

6.27 Specific Issue Unanimity

Comment

“In the typical case, a . . . general unanimity instruction to the jury adequately protects a defendant’s right to a unanimous jury verdict.” *United States v. Gonzalez*, 786 F.3d 714, 717 (9th Cir. 2015) (citing *United States v. Liu*, 631 F.3d 993, 1000 (9th Cir. 2011)).

“Courts must make a ‘threshold inquiry’ whether the ‘listed items’ in an ‘alternatively phrased’ statute are ‘elements or means.’” *United States v. Mickey*, 897 F.3d 1173, 1181 (9th Cir. 2018) (quoting *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016)); *see also United States v. Barai*, 55 F.4th 1245, 1249 (9th Cir. 2022) (“Calling a particular part of a statute an ‘element,’ as opposed to a ‘means,’ is legally significant.”). “[E]lements are those circumstances on which the jury must unanimously agree, while means are those circumstances on which the jury may disagree yet still convict.” *Mickey*, 897 F.3d at 1181(internal quotation marks, italics, and brackets omitted). Alternative elements require a specific unanimity instruction, while alternative means do not. *See id.* at 1181-82; *see, e.g., Barai*, 55 F.4th at 1250 (holding district court did not abuse its discretion in declining to give specific unanimity instruction because “the listed alternatives of 18 U.S.C. § 1589(a) are factual means, rather than distinct legal elements”).

Nonetheless, a specific unanimity instruction is required “if it appears that there is a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts.” *Gonzalez*, 786 F.3d at 717 (internal quotation marks omitted); *compare United States v. Echeverry*, 719 F.2d 974, 975 (9th Cir. 1983) (holding that unanimity instruction regarding specific conspiracy should have been given in light of proof of multiple conspiracies) *with United States v. Kim*, 196 F.3d 1079, 1082 (1999) (holding there was no abuse of discretion to decline to give specific unanimity instruction when the defendant was charged with a single crime based on single set of facts and where prohibited acts were merely alternative means by which defendant could be held criminally liable for underlying substantive offense). Thus, the Committee recommends the court consider the need for a specific unanimity instruction to avoid juror confusion if (1) the evidence is factually complex, (2) the indictment is broad or ambiguous, or (3) the jury’s questions indicate that it may be confused. *See United States v. Anguiano*, 873 F.2d 1314, 1319-21 (9th Cir. 1989). When the evidence establishes multiple conspiracies, failure to give a specific unanimity instruction may be plain error and the court may have a duty to *sua sponte* give the instruction requiring the jurors to unanimously agree on which conspiracy the defendant participated in. *See United States v. Lapier*, 796 F.3d 1090, 1093 (9th Cir. 2015) (holding that failure to give specific unanimity instruction was plain error because some jurors could have found defendant guilty of joining one conspiracy while other jurors could have found defendant guilty of joining second, completely independent conspiracy).

A specific unanimity instruction may also be necessary to avoid constitutional error. For example, when self-defense is at issue, a jury must unanimously reject the defense to convict. *See United States v. Ramirez*, 537 F.3d 1075, 1083 (9th Cir. 2008) (approving instruction that included specific unanimity within self-defense instruction consistent with this instruction and Instruction 5.10 (Self-Defense)); *see also Richardson v. United States*, 526 U.S. 813, 815 (1999) (continuing-criminal-enterprise prosecution requires unanimity as to specific violations that make up “continuing series of violations”); *but see United States v. Nobari*, 574 F.3d 1065, 1081 (9th Cir. 2009) (although unanimity is required to reject affirmative defense, specific unanimity instruction is not required for most affirmative defenses).

A specific unanimity instruction is not required to distinguish an aiding and abetting theory of liability from the underlying substantive crime. *See United States v. Garcia*, 400 F.3d 816, 820 (9th Cir. 2005). Nor is one required as to a particular false promise in a mail fraud case or as to a particular theory of liability underlying a “scheme to defraud” so long as jurors are unanimous that the defendant committed the underlying substantive offense. *United States v. Lyons*, 472 F.3d 1055, 1068-69 (9th Cir. 2007), *overruling on other grounds recognized by Tamosaitis v. URS Inc.*, 781 F.3d 468, 489 n.11 (9th Cir. 2015). Likewise, jurors do not need to agree unanimously as to which particular act or actions constituted a substantial step toward the commission of a crime in a prosecution for an attempt to commit a crime. *United States v. Hofus*, 598 F.3d 1171, 1176 (9th Cir. 2010). Further, when a defendant is charged with “a single, continuous act of possession,” jurors need not reach unanimous agreement on the pieces of evidence they find persuasive in establishing that possession. *United States v. Ruiz*, 710 F.3d 1077, 1081-82 (9th Cir. 2013); *see also United States v. Mancuso*, 718 F.3d 780, 792-93 (9th Cir. 2013).

When a specific unanimity instruction is necessary, the Committee recommends including in the substantive instruction the phrase “. . . with all of you agreeing [*as to the particular matter requiring unanimity*].” *See United States v. Garcia-Rivera*, 353 F. 3d 788, 792 (9th Cir. 2003) (unanimity instruction “fatally ambiguous” when jury could have understood they were required to decide unanimously only that possession occurred during *any* of three times enumerated).

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