first instance, it was asked to and did find that Smith was the victim of Armstrong's attack because of his race" and "[t]hat is sufficient reason to impose the enhancement." *Id.* at 1176.

Second, whether there were stronger underlying facts regarding "intentional selection" in *Armstrong* is irrelevant because application of Section 3A1.1(a) depends on the jury's actual findings and the jury's findings in *Armstrong* mirror the jury's findings here. In *Armstrong*, "the jury was required to find—and did find—that Armstrong used force or the threat of force; that he willfully injured, intimidated, and interfered with Smith; and that Armstrong acted because Smith is African American." 620 F.3d at 1175. Similarly, here, the jury was required to find that defendants willfully caused bodily injury to C.K. because of his race. *See*

SER-43. Even if there had been more facts to support a jury finding of "intentional selection" in *Armstrong*, the Ninth Circuit required no such jury finding for the enhancement to apply.

Finally, that the jury in *Armstrong* had to find race was "a motivating factor" for the attack, as opposed to a but-for cause of the attack, does not help defendants' argument. In fact, the Supreme Court has described the "motivating factor" test as a "more forgiving standard" under which liability can attach even where the protected characteristic is *not* the but-for cause of the defendant's unlawful conduct. *See Bostock*, 590 U.S. at 657; *see also EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 772-773 (2015) (recognizing "motivating factor" test as more relaxed than the traditional standard of "but-for" causation). Thus, if anything, the jury's causation finding in this case—that defendants would not have attacked C.K. but for his race—is even stronger grounds for applying the hate-crime enhancement than the jury finding in *Armstrong*.

CONCLUSION

For the foregoing reasons, this Court should affirm defendants' convictions, vacate defendants' sentences, and remand the case to the district court for resentencing.

Respectfully submitted,

CLARE E. CONNORS
United States Attorney
District of Hawaii

CRAIG S. NOLAN
Assistant U.S. Attorney
United States Attorney's Office
Room 6-100
PJKK Federal Building
300 Ala Moana Blvd.
Honolulu, Hawaii 96850
(808) 541-2850

KRISTEN CLARKE
Assistant Attorney General

s/ Ellen Noble
ERIN H. FLYNN
ELLEN NOBLE
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 598-1479

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 23-373, 23-416, 23-635

I am the attorney or self-represented party.

This brief contains 2,727 **words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ◉ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ○ is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - ☐ it is a joint brief submitted by separately represented parties.
  - ☐ a party or parties are filing a single brief in response to multiple briefs.
  - ☐ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated ____.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Ellen Noble **Date** 06/18/2024
*(use "*s/[typed name]*" to sign electronically-filed documents)*