No. 23-30075

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CHANCE JOSEPH SENECA,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS APPELLEE

KRISTEN CLARKE
Assistant Attorney General

BONNIE I. ROBIN-VERGEER
YAEL BORTNICK
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-8271

STATEMENT REGARDING ORAL ARGUMENT

The United States believes that oral argument is unnecessary in this case because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. See Fed. R. App. P. 34(a)(2)(C).

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

LEGISLATIVE HISTORY:

GUIDELINES:

GUIDELINES (continued): **PAGE**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-30075

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CHANCE JOSEPH SENECA,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AS APPELLEE

JURISDICTIONAL STATEMENT

This appeal is from a district court's final judgment in a criminal case. The district court had jurisdiction under 18 U.S.C. 3231. The court entered final judgment against defendant Chance Joseph Seneca on January 25, 2023 (ROA.101-106), and an amended judgment, ordering restitution, on March 20, 2023 (ROA.110-115).[1] On January 31, 2023, Seneca filed a timely notice of

[1] "ROA.____" refers to the page numbers of the Record on Appeal. "Br. __" refers to page numbers in the State's opening brief.

appeal from the court's judgment. ROA.107-108. This Court has jurisdiction under 18 U.S.C. 3742 and 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

1. Whether the district court correctly applied the three-level "hate crime" enhancement pursuant to Sentencing Guidelines § 3A1.1(a).

   a. Whether application of the hate-crime enhancement requires evidence of hate or animus.

   b. Whether the district court clearly erred in finding that Seneca intentionally selected his victim because of his gender and/or sexual orientation.

   c. Whether any error in the district court's calculation of Seneca's advisory Guidelines range was harmless.

2. Whether the district court's selection of a 509-month sentence was substantively reasonable.

STATEMENT OF THE CASE

Over the course of many months, Chance Joseph Seneca, inspired by his idol, serial killer Jeffery Dahmer, painstakingly planned to fulfill a disturbing years-long fantasy of kidnapping, murdering, dismembering, and consuming a gay man. On June 19 and 20, 2020, Seneca, then 19 years old, acted on that plan by luring two gay men he had met on Grindr to his father's house, with the intent to

kidnap, kill, and dismember them. Following his failed attempted murder of one of these men, Seneca pleaded guilty to a violation of 18 U.S.C. 1201(a)(1) for kidnapping. The district court sentenced Seneca to 509 months' imprisonment, which he now challenges on appeal.

1. Factual Background

a. Chance Seneca idolized Jeffrey Dahmer—a notorious serial killer who lured gay men to his apartment, where he murdered, dismembered, preserved, and cannibalized his victims' bodies. ROA.149, 154, 166, 448, 547-548. Seneca "related to Mr. Dahmer on a high level," explaining that they "had struggled with similar issues while growing up" and that Seneca had "similar compulsions" to Dahmer's. ROA.155, 356; see also ROA.443, 547. Seneca's idolization of Dahmer manifested in a multitude of ways. At the time of his attempted murder of H.W., Seneca used a photograph of Dahmer as his Facebook profile photograph. ROA.164, 459. He wanted to get Dahmer's face tattooed on his body. ROA.166-167, 458. He named his pet bunny rabbit "Jeffrey Dahmer." ROA.167, 455-456. In a workbook for "Identifying your Passions," Seneca wrote that if he "could be any person in history, I would be Jeffrey Dahmer." ROA.168-169, 457. And, most disturbingly, Seneca fantasized for years about emulating Dahmer by kidnapping, murdering, dismembering, preserving, and cannibalizing gay men. See ROA.148-151, 153, 452, 461-464, 570.

Beginning in 2019, Seneca developed and acted on a plan to carry out his sick and disturbing fantasies. See ROA.148, 162-164, 452, 464, 570-576, 587. Seneca used Dahmer's past interviews to learn how to dismember people and preserve their body parts. ROA.157-158, 452, 570. In October 2019—eight months before the attempted murder at issue in this case—Seneca wrote a list of things he needed for his "experiments": "Hydrochloric muriatic acid, rope, tire iron, pistol, butcher knife, hacksaw maybe, * * * small and big sledge hammer, blowtorch and bow knife, oil funnel with extendible nozzle to pour acid, suitcase to put all the tools in, hammer with nails, brass knuckles, [and] bleach." ROA.162-163, 464. Continuing, he wrote that he would also need "to use [a] belt when they're incapacitated, alcohol most likely, [and] cooking recipes for beef/pork." ROA.162, 464. He told himself that his victims "are just objects to you." ROA.162, 464. And he formulated a plan for his gruesome crime: "watch Rocky Horror Picture Show with them, pull teeth out and write the letter of their first name on it so I'll remember who it's for and put it in glass vial, wash head in bath with me and preserve one hand and keep the skeleton of the other." ROA.163, 464; see also ROA.571.

On June 6, 2020, Seneca wrote out additional "instructions for dismembering a body and taking steps to preserve it":

> Cut off the head. Save it to boil later and preserve. Cut off the limbs, keep parts that I want from that, then deflesh it and save hands. Put

> lower half of body without legs inside an ice chest to use before I get rid of it. Smash any bones that I'm not keeping. Keep some of the thigh meat and glute meat, wrap in Saran Wrap. Pull a couple of teeth and write the initial of the person on it to remember who it's from. Save heart to preserve. Also figure out how to preserve eyeballs. Keep parts I want in an ice chest for a few days before preserving them. Might need a drill and needle to be able to get the brain out of the skull without damaging it. Possibly inject boiling water or some type of solution into the skull. Use putty scraper to get any meat off the bones that are sticking.

ROA.161-162, 463. Seneca's plans to cut off and preserve body parts, keep mementos, wrap items for food, and deflesh bones, mirrored Dahmer's crimes. ROA.162.

On June 19, 2020, Seneca made a final shopping list for supplies he would need to act out his fantasies: a big cooking pot; weapons, including a screwdriver, knife, and pistol; and an acid resistant bucket. ROA.160, 462. Seneca later confessed that he had "planned to continue murdering until he was caught or killed." ROA.278; see also ROA.150, 446.

b. Seneca chose Grindr as his exclusive "hunting ground." ROA.152, 453-454, 580-581. Grindr is "an internet-based social media and dating application primarily used by gay and bisexual men to meet other men." ROA.276; see also ROA.146-147, 453, 579, 582. Seneca viewed Grindr as a "sleazy app." ROA.582. Despite being familiar with other dating applications that catered to straight couples, ROA.539-540, 579, Seneca used Grindr to select his victims because he "knew everybody on there was gay." ROA.579.

On June 19, 2020, Seneca, then 19 years old, picked up J.F., whom he had met on Grindr, and brought him to Seneca's father's house.[2] ROA.147, 278, 352, 357-358, 564-566. After watching a movie and engaging in sexual activities, Seneca handcuffed J.F. with his hands behind his back. ROA.357, 566-567, 576. Seneca "planned to kill [J.F.] by strangulation, dismember him, and save his body parts, as Dahmer had done to his victims." ROA.357; see also ROA.160, 451-452, 564, 569-570. Seneca, however, was unable to carry through with his plan. ROA.278, 357, 451-452, 567-570. Beginning to cry, Seneca uncuffed J.F. and drove him home. ROA.357, 452, 567, 570. Undeterred, Seneca made a calendar reminder in his phone for the next day at 5 p.m., with the subject, "don't hesitate again." ROA.159-160, 461.

c. On June 20, 2022, Seneca prepared for his next victim. In addition to arming himself with a handgun, Seneca put an ice pick under his bed, put a knife in the bathroom, and had "brass knuckles in case [of] a fight." ROA.357, 596-597. To get himself "in the mood," Seneca watched "Silence of the Lambs." ROA.597. Seneca then picked up H.W., whom he had also met on Grindr. ROA.146, 276-277, 357, 597. Seneca pretended that he was "interested in meeting with H.W. for recreational or romantic purposes," but his true purpose "was to seize, inveigle,

---

[2] On the same date, Seneca was communicating with an additional potential victim, T.G., on Grindr, who was also a gay man. See ROA.147. Seneca canceled his meeting with T.G. to meet with J.F. instead. ROA.147.

kidnap, abduct, and hold H.W." to "kill[] and dismember[] him for his own gratification." ROA.276-277, 356; see also ROA.174, 595, 601, 617. Seneca also planned to preserve some of H.W.'s body parts in "an effort to follow in [Dahmer's] footsteps." ROA.356; see also ROA.596.

As he had done with J.F., Seneca drove H.W. to his father's house in Lafayette, Louisiana. ROA.146, 277, 598. Using sex as a pretext, Seneca handcuffed H.W. and lured him to the bathroom. ROA.174, 277, 357, 603-604, 609-611. Seneca showed H.W. a pistol. ROA.278, 357, 605, 609. Seneca then used a belt to strangle H.W. from behind until H.W. was unconscious. ROA.147, 277, 611-613. While strangling H.W., Seneca told him "to 'let go,' and that he was 'sorry,' and was setting him 'free.'" ROA.357; see also ROA.560, 613-614. Believing he was dead, Seneca "pulled H.W. into a bathtub, stripped him of his clothing, and prepared to" dismember him. ROA.277; see also ROA.614-615. Seneca "used a Bowie knife to slit H.W.'s wrists." ROA.277; see also ROA.614-616. Although Seneca was "grossed out" by H.W.'s exposed bones, he nonetheless attempted to cut H.W.'s other wrist off, rinsed off the knife, and put the knife in the sink. ROA.357, 615-616. Seneca became afraid that H.W. was "waking up" so, to ensure that he was truly dead, Seneca "hit H.W. in the back of the head with a hammer" and "stabbed him in the neck with an ice pick." ROA.277, 357, 616. He then put the hammer in the sink. ROA.616.

Rather than feeling "great" as he had expected, Seneca "felt even weaker than [he] did before." ROA.614; see also ROA.559 (statement by Seneca that "it hurt" when he "couldn't even go through with it"). Seneca "broke down" and "the hatred * * * for [him]self … came out too." ROA.619. Seneca went outside and called 911. ROA.277, 356, 617. Seneca told the dispatcher that he had strangled H.W. and stabbed him in the throat, and that H.W. could not be saved. ROA.277, 356. Before the police arrived, Seneca deleted his Grindr conversation with H.W. to "get rid of things." ROA.278.

d. When first responders arrived, they discovered a gruesome scene: They found a large hunting knife, ice pick, saw, and hammer, and saw blood on the floor and H.W. lying face down, naked and unconscious in a pool of blood in the bathtub, with the water running. ROA.277, 356, 617. H.W. had "strangulation marks around his neck" and his wrists were "slit to the bones," but he was still alive. ROA.356; see also ROA.278. H.W. was transported to a local hospital, where he remained in a coma for three days. ROA.278. H.W. had "brain swelling due to strangulation," ROA.356, and he "required extensive medical care to rehabilitate the damaged and severed tendons of his wrists." ROA.278. H.W. "suffered permanent nerve damage in his left hand" and his wrists were "scarred from slicing-injuries that penetrated to the bone." ROA.278.

e. In the weeks after he attempted to murder H.W., Seneca gave statements to the Lafayette Police Department (LPD), ROA.442-446, and the Federal Bureau of Investigations (FBI), ROA.447-454 (excerpt); ROA.486-637 (complete transcript); see also ROA.277. Seneca told investigators that he "never really wanted to hurt …women," and he admitted he targeted "just mostly men." ROA.278; see also ROA.151, 444. While Seneca states that he identifies as a gay male, the FBI found evidence that, in both the month before his offense and shortly thereafter, Seneca had engaged in romantic or sexual conversations with women online. ROA.170-173; see ROA.466.[3] Indeed, in addition to using Grindr, until "a couple months" before his offense, Seneca also had Tinder downloaded on his phone, which is a software application for men and women looking to "hook[] up" or "find somebody." ROA.539-540, 579; see also ROA.175. But Seneca never "use[d] Tinder to groom or otherwise lure women in as victims." ROA.176. And, regardless of his sexuality, Seneca told investigators that his choice of victims was

[3] While Seneca now identifies as "an openly gay male" (Br. 3), he told investigators, repeatedly, that he found his sexuality "confusing." ROA.445, 448, 537, 548. Shortly after his crime, for example, he sent a message to a woman from jail, stating that he "pretty much forced [him]self to only date guys because [he] felt like no girl really wanted to be with [him]," ROA.171-172, 466; see also ROA.170-173 (discussing Seneca's prior romantic or sexual conversations with women); ROA.276 (admitting he "had previously engaged in sexual conduct with both men and women"); ROA.527-530 (discussing Seneca's previous relationship with a woman).

"not a sexual driven thing … It wasn't a physical thing it was just mental." ROA.445; see also ROA.151, 448, 548, 588-589, 629-630.

Seneca also told investigators about his obsession with Dahmer. Seneca explained that when he "get[s] so deeply involved in something" he feels like he has "to be exactly … like them," to the point where he thinks that he has "pretty much become the person." ROA.156, 449-450, 561-562. Seneca stated that "pretty much everything I was gonna do was similar to [Dahmer]." ROA.157, 452, 570. Seneca "looked up to [Dahmer]" and "felt like [he] had to be like [Dahmer]." ROA.448, 548; see also ROA.587-589.

2. Procedural History

a. A federal grand jury returned a six-count indictment against Seneca. ROA.21-24. Seneca was charged with one count of committing a hate crime with attempt to kill, in violation of 18 U.S.C. 249(a)(2)(A)(ii) (Count 1); one count of possessing a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A) (Count 2); two counts of kidnapping (relating to H.W. and J.F.), in violation of 18 U.S.C. 1201(a)(1) (Counts 3 and 4); one count of attempted kidnapping (relating to T.G.), in violation of 18 U.S.C. 1201(a)(1) (Count 5), and one count of obstruction of justice for destroying records, in violation of 18 U.S.C. 1519 (Count 6). ROA.21-24.

Seneca pleaded guilty to Count 3, which charged him with kidnapping H.W. ROA.96-97 (court minutes), ROA.116-139 (plea hearing), ROA.268-285 (plea agreement). In exchange, the government agreed to dismiss the remaining counts of the indictment after sentencing. See ROA.269. As part of his guilty plea, Seneca acknowledged that the maximum sentence for his kidnapping conviction was a term of imprisonment of any term of years or for life. ROA.274-275.

b. In advance of sentencing, the U.S. Probation Office prepared an initial presentence investigation report (ROA.286-303) and then a revised (ROA.309-344) and final presentence investigation report (PSR) (ROA.350-385) after considering submissions by the parties. As relevant here, after calculating the base offense level,[4] the PSR added a three-level increase under Sentencing Guidelines § 3A1.1(a) for "Hate Crime Motivation" because Seneca intentionally selected his victim because of his "actual or perceived * * * gender * * * or sexual orientation." ROA.360. The PSR also included a two-level decrease under Sentencing Guidelines § 3E1.1(a) for acceptance of responsibility and a one-level decrease under Sentencing Guidelines § 3E1.1(b) because Seneca timely notified the government of his intention to enter a plea of guilty. ROA.360. With a

[4] The government (ROA.377-378) and Seneca (ROA.379-385) objected to the base offense level calculated in the PSR. The district court agreed with those objections and determined that the total offense level should be 41. ROA.143. The court's correction is not relevant to this appeal.

criminal history category of I and a total offense level of 41, the advisory Guidelines range was 324-405 months. See ROA.228, 345; Sentencing Table, Sentencing Guidelines § 5A.

Seneca objected to the three-level hate-crime enhancement under Sentencing Guideline § 3A1.1(a). ROA.380-384. Despite the evidence to the contrary (p. 9 & n.3, *supra*), Seneca claimed he identifies as a gay man. ROA.380-381; see also ROA.445, 474, 550. Seneca argued that he selected his victim not because of hatred toward the gay community, but because he and his victim were from the same community of gay men. ROA.380-382. Seneca described his offense as "a crime of opportunity." ROA.384.

The Probation Officer rejected this objection. See ROA.372-375. The Probation Officer did not dispute Seneca's claim about his sexual orientation, but he maintained that Seneca's use of Grindr, which is "targeted toward LGBTQ people," "to arrange dates with gay men, under the pretense of sex/romance, and with the intent to kill them, involved his victim(s) being selected based on their sexual orientation and gender." ROA.375. The Probation Officer recognized that the district court would have to make the factual determination beyond a reasonable doubt. ROA.375.

Seneca submitted a sentencing memorandum, seeking a 235-month sentence (ROA.468-472), which would require a downward variance if the hate-crime

enhancement applied. Seneca argued that his actions in reporting his crime and thereby saving H.W.'s life merited a 235-month sentence. ROA.470-471. The government also submitted a sentencing memorandum, which maintained that the hate-crime enhancement was properly applied and urged the court to impose a 405-month sentence. ROA.415-440. Seneca filed a response, reiterating his objections to the application of the hate-crime enhancement. ROA.473-484. In particular, Seneca argued that the government could not prove beyond a reasonable doubt that he was motivated by hatred of the victim's gender or sexual orientation. ROA.473-484.

c. The district court held a sentencing hearing on January 15, 2023. ROA.140-261. During the hearing, the court considered evidence on the application of the hate-crime enhancement under Sentencing Guidelines § 3A1.1(a). ROA.143-144. Specifically, the court heard testimony from Special Agent Daniel English regarding his investigation of the kidnappings, attempted kidnappings, hate crime, and gun counts charged in the indictment, and on cross-examination by defense counsel. ROA.145-208. The parties also introduced a number of exhibits (ROA.263, 267), including, *inter alia*, (1) the transcripts of Seneca's LPD and FBI interviews (ROA.150, 155, 179-180, 442-446, 447-454, 486-637); (2) information recovered from Seneca's iPhone that showed his planning for the attempted murders (ROA.159, 460-464); (3) evidence of Seneca's

idolization of Jeffrey Dahmer (ROA.164, 166-169, 455-459); (4) Seneca's July 26, 2020, text message admitting his feelings for a woman (ROA.171-172, 465-466); (5) evidence of Seneca's fascination with the Nazi party (ROA.204-207, 264); and (6) J.F.'s victim impact statement (ROA.230, 265-266).

After considering English's testimony, the exhibits submitted, and the parties' arguments, the district court rejected Seneca's objections to the application of the hate-crime enhancement. ROA.223-228. First, the court found that the plain meaning of Section 3A1.1's text does not require "evidence of animus, animosity, or hate in order for that provision to apply." See ROA.224-225. Instead, the court explained, the Guideline's "because of" language requires a showing of "causation"—*i.e.*, that the defendant targeted the victim "because of" the protected characteristics. ROA.224.

Second, the district court found that Seneca intentionally selected his victims based on a protected characteristic. ROA.226. The court explained that the hate-crime enhancement would not apply if the evidence showed that Seneca "selected his victims because he dates gay men, he's a member of the gay community, and Grindr is how he meets those persons who he dates." ROA.226. Instead, the court found that the evidence showed that Seneca was "fascinate[ed]" with and "idoliz[ed]" Jeffrey Dahmer, and that he "mimicked Jeffrey Dahmer in a very detailed and organized way." ROA.226-227. Noting that Dahmer targeted gay

men, the court found that "Seneca wished to emulate that, and by emulating that, his victims were members of – male members of the gay community." ROA.227.

The district court also rejected Seneca's argument that this was simply a crime of convenience or limited to his community. ROA.226-227. The court found that Seneca also "had access to women" and "access to Tinder," but instead he "selected gay men" as his victims "because that's what Jeffrey Dahmer did." ROA.227-228.

While the district court explained that it took the reasonable doubt standard "very seriously," the court did not have "any doubts" that "Seneca intentionally selected his victims because of the[ir] actual or perceived sexual orientation and sex, men, and that he did so to emulate Jeffrey Dahmer." ROA.228. The court then found that Seneca's total offense level was 41, which, with a criminal history category of I, yielded an advisory guideline range of 324 to 405 months' imprisonment. ROA.228. Defense counsel objected to the court's application of the enhancement. ROA.228.

d. After rejecting Seneca's objection to the hate-crime enhancement, the district court considered the sentencing factors under 18 U.S.C. 3553(a). The court noted that it had previously "reviewed the sentencing memorandum submitted by defense counsel and the government as well as the letters that have been submitted on the defendant's behalf." ROA.229-230. The court received a victim impact

statement from J.F. and heard victim impact statements from H.W. and his sister. ROA.230-238, 265-266. H.W. described his ongoing physical, mental, and emotional pain. ROA.234-238. More than two and a half years after the attack, H.W. still could not "lay on his head in a certain position" due to pain from where Seneca bashed it with a hammer, his neck had an inch and a half long scar from being stabbed, and his throat has "multiple little hole punctures." ROA.235. He continues to "have struggles with [his] voice." ROA.235. Because of his wrists being "mutilated almost down to the bone," H.W. cannot feel one of the fingers on his right hand or half the fingers on his left hand, which he can barely use. ROA.236. H.W. was diagnosed with PTSD and anxiety. ROA.236. Emotionally, the attack "affected the way that [H.W.] can further date" and the way that [he] look[s] at [his] sexuality." ROA.237. H.W. requested that the court impose a life sentence. ROA.238.

Following the victim impact statements, Seneca also made a statement to the court. ROA.244. Addressing H.W., Seneca stated that the "only good thing that occurred" on the day of his offense, was that he "stop[ped] and call[ed] the authorities to save your life." ROA.244. Seneca asked for forgiveness, claiming he has "not a violent bone in his body" and that he has "changed for the better." ROA.244.

The district court then turned to the 18 U.S.C. 3553(a) factors. ROA.253-254. First, examining "the nature and circumstances of the offense," the court concluded that the offense was "particularly heinous" and "particularly brutal." ROA.254. In light of the "significant amount of planning that went into" it, the court characterized it as "a cold, rational, [and] calculated offense." ROA.254. The court also considered the "life-altering" impact on the victim in evaluating the "seriousness of the offense." ROA.254. The court recognized, as "counsel and the defendant ha[d] pointed out," the fact that "the victim ultimately survived." ROA.254. But the court emphasized that the victim survived "with significant pain, disability, [and] both mental and physical scars." ROA.254.

Turning to "the history and characteristics of the defendant," the district court recognized that there were "mitigating factors," such as Seneca's "drug use" and "mental health." ROA.254. Without those mitigating factors, the court stated it "would consider life, which is the statutory maximum." ROA.255. The court, however, observed that there were also "other aggravating factors," which it found "significant." ROA.255. Although the court saw "evidence of remorse in the record," the court believed that "a lot of that remorse" was Seneca's sadness that he "could not perform [his crimes] as Jeffrey Dahmer performed." ROA.255. In reviewing Seneca's "description of what he did and his views towards Jeffrey Dahmer * * * in the interviews he had with the FBI," the court found "chilling

evidence that this may not be fixable" and that as long as Seneca "is walking free, the public may be in danger." ROA.255.

Considering "these factors," as well as "the kinds of sentences available and the sentencing guidelines," the district court concluded that an above-Guidelines sentence was "fair and reasonable" based on "the heinous nature of [the] crime and the cold calculation" the court saw in Seneca "in preparing for and executing this crime." ROA.255-256. The court sentenced Seneca to 509 months' imprisonment, which was an "upward variance from the guideline sentence based on the Court's consideration of the 3553 factors."[5] ROA.256. The court also sentenced Seneca to five years' supervised release. ROA.257. In the Statement of Reasons accompanying the Judgment, the court indicated that it had imposed an above-Guidelines sentence for two reasons: (1) "[t]he nature and circumstances of the offense pursuant to 18 U.S.C. § 3553(a)(1)"—specifically, because of the "[e]xtreme [c]onduct" and "[v]ictim [i]mpact"; and (2) "[t]o protect the public from further crimes of the defendant (18 U.S.C. § 3553(a)(2)(C))." ROA.348 (Part VI).

[5] The court explained that its sentence represented a 540-month sentence adjusted downward by the 31 months Seneca had served in state custody that would not have otherwise been credited to Seneca had the court simply sentenced him to 540 months. ROA.256.

The district court further explained that it had "also calculated what the guideline range would have been without [defendant's] objections." ROA.259. The court concluded that

> taking it all together, my consideration of [Section] 3553 and those differing guideline ranges, the sentence that I have imposed is the sentence I would impose even if the Court has in some way erred in calculating the applicable guideline range based on all the information presented to the Court in this proceeding.

ROA.259; see also ROA.349 (Part VIII). Defense counsel objected to the court's statement. ROA.260-261.

On January 25, 2023, the district court entered judgment (ROA.101-106) and then on March 20, 2023, entered an amended judgment (ROA.110-115) requiring that Seneca pay restitution in the amount of $25,571.91.

e. Seneca timely appealed. ROA.107-108.

SUMMARY OF ARGUMENT

1. The district court was correct in applying the hate-crime enhancement, Sentencing Guidelines § 3A1.1(a). As the plain text of that Guideline makes clear, the enhancement applies if the finder of fact determines beyond a reasonable doubt that the defendant "intentionally selected any victim" because of the victim's actual or perceived gender or sexual orientation (among other protected characteristics). Nothing in the text or structure of this enhancement requires proof that the defendant's motivation for that selection was based on hate or animus.

In addition, overwhelming evidence supports the district court's finding that Seneca intentionally selected his victims (including H.W.) because they were gay men. Even if the court improperly applied the enhancement, however, such error was harmless. After considering the Guidelines ranges both with and without the enhancement, as well as the sentencing factors under 18 U.S.C. 3553(a), the court expressly stated that it would have imposed the same sentence even if it erred in calculating the applicable Guidelines range.

2. Seneca's sentence was also substantively reasonable. Although the district court imposed a large upward variance, this Court has routinely upheld variances of similar, and sometimes much greater, magnitude where the district court's decision was justified by the sentencing factors. Rather than point to any error with respect to the district court's weighing of the sentencing factors under 18 U.S.C. 3553(a), Seneca reiterates the same arguments that he made below. But the district court was aware of and acknowledged the mitigating factors Seneca emphasizes, and it held that the seriousness of the offense, the history and characteristics of the defendant, and other aggravating factors deserved more weight and merited the above-Guidelines sentence. This Court should reject Seneca's invitation to reweigh the sentencing factors and reach a different outcome.

For these reasons, this Court should affirm the judgment and Seneca's sentence.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY CALCULATED SENECA'S GUIDELINES SENTENCE

A. Standard Of Review

This Court reviews the sentencing court's "application of the [Sentencing] Guidelines de novo, and [its] factual findings—along with the reasonable inferences drawn from those facts—for clear error." *United States* v. *Velasco*, 855 F.3d 691, 693 (5th Cir. 2017) (emphasis and citation omitted). "A factual finding is clearly erroneous if it is not plausible in light of the record as a whole." *United States* v. *Olarte-Rojas*, 820 F.3d 798, 801 (5th Cir.), cert. denied, 137 S. Ct. 232 (2016). Even if there was an error with the Guidelines calculation, this Court will not reverse if that error is harmless. *United States* v. *Delgado-Martinez*, 564 F.3d 750, 752 (5th Cir. 2009).

B. The District Court Correctly Applied The Hate-Crime Enhancement

Seneca contends (Br. 20-39) that the district court erred in two ways in applying the hate-crime enhancement. First, as a legal matter, Seneca argues (Br. 23-34) that the hate-crime enhancement requires a showing that "the defendant harbored hate or animus toward the victim's protected class." Second, as a factual

matter, Seneca argues (Br. 34-39) that the evidence failed to show that he intentionally selected his victim because of gender or sexual orientation.

This Court should reject both arguments. The plain text of the hate-crime enhancement makes no mention of hate or animus as a prerequisite to finding that the enhancement applies. And the district court's factual findings underlying its application of the enhancement were abundantly supported and therefore not clearly erroneous. Moreover, even if this Court concluded that the district court incorrectly interpreted and applied the hate-crime enhancement, any error would be harmless in this case.

1. The Hate-Crime Enhancement Does Not Require A Finding Of Hate Or Animus

a. The district court correctly interpreted the hate-crime enhancement. The traditional rules of statutory interpretation apply to the Sentencing Guidelines. *United States* v. *Stanford*, 883 F.3d 500, 511 (5th Cir. 2018). "If the language is unambiguous, and does not lead to an 'absurd result,' the court's inquiry begins and ends with the plain meaning of that language." *Ibid.* (quoting *United States* v. *Koss*, 812 F.3d 460, 473 (5th Cir. 2016)).

The plain language of Section 3A1.1(a) is clear, unambiguous, and makes no mention of hate or animus as a prerequisite to finding that the enhancement applies. As relevant here, the hate-crime enhancement applies where

> in the case of a plea of guilty * * * , the court at sentencing 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 * * * gender * * * or sexual orientation of any person.

Sentencing Guidelines § 3A1.1(a). Thus, the enhancement applies where the victim's gender or sexual orientation was a but-for cause of the defendant's conduct. See *Burrage* v. *United States*, 571 U.S. 204, 212-213 (2014) (explaining that "because of" generally requires but-for causation). The text includes no additional requirement relating to a defendant's motivation for that selection. See *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 93, 154 (2d Cir. 2008) (holding that a defendant's motivation is "utterly irrelevant to the applicability of the hate crime enhancement"), cert. denied, 556 U.S. 1283 (2009) and 558 U.S. 1137 (2010) (*Terrorist Bombings*). Indeed, "because there can be no 'good reasons' for" selecting a victim on the basis of one of the listed factors, "the underlying motivation is simply beside the point." *Ibid.*; cf. *United States* v. *Roof*, 10 F.4th 314, 389-390 (4th Cir. 2021) (declining to "insert a new mens rea element of 'hostility'" into the text of 18 U.S.C. 247(a)(2), which "allows for conviction if the defendant intentionally obstructs another's enjoyment of the free exercise of religion"), cert. denied, 143 S. Ct. 303 (2022).

Nor does following the plain language of the Guideline lead to an absurd result. Contrary to Seneca's suggestion (Br. 25), neither the fact that the Guideline

is entitled "Hate Crime Motivation or Vulnerable Victim," see Sentencing Guidelines § 3A1.1, nor the fact that the commentary states that the enhancement "applies to offenses that are hate crimes," *id.* at comment. (n.1), means that the enhancement requires proof of "hate towards the protected class." The hate-crime enhancement derives from Congress's directive in Section 280003 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 103d Cong., 2d Sess., 108 Stat. 2096. Section 280003(a) defines a "hate crime" to "mean[] a crime in which the defendant intentionally selects a victim * * * because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person," and Section 280003(b) directs the Commission to provide a three-level enhancement "for offenses that the finder of fact at trial determines beyond a reasonable doubt are hate crimes." Thus, that the enhancement applies to "hate crimes" simply means that it applies where the defendant intentionally selected a victim *because of* their gender or sexual orientation (or other protected characteristic)—not that the enhancement requires proof that the defendant hated the victim for that reason.[6]

---

[6] Considered in light of Congress's definition of a "hate crime," the title and background commentary to the Guideline's hate-crime enhancement are consistent with the Guideline's text. However, if that were not the case, the text of the guideline would control. See *Stinson* v. *United States*, 508 U.S. 36, 45 (1993) (holding that the commentary should be given "controlling weight unless it is plainly erroneous or inconsistent with" the guideline it interprets) (citation omitted).

The hate-crime enhancement's purpose further confirms that it should apply not only when prosecutors can prove hate or animus but any time a defendant intentionally selects a victim on the basis of a protected characteristic. Congress has repeatedly recognized that bias-motivated crimes "transcend their immediate victims and cast a shadow of fear and terror throughout entire communities." See, *e.g.*, 139 Cong. Rec. H6792-01, H21784 (daily ed. Sept. 21, 1993) (Statement of Rep. Sensenbrenner in support of the Hate Crimes Sentencing Enhancement Act of 1993); see also *Wisconsin* v. *Mitchell*, 508 U.S. 476, 488 (1993) (holding that the government may punish "bias-inspired conduct" because it "inflict[s] greater individual and societal harm"). To that end, the hate-crime enhancement provides an "additional penalty for the 'discrete harms' of targeting victims based on their [protected characteristics]." *Terrorist Bombings*, 552 F.3d at 153. Consistent with this purpose, Congress intended the enhancement to apply in all cases where "prosecutors can show beyond a reasonable doubt that the victim of the felony was chosen because of their * * * gender[] or sexual orientation." See, *e.g.*, 140 Cong. Rec. S12399-03, S12414 (daily ed. Aug. 24, 1994) (Statement of Sen. Feinstein, the provision's primary sponsor).

b. Contrary to Seneca's suggestion (Br. 19), the hate-crime enhancement contains no exception for "crimes committed within protective class communities." The Sentencing Guidelines recognize only two circumstances where Section

3A1.1(a), although otherwise applicable, should not be imposed. First, the enhancement does not apply if the base offense level is already increased by six levels because the defendant was a public official at the time of the offense or because the offense was committed under color of law. Sentencing Guidelines § 3A1.1(c) (citing Sentencing Guidelines § 2H1.1(b)(1)); see also Sentencing Guidelines § 3A1.1, comment. (n.1); Sentencing Guidelines § 2H1.1, comment. (n.4). Second, the enhancement does not apply on the basis of gender in cases of a sexual offense because this factor is already taken into account by the offense level of the applicable guideline. Sentencing Guidelines § 3A1.1, comment. (n.1). The Guideline does not provide any exception for cases involving intragroup offenses.[7]

Seneca is also incorrect (Br. 31) that the government has "obviously not pursued" its "broad reading" of the term "hate crimes" in other cases. Although there are few cases specifically analyzing Section 3A1.1(a), the Shepard-Byrd Hate Crimes Prevention Act (Shepard-Byrd Act) likewise applies where the defendant acted because of the victim's actual or perceived gender, sexual orientation, or other protected characteristic. See 18 U.S.C. 249(a)(1) and (2). The United States has pursued cases pursuant to that Act involving intragroup offenses.

---

[7] Additionally, even if the Guideline did provide such an exception, Seneca has not shown that his was an intragroup offense. See p. 9 & n.3, *supra*.

For instance, as Seneca himself recognizes (Br. 28), in *United States* v. *Miller*, 767 F.3d 585, 590-591 (6th Cir. 2014), the United States pursued hate-crime charges against members of the Amish community for assaulting fellow Amish community members because of their religion, in violation of 18 U.S.C. 249(a)(2)(A). See also *United States* v. *Howald*, No. 21-cr-4, 2023 WL 3003816, *2-3 (D. Mont. Apr. 19, 2023) (denying defendant's motion for new trial following his conviction under Shepard-Byrd Act where defendant and intended victims shared same sexual orientation), appeal pending, No. 23-1182 (9th Cir. docketed June 15, 2023). And the United States routinely proposes, and district courts implement, jury instructions to the same effect. For example, in *United States* v. *Jenkins*, the government proposed a jury instruction that read in relevant part as follows:

> If you find that the defendant acted because of [the victim's] actual or perceived sexual orientation, you may find this element met regardless of the Defendant's sexual orientation. The law prohibits an assault motivated by the victim's actual or perceived sexual orientation, even if the Defendant shares the same sexual orientation as the victim.

120 F. Supp. 3d 650, 652 n.4 (E.D. Ky. 2013); see also Government's Requested Jury Instructions (Doc. 87) (Jan. 7, 2014) and Jury Instructions as to George Allen Mason, Jr. (Doc. 149) (Feb. 3, 2014), *United States* v. *Mason*, No. 3:13-cr-00298 (D. Or.) (proposing and issuing a similar instruction).

Moreover, even if Seneca were "correct that this factual scenario is distinct" from those in which Section 3A1.1(a) is typically applied, "it does not follow that its application here is incorrect." See *United States* v. *Robinson*, 654 F.3d 558, 563 (5th Cir. 2011) (upholding the application of Sentencing Guidelines § 3B1.4 despite the "lack of factually similar precedent"). Although it is true that hate crimes are *often* committed by members of one group against another, courts have also long recognized that discrimination may occur within groups. See, *e.g.*, *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998) (holding, in the context of Title VII, that nothing "bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant * * * are of the same sex"); *Castenada* v. *Partida*, 430 U.S. 482, 499 (1977) ("Because of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group."); *McWilliams* v. *Escambia Cnty. Sch. Bd.*, 658 F.2d 326, 333 (5th Cir. 1981) (holding that the fact that "blacks comprise a majority of those responsible for the allegedly discriminatory result" is "insufficient to rebut a prima facie case of purposeful discrimination" against Black employee).

For the same reasons, courts have recognized that "it is entirely plausible for a person to commit a bias-related crime against another person sharing the same protected characteristic because of that characteristic." See, *e.g.*, *Lucas* v. *United*

States, 240 A.3d 328, 350 (D.C. 2020). In *Lucas*, for example, the court held that the weight of the evidence of the defendants' bias toward their victim was not mitigated by the fact that one of the defendants was also gay. *Ibid.*

The district court did not err in holding that the hate-crime enhancement applies, regardless of proof of hate or animus, where the defendant intentionally selected a victim because of the victim's actual or perceived gender or sexual orientation, even if the defendant shares those qualities with the victim.

2. Sufficient Evidence Supports The Court's Holding That Seneca Intentionally Selected His Victims Because They Were Gay Men

a. Seneca argues (Br. 34), in the alternative, that the district court erred in applying the hate-crime enhancement because "the government failed its burden to prove beyond a reasonable doubt that Seneca kidnapped the victim because the victim was a gay man." The court's factual findings underlying its application of the hate-crime enhancement should be affirmed so long as they are "plausible in light of the record as a whole" and do "not amount to clear error." See *United States* v. *Rodriguez*, 630 F.3d 377, 380 (5th Cir. 2011); *United States* v. *Horsting*, 204 F. App'x 441, 445 (5th Cir. 2006), cert. denied, 551 U.S. 1169 (2007). Even if this Court would have "weighed the evidence differently and made a different finding," it should not set aside the district court's findings of fact as clearly erroneous unless, after reviewing all the evidence, the Court is left "with the

definite and firm conviction that a mistake has been committed." *Rodriguez*, 630 F.3d at 380 (citation and internal quotation marks omitted).

The district court made no mistake—much less any clear error—in finding that Seneca intentionally selected his victims (including H.W.) because of their gender and/or sexual orientation. As previously discussed, the enhancement applies where the victim's gender or sexual orientation was a but-for cause of the defendant's conduct. See *Burrage*, 571 U.S. at 212-213. But-for causation simply means "'that the harm would not have occurred' in the absence of" the particular factor. *Id.* at 211 (citation omitted); see also *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020) (recognizing that but-for causation "can be a sweeping standard"). In this case, the requirement that the defendant have selected a victim "because of" the victim's actual or perceived gender or sexual orientation means that a victim would not have been selected for this offense "but for" his gender or sexual orientation. As the Supreme Court has explained, a "but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause." *Bostock*, 140 S. Ct. at 1739; see also *Burrage*, 571 U.S. at 211.

Here, there was more than sufficient evidence in the record to support the district court's finding that Seneca "selected gay men" to be his victims "because that's what Jeffrey Dahmer did." See ROA.228. Seneca admitted that "pretty

much everything I was gonna do was similar to [Dahmer]." ROA.452, 570. Seneca further stated that he "looked up to [Dahmer]" and "felt like [he] had to be like [Dahmer]." ROA.448, 548; see also ROA.587-589. It was not clearly erroneous for the court to conclude that Seneca, like Dahmer, intentionally selected gay men to be his victims.

Nor did the district court err in finding that Seneca's offense was not a "crime[] of convenience" or a crime "limited to the community."[8] See ROA.226. As the court explained, Seneca "had other means of selecting his victims." ROA.228. Seneca had access to Tinder, which is a software application for men and women looking to "hook[] up" or "find somebody." ROA.539-540, 579. And Seneca had access to women online and had engaged in sexual conversations with women in the month immediately before his offense. ROA.170-173. But Seneca chose to hunt for his victims on Grindr, a dating application primarily focused on gay men seeking other gay men, ROA.146-147, because he "knew everybody on there was gay." ROA.579.

---

[8] Although the district court suggested that a "crime[] of convenience" might fall outside of the subset of cases where the enhancement applies (ROA.226), this Court has held that evidence of premeditation or a plan to attack members of a particular group "is not necessary so long as there is other evidence of the defendant's motivation." See *United States* v. *Cannon*, 750 F.3d 492, 507 (5th Cir.) (considering the sufficiency of the evidence under the Shepard-Byrd Hate Crimes Prevention Act, 18 U.S.C. 249(a)(1)), cert. denied, 574 U.S. 1029 (2014).

b. Seneca's arguments to the contrary are unavailing. For starters, Seneca is incorrect (Br. 35) that "the government failed to introduce any evidence that Seneca shared any of Dahmer's victim-selection criteria or motivation for specifically selecting gay male victims." In the stipulated factual basis for his guilty plea, Seneca admitted that he "never really wanted to hurt … women." ROA.278; see also ROA.151, 444. In other words, if this Court were to change H.W.'s gender, then "the outcome [would] change[]." See *Bostock*, 140 S. Ct. at 1739. Seneca would not have targeted H.W. had he been a woman.

Seneca likewise would not have targeted H.W. had he been a straight man. The fact that Seneca previously had used Grindr "to meet dating partners" (Br. 39) does not disprove the fact that he also used it to intentionally select gay men to be the victims for his carefully planned and premeditated attack. While Seneca may have initially used Grindr "to find someone to … be in a relationship with or a friend," in the months leading up to his crimes, he admitted that he began to think of Grindr "as an easier way to find someone to … actually get to kill." ROA.453, 582; see also ROA.148-149, 176. And Seneca stipulated that he used Grindr to "pretend[] that he was interested in meeting with H.W. for recreational or romantic purposes," when his "true purpose was to seize, inveigle, kidnap, abduct, and hold H.W. for the unlawful purpose of killing and dismembering him for his own gratification." ROA.276-277; see also ROA.152-153, 173-174.

Finally, Seneca's argument (Br. 39) that "the evidence presented at the sentencing supported several alternative reasons why the victim was selected" does not require a different result. As the Supreme Court has recognized, events often "have multiple but-for causes." *Bostock*, 140 S. Ct. at 1739; see also *United States* v. *Johns*, 615 F.2d 672, 675 (5th Cir. 1980) (holding that "[t]he presence of other motives, given the existence of the defendants' motive to end interracial cohabitation, does not make their conduct any less a violation of [the Fair Housing Act]"). Under the but-for causation standard, "a defendant cannot avoid liability just by citing some *other* factor that contributed." *Bostock*, 140 S. Ct. at 1739. That Seneca may have also selected his victims because they were "small in stature" and "willing to go to Seneca's house" (Br. 39) does not negate the fact that he also selected his victims because of their gender and sexual orientation. "So long as [H.W.'s gender or sexual orientation] was one but-for cause of [Seneca's] decision, that is enough to trigger [the enhancement]." See *Bostock*, 140 S. Ct. at 1739.

C. Any Error In Applying The Hate-Crime Enhancement Was Harmless

Even if this Court were to conclude that the district court incorrectly interpreted and applied Section 3A1.1(a), any error would be harmless.

1. "A procedural error during sentencing is harmless if the error did not affect the district court's selection of the sentence imposed." *Delgado-Martinez*,

564 F.3d at 753 (citation and internal quotation marks omitted). As the party seeking to uphold the sentence, the government can show harmless error in one of two ways. See *United States* v. *Guzman-Rendon*, 864 F.3d 409, 411 (5th Cir. 2017) (citing *United States* v. *Richardson*, 676 F.3d 491, 511 (5th Cir. 2012)). First, the government can "show that the district court considered both ranges (the one now found incorrect and the one now deemed correct) and explained that it would give the same sentence either way." *Ibid.* Second, even if the district court did not consider the correct Guidelines range, this Court will find harmless error if the government can "convincingly demonstrate" that the district court would have imposed the same sentence for the same reasons had it not made the error. *Ibid.* (alteration omitted) (quoting *United States* v. *Ibarra–Luna*, 628 F.3d 712, 714 (5th Cir. 2010)). Here, any error the district court may have made in applying the hate-crime enhancement was harmless under either test.

a. With respect to the first test, the district court explained multiple times that it had considered the advisory Guidelines ranges with and without the hate-crime enhancement and would have imposed the same sentence either way. First, when the court began to explain the sentence it intended to impose, the court stated that it had "considered the arguments of counsel" and "their sentencing recommendations." ROA.253. Second, after discussing the Section 3553(a) factors, the court reiterated that it had considered "the kinds of sentences available

and the sentencing guidelines," including the "wide disparity in what sentences are being proposed by the different parties here." ROA.255-256. Finally, after sentencing the defendant, the court stated a third time that it "calculated what [the] guideline range would have been without" the hate-crime enhancement. ROA.259. The court then explicitly stated that

> taking it all together, my consideration of [the Section] 3553 [factors] and those differing guideline ranges, the sentence that I have imposed is the sentence I would impose even if the Court has in some way erred in calculating the applicable guideline range based on all the information presented to the Court in this proceeding.

ROA.259.

Accordingly, because the district court stated repeatedly that it had considered both possible guideline ranges and that it would have imposed the same sentence even if a different guideline range applied, this Court should hold that any error was harmless. See *Guzman-Rendon*, 864 F.3d at 409 (holding any error harmless where court acknowledged that the PSR and defense counsel recommended a lower guideline range but stated that the defendant's conduct merited an upward departure even if that range were to apply).

b. The Court can stop there, but alternatively, even if the district court had not considered the correct Guidelines range, the second test for harmless error is also met. First, it is clear that the district court would have imposed the same sentence for the same reasons absent the error. See *United States* v. *Redmond*, 965

F.3d 416, 421 (5th Cir. 2020); *Ibarra-Luna*, 628 F.3d at 717. The court explained that it selected its 509-month sentence based on its consideration of the totality of the circumstances and its analysis of the Section 3553 factors. ROA.259. In particular, the court found an above-Guidelines sentence was warranted based on "the heinous nature of [the] crime and the cold calculation" that the court saw "in the defendant in preparing for and executing [the] crime." ROA.256; see also ROA.348 (Statement of Reasons) (selecting, as reasons for the variance, "the nature and circumstances of the offense" and, specifically, the "extreme conduct" and "victim impact," as well as the need to "protect the public from further crimes of the defendant"). As Seneca points out (Br. 41), the Guidelines range without the hate-crime enhancement would have been 235 to 293 months, while the Guidelines range with the enhancement was 324 to 405 months. "Yet if a sentence of [324] to [405] months is not long enough, then plainly a [235]-to-[293] month sentence also would not be long enough, for precisely the same reason[s] that the district court gave." See *Ibarra-Luna*, 628 F.3d at 718.

Second, the 509-month sentence the district court imposed "was not influenced in any way by the erroneous Guidelines calculation." See *Ibarra-Luna*, 628 F.3d at 719. This Court has held that a sentence was based on "independent factors" where the sentencing court discussed the Section 3553(a) factors and explained why it believed an above-Guidelines sentence was appropriate. See

Redmond, 965 F.3d at 421 (quoting *Ibarra-Luna*, 628 F.3d at 719). In contrast, this Court has typically found that an erroneous Guidelines calculation influenced a defendant's sentence in cases where the district court had originally sentenced the defendant at the low end of an improperly calculated Guidelines range. *Id.* at 421-422 (collecting cases). In those circumstances, "district courts often impose lighter sentences when confronted with a sentencing error." *Id.* at 422.

This case falls squarely into the former category. The sentencing transcript makes clear that the district court selected an above-Guidelines sentence based on "independent factors" (here, its consideration of the Section 3553 factors) and not on any particular Guidelines range. See ROA.254-255. Specifically, as previously discussed (pp. 17-18, *supra*), the court examined the nature and circumstances of the offense, Seneca's history and characteristics, and the potential danger he poses to the public "as long as he is walking free." ROA.254-255. Considering "these factors," as well as "the kinds of sentences available and the sentencing guidelines," the court found a 509-month sentence to be "fair and reasonable." ROA.255-256.

Accordingly, "[b]ased on the transcript, it is clear that the district court would have imposed the same above-Guidelines, [509]-month sentence even absent the Guidelines calculation error and would have done so for the same reasons." See *Redmond*, 965 F.3d at 421.

2. Seneca incorrectly contends (Br. 41) that the "drastic difference in the applied Guidelines range and the correct Guidelines range require[s] a remand for a new sentencing hearing." As discussed above, however, there are two ways that the government can establish harmless error and neither includes a numerical cut-off above which harmless-error analysis does not apply. In *Guzman-Rendon*, for instance, this Court held that even if the district court erred in imposing a 16-level enhancement, which increased the Guidelines range from 8 to 14 months, to 41 to 51 months, the error was harmless because the court had considered both ranges and stated that it would have imposed the same sentence either way. 864 F.3d at 411. The same is true here.

3. Finally, Seneca is also wrong (Br. 47) to the extent that he suggests that either of this Court's tests for harmless error allow district courts to use "routine inoculating statements" to "shield [their sentences] from appellate review." Like the out-of-circuit cases cited by Seneca (Br. 42-47), this Court's precedent already places a heavy burden on the proponent of the sentence to show harmless error. See *Richardson*, 676 F.3d at 511. Nor would applying the cases cited by Seneca require a different result here.

Unlike in *United States* v. *Asbury* (cited in Br. 43-44), for instance, the district court here did not simply toss in a "generic disclaimer of all possible errors." 27 F.4th 576, 581 (7th Cir. 2022); see also *id.* at 583. Rather, the court

"addressed and accounted for the *specific* possible error," and adequately explained why the error would not have affected the ultimate outcome. *Id.* at 581; see pp. 17-19, *supra*.

The other cases Seneca cites (Br. 43-45) are also inapposite because—in sharp contrast to the present case—it was not clear from the record in any of them that the sentencing court would have imposed the same sentence for the same reasons absent the error. See *United States* v. *Loving*, 22 F.4th 630, 636 (7th Cir. 2022) (holding an error was not harmless where the court said three times that the defendant "deserved a sentence *within the guideline range*"); *United States* v. *Seabrook*, 968 F.3d 224, 234 (2d Cir. 2020) (same, where the court "repeatedly acknowledged the importance of the Guidelines" range in "framing its choice of the appropriate sentence"); *United States* v. *Williams*, 5 F.4th 973, 978 (9th Cir. 2021) (finding a court's statement it would impose the same sentence insufficient where it "gave no explanation of why an above-Guidelines sentence would be appropriate"); *United States* v. *Wright*, 642 F.3d 148, 154 n.6 (3d Cir. 2011) (finding the court's statement insufficient to render an error harmless where the court did not "explain[] what the Guidelines range would have been without the enhancement" or "why an upward departure or variance would be merited from that range"); *United States* v. *Smalley*, 517 F.3d 208, 213 (3d Cir. 2008) (finding no harmless error where the court's only statement that it would have imposed the

same sentence absent an error was made in an "Amended Judgment," which did not comply with federal or local rules).

Accordingly, this Court should affirm Seneca's sentence regardless of whether the district court correctly applied the hate-crime enhancement because any error in applying the enhancement was harmless.

II

THE DISTRICT COURT'S ABOVE-GUIDELINES SENTENCE IS SUBSTANTIVELY REASONABLE

A. Standard Of Review

This Court reviews a defendant's sentence for substantive reasonableness under an abuse of discretion standard of review. *United States* v. *Duhon*, 541 F.3d 391, 395 (5th Cir. 2008). To assess the substantive reasonableness of a sentence, this Court considers "the totality of the circumstances, including the extent of any variance from the Guidelines range." *United States* v. *Churchwell*, 807 F.3d 107, 123 (5th Cir. 2015) (citing *Gall* v. *United States*, 552 U.S. 38, 51 (2007)). "Even a significant variance from the Guidelines," however, "does not constitute an abuse of discretion if it is 'commensurate with the individualized, case-specific reasons provided by the district court.'" *United States* v. *Diehl*, 775 F.3d 714, 724 (5th Cir.) (quoting *United States* v. *McElwee*, 646 F.3d 328, 338 (5th Cir. 2011)), cert. denied, 577 U.S. 890 (2015). Ultimately, "[a]ppellate review is highly deferential as the sentencing judge is in a superior position to find facts and judge their import

under § 3553(a) with respect to a particular defendant." *United States* v. *Campos-Maldonado*, 531 F.3d 337, 339 (5th Cir.), cert. denied, 555 U.S. 935 (2008).

B. Seneca's 509-Month Sentence Is Substantively Reasonable

An above-Guidelines sentence is substantively unreasonable only where it "(1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors." *Churchwell*, 807 F.3d at 123 (quoting *United States* v. *Smith*, 440 F.3d 704, 708 (5th Cir. 2006)). None of these situations is present here.

a. The circumstances of Seneca's crimes, coupled with a consideration of the relevant sentencing factors, support the district court's sentence of 509 months' imprisonment. Although the extent of the variance from the Guidelines range "does require careful consideration," this Court has routinely upheld variances of similar and sometimes much greater, magnitude "where the district court's decision was justified by the sentencing factors." *Diehl*, 775 F.3d at 726; see also *United States* v. *Redmond*, 965 F.3d 416, 423 (5th Cir. 2020) (collecting cases affirming large upward variances).

Here, the district court discussed at length its reasons for imposing an above-Guidelines sentence and why the variance was justified by the Section 3553 sentencing factors. The court "considered the arguments of counsel" and "their

sentencing recommendations." ROA.253. It also "considered the allocutions of the defendant as well as the victims that [were] present." ROA.253. The court understood that it had to consider, but was not bound by, the advisory Guidelines range. ROA.253. And in deciding "whether to vary upwards or downwards from the sentencing range," the court adequately analyzed the Section 3553(a) factors. See ROA.253-254.

First, as discussed above (p. 17, *supra*), the district court properly considered (ROA.254) "the nature and circumstances of the offense and the history and characteristics of the defendant." See 18 U.S.C. 3553(a)(1). Specifically, the court underscored the "particularly" "heinous" and "brutal" nature of the offense, that it was "cold, rational, [and] calculated," and the "significant amount of planning that went into it." ROA.254. The court recognized—as Seneca and his counsel pointed out—that the victim survived. But the court emphasized the "life-altering" impact on the victim, including his "significant pain, disability, [and] both mental and physical scars," which it had to "consider[] as well as the seriousness of the offense." ROA.254. Turning to Seneca's history and characteristics, the court observed that there were "mitigating factors with respect to this defendant," including his "drug use and "mental health." ROA.254. But while the court saw "evidence of remorse," it explained that "a lot of that remorse is sadness that [Seneca] isn't being able to replicate a crime in the manner in which his idol,

Jeffrey Dahmer, performed those crimes" and "that this is going to affect [Seneca's] life as far as the possibility of incarceration." ROA.254.

Second, the district court considered (ROA.255) the "need for the sentence imposed." See 18 U.S.C. 3553(a)(2). The court found that Seneca's "description of what he did and his views toward Jeffrey Dahmer" were "aggravating factors." ROA.255. And although the court recognized there was some evidence that Seneca "won't recidivate," it also found "a lot of chilling evidence that this may not be fixable, that as long as [Seneca] is walking free, the public may be in danger." ROA.255; see 18 U.S.C. 3553(c)(2)(C).

Finally, the district court considered (ROA.255-256) "the kinds of sentences available and the sentencing guidelines." See 18 U.S.C. 3553(a)(3) and (4). The court explained that absent mitigating factors, this might have been a case in which it considered "life, which is the statutory maximum." ROA.255. But considering "other aggravating factors"—such as the calculated, heinous, and brutal nature of the crime; the life-altering impact on the victim; Seneca's lack of genuine remorse; and the need to protect the public—which the court found "significant," the court concluded that a 509-month sentence was "fair and reasonable." ROA.255-256.

Under the totality of the circumstances, the district court's determination of the appropriate sentence based on the Section 3553(a) factors is entitled to deference. *McElwee*, 646 F.3d at 337.

b. Seneca raises three reasons (Br. 49-54) that this Court should remand for a new sentencing hearing. None of the proffered reasons, however, demonstrates that Seneca's sentence was unreasonable.

First, Seneca argues (Br. 50) that his sentence is substantively unreasonable because the district court relied on the fact that his offense had a life-altering impact on H.W., even though the victim's injuries "are already accounted for in the Guidelines range of 324 to 405 months." Both the Supreme Court and this Court, however, have rejected that argument. See *United States* v. *Williams*, 517 F.3d 801, 809 (5th Cir. 2008) (citing *Gall*, 552 U.S. at 49-50, and *Kimbrough* v. *United States*, 552 U.S. 85, 91 (2007)). As this Court has recognized, "giving extra weight to circumstances already incorporated in the guidelines * * * is within the discretion of the sentencing court." *United States* v. *Key*, 599 F.3d 469, 475 (5th Cir. 2010), cert. denied, 562 U.S. 1182 (2011).

Likewise, Seneca's argument (Br. 51) that the district court's statement that he poses a danger to the public "lacks support" is easily refuted. As the court observed, Seneca committed a calculated, heinous, and brutal crime that had a life-altering impact on the victim. ROA.254. The court recognized that there was some evidence that "this may be the last time [Seneca] does something like this, that he won't recidivate." ROA.255. But, in light of the nature and circumstances of the offense, as well as Seneca's lack of remorse apparent in his "description of

what he did and his views towards Jeffrey Dahmer," the court found "chilling evidence that this may not be fixable." ROA.255. This was not error. Remarkably, even after attacking H.W., Seneca refused to see Dahmer as "a bad person." ROA.448, 548.

Seneca also argues (Br. 49) that his sentence is substantively unreasonable because the district court failed to address two mitigating factors: (1) "Seneca's age" and (2) his "self-reporting of the crime." But the sentencing transcript refutes his argument that the court did not consider these factors. As Seneca himself recognizes (Br. 52-53), he made the same mitigation arguments in the district court that he makes on appeal. In sentencing Seneca, the district court stated that it had "considered the arguments of counsel [and] their sentencing recommendations." ROA.253. And it specifically remarked that it understood the defense argument that the victim survived. ROA.254. While the court recognized the presence of "mitigating factors"—including the fact that H.W. ultimately survived—it weighed those factors against the seriousness of the offense, the severe injuries suffered by H.W., and the need to protect the public from the defendant. ROA.254-255. In fact, the court stated it would have considered a life sentence but, given the mitigating factors present, the court instead imposed a 509-month sentence. ROA.255-256.

In sum, Seneca's arguments fail to demonstrate that the district court abused its discretion by determining that a 509-month sentence was sufficient, but not greater than necessary, to satisfy the sentencing purposes set forth in Section 3553(a). The sentencing transcript amply reflects that the court considered, and rejected, Seneca's arguments. See *United States* v. *Bailentia*, 717 F.3d 448, 450 (5th Cir.) (holding a sentence was reasonable where the court was aware of the mitigating factors pointed to by the defendant at sentencing and implicitly gave more weight to other aggravating factors), cert. denied, 571 U.S. 1002 (2013); *Smith*, 440 F.3d at 707 (explaining that the court need not engage in robotic incantations that each statutory factor has been considered).

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment and sentence.

Respectfully submitted,

KRISTEN CLARKE
Assistant Attorney General

s/ Yael Bortnick
BONNIE I. ROBIN-VERGEER
YAEL BORTNICK
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 616-8271

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2023, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS PLAINTIFF-APPELLEE with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Yael Bortnick
YAEL BORTNICK
Attorney

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

(1) This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 10576 words according to the word processing program used to prepare the brief.

(2) This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365, in 14-point Times New Roman font.

s/ Yael Bortnick
YAEL BORTNICK
Attorney

Date: August 3, 2023