Something upon Which We Can All Agree: Requiring a Unanimous Jury Verdict in Criminal Cases

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SOMETHING UPON WHICH WE CAN ALL AGREE: REQUIRING A UNANIMOUS JURY VERDICT IN CRIMINAL CASES

Brian M. Morris*

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INTRODUCTION

Everyone has heard the familiar maxim that all twelve jurors must find a criminal defendant guilty beyond a reasonable doubt. The United States Constitution guarantees an accused the right to a unanimous verdict in all criminal actions in federal court.¹ The Montana Constitution similarly declares that in criminal actions "the verdict shall be unanimous."²

Fewer of us understand, however, precisely the underlying facts upon which all twelve jurors must agree in order to convict

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¹. Johnson v. Louisiana, 406 U.S. 356, 369 (1972) (Powell, J., concurring) ("In an unbroken line of cases reaching back into the late 1800's, the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensable features of the federal jury trial."). Justice Powell cited the following examples: Andres v. United States, 333 U.S. 740, 748-49 (1948) (Sixth Amendment demands unanimity in federal criminal case); Patton v. United States, 281 U.S. 276, 288-90 (1930) (same); Hawaii v. Mankichi, 190 U.S. 197, 211-12 (1903) (same); Maxwell v. Dow, 176 U.S. 581, 586 (1900) (same); Thompson v. Utah, 170 U.S. 343, 355 (1898) (same). Most people, including many lawyers, would be shocked to learn, however, that the United State Constitution nowhere guarantees an accused the right to a unanimous verdict in a criminal proceeding in state court. See, e.g., Apodaca v. Oregon, 406 U.S. 404 (1972) (holding that 9-3 verdict satisfied constitutional right to trial by jury).

². MONT. CONST. art. II, § 26.
a criminal defendant. Courts struggle to determine the precise level of factual specificity that must be agreed upon by the jury in a criminal trial.

Courts freely acknowledge that the United States Constitution requires something beyond a simple unanimous finding by the jury that the accused has committed a crime. On the other hand, courts refuse to impose a requirement that the jury agree unanimously as to the minute details surrounding the commission of the crime. All twelve jurors obviously must agree on whether the defendant committed the alleged crime; however, all twelve jurors need not agree, for example, on whether the defendant used a penknife or a hammer to break the lock on the door of the victim’s house.

A standard jury instruction, referred to here as a “general unanimity” instruction, merely directs the jury to decide unanimously the basic question of the defendant’s guilt or innocence. The court instructs the jury that the state bears the burden of proving each element of the offense charged. The court does not direct the jury to consider separately and agree unanimously as to which underlying material fact, or facts, satisfies each such element.

By contrast, what is referred to here as a “specific unanimity” instruction, directs the jury to agree unanimously as to each particular material fact that establishes the elements of

3. The Court in *Duncan v. Louisiana*, 391 U.S. 145 (1968), faced the issue of whether the Sixth Amendment’s right to a trial by jury in criminal cases applied to the states. Louisiana permitted non-jury trials for certain misdemeanor offenses. The Court concluded that “trial by jury in criminal cases is fundamental to the American scheme of justice.” *See Duncan*, 391 U.S. at 149. As a result, the Court found that the 14th Amendment “guarantees a right of jury trial in all criminal cases which — or were they to be tried in a federal court — would come within the Sixth Amendment’s guarantee.” *Id.* The Court’s decision represents another battle in the “incorporation” debate as to whether the 14th Amendment “incorporates” the Bill of Rights to the States. As evidenced by later Court decisions, such as *Williams v. Florida*, 399 U.S. 78 (1970) (holding that “twelve-man panel is not a necessary ingredient of ‘trial by jury’”), however, the Court did not adopt the “jot-for-jot” approach advocated by Justice Black in *Adamson v. California*, 332 U.S. 46 (1947) (Black, J., dissenting) (arguing that full incorporation of all Bill of Rights guarantees was the “original purpose” of the 14th Amendment). *But see Ballew v. Georgia*, 435 U.S. 223 (1978) (holding that defendant’s trial before a 5-member jury deprived him of his constitutional right to jury trial).

4. *See, e.g., McKoy v. North Carolina*, 494 U.S. 433, 449-50 n.5 (1990) (Blackmun, J., concurring) (“unanimity . . . means more than a conclusory agreement that the defendant has violated the statute in question; there is a requirement of substantial agreement as to the principal factual element underlying a specified offense”).

5. *See, e.g., McKoy*, 494 U.S. at 449 n.5 (Blackmun, J., concurring) (“This [unanimity] rule does not require that each bit of evidence be unanimously credited or entirely discarded . . .”).

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the offense charged. Fundamental fairness dictates that the trial court should inform the jury that all twelve of the jurors must agree as to all of those underlying *material* facts that constitute the given criminal offense. The debate hinges on what facts are "material" to the state's proof of the underlying elements of that criminal offense.

The question of materiality is particularly troubling when a jury faces a series of alternatives. These alternatives emerge when a statute provides for an alternative, either in the defendant's mental state while committing the offense or in the means of committing the offense. Such alternatives also arise when the document charging the defendant contains allegations of multiple bad acts in support of the charge.

With respect to statutes that provide for alternative mental states, the question is whether all twelve jurors must agree as to the defendant's intent in acting. For instance, in a homicide case, must all twelve jurors agree as to whether the defendant acted purposely as opposed to whether he acted knowingly in causing the victim's death? Is the defendant's particular mental state "material" to the jury's verdict, or is it sufficient for the jury to agree unanimously that the defendant's conduct caused the victim's death? Moreover, is it feasible, or reasonable, to demand that jurors attempt to distinguish subtle nuances in human behavior, such as whether a person acted "purposely" versus whether a person acted "knowingly"?

Similarly, the issue arises whether the jury should be required to agree unanimously as to which course of conduct the defendant followed when a statute provides for alternative means of committing the offense. For instance, many jurisdictions provide that a person commits assault either when he actually inflicts bodily injury or when he inflicts reasonable apprehension of bodily injury. Must the jury specifically agree as to how the person committed the assault? Must they agree as to whether the assailant actually struck the victim and inflicted bodily injury as opposed to the assailant swinging and missing, but still inflicting reasonable apprehension of bodily injury in the victim?

The issue is further complicated where the document

6. See, e.g., United States v. Beros, 833 F.2d 455, 461 (3rd Cir.1987) (holding that jury must agree unanimously on "specific act or acts which constitutes ... [an] offense").

7. See, e.g., MONT. CODE ANN. § 45-5-202(2) (1997), which formerly provided for three separate alternative means for committing assault. See infra notes 119-21 and accompanying text for a more detailed discussion of these alternatives.
charging the defendant takes the form of a single count with allegations of multiple bad acts included within that single count. The specific bad act that the defendant committed seems material to the underlying charge and thereby should warrant specific unanimity by the jury. In this situation, the state generally compounds the potential problems by introducing evidence to support each of these alleged bad acts, some of which can be quite different in type, time, or place from the others. These circumstances often arise in cases such as embezzlement, where the state introduces numerous acts of theft by the defendant in support of a single embezzlement count. In these cases, the question is whether the court must instruct the jury that they should agree unanimously as to which act of theft the defendant committed. If the court does not, it runs the risk that some jurors will believe that the defendant committed one act of theft in satisfaction of an element of the offense, while other jurors will believe that the defendant committed different bad acts, but not the same theft as the first group of jurors. It is possible without such a specific unanimity instruction that all twelve jurors will not agree as to which act of theft the defendant committed.

This Article examines the specific unanimity debate as it has developed in courts in general, and Montana courts in particular. Underlying this examination, is the question of what set of facts and circumstances present potential confusion among the jurors as to precisely which facts they must agree. Section I provides an introduction to the discussion in the context of statutory alternative mental states and aggravating factors. In these situations, no doubt exists as to the underlying acts at issue. The jury must choose from among several choices of mental states or aggravating factors corresponding to the defendant's acts. Section II discusses specific unanimity in the context of alternative means contained within a single statute. This discussion includes an overview of the development of the single offense doctrine in state courts, the emergence in federal courts of the conceptual groupings test, and the problems arising from increasingly complex criminal statutes. The inclusion of alternate means of committing an offense in a single statute raises potential doubts as to the underlying acts at issue.

Section III analyzes the specific unanimity issue in the context of a single charge containing allegations of multiple bad acts. Multiple bad acts charged in a single count leads to confusion among the jury as to what acts the defendant
committed. This section first reviews the issue through the predicate acts requirement of complex federal criminal statutes and then turns to cases arising from state courts. Finally, Section IV attempts to synthesize these decisions into a coherent theory to guide courts and practitioners as to when a specific unanimity instruction must be provided in order to ensure that a unanimous verdict means something more than simply a guilty verdict. Throughout this Article, special reference is made as to how Montana courts apply these doctrines. These decisions include Kills On Top v. State,8 State v. Weldy,9 and State v. Weaver.10 Each decision is analyzed in the context of related issues drawn from decisions of federal courts and other jurisdictions.

**NO SPECIFIC UNANIMITY INSTRUCTION IS REQUIRED WHERE NO CONFUSION EXISTS AS TO THE ACTS COMMITTED**

Modern criminal statutes regularly provide for numerous alternatives for the jury in deciding the guilt of a defendant. These alternatives include both the means of committing an element of an offense, such as through the use of force or through the threat of the use of force, and alternative mens rea, or mental states, for motivating the defendant’s conduct. Statutes containing only alternative mental states pose fewer concerns with respect to the requirement of a unanimous verdict.

*Alternative Mens Rea Do Not Raise Confusion as to the Acts Committed*

*Mens rea* represents an attempt to discern the mental state motivating the actions of a criminal defendant. Courts strive to determine the defendant’s mental state to avoid meting out similar punishment for intentional acts and unintentional acts that may result in similar outcomes. For instance, a child playing in the street may be killed when hit by a car, regardless of the driver’s mental state. It is generally accepted, however, that a driver whose car hit the child after he fell asleep at the wheel after taking prescription medication deserves a far

10. State v. Weaver, 1998 MT 167, 290 Mont. 58, 964 P.2d 713.
different punishment from a driver who purposely ran down the child. Similarly, the law views differently the culpability of a defendant who kills in the heat of passion compared with a defendant who kills in a calculated and premeditated manner. Under the common law, courts recognized this distinction by adding the requirement that the defendant act with “malice aforethought” in an intentional murder case.

Legislatures have expanded upon the original common law *mens rea* by routinely including a series of mental states that the defendant might have possessed at the time of committing the act. These attempts to broaden the spectrum of guilty mental states complicates the jury’s task. For example, how can a jury, untrained in the law or psychology, be expected to differentiate between whether a defendant acted “purposely” versus “knowingly” while committing a crime? Courts generally have taken a common sense approach to such questions and do not require juries to split hairs in determining the defendant’s mental state.\(^1\)

In 1981, the Montana Supreme Court rejected the notion that a jury must agree unanimously as to the specific mental state animating a defendant’s conduct in *State v. Fitzpatrick*.\(^2\) The statute at issue provided that the jury could convict the defendant if the state proved that the defendant acted “purposely” or “knowingly.” The court held that in such cases a general unanimity instruction “suffices to instruct the jury that they must be unanimous on whatever specifications they find to be predicate of the guilty verdict.”\(^3\) The *Fitzpatrick* court distinguished seemingly contradictory decisions from federal courts on the grounds that they involved non-unanimity as to the “*actus reus,*” rather than as to the defendant’s mental state related to an element of the offense.\(^4\)

\(^1\) See, e.g., California v. Heideman, 130 Cal. Rptr. 349 (Cal. Ct. App. 1976) (finding that a jury need not agree unanimously whether a defendant possessing an outlawed explosive in a public place acted “recklessly” or “maliciously.”).


\(^3\) Id. at 326, 638 P.2d at 1012 (quoting United States v. Murray, 618 F.2d 892, 898 (2nd Cir. 1980)). *Murray* involved a defendant charged with a single count of conspiracy to import and to distribute cocaine and marijuana. *Murray*, 618 F.2d at 896. The defendant in *Murray* contended that charging two crimes in a single count deprived him of his right to a unanimous verdict. *Id.* at 898. The court disagreed, noting that “[t]he essence of the crime of conspiracy is agreement to put into effect an illegal project. Even if the agreement contemplates more than one nefarious end, there is still but a single agreement.” *Id.*

\(^4\) *Fitzpatrick*, 194 Mont. at 325, 638 P.2d at 1101 (citing, e.g., United States v. Gipson, 553 F.2d 454 (5th Cir. 1977) (holding that trial court erred in not providing jury
The Montana Supreme Court returned to the issue more recently in *Kills On Top v. State*. The state charged Lester Kills On Top with robbery, aggravated kidnapping, and deliberate homicide in the death of John Martin Etchemendy, Jr. At trial, the state offered evidence that Kills On Top, his brother, Vernon Kills On Top, Diana Bull Coming, and Doretta Four Bear encountered Etchemendy outside a bar in Miles City, Montana sometime after midnight on October 17, 1987. The group offered a ride to Etchemendy. The group drove south toward Ashland, Montana, where, according to the testimony at trial, Lester Kills On Top and his brother beat Etchemendy severely, stole Etchemendy's wallet and some checks, and forced Etchemendy to strip. The group then stuffed Etchemendy into the trunk of the car.

The group continued on to Gillette, Wyoming with Etchemendy in the trunk of the car. In Gillette, according to testimony given at trial, Lester Kills On Top finally killed Etchemendy and dumped his body in an abandoned building outside town. A jury convicted Lester Kills On Top on all charges following a trial in Custer County in 1988. The court imposed a 40-year sentence for the robbery conviction and the death penalty for each of the other two convictions. The Montana Supreme Court affirmed Lester Kills On Top's conviction in 1990 on direct appeal. Lester Kills On Top filed a petition for post-conviction relief and a writ of habeas corpus on January 14, 1991. The district court dismissed these petitions and Kills On Top appealed.

with specific unanimity instruction in prosecution for violation of statute prohibiting the sale or possession of stolen goods)). The facts and holding of *Gipson* are discussed in greater detail in Part III, *infra*.

17. *Id.*
18. *Id.*
19. *Id.* at 382, 787 P.2d at 338.
20. *Id.* at 380, 787 P.2d at 338.
21. *Id.* at 381, 787 P.2d at 337.
22. *Id.* at 380, 787 P.2d at 338.
23. *Kills On Top II*, 273 Mont. 32, 40, 901 P.2d 1368, 1373 (1995). The district court dismissed this petition for a writ of habeas corpus and granted the state summary judgment on the majority of Kills On Top's other claims because he had failed to raise them on direct appeal. With respect to Kills On Top's other claims, the district court ordered an evidentiary hearing into claims of ineffective assistance of counsel, outrageous governmental conduct, and failure to disclose *Brady* material. On May 3, 1993, the district court entered its order that denied Kills On Top's remaining claims for post-conviction relief. *Id.* at 41-42, 901 P.2d at 1374.
In *Kills On Top II*, the Montana Supreme Court reviewed the petition for post-conviction relief and the petition for a writ of habeas corpus.²⁴ This review required the Court to address the multiple alternatives contained in Montana's aggravating kidnapping statute. Kills On Top argued that his trial counsel provided ineffective assistance when he failed to object to the trial court's instructions to the jury setting out the elements of aggravated kidnapping on the grounds that the multiple alternatives within the instruction infringed upon his right to a unanimous jury verdict.²⁵ The trial court's instruction to the jury setting out aggravated kidnapping read as follows:

A person commits the offense of aggravated kidnapping if he knowingly or purposely and without lawful authority restrains another person by either secreting or holding him in a place of isolation or by using or threatening to use physical force, with either of the following purposes:

(a) to facilitate commission of robbery or flight thereafter, or
(b) to inflict bodily injury on or to terrorize the victim.²⁶

This instruction was patterned after Montana's statute on aggravated kidnapping.²⁷ Kills On Top argued that the multiple alternatives within the instruction made it impossible to determine which of the alternative purposes the jurors agreed on in finding him guilty.²⁸

The court found fault with Kills On Top's failure to specify

²⁴. *Id.*
²⁵. *Id.* at 64, 901 P.2d at 1389. Kills On Top also contended that this same argument applied to his conviction for deliberate homicide because the underlying felony in his deliberate homicide conviction was aggravated kidnapping. *Id.* at 64, 901 P.2d at 1389.
²⁶. The trial court jury instruction was based on the Montana Criminal Jury Instructions (1990 Edition). See MCJI § 5-303.
²⁷. *Kills On Top II*, 273 Mont. at 55, 901 P.2d at 1382. The complete text of Montana's aggravated kidnapping statute, provides that a person commits the crime of aggravated kidnapping by engaging in one of the following alternative criminal acts:
Knowingly or purposely and without lawful authority restrain another person by either:
- secreting or holding in a place of isolation; or
- using or threatening physical force
With any of the following purposes:
- to hold for ransom or reward or as a shield;
- to facilitate commission of any felony or flight thereafter;
- to inflict bodily injury or terrorize victim;
- to interfere with performance of governmental or political function; or
- to hold another in condition of involuntary servitude.

which of the alternatives in the trial court’s jury instruction to which he objected. 29 The court rejected the notion “whereby every alternative in an instruction must be separately and specifically found by the jury.” 30 As noted by the court, the alternatives contained in the aggravating kidnapping instruction do not represent separate elements in themselves; rather, the alternatives provide different means of satisfying a specific element of the kidnapping statute. 31 Neither of the alternative purposes contained in the aggravated kidnapping instruction contain a *mens rea*, such as intent, that is not required in the others. Both alternatives involve proof of restraint and some improper purpose.

Moreover, the court pointed out that Kills On Top had failed to demonstrate that the alternatives were “so morally disparate as to represent inherently separate offenses.” 32 Instead, the court reasoned that the “equivalent blameworthiness or culpability” suggested by the various alternatives lead to the conclusion that they merely represent alternative means of satisfying the same offense. 33

Based on this reasoning, the court in *Kills On Top II* found that the jury did not have to indicate upon which alternative purpose it based the defendant’s guilt. 34 The court found that the jury unanimously agreed as to each element: the defendant (1) restrained the victim and (2) for an improper purpose, and that it need agree to nothing more. Under these circumstances, therefore, the court concluded that the district court did not violate the defendant’s right to a unanimous verdict by failing to offer a specific unanimity instruction. 35

29. *Id.* at 55-56, 901 P.2d at 1383.
30. *Id.* (citing Schad v. Arizona, 501 U.S. 624, 643 (1991)).
31. *Kills on Top II*, 273 Mont. at 54, 901 P.2d at 1383.
32. *Id.* at 56, 901 P.2d at 1384. Similar logic applies that a jury in a first-degree assault case need not decide whether the defendant attacked the victim intentionally or with wanton indifference. See, e.g., Wells v. Kentucky, 561 S.W.2d 85 (Ky. 1978).
33. The absence of any discernable distinction in the culpability of the alternative *mens rea* requirements in Utah’s second degree murder statute led a majority of the Utah Supreme Court to reject a specific unanimity challenge. Utah v. Russell, 733 P.2d 162 (Utah 1987) (plurality opinion). The court found that the separate *mens rea* set forth under the statute simply constituted different formulations of the single common law *mens rea* of malice aforethought. *Id* at 171-74 (Stewart, J., concurring).
34. *Kills On Top II*, 273 Mont. at 56, 901 P.2d at 1384.
35. *Id.* See also, State v. Warnick, 202 Mont. 120, 129, 656 P.2d 190, 194-95 (1982) (holding that the state must prove that each element of the offense was done purposely or knowingly in order to sustain the charge of aggravated assault, but that the state did not need to specify which one).
Such an approach withstands analytical scrutiny. For example, the elements of the aggravated kidnapping statute require the state to prove beyond a reasonable doubt that the defendant unlawfully restrained a person for an improper purpose. 36 The court easily could have found that the alternatives of secreting or using physical force represent two separate options for satisfying the concept of the first element—restraint. 37 Similarly, the two alternatives contained in the trial court's instruction to the jury—facilitating commission of robbery or flight thereafter and to inflict bodily injury or to terrorize the victim—represent separate options for satisfying the element of improper purpose. No confusion exists as to the basic underlying facts. Kills on Top and his cohorts restrained Etchemendy against his will. Regardless of their motivations, it certainly was for an improper purpose and the jury should not be required to agree unanimously as to the specific alternative contained in the aggravated kidnapping instruction.

Alternative Aggravating Factors Do Not Raise Confusion as to the Acts Committed

Legislatures generally include aggravating factors in a statute in an effort to distinguish especially violent or heinous conduct. The presence of such aggravating factors qualifies a defendant for harsher punishment, such as the death penalty in the case of murder. In Oregon, for example, the legislature has defined "aggravated murder" as murder committed with any one of several enumerated aggravating factors. 38 These aggravating factors include murder for hire, various types of felony murder, or the murder of a police officer. 39 The legislature authorized the death penalty for such murders.

In State v. Boots, 40 the State of Oregon charged the defendant, in the alternative, with murder in the course of a robbery, or murder for the purpose of concealing the identity of the robbers. The statute listed both as aggravating factors for purposes of enhanced punishment. 41 The jury returned a

36. MONT. CODE ANN. § 45-5-303 (1997), discussed at supra, note 27 and accompanying text.
37. See, e.g., United States v. Gipson, 553 F.2d 453, 458 (5th Cir. 1977) (discussing the "conceptual groupings" test). See discussion infra Part II.B.
39. Id.
41. Id. at 727.
general guilty verdict that qualified Boots for the death penalty, without specifying which of the aggravating factors it found to be present.42

On appeal, the Oregon Supreme Court rejected the general jury verdict and reversed Boots's conviction: “the [general] instruction relieves the jury from seriously confronting the question whether they agree that any factual requirement of aggravated murder has been proved beyond a reasonable doubt, so long as each juror is willing to pick one theory or another.”43 The court found that such a general verdict violated the defendant's right to a unanimous verdict.44

It is difficult to understand how the alternatives present in Boots—murder in the course of a robbery or murder for the purpose of concealing the identity of the robbers—represent specific factual choices from which the jury could choose. The fine distinction seems to be whether the defendant inadvertently killed the victim during the course of the pre-planned robbery, the classic felony-murder scenario,45 or whether the defendant consciously chose to kill the victim after committing the robbery to prevent the victim from identifying him. In the first instance, the defendant set out to commit the robbery in disregard of the collateral consequences, such as the fact that he may encounter resistance from persons in the vicinity. The law holds the defendant responsible for all consequences following his decision to commit the robbery. In the second instance, the defendant made a decision to kill the victim after making an earlier decision to commit the robbery. The question confronting the jury seems similar to trying to determine whether a defendant acted “purposely” or “knowingly.”

The difficulty in rationalizing the degree of difference between aggravating factors emerges further in Utah v. Tillman.46 In Tillman, the Utah Supreme Court upheld a first-degree murder conviction.47 The state argued at trial that the defendant had committed the murder while engaged in a series of aggravating activities, including arson, aggravated arson,
burglary, or aggravated burglary. The trial court had not instructed the jury that it had to agree unanimously that the defendant was engaged in a particular aggravating activity. On appeal, the court rejected the defendant's specific unanimity argument on the grounds that the defendant had been convicted of a single crime — murder — and that the aggravating circumstances represented "objective circumstances which evaluate and aggravate the singular actus reus 'of murder.'"

The evidence presented at trial showed that the defendant burgled the victim's house, killed the victim, and burned down the house. All of these are objective factors as suggested by the court. How could the jury distinguish between whether the defendant killed the victim while engaged in the burglary or during the arson? Would it have been appropriate for the jury to find the defendant not guilty under the circumstances if all twelve jurors could not agree as to whether the victim died during the burglary or during the arson?

As noted by the U.S. Supreme Court in Andersen v. United States nearly a century before, in a case where the victim's body was found floating in the ocean with a bullet in it after being thrown from a ship, it is immaterial "whether the vital spark had fled" from the victim when the defendant shot him on the ship or only later from drowning in the ocean. Is it likewise immaterial in Tillman "whether the vital spark had fled" during the burglary or during the arson? Surely no confusion exists that the defendant killed the victim; no confusion exists that the defendant committed burglary by entering the house at night; and no confusion exists that the defendant intentionally set fire to the house. In either case, the defendant killed the victim during the course of committing another crime. In this way, the use of alternative aggravating factors resembles the use of alternative mens rea. No confusion exists among the jurors as to the acts in which the defendant engaged. The only question is the defendant's motivation for committing these acts.

48. Id. at 562.
49. Id. at 563.
50. Id. at 565.
52. Id. at 483-84, 500.
A Specific Unanimity Instruction Is Required When Statutory Alternatives Create Separate Offenses

The presence of alternative means of committing a crime in the same statute poses much greater concerns with respect to jury unanimity. If the statutory alternatives prohibit only a single offense, then the jury need not agree unanimously as to which of the alternative means the defendant violated. On the other hand, if the statutory alternatives actually represent independent crimes, then the jury must agree unanimously as to which crime the defendant committed.54 Courts have grappled throughout this century with the issue of whether a statute that provides for alternative means prohibits more than one offense, and thereby triggers the need for a specific unanimity instruction.55

When a Single Statute Prohibits More Than One Offense.

As early as 1903, the New York Court of Appeals in State v. Sullivan56 considered the issue of whether a defendant prosecuted for first degree murder on separate theories of premeditated murder and felony murder was entitled to a verdict specifically limited to one of the theories.57 The Sullivan court noted that the state enjoys nearly unfettered discretion in charging the defendant.58 The court saw no need to handcuff the state by forcing it to select a single theory upon which it relied, particularly where the statute prohibited only a “single offense.”59

57. Id.
58. Id. at 990.
59. Id. Most modern courts generally follow some version of the test set forth in United States v. Uco Oil Co., 546 F.2d 833 (9th Cir. 1976), in evaluating whether a particular statute prohibits a single crime. Legislative intent determines whether a statute prohibits a single crime. Uco Oil, 546 F.2d at 836. The Uco Oil court listed four factors to be used in determining legislative intent behind a statute: (1) the language of the statute itself; (2) the legislative history, including the statutory context; (3) the nature of the proscribed conduct, in other words, whether the proscribed acts constitute “distinctly different kinds of conduct;” and (4) the appropriateness of multiple punishments for the conduct charged in the indictment. Id. at 836-37. With respect to the statutory context inquiry, 18 U.S.C.§ 545, for example, which prohibits, in separate paragraphs, the clandestine smuggling of goods into the United States and the
The court recoiled at the notion that a defendant who used multiple means to kill could escape punishment if the jury could not agree unanimously as to which means actually caused the victim's death.\textsuperscript{60} The court held that "it was sufficient that each juror was convinced beyond a reasonable doubt that the defendant committed the crime of murder in the first degree as that offense is defined by the statute."\textsuperscript{61} Unfortunately, the court merely concluded that the statute at issue prohibited a single offense – the intentional killing of another person. What \textit{Sullivan} failed to address is how courts should go about determining whether a single statute prohibits more than one offense.

The U.S. Supreme Court showed a similar disregard for details in \textit{Andersen v. United States},\textsuperscript{62} in which the trial court permitted a general verdict in a case involving a defendant charged with murder on the high seas. In \textit{Andersen}, the defendant allegedly shot the ship's mate and threw his body overboard.\textsuperscript{63} The indictment charged the defendant with alternative means of causing the death: shooting or drowning.\textsuperscript{64} The Court rejected the defendant's duplicity argument on the grounds that the indictment charged a continuous transaction in which the defendant employed the two means "cooperatively."\textsuperscript{65} In such circumstances, the Court found it immaterial "whether the vital spark had fled before the riddled body had struck the water, or lingered till extinguished by the waves."\textsuperscript{66}

It should be pointed out, however, that no doubt existed that the defendant in \textit{Andersen} had committed the acts that lead

\begin{itemize}
  \item \textsuperscript{60} \textit{Sullivan}, 65 N.E. at 990.
  \item \textsuperscript{61} \textit{Id.}
  \item \textsuperscript{62} \textit{Andersen v. United States}, 170 U.S. 481 (1898).
  \item \textsuperscript{63} \textit{Id.} at 483.
  \item \textsuperscript{64} \textit{Id.} at 483-84.
  \item \textsuperscript{65} \textit{Id.}
  \item \textsuperscript{66} \textit{Id.} at 500.
\end{itemize}
to the shipmate’s death. Such latitude would not be appropriate were disputes raised as to whether the specific defendant caused the shipmate’s death. Moreover, such sentiments seem more appropriate in the case of homicide, in which the existence of a dead body by unnatural means indicates that a crime has taken place. It is not so obvious, however, that a crime has taken place when assault by mere threat of force is at issue. The level of ambiguity increases when we consider white collar criminal offenses largely defined through complex statutes, such as the insider trading of stocks.

The Conceptual Groupings Test

The question becomes more difficult as the statute concentrates on actual alternative means of committing the offense. At some point, a court must decide whether the alternative means constitute independent crimes that should be charged separately in order to avoid confusing the jurors as to what facts they must agree. One court has focused on the level of similarity of the conduct included in the various alternatives in determining whether each one constitutes an independent crime that would require the court to provide a specific unanimity instruction.

In *United States v. Gipson* the federal government charged Franklin Delano Gipson with violating 18 U.S.C. § 2313, which prohibits knowingly “receiving, concealing, storing, bartering, selling or disposing” of any stolen vehicle or aircraft moving in interstate commerce. At trial, the Government presented evidence to support all six prohibited acts. After an hour of

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67. *See also*, North Carolina v. Baker, 63 N.C. 276, 281 (N.C. 1869) ("The killing is the substance, the mode is the form . . . and it is not to be tolerated that the crime is to go unpunished because the precise manner of committing it is in doubt.").

68. In this regard, the rule of lenity long has been accepted by courts in interpreting criminal law statutes. Under this doctrine, “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” *Rewis v. United States*, 401 U.S. 808, 812 (1971). In other words, Congress must be explicit in establishing multiple punishments for a single offense; otherwise, a court should presume that Congress intended for a court to choose a single punishment from the array of those authorized. *See, e.g.*, United States v. Uco Oil Co., 546 F.2d 833, 838 (9th Cir. 1976) (citing *Bell v. United States*, 349 U.S. 81, 83 (1955) (“It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.”)).


70. *553 F.2d 453* (5th Cir. 1977).

71. *Id. at 459.*
deliberation, the jury requested additional instructions. The district court responded by charging the jury that it could find Gipson guilty without agreeing unanimously as to which of the six prohibited acts he had committed. The jury convicted the defendant based upon a general verdict of guilty.

On appeal, the Fifth Circuit unanimously reversed. The court reasoned that although a person may violate a statute by distinct acts, mere agreement on guilt would not preserve the accused's right to a unanimous verdict "unless this prerequisite of jury consensus as to the defendant's course of action is also required." Without a doubt, the actus reus constitutes an essential element of every crime. As the Gipson court stated: "requiring the vote of twelve jurors to convict a defendant does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required." Accordingly, the court held that the jury must "be in substantial agreement as to just what a defendant did" in order to satisfy a defendant's Sixth Amendment right to a unanimous verdict.

The court analyzed its "substantial agreement" requirement by looking to the alternatives. The court surmised that the six prohibited acts fall loosely into "two distinct conceptual groupings" with receiving, concealing and storing constituting the "housing" of stolen goods, and bartering, selling, and disposing constituting the "marketing" of stolen goods. The court found those acts comprising each group to be "sufficiently analogous" to justify relaxing the specificity requirement. Within these two distinct conceptual groupings of "housing" and "marketing," therefore, the jury need not agree about which particular act the defendant committed. The facts of Gipson,
however, did not permit the court to relax the specificity requirement as the Government had presented evidence to satisfy all six prohibited acts. This "joinder" in a single count of "two distinct conceptual groupings"—housing and marketing—impaired Gipson's right to a unanimous verdict. As a result, the court found the possibility of "significant disagreement among the jurors as to what [Gipson] did."

Although rightfully criticized for its subjectivity, Gipson at least served as a starting point for courts forced to operate in an increasingly complex environment spawned by the explosion of criminal statutes. Considerable debate emerged following Gipson as to what facts should be considered "material," requiring jury unanimity, and what facts should be considered "immaterial," allowing for non-unanimous agreement among the jury. In fact, many commentators expressed concern that requiring jury unanimity on "material facts" actually could hurt defendants in some instances. For example, forcing the jury to respond to special verdict forms in criminal cases that delineated all underlying "material" facts supporting the crime could undermine the jury's nullification power.

concurring). See also Hayden J. Trubitt, Patchwork Verdicts, Different-Jurors Verdicts, and American Jury Theory: Whether Verdicts are Invalidated by Juror Disagreement on Issues, 36 OKLA. L. REV. 473, 549 (1983) ("[I]t is difficult to see how a court could determine that 'housing' and 'marketing' are ultimate acts in some metaphysical constitutional sense, and thus prohibit the legislature from including them in the single offense of trafficking.").

83. Gipson, 553 F.2d at 456-59.

84. Id. at 458-59. For other courts adopting the "distinct conceptual groupings" test see, e.g., United States v. Peterson, 768 F.2d 64, 65-68 (2nd Cir. 1985) (holding that specific unanimity instruction required when single count included two discrete instances of drug possession: three glassine envelopes found on defendant's brother and glassine envelope stored in nearby wall); United States v. Duncan, 850 F.2d 1104, 1113 (6th Cir. 1990) (holding that specific unanimity instruction required when single count contains two alleged false representations); State v. Baldwin, 304 N.W.2d 742, 747-49 (Wis. 1981) (finding it immaterial in sexual assault case when "force" is an element of the crime whether defendant achieved force by actually inflicting a blow on the victim or merely raising his fist). But see, Rice v. State, 532 A.2d 1357, 1365 (Md. 1987) (criticizing Gipson criteria as "not entirely clear" and as "provid[ing] little guidance").

85. See e.g., Mark A. Gelowitz, Jury Unanimity on Questions of Material Fact: When Six and Six Do Not Equal Twelve, 12 QUEENS L.J. 66, 96 (1987) ("The Gipson approach . . . is at least a reasoned, principled response . . . and is to be preferred to blind adherence to the intent of the legislature.").


87. See, e.g., Trubitt, supra, note 82, at 490. Trubitt actually seems to discount the practical application of jury nullification: "There is a great deal of sentimentalism in the legal literature for this secret ameliorative function of the jury, tapping as it does the
Modern legislatures routinely increase the complexity of common law crimes when they codify them into statutes. As discussed, these complexities include the provision of multiple mens rea and multiple alternatives means. The increased complexity of these statutes derived from common-law has raised numerous questions with regard to the need for specific unanimity instructions. For example, when do these alternative means deviate to the point of constituting separate crimes? At what point do the potential aggravating factors diverge to the point of triggering the need for a specific unanimity instruction? Unfortunately, no clear answer has emerged to either of these questions. The best that can be said is that courts will grant greater deference to a state's authority to draft a statute the more closely that the statute reflects the crime's common law roots.

In Schad v. Arizona, the U.S. Supreme Court refused to impinge upon a state's discretion to include multiple alternative means in a single criminal statute, especially when the statute in question had common law origins. The Court grounded its opinion on the long history and tradition of permitting states to codify common-law crimes that create alternative means of committing the same offense.

In Schad, an Arizona highway worker discovered the badly decomposed body of 74-year-old Lorimer Grove in the underbrush off U.S. Highway 89, in September 1978, with a rope around his neck. Mr. Grove had left his home in Bisbee, Arizona, eight days earlier, driving his new Cadillac and towing a camper. The petitioner was arrested while driving Grove's Cadillac in Salt Lake City, Utah, for a parole violation and possession of a stolen vehicle. Police found Grove's personal

American democratic mythos of the splendor of the common man and mollifying lawyers' fears that the inflexible system of rules they have created is insensitive to justice. The concept of jury nullification lay dormant in modern times until the advent of antiwar defendants during the Vietnam War. Id. at 493 (commenting that defendants using the tactic during the 1960s probably sought to capitalize on the ideological or racial solidarity of one or two jurors rather than trying to convince all twelve jurors to serve as the conscience of the community in the face of prosecutorial overreach).

89. Id. at 635.
90. Id. at 628.
91. Id.
belongings when they searched the car, and petitioner's wallet contained two of Grove's credit cards, which Schad had begun using on August 2, 1978.92

Schad was convicted under an Arizona statute that defined first-degree murder as "murder which is . . . willful, deliberate or premeditated . . . or which is committed . . . in the perpetration of, or attempt to perpetrate . . . robbery."93 At trial, the court instructed the jury that murder in the first degree could be premeditated murder or murder committed in an attempt to commit robbery.94 Schad contended that due to the vagueness of the court's instruction, it was possible that the jury was not unanimous in that six jurors could have agreed that he committed premeditated murder while six could have agreed that he committed murder in an attempt to commit robbery.95 Schad claimed that the jury should have been instructed, instead, that it had to agree unanimously as to whether he committed the murder in a premeditated fashion or whether he committed the murder during the course of committing a robbery.96 Schad was convicted and sentenced to death, but the Arizona Supreme Court set aside his conviction on collateral review, forcing the state to re-try Schad for the original offense.97

Following an appeal from Schad's re-trial, the U.S. Supreme Court affirmed the state court and upheld the defendant's

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92. Id.
93. The full statute provided as follows:
A murder which is perpetrated by means of poisoning or lying in wait, torture or by any other kind of willful, deliberate, or premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting and escape from legal custody, or in the perpetration of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping, or mayhem, or sexual molestation of a child under the age of thirteen years, is murder in the first degree. All other kinds of murder are of the second degree. ARIZ. REV. STAT. ANN. § 13-452 (West Supp. 1973).
94. Schad, 501 U.S. at 628.
95. Id. at 629.
96. The felony murder doctrine has spawned considerable controversy based upon the claim that it relieves the state of its burden of proving that the defendant intended to commit the murder. See Nelson E. Roth & Scott E. Sundby, The Felony-Murder Rule: A Doctrine at Constitutional Crossroads, 70 CORNELL L. REV. 446 (1985). Roth and Sundby suggest that the concept of mens rea had not been sufficiently developed in the common law at the time of the development of the felony murder rule in the seventeenth and eighteenth centuries. Despite this controversy, courts routinely have upheld its validity. See, e.g., Guam v. Root, 524 F.2d 195 (9th Cir. 1975) (holding that felony murder does not presume intent in violation of Winship).
conviction. Justice Souter's plurality opinion focused on whether such a statutory scheme violated a defendant's due process rights under the Fifth Amendment, rather than his Sixth Amendment guarantee of a unanimous verdict. In so doing, the Court recharacterized the defendant's claim as "one of the permissible limits in defining criminal conduct, as reflected in the instructions to jurors applying the definitions [of elements of a crime], not one of juror unanimity."

The Court listed numerous historical precedents in rejecting the notion that the jury must agree unanimously as to the underlying actus reus. For example, the Court cited Anderson v. United States, which found it immaterial whether the defendant caused the victim's death by one means or the other, in holding that the Government need not make the charge in the alternative. The Court rejected the notion that the jury must "indicate on which of the alternatives it has based the defendant's guilt, ... where there is no indication that the statute seeks to create separate crimes."

The Court noted that it would be nearly impossible to produce a single analytical model for determining whether "two means are so disparate as to exemplify two inherently separate offenses." In making this calculation, however, the Court stated that the two alternative means contained within the statute must "reasonably reflect notions of equivalent blameworthiness or culpability, whereas a difference in their perceived degrees of culpability would be a reason to conclude that they identified different offenses altogether."

98. Schad, 501 U.S. at 630.
99. The Fifth Amendment reads, "No person shall be ... deprived of life, liberty, or property, without due process of law...." U.S. CONST. amend. V.
100. Schad, 501 U.S. at 631. Justice Scalia, in his concurring opinion, similarly defined the issue as whether the definition of the crime contained in Arizona's first-degree murder statute violated due process. Id. at 650 (Scalia, J., concurring in part and concurring in the judgment).
101. Id. at 631. (citing Andersen v. United States, 170 U.S. 481 (1898)) (sustaining a murder conviction against challenge that indictment was duplicitous in charging that death occurred through both shooting and drowning).
102. Schad, 501 U.S. at 631. Rule 7(c)(1) of the Federal Rules of Criminal Procedure provides the underpinning for these decisions: "[I]t may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means." FED. R. CRIM. P. 7(c)(1).
103. Schad, 501 U.S. at 635-36.
104. Id. at 643.
105. Id.
premeditated murder and felony murder, in this case, a murder committed in the course of a robbery.\textsuperscript{106}

Based on this reasoning, the Court concluded that jurors need only agree unanimously upon those facts that are deemed "material" or "necessary to constitute the crime."\textsuperscript{107} The Court dismissed the need for jury unanimity for those facts that constitute "mere alternative means" of satisfying the necessary elements of the crime.\textsuperscript{108}

The Court stated that it is "erroneous [to] assum[e] that any statutory alternatives are \textit{ipso facto} independent elements defining independent crimes under state law, and therefore subject to the axiomatic principle that the prosecution must prove independently every element of the crime."\textsuperscript{109} The Court noted that "legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes."\textsuperscript{110}

Justice White's dissenting opinion suggests that the state sought to convict Schad of an offense by two separate routes, each of which contained elements distinct from the other.\textsuperscript{111} As analyzed by Justice White, the question should not be whether the state should have flexibility in defining all elements of the offense. Rather, the question should be whether, in having established two distinct alternative sets of elements of the offense, the state must be forced to choose upon which alternative it relies.\textsuperscript{112} The elements for premeditated murder under Arizona law demands both an intent to kill and forethought in devising this intent.\textsuperscript{113} By contrast, Justice White contended, the felony murder route contains two different elements in that a death must have been caused and that death must have been caused during the course of a felony.\textsuperscript{114}

\begin{footnotes}
\item[106.] Id.
\item[107.] Id. at 638-39.
\item[108.] Id. at 631-32. \textit{See also} Washington v. Golladay, 470 P.2d 191, 200 (1970) (finding that murder committed with premeditation and murder committed during the course of a felony were "but alternative constituents of the same statutory offense; they [did] not constitute separate and distinct offenses").
\item[109.] Schad, 501 U.S. at 636 (citations omitted).
\item[110.] Id. (footnote omitted).
\item[111.] Id. at 653.
\item[112.] Id. at 657-58.
\item[113.] Premeditated murder under Arizona law requires the state to prove the following elements: (1) the killing caused the victim's death; (2) the killing was done with malice; and (3) the killing was premeditated. \textit{Schad}, 501 U.S. at 653-54 (White, J., dissenting).
\item[114.] Id.
\end{footnotes}
Justice White contended that the omission of any element from the felony murder instruction that the defendant committed the killing or even that the defendant intended to kill, represents more than simply "a substitution of one \textit{mens rea} for another," and therefore concluded that Arizona had convicted Schad without requiring the jury to agree unanimously on which of the separate alternatives it had based Schad's guilt.\textsuperscript{115} Thus, some jurors may have believed that the defendant committed premeditated murder, while others may have believed that the killing had been accidental. Under this latter scenario, Justice White argued, the defendant may have intended to commit the felony, but then inadvertently killed the victim during the course of committing the felony.\textsuperscript{116} The Court's plurality opinion responded that in cases involving state criminal statutes, Justice White's "statutory alternatives" test "runs afool of the fundamental principle that we are not free to substitute our own interpretations of state statutes for those of a State's courts."\textsuperscript{117}

In \textit{Schad}, the Court once again faced a situation in which no confusion existed as to the defendant's conduct: Schad stole Grove's car and killed him. The Arizona courts and the dissenting Justices on the U.S. Supreme Court worried that the

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\item[115.] \textsuperscript{Id.} at 654. This combination of the legislature's decision to combine separate offenses into the same statute and the district court's failure to require the jury to agree unanimously as to which alternative, relieves Arizona of its burden under \textit{Winship} of proving every element of the offense beyond a reasonable doubt. Similarly, the burden-shifting cases prevent the State from relying on presumptions that the accused must affirmatively rebut to prove his innocence. For example, in \textit{Sandstrom v. Montana}, the Court rejected an instruction that directed the jury to hold the defendant responsible for the ordinary consequences of his actions. Instead, the Court found that such an instruction improperly shifted the burden of proving lack of intent in violation of \textit{Winship}: "whether the crime was committed purposely or knowingly is a fact necessary to constitute the crime of deliberate homicide." \textit{Sandstrom}, 442 U.S. 510, 520 (1979). \textit{Cf.} \textit{Patterson v. New York}, 432 U.S. 197, 205-06 (holding that requiring the defendant to establish the affirmative defense of extreme emotional disturbance did not violate due process). In \textit{Patterson}, the Court concluded that the state merely must prove the death, the intent to kill, and causation, beyond a reasonable doubt to establish the offense of murder. "No further facts are either presumed or inferred in order to constitute the crime." \textit{Id.}

\item[116.] The gravity of the distinction appears in \textit{Schad} itself. The jury returned a general verdict that no where mentions the defendant's intent to kill or whether the petitioner participated in the actual killing of the victim. The sentencing judge included in his order, however, a finding beyond a reasonable doubt that the petitioner intended to kill the victim and did, in fact, kill the victim. Without such a finding, the sentencing judge likely would not have imposed a death sentence on the defendant. Such a general verdict, therefore, could create an intolerable risk in other cases that the sentencing judge may impose a death sentence based upon findings that contradict those actually made by the jury during the guilt phase of the trial. \textit{Schad}, 501 U.S. at 655.

\item[117.] \textsuperscript{Id.} at 636 (footnote omitted).
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jury did not agree unanimously as to Schad's motivation for acting; that is, did Schad kill Grove in a premeditated fashion or was the killing an unintentional, but highly foreseeable, consequence of Schad's conscious decision to engage in the felony of stealing Grove's car. Nevertheless, the Court found that the statutory alternatives of premeditated murder and felony-murder did not diverge to the point of constituting separate offenses that could have resulted in a non-unanimous verdict. At some point, however, the statutory alternatives diverge to the point of constituting separate offenses. In State v. Weldy, the Montana Supreme Court was forced to confront this divergence.118

When the Alternatives Constitute Separate Offenses as Analyzed by Montana Courts in State v. Weldy

In 1994, following a series of violent incidents with his wife, the state of Montana charged Ralph Owen Weldy with one count of felony assault and one count of misdemeanor domestic abuse.119 The Montana Code Annotated formerly provided three separate alternative methods for committing felony assault.120 Under these alternatives, a person commits felony assault when their knowing or purposeful conduct causes the following harm:

1. Bodily injury with a weapon;
2. Reasonable apprehension of bodily injury with a weapon; or
3. Bodily injury to a peace officer.

Thus, the state had to prove three separate elements: (1) an intentional act (2) with a weapon (3) that causes bodily injury or reasonable apprehension of bodily injury.121

The state’s decision to charge Weldy with a single count for an offense that stemmed from conduct spanning an evening and into the next day triggered a controversy with regard to the alternative means contained in the felony assault statute and

119. Id. at 72, 902 P.2d at 3.
120. MONT. CODE ANN. § 45-5-202(2) (1997). During the 1999 Legislative session, the Montana Legislature revised Montana’s felony assault statutory scheme. Under the current code, Assault with a Weapon, MONT. CODE ANN. § 45-5-213 (1999), and Assault on a Peace Officer, MONT. CODE. ANN. § 45-5-210 (1999), replace the previous felony assault statute.
121. For purposes of this analysis, we can avoid discussing the “bodily injury to a peace officer” subsection. MONT. CODE ANN. § 45-5-202(2) (1997). This provision, unlike subsections (a) and (b), did not require that the assailant use a weapon in injuring the police officer. Id.
the unanimous jury requirement. The facts of the case, as submitted by the state during trial, showed that Weldy began beating his wife, Cynthia, on their honeymoon and continued beating her for several years.\(^\text{122}\) On the night in question, Weldy began abusing Cynthia when she returned home from her waitressing job at the Lucky Cuss Restaurant.\(^\text{123}\) At one point, Weldy plunged a 12-inch serrated knife into the wall beside Cynthia's head while she sat in a kitchen chair.\(^\text{124}\)

The evidence showed that Weldy kept up the assaults throughout the night. He broke a drinking glass and threatened her with the jagged glass.\(^\text{125}\) He later grabbed a piece of firewood and hit her on the head, shoulder, and hand.\(^\text{126}\) Weldy finally went to bed at 7 a.m.\(^\text{127}\) Cynthia managed to sneak out of the house and report to her second job as a waitress at the Friendly Café. Weldy roused from his slumber in time to find Cynthia at work and strike her in the back and side of her head while she was carrying a pot of coffee to customers.\(^\text{128}\) After a brief reprieve, Weldy returned to the Friendly Café for one final onslaught. He pulled Cynthia out the rear door and beat her severely. Weldy did not use any weapons other than his hands during the final two attacks.\(^\text{129}\) After hearing the evidence, the jury convicted Weldy of felony assault and domestic abuse.\(^\text{130}\)

Weldy argued that the district court erred in not providing the jury with a specific instruction that directed the jurors to agree unanimously to the specific act that he committed in support of the felony assault charge.\(^\text{131}\) The state introduced evidence to support a conviction for felony assault based on two separate theories: (1) that Weldy inflicted bodily injury to Cynthia with a weapon, or (2) that Weldy merely inflicted reasonable apprehension of bodily injury on her, as set forth in the first two prongs of the statute. Moreover, Weldy argued that the district court should have used a verdict form that would

\(^{122}\) Weldy, 273 Mont. at 79, 902 P.2d at 8.
\(^{123}\) Id. at 72, 902 P.2d at 3.
\(^{124}\) Id.
\(^{125}\) Id.
\(^{126}\) An emergency room physician confirmed that the wife's injuries were consistent with being struck by a piece of firewood. Id. at 79, 902 P.2d at 7.
\(^{127}\) Id. at 72, 902 P.2d at 3.
\(^{128}\) Id.
\(^{129}\) Id.
\(^{130}\) Id.
\(^{131}\) Id. at 78, 902 P.2d at 7. No one accused Weldy of striking a peace officer, so the jury could ignore third statutory alternative.
have required the jury to find him guilty or innocent under one, but not both, subsections of the felony assault statute. The district court simply provided the general unanimity instruction and verdict form.

Weldy contended that the combination of the state’s introduction of evidence in support of the actual bodily injury subsection and evidence in support of the reasonable apprehension of bodily injury subsection, and the district court’s general instruction may have confused the jury. In other words, Weldy argued that some members of the jury may have believed that he actually caused bodily injury to his wife with a weapon, while another group of jurors may have believed only that Weldy caused Cynthia reasonable apprehension of bodily harm with a weapon, without all 12 jurors ever agreeing as to which prong of the felony assault statute was satisfied.

On appeal, the court distinguished the precedents relied upon by the state on the ground that the “purposely” and “knowingly” alternative mental states at issue in those cases did not constitute independent elements of an offense; instead, they represented alternative means of satisfying each element of the underlying offense. By contrast, the alternatives found in the felony assault statute — bodily injury with a weapon or reasonable apprehension of bodily injury — constituted two separate offenses. As separate offenses, the court found that they should have been charged as separate offenses, rather than as a single count contained in the information.

It is not immediately clear how these two alternative means

132. Id.
133. The jury was instructed that “[I]n your deliberations you shall first consider the charge of Felony Assault . . . [a]ll twelve of you must find the defendant either guilty or not guilty of that charge.” Id. The verdict form provided as follows: We the jury, duly empaneled and sworn to try the issues in the above case, unanimously find as follows: Count I; Of the charge of Felony Assault, we find the defendant Guilty. Id.
135. Weldy, 273 Mont. at 76, 902 P.2d at 6 (citing State v. Warnick, 202 Mont. 120, 128, 656 P.2d 190, 194-95 (1982) (holding that the state must prove that each element of the offense was done purposely or knowingly in order to sustain the charge of aggravated assault)).
136. Weldy, 273 Mont. at 78, 902 P.2d at 7. The court need not have considered the third alternative of bodily injury to a peace officer as the state did not introduce evidence of such conduct by Weldy.
137. Id.
of satisfying the felony assault statute constitute two separate offenses rather than mere alternative means of satisfying the same offense. In all instances the accused must act purposely or knowingly. In all instances the accused must employ a weapon. Weldy's conduct appears to satisfy these criteria: he used a piece of firewood against Cynthia; he brandished a knife so that Cynthia would see it; and he broke a glass and held part of it near Cynthia so that she could see it.

The alternative means vary only in whether the defendant actually inflicted bodily injury. The defendant's conduct could be identical. It simply depends upon the results of that identical conduct. The distinction boils down to whether Weldy's knowing or purposeful actions caused injury to his wife, or whether Weldy's knowing or purposeful actions simply aroused in her reasonable apprehension of such bodily injury. In other words, it all depended on the accuracy of Weldy's aim.

The court's characterization of the alternatives as representing two separate offenses makes more sense if one considers Weldy's attacks on Cynthia as constituting a single course of conduct. The state apparently perceived the situation as a continuous course of conduct as evidenced by the fact that it charged Weldy with only a single count of assault. The state chose to introduce, however, evidence of multiple bad acts by Weldy that included striking the victim with various

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138. At least one other court facing a similar challenge under a felony assault charge found that failing to adopt the "single offense" rule from Sullivan, discussion supra Part II.A., would "result in juror disagreement over semantics in many cases in which [jurors] unanimously agree that the defendant committed the wrongful deed." State v. James, 698 P.2d 1161, 1165 (Alaska 1985). In James, the defendant had been convicted of first degree felony assault. The State contended that the defendant had used a dangerous instrument in committing the assault or that he had acted under circumstances exhibiting an extreme indifference to human life. Id. at 1162-63. The court rejected the defendant's unanimity challenge on the grounds that the statute prohibited only a single offense. Id. at 1165. See also Ward v. State, 758 P.2d 87 (Alaska 1988) (upholding conviction under statute forbidding the operation of a motor vehicle either (1) while under the influence of alcohol, or (2) with a blood alcohol of more than 0.10% by weight, on grounds that the statute prohibited only one offense).

139. The state has the option to combine a series of separate offenses into part of a larger common scheme and charge the defendant accordingly. For example, MONT. CODE ANN. § 45-6-301(8) (1999), permits the state to aggregate the amounts of thefts committed pursuant to a common scheme in determining the value of the property. This type of aggregation permits the state to charge a more serious offense or to seek a higher penalty at sentencing. MONT. CODE ANN. § 45-2-101(7) (1999) defines such a "common scheme" to mean "a series of acts or omissions motivated by a purpose to accomplish a single criminal objective or by a common purpose or plan that results in the repeated commission of the same offense or that affects the same person or the same persons or the property of the same person or persons."
weapons and brandishing a variety of weapons in her vicinity. In light of the fact that the evidence indicates that Weldy attacked his wife on several different occasions and at several different locations, the state clearly could have divided Weldy's conduct into several counts that encompassed his behavior. Moreover, the state further muddied the waters by introducing evidence that Weldy struck Cynthia with a weapon and menaced her with various weapons, including a knife, a broken glass, and a piece of firewood.

Justice Nelson's concurring opinion deftly focuses on this final point as the root of the problem. The state's tactic of dumping multiple wrongful acts into a single charge creates a myriad of unnecessary complications. As analyzed by Justice Nelson, the amended information charging Weldy with one count of felony assault clearly charges multiple alternative assaultive actions from which the jury could choose. 140

Justice Nelson suggests that the confusion could have been avoided by requiring the state to charge offenses and different statements of the same offense as different counts. 141 A charging document with the felony assault alternatives contained in separate counts would have avoided the constitutional infirmity. 142 The accompanying verdict form would have posed separate questions to the jury to reflect the

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140. The amended information provides as follows:
Count I: Felony Assault, in violation of Section 45-5-202(2)(a) and (b), MCA, committed on or about the night of July 9 to July 10, 1993, when the defendant purposely or knowingly caused bodily injury to Cynthia Wood with a weapon when he hit her with a piece of firewood, causing pain, and when the defendant purposely or knowingly caused Cynthia Wood to have reasonable apprehension of serious bodily injury by use of a weapon when he brandished a knife so that she would see it, hit her with a piece of firewood, and broke a glass and held part of the broken glass near her so that she would see it.


141. Id. at 81, 902 P.2d at 9 (Nelson, J., concurring). In particular, Justice Nelson's concurring opinion points to the language of MONT CODE ANN. § 46-11-404(1) (1999), which provides as follows:
Two or more offenses or different statements of the same offense may be charged in the same charging document in a separate count, or alternatively, if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same transactions connected together or constituting parts of a common scheme or plan. Allegations made in one count may be incorporated by reference in another count.

Justice Nelson read the statute as requiring the state to charge separate offenses and different statements of the same offense in separate counts. To hold otherwise, he reasoned, would render the statutory language "in a separate count" surplusage. Weldy, 273 Mont. at 81, 902 P.2d at 9. (Nelson, J., concurring).

142. Weldy, 273 Mont. at 81, 902 P.2d at 9 (Nelson, J., concurring).
UNANIMOUS JURY VERDICTS

Justice Nelson’s approach certainly remedies the problem of jury confusion and the defendant’s right to a unanimous verdict. Although effective, this approach comes with a price. The state no longer can choose to charge a defendant with a single count of an offense whenever it intends to introduce evidence of multiple acts in support of the charge. The state likely will be encouraged to overcharge defendants with multiple counts stemming from conduct that often occurs as a single incident. Such a tendency to overcharge by the state unnecessarily complicates and frustrates pre-trial bargaining among the parties. On the other hand, simply requiring the district court to provide a specific unanimity instruction in such cases alleviates potential confusion among the jurors as to which facts they must agree unanimously without impinging the state’s discretion as to how to charge the defendant.

A SPECIFIC UNANIMITY INSTRUCTION IS REQUIRED WHEN A SINGLE COUNT INCLUDES ALLEGATIONS OF MULTIPLE BAD ACTS

Schad underscores the latitude that courts generally grant to states in drafting criminal statutes. Based on the common-law origins of many of the criminal statutes, the court refused to limit a state’s ability to include multiple alternative means of committing the offense. As evidenced by Weldy, however, limitations may be found elsewhere, such as in a state’s constitution. These limitations often will include the need for a district court to provide a specific unanimity instruction to the jury as to which statutory alternative means the defendant violated.

The need for a specific unanimity instruction more commonly arises, however, in situations where the state, regardless of the number of alternatives means contained in a statute, charges a number of discrete acts in a single count. Any one of these discrete acts would constitute a violation of the statute at issue, and as such, could give rise to the real possibility of jury confusion as to the facts on which the jurors must agree. Under these circumstances, the jury could convict a defendant under the statute without agreeing unanimously as to what the accused did.

143. See, e.g., United States v. Duncan, 850 F.2d 1104, 1111 (6th Cir. 1988); United States v. Beros, 833 F.2d 455, 462 (3rd Cir. 1987); United States v. Ferris, 719 F.2d 1405, 1407 (9th Cir. 1983).
Further problems develop when the state combines the distinct alternative means of committing an offense, such as in *Schad* and *Weldy*, with multiple theories of culpability. The issue has been complicated further with the advent of increasingly complex federal criminal statutes as Congress has waged tougher wars against drugs, the mob, and sophisticated white-collar financial crimes. In particular, Congress has been at the forefront in fashioning complex federal criminal statutes that contain multiple alternative means of committing the offense. These complex federal criminal statutes, with their predicate act threshold, provide a unique window through which to examine the specific unanimity issue.

**Complex Federal Criminal Statutes Lump Multiple Bad Acts into a Single Count**

Congress enacted the Continuing Criminal Enterprise Statute (CCE) as a means of prosecuting drug kingpins. The CCE targets kingpins by requiring the Government to prove that the defendant supervises five or more persons, and by imposing harsh sentences on those persons involved in a “pattern” or “series” of criminal conduct. Proving this “pattern” or “series” of criminal conduct forces the Government to demonstrate a specific number of violations of other criminal statutes. Numerous narcotics felonies provide ample fodder for these predicate acts under the CCE.

In light of the specific unanimity requirement, the CCE raises the issue of whether the jury must agree unanimously as to whom the accused supervised as part of the CCE. Similarly, must the jury agree unanimously as to which predicate act, or acts, the accused committed before finding him guilty of the charge under the CCE? The Government regularly presents

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147. 21 U.S.C. §§ 841(a), 842(a), and 960(a) (1988), codify various narcotics-related crimes under the U.S. Code.

148. For a more detailed analysis of the specific unanimity requirement in the context of complex federal criminal statutes, see Eric S. Miller, Note, Compound-Complex Criminal Statutes and the Constitution: Demanding Unanimity as to Predicate Acts, 104
evidence of numerous predicate acts in the hope that the jury will find that the accused committed a sufficient number to satisfy the CCE requirement of three predicate acts.\textsuperscript{149} The U.S. Supreme Court has found that failure by the district court to provide a specific unanimity instruction that directs the jury to agree unanimously as to which predicate act, or acts, the accused committed leaves in doubt the validity of the verdict.\textsuperscript{150}

The Court addressed the unanimity requirement, as it applied to the CCE, in \textit{Richardson v. United States}.\textsuperscript{151} In 1994, the Government charged Eddie Richardson with violating the CCE in connection with his activities as the leader of a Chicago street gang known as the Undertaker Vice Lords.\textsuperscript{152} The trial court rejected Richardson's proposed jury instruction that it must "unanimously agree on which three acts constituted [the] series of violations" for purposes of the CCE.\textsuperscript{153} Instead, the trial court instructed the jury simply that they "must unanimously agree that the defendant committed at least three federal narcotics offenses," but the jury did not "have to agree as to the particular three or more federal narcotics offenses committed by the defendant."\textsuperscript{154} The U.S. Supreme Court granted certiorari to resolve a split among the courts of appeal as to what level of unanimity was required.\textsuperscript{155}

\textsuperscript{149} \textit{United States v. Echeverri}, provides a case study in the need for a specific unanimity instruction. 854 F.2d 638 (3rd Cir. 1988). The Government offered a "plethora of drug-related activity" in seeking to convict the defendant under the CCE. \textit{Id.} at 642. To counteract this effort, the defendant sought an instruction requiring the jury to agree unanimously "on which three acts constitute the continuing series of violations." \textit{Id.} The district court refused and gave only the general unanimity instruction.

On appeal, the defendant argued that the district court's failure to provide the jury with his requested specific unanimity instruction violated his Sixth Amendment right to a unanimous verdict in a federal criminal trial. \textit{Id.} The court agreed. The CCE statute requires the Government to prove that the defendant participated in a continuing series consisting of at least three violations of federal drug laws. As such, each predicate act represents an "essential element of the crime charged." \textit{Id.} at 643. The jury must agree unanimously as to each predicate act. \textit{Id.}

\textsuperscript{150} \textit{Richardson v. United States}, 526 U.S. 813 (1999).

\textsuperscript{151} 526 U.S. 813 (1999).

\textsuperscript{152} \textit{Id.} at 816.

\textsuperscript{153} \textit{Id.}

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} \textit{Cf.} United States v. Edmonds, 80 F.3d 810, 822 (3rd Cir. 1996) (en banc) (jury must agree unanimously on which "violations" constitute the series); United States v. Hall, 93 F.3d 126, 129 (4th Cir. 1996) (unanimity with respect to particular "violations" is not required); and United States v. Anderson, 39 F.3d 331, 350-51 (D.C. Cir. 1994) (same).
By way of review, the Court acknowledged its recent precedent in *Schad* when it stated that "a federal jury need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element" of an offense.\(^\text{156}\) For example, disagreement regarding the means, such as whether a robber used a knife or a gun, does not invalidate the jury's unanimous conclusion that the Government proved the necessary elements of the offense of robbery.\(^\text{157}\)

The CCE statute, however, required the Court to make a clear choice: first, whether the statute's phrase "series of violations" refers to a single element — a "series" — to which the "violations" constitute the underlying brute facts; or in the alternative, whether the phrase creates several elements — the several "violations" — to each of which the jury must agree unanimously and separately.\(^\text{158}\) The Government had introduced evidence that Richardson committed more than the three crimes necessary to make up a "series."\(^\text{159}\) Therefore, if the "series" constitutes a single element of the CCE of which the individual violations represent the means, then the jury need only agree that Richardson had committed at least three of the underlying crimes that the Government attempted to prove. On the other hand, if the CCE makes each "violation" a separate offense, then the jury must agree unanimously about which three acts Richardson committed.

The Court searched for meaning in the statute's language. The words "violates" and "violations" refer to conduct that is contrary to law. As a result, the Court concluded that each "violation" represents a separate element under the CCE to which the jury must agree unanimously.\(^\text{160}\) Interestingly, the Court relied upon *Schad* in support of its conclusion that the Constitution limits a state's power to define crimes.\(^\text{161}\) Unlike the common-law origin of the felony-murder rule in *Schad*,


\(^{157}\) *Richardson*, 526 U.S. at 817 (citing *McKoy* v. North Carolina, 494 U.S. 433, 449 (Blackmun, J., concurring)).

\(^{158}\) *Richardson*, 526 U.S. at 817-18.

\(^{159}\) *Id.* at 818.

\(^{160}\) *Id.* at 818-19.

\(^{161}\) *Id.* at 820. The Court rejected analogies offered by the Government to state statutes making criminal such acts as sexual abuse of a minor. Courts have sometimes permitted juries to avoid agreeing to a specific incident as long as the incidents were proved to be part of a "continuous course of conduct." *See*, *e.g.*, *People* v. *Gear*, 23 Cal. Rptr. 2d 261, 263-67 (Cal. Ct. App. 1993) (continuous sexual abuse of a child).
however, the Government in *Richardson* could not rely upon history or tradition to argue that Congress intended to treat individual criminal "violations" simply as means toward the commission of a greater crime. As a result, the Court found no reason to believe that Congress intended to test the constitutional limits of its statute-drafting authority when it passed the CCE. 162

The Court also found that the sweeping breadth of the CCE argues against treating each individual violation simply as a "means" of proving an element of an offense. 163 As noted by the Court, the word "violations" as contained in the CCE covers many different kinds of behavior of varying degrees of seriousness, while the Government likely will try to prove that a "drug kingpin" engaged in numerous such violations. 164 Thus, the Court found increased likelihood that permitting the jury to avoid discussion of specific factual details of each violation would "cover-up wide disagreement among the jurors about just what the defendant did, or did not, do." 165 Moreover, the risk increases that the jury, rather than focusing upon factual detail, simply will conclude, "that where there is smoke there must be fire." 166 Although *Richardson's* reasoning may be persuasive in other contexts, the decision applies solely to the CCE and its predicate act requirement. The fifty states remain free to thrash out their own rule for the need for a specific unanimity instruction within the broad constitutional parameters set by *Richardson* and *Schad* and in line with their own state constitutions.

**Jury Confusion Regarding the Acts Committed**

The explicitness of the predicate acts requirement of the CCE has the advantage of focusing on the need for a specific
unanimity instruction. No doubt exists, as found by the Court in *Richardson*, that these predicate acts represent material facts upon which the jury must agree unanimously. Moreover, the Government's decision to introduce as many examples of predicate acts as possible injects the notion of alternative means of violating the CCE into the equation. In other words, the jury could have six examples of alleged bad acts, as opposed to the statutorily required three, from which to choose in determining whether the defendant's conduct satisfies the predicate acts requirement of the CCE. At that point, the likelihood of the jury being confused as to precisely the facts upon which they must agree unanimously rises to an unacceptable level without guidance from the court in the form of a specific unanimity instruction.

Gauging what constitutes an acceptable threshold of confusion among the jury as to which facts they must agree unanimously becomes even more difficult outside the relatively explicit parameters of the CCE's predicate acts requirement. Other federal criminal statutes contain underlying elements that the Government must prove in order to convict a defendant. These statutes often provide that these underlying elements may be proven by alternative means. Numerous federal courts have evaluated whether the alternative means of committing a crime differ so greatly in character that they must be viewed as separate offenses. In analyzing these problems, these courts have shifted the focus from whether the statute includes distinct conceptual groupings, as is set forth in *Gipson*, to whether a high possibility of jury confusion exists.

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167. See, e.g., United States v. North, 910 F.2d 843, 875 (D.C. Cir. 1990) (holding that the "trial court erred in refusing to instruct that in order to return a unanimous verdict of guilty on a count involving multiple distinct underlying acts, jurors are required to be unanimous as to the specific act by which the defendant violated the law"); United States v. Beros, 833 F.2d 455, 462 (3rd Cir. 1987) ("When the government chooses to prosecute under an indictment advancing multiple theories, it must prove beyond a reasonable doubt at least one of the theories to the satisfaction of the entire jury."); United States v. Jessee, 605 F.2d 430, 431 (9th Cir. 1979) (finding that the defendant's request for a specific unanimity instruction "was properly denied, since the trial court instructed that the jurors must unanimously agree on at least one of the factual allegations charged"); United States v. Payseno, 782 F.2d 832, 837 (9th Cir. 1986) (requiring specific unanimity instruction when strong possibility of jury confusion exists).

168. United States v. Beros, 833 F.2d at 462 (jury confusion); Payseno, 782 F.2d at 837 (jury confusion); Washington v. Green, 616 P.2d 628, 637-38 (Wash. 1980) (construing Washington's aggravated murder statute to require jury unanimity as to the underlying offense because the statute set forth alternate methods of committing aggravated murder.)
The Jury Confusion Threshold as Analyzed by Federal Courts

Unfortunately, those circumstances that give rise to a high possibility of jury confusion cannot readily be identified. One must look to those cases in which the jury confusion approach is adopted to discern any patterns. In United States v. Beros, the Government charged the defendant with multiple counts of embezzling and converting union funds. Several of the counts charged that on separate occasions the defendant was guilty of "[1] embezzling, [2] stealing, [3] abstracting or [4] converting to his own use" funds of the Teamsters Joint Council 40 and of the pension fund.

For example, Count 3 of the indictment charged as follows:

On or about December 13, 1981 and continuing to on or about January 26, 1982, in the Western District of Pennsylvania, the defendant James M. Beros, did willfully and unlawfully embezzle, steal, abstract and convert to his own use the monies, funds, property and other assets of Joint Council 40, to wit, the approximate sum of $1,063.00, expenses incurred by James M. Beros for a plane ticket in the name of Mrs. C. Beros for a flight to Ft. Lauderdale, Florida and lodging in Hollywood, Florida. In violation of Title 29, United States Code, Section 501(c).

This count alleges three separate transactions: (1) using a Joint Council credit card to pay airfare for himself and his wife; (2) occupying a hotel suite that cost $160.00 per day rather than a single or double room that would have cost no more than $60.00 per day; and (3) remaining in Florida for personal reasons for a couple of extra days after the end of the conference.

Similarly, Count 5 of the indictment charged as follows:

On or about November 26, 1982 and continuing to on or about January 24, 1983, in the Western District of Pennsylvania, the defendant, James M. Beros, did willfully and unlawfully embezzle, steal, abstract and convert to his own use the monies, funds, property and other assets of the Pension Fund, to wit, the approximate sum of $765.87, a cash advance drawn upon the Pension Fund by James M. Beros on or about November 26, 1982 for a trip to Orlando, Florida and expenses incurred by James M. Beros for lodging, food, and rental car in Orlando, Florida. In violation of Title 18, United States Code,
This count alleges two separate illegal transactions: (1) a cash advance in the amount of $765.87 for a trip to Florida; and (2) expenses for lodging, food, and rental car while in Florida. Both counts, however, allege four separate and distinct theories of criminal activity: (1) embezzlement; (2) abstraction; (3) stealing; and (4) conversion.

The court found that the alleged multiple theories of culpability and the various enumerated bad acts, any of which could have supported the conviction, created a strong likelihood of jury confusion. To alleviate jury confusion, the court adopted the rule that the trial judge "must augment the general instruction to ensure the jury understands its duty to unanimously agree to a particular set of facts." The court found that the Government’s choice to prosecute under an indictment advancing multiple theories requires it to prove beyond a reasonable doubt at least one of the theories to the entire jury. The court emphasized that the combination of the multiple distinct acts included in the indictment and the Government’s reliance on several distinct theories of culpability triggered the jury confusion.

174. *Id.* at 458-59.
175. *Id.* at 461.
176. *Id.* at 458. In determining that jury confusion was likely present, the court adhered to the following test: “When it appears ... that there is a genuine possibility of jury confusion or that a conviction may occur as a result of different jurors concluding that the defendant committed different acts, the general unanimity instruction does not suffice.” *Id.* at 461 (quoting United States v. Echeverry, 698 F.2d 375, modified 719 F.2d 974, 975 (9th Cir. 1983) (en banc)).
177. Beros, 833 F.3d at 461 (quoting Echeverry, 698 F.2d 375, modified 719 F.2d 974, 975 (9th Cir. 1983) (emphasis in original).
178. Beros, 833 F.2d at 462. The court distinguished several cases relied upon by the Government, including United States v. Wright, 742 F.2d 1215 (9th Cir. 1984), and United States v. Ferris, 719 F.2d 1405 (9th Cir. 1983), on the grounds that no special circumstances existed in those cases. Each of those cases involved counts in which only one act was specified, but the Government supported each act through multiple theories of culpability. Beros, 833 F.2d at 462.
179. Beros, 833 F.2d at 462. In reaching its decision, the court went one step further by finding that the Sixth Amendment demands such unanimity, rather than relying solely on any federal statute. *Id.* This point raises serious questions for state courts reviewing convictions resting upon indictments putting forth multiple theories of culpability as the dictates of the Sixth Amendment apply to all state criminal proceedings. Cf. Schad v. Arizona, 501 U.S. 624, 632-46 (1991), which analyzed the Arizona statute to determine whether it violated the defendant’s due process rights under the Fifth Amendment, rather than the Sixth Amendment’s guarantee to a unanimous verdict.
Likewise, in United States v. Payseno, the Government advanced multiple distinct acts in support of the defendant's extortion indictment. Count two of the indictment charged Payseno with knowingly participating with a co-defendant in the use of extortionate means from April to December, 1979. Payseno demanded a bill of particulars. At the court's request, the Government provided the following information:

In April 1979, in Seattle, Washington, Mrs. Barbara Merlino was repeatedly telephoned and the caller threatened her and her children if Patrick Cocco did not repay his debt to Joseph Brown. In April or May of 1979, in Burbank, California, Mr. and Mrs. William Seelig were contacted repeatedly in person and by telephone and threatened that their house would be burned down and they would be murdered if Patrick Cocco did not contact Adrian Payseno. In December 1979, in San Diego, California, Dan Cocco was contacted in person and by telephone. He was informed that he, his wife, and children would be killed if his father did not contact “Adrian.” The identities of the persons who made all of the threats are unknown.

The jury understandably might have been confused when the Government presented separate evidence in support of each allegation and the trial court simply instructed the jury that its verdict must be unanimous. The alleged conduct took place in no fewer than three separate cities: Seattle, Burbank, and San Diego. The alleged conduct targeted no fewer than four people: Barbara Merlino, William Seelig, his wife, and Dan Cocco. The alleged conduct took place during three separate months: April, May, and December. The alleged conduct involved two different methods of communicating the threats: by telephone and in person. And the alleged conduct was carried out by varying numbers of persons. When reviewing this type of factual situation, the appellate court is “not free to hypothesize whether the jury indeed agreed to and was clear on”

180. United States v. Payseno, 782 F.2d 832 (9th Cir. 1986).
181. Id. at 835.
182. Id.
183. Id.
184. Id.
185. Id.
186. Id. at 835.
187. Id. at 837. The court acknowledges that defense counsel's failure to require an election by the Government of the conduct on which it relied in support of its charge when the bill of particulars revealed three separate instances of extortion “complicated” the case. Id. at 836.
the conduct underlying the conviction. 188

Jury Confusion as Analyzed by Montana Courts in State v. Weaver

The subjective nature of the jury confusion inquiry has led to vastly diverse results in different courts regarding the issue of which circumstances warrant a specific unanimity instruction. Each state remains free to draw the line for the level of possible jury confusion that warrants a specific unanimity instruction. Montana courts, for example, have recognized potential jury confusion problems posed by the state’s decision to include multiple bad acts in a single count. 189 Such a practice parallels the explicit predicate acts requirement of the CCE. In both situations, the jury must determine whether a defendant committed a series of alleged bad acts in deciding upon the defendant’s ultimate guilt. For our purposes, the question in each instance is whether the jury must agree unanimously as to which specific bad acts the defendant committed. A recent Montana case illuminates the likelihood of jury confusion absent a specific unanimity instruction under such circumstances.

In State v. Weaver, the state charged James Elmer Weaver, a retired engineer who served as a volunteer with the Big Brothers/Big Sister program, with four counts of sexual assault in violation of MONT. CODE ANN. § 45-5-502(1), involving four separate victims. 190 With respect to the first count, the state alleged no specific incident of sexual assault, but instead broadly charged sexual contact with one victim, J.M., over a five-year period. 191 Count four was nearly identical to the first count. 192

188. Id. at 836 (quoting United States v. Echeverry, 698 F.2d 375, 377, modified at 719 F.2d 974, 975 (9th Cir. 1983) (en banc). Other concrete examples of jury confusion prompting the need for a specific unanimity instruction can be found in Echeverry itself, where the court reversed a drug conviction because an ambiguous instruction permitted the jury to convict without unanimous agreement on the existence and duration of a single conspiracy or multiple conspiracies. Echeverry, 698 F.2d at 377. See also, United States v. Frazin, 780 F.2d 1461, 1468 (9th Cir. 1986), where the court found a specific unanimity instruction to be appropriate “where [1] the complex nature of the evidence, [2] a discrepancy between the evidence and the indictment, or [3] some other particular factor creates a genuine possibility of juror confusion.” Id.


190. Id. at ¶ 7.

191. Count one provided as follows: “The Defendant, James Elmer Weaver, between approximately June, 1984, and April, 1989, knowingly subjected another, J.M., date of birth May 2, 1975, to sexual contact without consent, in Flathead County, Montana, contrary to Section 45-5-502(1), MCA.” Id. at ¶ 9.

192. Count four, in pertinent part, alleged that “between approximately July 30,
J.M. testified to numerous occasions on which Weaver allegedly touched his genitals or watched him undress. These alleged incidents varied in time, place, and manner. J.M. could provide no more specific testimony, however, as to the date or time of these alleged incidents. The state presented similar testimony through D.M. in support of count four. D.M. also could not provide specific dates or times as to when the alleged incidents took place.

The district court instructed the jurors that each count against Weaver charged a distinct offense and that they must decide each count separately. The district court further provided a general unanimity instruction regarding each count. Weaver's trial counsel did not demand a specific unanimity instruction and he did not present his own proposed instruction. The jury found Weaver not guilty on the two charges that each involved a single alleged incident of abuse. On counts one and four, however, the jury found Weaver

1990, and December, 1990, [Weaver] knowingly subjected D.M., . . . [to] sexual contact without consent.” Id. at ¶ 13. Count two and count three each involved a specific, discrete incident, alleging that Weaver had engaged in inappropriate sexual contact against two “little brothers” on different occasions. Id. at ¶¶ 10-11.

193. J.M. described the following incidents: (1) Weaver helped J.M. urinate when he was 8 or 9. Tr. 185; (2) Weaver reached over and grabbed J.M.'s penis while the two of them were swimming in Whitefish Lake with a friend of J.M.'s. Tr. 189; (3) Weaver touched the outside of J.M.'s pants on several occasions at the local Dairy Queen Restaurant and at the Whitefish Golf Course. Tr. 190-192; (4) Weaver helped J.M. place a condom on J.M.'s erect penis when J.M. was 13. Tr. 194; (5) Weaver masturbated J.M. while the two of them watched television one night at Weaver's house. Tr. 196; and (6) Weaver regularly touched J.M. when J.M. would get in Weaver's pick-up truck or when they were alone in one of Weaver's boats on Whitefish Lake. Tr. 197-198.

194. D.M. described the following incidents: (1) Weaver watched D.M. undress while they were going swimming at Weaver's house. Tr. 625; (2) Weaver watched him urinate on one occasion, and watched him shower on another. Tr. 628 & 638; (3) Weaver touched his penis while he was changing to go swimming. Tr. 629-30; and (4) Weaver touched him on other occasions in Weaver's boat or in Weaver's pick-up truck. Tr. 630-32. In support of count 2 and count 3, the state put forth testimony by the two putative victims. Weaver allegedly had tapped a boy on the penis during a discussion of human sexuality while they changed clothes after swimming. Tr. 586. The boy's mother testified that she had given Weaver a book on teenage sexuality that she previously had discussed with her son, and told Weaver that her son may have questions regarding the book. Tr. 810-11. With regard to count 3, Weaver allegedly had helped a seven-year old unbutton his pants to urinate while the two of them were driving to a lake in the mountains. Tr. 52. On cross-examination, the boy testified that he had walked around to Weaver's side of the pick-up truck and had asked for such assistance. Tr. 350.

195. Tr. 1237.

196. The district court's jury instruction provided as follows: The law requires the jury verdict in this case to be unanimous. Thus, all twelve of your number must agree in order to reach a verdict on each Count contained in the Information, whether the verdict be guilty or not guilty. Tr. 1239.
On appeal, Weaver claimed for the first time that the general unanimity instruction violated his constitutionally protected right to a unanimous verdict. Normally such an omission would have proved fatal. Instead, the Montana Supreme Court relied on its inherent authority to engage in plain error review in light of its finding that uncertainty regarding the unanimity of Weaver's verdict sufficiently called into question the fundamental fairness of his trial.

In reviewing the merits, the court first rejected the state's reliance on Fitzpatrick v. State, in which the court had found that the jury need not agree as to which mental states—

197. Weaver, ¶ 19.
198. Id. at ¶ 23.
199. See, e.g., State v. Weeks, 270 Mont. 63, 86, 891 P.2d 477, 491 (1995) (refusing to consider an issue raised for the first time on appeal). Weaver first had to convince the court that the issue of his fundamental right to a unanimous verdict merited overlooking his omission. The court has limited this discretionary plain error review to cases when failing to review the claimed error may: "(1) result in a manifest miscarriage of justice; (2) leave unsettled the question of the fundamental fairness of the trial proceedings; or (3) compromise the integrity of the judicial process." Weaver, ¶ 25. See also, State v. Finley, 276 Mont. 126, 137, 915 P.2d 208, 215 (1996) (overruled on other grounds in State v. Gallagher, 2001 MT 39, 2001 Mont. LEXIS 40 (2001). Weaver argued that the district court's failure to provide the specific unanimity instruction, sua sponte, required plain error review. Weaver, ¶ 30; See also State v. Lundblade, 191 Mont. 526, 625 P.2d 545 (1981) (holding that plain error doctrine applies even though defendant had failed to object to jury instruction that did not set forth statutory elements of the crime). This power applies even if the defendant fails to make a contemporaneous objection. Moreover, plain error review permits the court, at its discretion, to review errors that implicate a criminal defendant's fundamental rights under certain circumstances. The court found controlling the fact that the Declaration of Rights of the Montana Constitution makes explicit the right to a unanimous verdict. Weaver, ¶ 26 (citing Gryczan v. State, 283 Mont. 433, 449, 942 P.2d 112, 122 (1997)).
200. Weaver, ¶ 25.
201. Fitzpatrick v. State, 194 Mont. 310, 324-25, 638 P.2d 1002, 1011 (1981). The court held in such cases that a general unanimity instruction "suffices to instruct the jury that they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict." Id. at 326 (quoting United States v. Murray, 618 F.2d 892, 898 (2nd Cir. 1980)). Murray involved a defendant charged with a single count of conspiracy to import and to distribute cocaine and marijuana. Murray, 618 F.2d at 896. The defendant contended that charging two crimes in a single count deprived him of his right to a unanimous verdict. Id. at 898. The court disagreed, noting that "[t]he essence of the crime of conspiracy is an agreement to put into effect an illegal project. Even if the agreement contemplates more than one nefarious end, there is still but a single agreement." Id. This somewhat anomalous quirk of the conspiracy law played no part in the charges alleging sexual assault against Weaver. The Fitzpatrick court distinguished United States v. Gipson, 553 F.2d 453 (5th Cir. 1977), on the grounds that Gipson involved a case of non-unanimity as the "actus reus," rather than the defendant's mental state related to an element of the offense. Fitzpatrick, 194 Mont. at 325, 638 P.2d at 1011.
"purposely" or "knowingly"—animated a murder defendant's intentional conduct:

The cases cited by the State [including Fitzpatrick] address alternative mental states (purposely or knowingly) which related to each element of the offense in question. Purposely and knowingly are not independent elements: Rather they are alternative means of satisfying each of the elements underlying the offense. State v. Warnick, 202 Mont. 120, 128, 656 P.2d 190 (1982) (to sustain the charge of aggravated assault, the state must prove each element of the offense was done purposely or knowingly).\(^{202}\)

Instead, the Weaver court adopted the reasoning of United States v. Holley\(^ {203}\) and United States v. Echeverry,\(^ {204}\) in which two separate federal appellate courts reversed convictions based on the trial court's failure to give a specific unanimity instruction.\(^ {205}\)

In Holley, the Government charged the defendant with two counts of perjury in violation of 18 U.S.C. § 1623.\(^ {206}\) Each count contained several different allegations of false statements. The district court refused to instruct the jury that it had to be unanimous in finding that the defendant made at least one particular statement alleged in each count. On appeal, the Fifth Circuit reversed, noting that "unanimity... means more than a conclusory agreement that the defendant has violated the statute in question; there is a requirement of substantial agreement as to the principal factual elements underlying a specified offense."\(^ {207}\) Similarly, in Echeverry the Ninth Circuit

\(^{202}\) Weaver, ¶ 37 (quoting State v. Weldy, 273 Mont. 68, 76, 902 P.2d 1, 6 (1995)). Moreover, the alternative mens rea of "purposely" and "knowingly" suggest similar culpability due to the fact that both involve intentional conduct. Requiring jury unanimity as to which mens rea under these circumstances would serve no useful purpose and likely produce absurd results. See Michael R. Johnson, State v. Johnson and Multiple Factual Theories: A Practitioner's Guide to Interpreting Utah's "Patchwork Verdict" Rules, 1993 UTAH L. REV. 907, 933-34 (1993).

\(^{203}\) 942 F.2d 916 (5th Cir. 1991).

\(^{204}\) 719 F.2d 974 (9th Cir. 1983).

\(^{205}\) Weaver, ¶ 32-34.

\(^{206}\) Holley, 942 F.2d at 916.

\(^{207}\) Id. at 925 (quoting McKoy v. North Carolina, 494 U.S. 433, 449 n. 5 (1990)) (Blackmun, J., concurring). See also the "either/or" rule, as expressed in People v. Gordon, 212 Cal.Rptr. 174, 183 (Cal. Ct. App. 1985):

when the accusatory pleading charges a single criminal act and the evidence shows more than one such unlawful act, either the prosecution must select the specific act relied upon to prove the charge or the jury must be instructed... that it must unanimously agree beyond a reasonable doubt that defendant committed the same specific criminal act.

The following excerpt from California v. Diedrich, 643 P.2d 971, 980 (Cal. 1982),
focused on a trial judge's duty to give a specific unanimity instruction when a genuine possibility of jury confusion exists, or when a conviction "may occur as the result of different jurors concluding that a defendant committed different acts." 208

When these circumstances exist, the Weaver court found that the trial judge "must augment the general instruction to ensure the jury understands its duty to unanimously agree to a particular set of facts." 209 On this point, the court found its earlier reasoning in Weldy to be "analogous." 210 The likelihood of jury confusion in Weaver arose from the fact that the two counts on which the jury convicted Weaver charged a series of unrelated allegations of sexual misconduct taking place over a period of years. The state presented evidence of disparate acts over an extended period. Neither the jury instructions nor the verdict form made clear that the jury unanimously agreed upon at least one specific underlying act of sexual assault for each count. 211

The court also flatly rejected the state's claim that Weaver's alleged assaults on J.M. and D.M. constituted a continuous course of conduct that negated the need for the jury to agree

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provides a succinct application of the either/or principle:

There simply is no escape from the fact that two separate violations of section 165 were provided under the umbrella of count I and that at no point was the prosecution required to elect between the two violations; nor was the jury instructed that it had to find unanimously that Diedrich had committed at least one of them.

208. Holley, 942 F.2d at 926. For a discussion of circumstances likely to result in jury confusion regarding precisely upon what they must agree, see United States v. Payseno, 782 F.2d 832, 836-37 (9th Cir. 1986) (stating that "there exists the genuine possibility that some jurors may have believed Payseno used extortionate means on one occasion while others may have believed that he was guilty of engaging in extortion at a different time and place.").

209. Weaver, ¶ 34 (quoting United States v. Echeverry, as modified in 719 F.2d 974, 975 (9th Cir. 1983)). The Weaver court ignored the state's contention that these federal decisions rely upon federal statutes far different than the sexual assault statute at issue: "While the federal statutes do require different elements, the reasoning of the courts of appeals is instructive and the principles at issue are universal." Weaver, ¶ 31. See, e.g., United States v. Duncan, 850 F.2d 1104 (6th Cir. 1988) (holding that jury must be unanimous as to at least one specific statement where a single count charged two separate false statements).

210. Weaver, ¶ 38. The court characterized Weldy as an attempt to resolve potential jury confusion arising from the fact that two of the three distinct alternatives for committing felony assault could have applied to the defendant. Id. at ¶ 37. The Weaver court noted that the district court in Weldy should have structured the instructions and the verdict form to make it clear to the jury that it was required to reach a unanimous verdict under one alternative or the other, or both. Id. (citing State v. Weldy, 273 Mont. 68, 78-79, 902 P.2d 1, 7 (1995)).

211. Weaver, ¶ 38.
unanimously upon at least one underlying act of sexual assault for each count. The court's rejection rested on the following grounds. First, the state did not charge Weaver with a continuous course of conduct; instead, it charged Weaver with knowingly subjecting another "to sexual contact without consent" occurring during an extended period of time. More importantly, the court did not find that the acts of sexual misconduct alleged against Weaver were so closely connected that "they form part of one and same transaction, and thus one offense." Similarly, the alleged acts of sexual misconduct by Weaver did not occur within "a relatively short time span.

The alleged discrete incidents of sexual assault took place over a five-year period in the case of J.M. and over a six-month period in the case of D.M. For future trial courts facing similar circumstances, the court added a final advisory provision in which it offered a sample specific unanimity instruction similar to the two options posed by the court in Gordon. Unfortunately, however, the

212. Id. at ¶ 36. The Weaver court explained the continuous course of conduct exception by quoting from State v. Gordon:

This exception arises when the criminal acts are so closely connected that they form part of one and the same transaction, and thus one offense. Thus, "[s]eparate acts may also result in but one crime if they occur within a relatively short time span...." In this case, there is absolutely no evidence concerning the timing of the two acts of sodomy, except that they allegedly occurred between 1978 and August 1979 and that one may have occurred during a camping trip in July 1979.

213. Id. at ¶ 36. The Weaver court explained the continuous course of conduct exception by quoting from State v. Gordon, 212 Cal. Rptr. 174, 184-85 (1985); See also supra, note 139, discussing "common scheme" felony theft under Montana law.

214. Id. at ¶ 36 (quoting Gordon, 165 Cal.App.3d at 854-55.) For a further discussion regarding application of the "continuous course of conduct" exception to the specific unanimity requirement, see, e.g., People v. Gear, 23 Cal. Rptr. 2d 261, 263-67 (Cal. Ct. App. 1993) (continuous sexual abuse of a child).

215. Id. at ¶ 36. The first sample provided as follows:

The defendant is charged with offense of _______ . He may be found guilty if the proof shows beyond a reasonable doubt that he committed any one or more of such acts, but in order to find the defendant guilty, all the jurors must agree that he committed the same act or acts. It is not necessary that the particular act or acts committed so agreed upon be stated in the verdict.

Id. at ¶ 39 (quoting Gordon, 212 Cal. Rptr. at 183 (quoting CALJIC No. 17.01 (4th ed. 1979)). The second sample provided as follows:

Defendant is charged in [Count ___ of the information with the commission of the crime of ______________ , a violation of section ______ of the [Montana] Code, on or about a period of time between _____________ and ____________ . In
Weaver court advised only that such an instruction should be given "where appropriate." The court did not specify whether the instruction should be given only in cases, such as Weldy and Weaver, in which the state includes multiple wrongful acts in a single count. Not surprisingly, controversy has since arisen in Montana regarding the circumstances under which requiring such a specific unanimity instruction would be "appropriate."

**The Likelihood of Jury Confusion is Irrelevant With Regard to Immaterial Facts**

The Montana Supreme Court retreated from its specific unanimity requirement in Weaver. First, in State v. Dahlin, where the court refused to impose a specific unanimity requirement in a case where the accused was charged with perjury even though none of the jury instructions identified the specific date or facts of the alleged perjurious statement. The court went even farther in Harris v. State, when it seemingly repudiated the fundamental right analysis that it had employed in Weaver to justify a specific unanimity instruction.

**State v. Dahlin**

On January 3, 1997, Danny Dahlin went to the police station in Lewistown, Montana, to talk with a police officer regarding his involvement in the events of the previous evening in which his brother, David, had been arrested for his fifth offense of driving while under the influence of alcohol. Danny

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218. Weaver, ¶ 39. For example, the court made no mention of whether the instruction should be given in circumstances where the level of culpability associated with alternative [*mens rea*] deviates to the point that due process requires a specific unanimity instruction.


220. *Id.* at ¶ 30.

221. 1999 MT 115, 294 Mont. 397, 983 P.2d 881.

222. *Id.* at ¶ 12.

wrote out two conflicting statements regarding his role, in both of which, he wrongly claimed to have been driving his brother's truck.224 Danny compounded his problems when he testified falsely at his brother's DUI trial that he had a neighbor give him a ride to retrieve David's truck.225 Danny further admitted that he had lied in his initial written statement to the police in which he claimed that his mother had given him a ride into town. Despite Danny's testimony, the district court found David guilty on the DUI charge.226

Following David's conviction on the DUI charge, the state charged Danny with felony perjury stemming from his testimony at David's trial.227 At Danny's trial, among other witnesses, the state presented the Montana Highway Patrol Officer, who described Danny's visit to the police station on the day after David's arrest.228 Danny's neighbor also testified that Danny and David had tried to get her to help them by saying that she had given Danny a ride. The neighbor verified that she had not given Danny a ride to retrieve David's truck.229

Before the trial, Danny had filed a motion in limine to exclude his neighbor's testimony as to whether she had given Danny a ride on the grounds that it could confuse the jury.230 Danny argued that allowing the jury to hear the neighbor's statement could lead the jury to convict him for perjury based either on his lying about how he got to David's truck or his lying

224. Id.
225. Danny testified that he had been with his brothers, his mother, and Cami Meador, at the Bar 19 in Lewistown on the night of January 2, 1999. Danny stated that David later called him from a pay telephone to ask him to take David's pickup home after Cami's arrest. Danny further testified that his mother was in bed, so he had a neighbor give him a ride to retrieve David's truck. Danny claimed that he did not find David where they had planned to meet, so he walked to the parking lot where the truck was located and found David sitting in the passenger seat of the truck. Id. at ¶ 7-8. Danny claimed that he drove David's truck out of the parking lot, but soon saw that an officer was following them. Danny alleged that he managed to evade the officer long enough to flee the scene before being pulled over. Danny justified his running on the grounds that David had no proof of insurance for his truck and that a city court judge earlier had told him that a person could get 30 days in jail for driving without insurance. Id.
226. The Montana Supreme Court later reversed David's conviction based upon the district court's failure to take David's written waiver of his right to a jury trial. Id. at ¶ 24.
227. Id. at ¶ 6; See also, MONT. CODE ANN. § 45-7-201 (1999) regarding Montana's criminal perjury statute.
229. Id. at ¶ 14.
230. Id. at ¶ 33.
about whether he actually drove David's truck. The district court denied the motion, and, instead, offered to provide the jury with a specific verdict form regarding precisely which false testimony Danny had provided at David's trial. The state agreed that such a specific verdict form would resolve any potential jury confusion.

At the close of evidence, Danny's counsel reminded the district court of the earlier agreement regarding the specific verdict form. The district court refused to provide the special verdict form, and, instead, suggested that Danny's counsel argue during his summation that the jury could consider only the crime charged in the information – whether Danny lied about having driven David's truck. Danny's counsel did so, but he did not present a proposed unanimity instruction to the district court. The state contended during closing argument that statements made by Danny that were untrue or inconsistent demonstrated his "propensity not to tell the truth." This "propensity" included Danny approaching his neighbor about lying that she drove Danny to David's truck. The district court's jury instructions neither identified the statement with which Danny was charged, nor specified the date upon which he allegedly uttered the false statement. The jury found Danny guilty of perjury.

On appeal, the Montana Supreme Court squarely rejected Danny's claim that the district court should have offered a specific unanimity instruction to alleviate any possibility of jury confusion. It first noted that Danny's counsel failed to offer a special verdict. This omission came, however, only after the district court had implied during pre-trial motions that it would offer its own specific unanimity instruction. The court next pointed out that Danny's counsel "consented" during the settling of jury instructions to the district court's "suggestion" that

231. Id. at ¶ 25.
232. Id. at ¶ 27.
233. Id.
234. Id. Dahlin's counsel should have objected at that point that the prejudicial effect of such information far outweighed any probative value of the statement. Rule 403, MONT. R. EVID. It seems doubtful, however, that the trial court would have sustained the objection given the proximity in time of the false statements and the similar intent of the statements to reduce the culpability of Dahlin's brother.
235. Dahlin, ¶ 25.
236. Id. at ¶¶ 16-17.
237. Id. at ¶¶ 26-27.
238. Id.
counsel for each party inform the jury during closing of the facts upon which the State based the perjury charge against Danny.²³⁹ Danny’s counsel was hardly in the kind of equal bargaining position necessary to make the “consent” voluntary, although, admittedly Danny’s counsel should have preserved the objection for appeal. Nevertheless, the district court’s failure to provide the type of unanimity instruction that it had suggested during the pre-trial motions overshadows this oversight.

The court distinguished its decision to apply plain error review in Weaver on the ground that Danny was charged with an offense under a single theory.²⁴⁰ A review of the information in Weaver reveals, however, that he, too, was charged under a single theory – that he knowingly engaged in improper sexual contact with minors.²⁴¹ A more appropriate question would have been whether circumstances existed that potentially would have confused the jurors as to which facts they had to agree unanimously. For instance, there was some potential that some jurors might think that they could convict Danny for perjury based solely upon evidence of his previous statement that he had been driving his brother’s truck, while others might think that they could convict Danny based solely on his previous testimony that he had gotten a ride from a neighbor to the scene of his brother’s truck. In this regard, it is important to note the distinctions between the circumstances of Dahlin and Weaver.

The two cases diverge from the information charging each of them. The state charged Weaver with committing sexual assault over a protracted period of time; the state charged Dahlin with committing perjury on a single day at his brother’s trial on May 2, 1997.²⁴² The state charged Weaver with an indeterminate number of acts of sexual assault; the state charged Dahlin with a single instance of falsely testifying under oath at his brother’s trial that he, and not his brother, was driving the truck.²⁴³

The similarities that do emerge prove to be superficial. For example, the state introduced evidence against Weaver of multiple bad acts involving J.M. and D.M. which took place in

²³⁹. Id.
²⁴⁰. Id. at ¶ 30. The court further reasoned that “[n]othing in the arguments of counsel, the jury instructions, or the special verdict form contradicted this fact.” Accordingly, the court found no need to apply plain error review. Id.
²⁴¹. State v. Weaver, 1998 MT 167, ¶ 1, 290 Mont. 58, ¶ 1, 964 P.2d 713, ¶ 1.
²⁴². Id. at ¶ 7; Dahlin, ¶ 6.
²⁴³. Weaver, ¶ 7; Dahlin, ¶ 6.
disparate times and places over a period of years. 244 In fact, the state presented evidence of no fewer than six potential criminal acts by Weaver involving J.M. and four potential criminal acts against D.M. 245 By contrast, the state introduced two possible false statements by Dahlin that he uttered on the same day at his brother's trial: (1) that Dahlin was driving his brother's truck at the time of the second stop; and (2) that Dahlin's neighbor gave him a ride to the scene. 246 Dahlin made both of these statements on the same day and to the same person. 247

A review of other cases evidences that any potential jury confusion in Dahlin would have been minimal by comparison. For example, in Beros, the Government charged, in a single count, three distinct acts of misappropriation that took place during a three-month period, under no fewer than four separate theories of culpability. 248 Payseno offers a similar scenario of multiple bad acts charged in a single count combined with the Government's decision to advance multiple theories of culpability. Payseno's conduct involved threats made by telephone and in person, by a multiple number of people spanning over a six-month period in locations from Seattle to San Diego. 249

Because there is no confusion as to when Dahlin uttered the false statements, or as to whom he uttered them, Dahlin falls well short of the level of jury confusion present in Weaver, Beros, or Payseno, that prompted the reviewing court to require a specific unanimity instruction. The relative simplicity of Dahlin, as evidenced by the proximity in time and of subject matter of the two alleged false statements, proves too much for Dahlin to overcome in demonstrating that the trial court erred in not providing a specific unanimity instruction.

State v. Harris

Less than a year after Dahlin, the Montana Supreme Court reviewed the specific unanimity issue again in State v. Harris. 250 The court provided no clarification to trial courts, however, on

244. Weaver, ¶ 10.
245. Id. at ¶ 36-37. These alleged bad acts ranged from helping J.M. urinate in 1985, to touching D.M. in Weaver's boat in 1990. Id. at ¶ 17.
246. Dahlin, ¶ 7.
247. Id.
249. United States v. Payseno, 782 F.2d 832, 835 (9th Cir. 1987).
the question of when the facts of a case present a sufficient likelihood of jury confusion as to require a specific unanimity instruction.\textsuperscript{251}

In \textit{Harris}, the state charged Wayland Paul Harris with three offenses based on allegations that he had sexual relations with his adopted daughter over an 8-year period.\textsuperscript{252} As in \textit{Weaver}, the state presented evidence at trial of several specific incidents of incest in support of each charge.\textsuperscript{253} Harris' daughter testified that Harris began having sex with her after she began menstruating at age 13 and continued until January 1, 1997 - some eight years later.\textsuperscript{254} She could not otherwise remember specific dates.\textsuperscript{255} The jury acquitted Harris on the two charges of alleged sexual intercourse without consent and found him guilty of incest.\textsuperscript{256}

Harris argued that the district court should have provided a specific unanimity instruction that would have required the jury to agree unanimously to at least one of the specific incidents of alleged incest to have taken place during the 8-year time period. Not surprisingly, the state argued that Harris had waived the issue on appeal by failing to offer a proposed specific unanimity instruction and by failing to object to the general unanimity instruction provided by the district court. What is surprising is the court's acceptance of the waiver argument. The court rejected the notion that plain error review could salvage Harris' claim. Without so much as a glancing reference to \textit{Weaver}, the court announced that "this is not one of those exceptional cases warranting plain error review and we decline to address the issue."\textsuperscript{257}

Justice Nelson, in an opinion concurring in the result only, read \textit{Weaver} to require a specific unanimity instruction in cases where the state charges different criminal acts in a single count: "In other words, the jury is to be instructed that it must reach a

\textsuperscript{251} See generally id.
\textsuperscript{252} Count one charged Harris with sexual intercourse without consent on numerous occasions between November of 1988 and November 21, 1991. Count two charged him with sexual intercourse without consent on numerous occasions between November 21, 1991 and January 1, 1997. Finally, Count three charged him with incest on many occasions between November of 1988 and January 1, 1997. Id. at \S 7.
\textsuperscript{253} Id. at \S 18.
\textsuperscript{254} Id. at \S 39.
\textsuperscript{255} Id.
\textsuperscript{256} Id. at \S 8.
\textsuperscript{257} Id. at \S 18.
unanimous verdict on at least one specific act for each count."²⁵⁸ The state certainly charged multiple criminal acts in a single count. Each of the counts alleged that Harris committed numerous separate bad acts over the period of several years.

Justice Nelson further noted that Harris' trial took place in December 1997, and that the court did not decide *Weaver* until July 1998. As a result, "neither Harris, his counsel nor the trial court had the benefit of our decision."²⁵⁹ He concluded, since the court addressed the same unanimity instruction issue in *Weaver*, no logical reason existed for not doing the same in *Harris*.²⁶⁰

No logical reason readily emerges for the court's failure to address the specific unanimity issue under plain error review. Although the loathsomeness of the crime may explain the court's decision, it certainly does not justify the court's abandonment of its "general rule" regarding the necessity of specific unanimity instructions.²⁶¹ As noted by Justice Nelson, the court had other options available for affirming Harris' conviction, such as the continuing course of conduct exception, without unnecessarily trampling on its own precedents relating to specific unanimity instructions.²⁶² Instead, the court needlessly kept alive the question of when a district court must provide the jury with a specific unanimity instruction in criminal cases. The legal counsel's failure to request such a specific unanimity instruction allowed the court to sidestep the issue and leave all parties - judges, prosecutors, defense counsel, and defendants - scrambling to interpret the scope of the court's pronouncements on the issue in *Kills on Top, Weldy*, and *Weaver*, on the need for a specific unanimity instruction.

²⁵⁸. *Id.* at ¶ 37 (Nelson, J., concurring) (citing State v. *Weaver*, 1998 MT 167, ¶¶ 38-40, 290 Mont. 58, ¶¶ 38-40, 964 P.2d 713, ¶¶ 38-40). In upholding the jury's verdict, Justice Nelson relied on an exception to what he categorized as the "general rule" regarding specific unanimity instructions in those cases. This exception, noted in *Weaver*, derives from California cases that adopted the "continuous course of conduct" rule. This exception applies in the following circumstances: The criminal acts are so closely connected that they form part of one and the same transaction, and thus one offense. Thus, "[s]eparate acts may result in but one crime if they occur within a relatively short time span..." *Harris*, ¶ 38 (quoting *Weaver*, ¶ 39) (citing People v. Gordon, 212 Cal.Rptr. 174, 184-85 (1985)).


²⁶⁰. *Id.* at ¶ 41 (Nelson, J., concurring).

²⁶¹. *Id.* at ¶ 37 (Nelson, J., concurring).

²⁶². *Id.* at ¶¶ 38-39 (Nelson, J., concurring).
UNANIMOUS JURY VERDICTS

GENERAL RULES REGARDING SPECIFIC UNANIMITY INSTRUCTIONS

As this discussion demonstrates, defining the precise circumstances under which a trial court must provide the jury with a specific unanimity instruction remains an elusive exercise. Nevertheless, it remains useful to identify those situations in which reviewing courts have required a specific unanimity instruction and to understand the court's rationale for requiring it. More importantly, understanding the court's rationale for requiring it in these situations illuminates the utility of requiring a specific unanimity instruction in other cases.

First, in the criminal process, the state controls the basic rules of the game. The state drafts the statutes and in so doing necessarily enjoys broad latitude in deciding what conduct to prohibit and how to prohibit it. The statutes provide the underlying elements of the criminal offenses. The state naturally "must be permitted a degree of flexibility" in defining the elements of the offense. A classic example of permitting the state flexibility to define the elements of a crime arises where the legislature chooses to include alternative means of committing an offense in a single statute.

In Schad v. Arizona, a majority of the U.S. Supreme Court held that the Arizona Legislature's choice to define first-degree murder to include both premeditated murder and murder committed during the course of a felony did not violate a defendant's due process rights. The defendant's safeguard, however, is the constitutional requirement that alternative means must not constitute separate offenses. Courts will grant more latitude to states in those situations when the statutes represent the mere codification of common law crimes.

In this regard, mere alternative mens reae in a statute, such as "purposely" or "knowingly," do not constitute separate

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263. Schad v. Arizona, 501 U.S. 624, 638 (1991); See also discussion supra, Part II.C.
265. See, e.g., People v. Sullivan, 65 N.E. 989, 989-90 (N.Y. 1903), an early case discussing the broad discretion enjoyed by the state in charging offenses. See also United States v. Uco Oil Co., 546 F.2d 833, 836-38 (9th Cir. 1976); See also discussion supra, Part II.A., which sets forth the general test for determining whether a statute prohibits a single offense.
266. Schad, 501 U.S. at 640-41.
offenses that require a trial court to give a specific unanimity instruction.\textsuperscript{267} Courts have found that it is immaterial in those cases whether the jurors differed as to the defendant's precise mental state at the time of the crime. In either event, where the defendant acted intentionally and no confusion exists as to the act committed by the defendant, the state need prove nothing more.

The Montana Supreme Court took the extra step in \textit{Kills on Top} of rejecting the need for a specific unanimity instruction when the statutory elements provide alternative actions of comparable degrees of culpability.\textsuperscript{268} For example, under the aggravated kidnapping statute, the jury need not agree unanimously on the non-material issue of whether the defendant "secreted" the victim or held the victim in a "place of isolation." The sole requirement is that the jury agree that the defendant restrained the victim, and on this point the jury must agree unanimously. The defendant's possible motivation for having restrained the victim is immaterial for purposes of the specific unanimity analysis. Similar reasoning applies to multiple aggravating factors in a single count where no doubt exists as to the results of the defendant's actions.

At some point, however, the alternative means of committing an offense contained within a single criminal statute may diverge to the point of actually constituting separate offenses. This divergence into independent offenses requires that a trial court provide the jury with a specific unanimity instruction. The "conceptual groupings" test of \textit{Gipson} represents a somewhat subjective effort to identify this point of divergence. The inclusion of a comparison of the relative "blameworthiness" or culpability of the statutory alternatives limits to some degree the subjectivity of the \textit{Gipson} test. For example, Montana's aggravated kidnapping statute, as discussed in \textit{Kills on Top}, contains alternative \textit{mens rea}, such as "knowingly" or "purposely," that indicate an intentional act by the defendant.\textsuperscript{269} The statute further provides a series of alternate motivations for the defendant's holding of the victim. All of these purposes denote potentially violent motives that


\textsuperscript{268} \textit{Kills on Top I}, 243 Mont. 56, 793 P.2d 1273 (1990).

\textsuperscript{269} \textit{MONT. CODE ANN. § 45-5-303} (1999).
relate closely in terms of "blameworthiness," such as "to inflict body injury" or "to hold [in] involuntary servitude."270

Unfortunately, no court has answered definitively the question of when such alternative means rise to the level of separate offenses that should trigger automatically a specific unanimity instruction. Weldy draws a line between alternatives that actually inflict bodily injury and those that simply induce reasonable apprehension of such bodily injury. In doing so, however, Weldy relies as much on the possibility of confusion among the jurors as to which facts they had to agree as on any clear distinction among the alternative means contained in the felony assault statute. The importance of the likelihood of jury confusion in requiring a specific unanimity instruction in Weldy, and not requiring one in Kills on Top, can be gleaned from a simple comparison of the facts and circumstances of each case.

In Kills On Top, the state charged the defendant with aggravated kidnapping stemming from the abduction of the victim and the ensuing conduct. The conduct ran from early in the morning until dawn. This entire grisly episode constituted a single act of aggravated kidnapping. No jury likely would be confused as to which material facts it had to agree: Kills On Top and his co-defendants restrained the victim for an improper purpose. The jury did not need to agree unanimously as to precisely which improper purpose, among the equally blameworthy alternatives, in order to convict Kills on Top.

In Weldy, the defendant attacked the victim during the course of a night and the next day. He took several long breaks, including sleeping for many hours. Each attack could be separated from the other, by location, by type of weapon, and by the question of whether injuries were inflicted. The state chose to treat the attacks as a single assault, or a continuous course of conduct. The state failed to charge precisely which subsection of the felony assault statute that the defendant had violated. Based on these circumstances, a reasonable jury could have been confused as to precisely which alleged acts it had to agree, given the disparate time, place, and manner of the attacks. As noted by Justice Nelson in his concurring opinion, the state could have avoided the need for a specific unanimity instruction by charging each attack as a separate count of felony assault.271

This decision of how to charge the defendant rests

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270. Id.
exclusively with the state. The state holds great power in deciding how to charge a defendant and it should be permitted to draft the information as it chooses, within the bounds of constitutional propriety. Prosecutorial discretion certainly includes the decisions of both whether to charge the defendant with a particular offense and with what particular offenses.

The state must be held to suffer, however, the consequences of its charging decision. For example, the state lawfully may choose to charge a defendant with a single count even though it intends to introduce multiple criminal acts in support of that single count. At that point, the state should expect the court to instruct the jury that they must agree unanimously as to which specific conduct the defendant committed as alleged by the state. This specific unanimity instruction avoids potential confusion by ensuring that all twelve jurors agree beyond a reasonable doubt that the defendant committed the underlying material acts which constitute the crime.

On its face, the state's decision to charge a defendant with a single count, but to admit evidence of multiple bad acts in support of that single count, raises the likelihood of jury confusion. Weaver provides a textbook example. In that case, unanimous agreement among the jury as to any of the alleged bad acts introduced by the state could have been sufficient to convict the defendant. Without a specific unanimity instruction to focus their deliberations, however, the jury likely would be confused as to which facts it must agree. The jury could pick and choose among the alleged bad acts introduced by the state in cobbling together an unanimous agreement for conviction.

Numerous federal precedents, such as Beros and Payseno, reach the same conclusion as Weaver regarding the likelihood of jury confusion arising from the state's decision to include multiple bad acts into a single count. Moreover, the

272. See, e.g., United States v. Powell, 932 F.2d 1337, 1341 (9th Cir. 1991) (stating that the jury must agree unanimously on "principal factual elements underlying the offense").

273. Unfortunately, Harris needlessly undermined the clarity provided by Weaver on this key point. The court could have maintained logical consistency by applying plain error review in Harris and still upholding the conviction by relying upon the "continuous course of conduct" exception, as Justice Nelson suggests in his concurring opinion. State v. Harris, 1999 MT 115, ¶ 39, 294 Mont. 397, ¶ 39, 983 P.2d 881, ¶ 39 (Nelson, J., concurring).

274. United States v. Beros, 833 F.2d 455, 462 (3rd Cir. 1987); See discussion supra Part III.B.1.

275. United States v. Payseno, 782 F.2d 832, 837 (9th Cir. 1986); See discussion supra Part III.B.1.
complex federal criminal statutes, with their predicate act requirements, further highlight the need for a specific unanimity instruction in cases that charge multiple bad acts in a single count. The question of which of the multiple predicate acts satisfies the CCE threshold is analogous to the multiple bad acts issue raised by the state in *Weaver*.

*Richardson* drives home this point as the Court required an instruction to the jury that the jurors must agree unanimously as to which three of the alleged bad acts introduced by the government that the defendant had committed in satisfying the "serious of violations" element of the CCE. 276 Not surprisingly, therefore, the *Weaver* court relied heavily upon federal precedents that were decided even before the U.S. Supreme Court's pronouncement in *Richardson*. 277

Unfortunately, no clear line has emerged to guide courts in deciding when possible jury confusion warrants a specific unanimity instruction. The combination of multiple bad acts alleged in a single count and the state's reliance on multiple theories of culpability seems to be required. In this regard, we can view *Dahlin* as a guide as to what circumstances do not constitute sufficient jury confusion to trigger a specific unanimity instruction. 278 Apparently, in order to warrant a specific unanimity instruction, the alleged bad acts must have taken place over an extended period of time, in different locations, and involve different types of conduct. Courts will continue to struggle as they engage in ad hoc balancing tests as to when the level of jury confusion requires a specific unanimity instruction as the cases can set forth only general principles. It rests with the state to avoid the confusion inherent in these cases, particularly with respect to the drafting of charging documents.

As suggested by Justice Nelson's concurring opinion in *Weldy*, the state easily may avoid a specific unanimity instruction when it intends to introduce evidence of multiple bad acts in support of a single count by charging each alleged bad act as a separate offense. Prosecutors surely have the discretion to

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277. *See*, e.g., State v. Weaver, 1998 MT 167, ¶¶ 32-34, 290 Mont. 58, ¶¶ 32-34, 964 P.2d 713, ¶¶ 32-34 (citing United States v. Holley, 942 F.2d 916 (5th Cir. 1991) and United States v. Echeverry, 719 F.2d 974 (9th Cir. 1983)).

charge a defendant in such a manner. Moreover, nothing prevents the state from incorporating by reference allegations made in different counts. Such leeway allows the jury to consider separately each alleged wrongful act as set forth in the separate counts. This approach may have unintended consequences, however, such as encouraging the state to overcharge defendants.

For example, instead of charging an embezzler with a single count and introducing 30 thefts in support of it, the state may choose to charge the defendant with 30 separate counts of embezzlement. This type of charging decision would obviate the need for the trial court to provide the jury with a specific unanimity instruction. The jury would consider separately the facts and circumstances supporting each count.

The state, however, should not necessarily seek to avoid a specific unanimity instruction. A specific unanimity instruction has the advantage of focusing the jury's deliberations on those facts material to the charge against the defendant. Such an instruction actually may work to the state's advantage in some circumstances. In fact, several commentators have decried the giving of a specific unanimity instruction on the grounds that it will deter a jury from engaging in jury nullification. A jury would be hard pressed to acquit a defendant on the ultimate question of the defendant's guilt after it has agreed unanimously as to each material fact underlying the charge against the defendant.

A different approach in cases in which the state introduces evidence of multiple bad acts in support of a single count, known as the "either/or" rule, would force the state to specify which particular bad act it wants the jury to consider when evaluating a particular charge. Such an approach commonly occurs in courts in California. In this manner, the jury clearly understands which alleged act forms the basis for the state's charge. Once again, however, this approach raises peripheral issues unnecessarily. For example, by specifying which bad act


280. In Montana, for example, the criminal code provides that: "Allegations made in one count may be incorporated by reference in another count." MONT. CODE ANN. § 46-11-404(1) (1999).

281. Trubitt, supra note 82, at 492.

the jury should consider in support of a specific count charged, the state implicitly would be conceding that evidence of other bad acts was introduced, in large part, to influence the jury as to a defendant's propensity to commit a crime. The defendant has not been charged with the "unspecified" bad acts, so why should the jury be allowed to hear evidence of them? The court would be forced to make potentially difficult evidentiary decisions that would weigh the probative value of the alleged bad acts with the prejudicial effect that they may have.283

Requiring a specific unanimity instruction by the trial court represents a simpler and more objective method of avoiding possible confusion among the jurors as to which facts they must agree unanimously. Under this approach, both the state and the defendant would have the opportunity to submit proposed instructions to the court, and the court, not one party, such as in Dahlin, would have the duty of explaining the law to the jury. This option would leave untrammeled the state's flexibility to define wrongful conduct and would allow the state discretion to charge the defendant as it sees fit. At the same time, however, this method would ensure that the jury agrees unanimously that the defendant committed the conduct in support of the charge. Protecting the defendant's right to a unanimous verdict, as guaranteed by the Montana Constitution, and more importantly, safeguarding the basic tenets of our adversarial system, far outweigh any concerns of expediency on the part of the state.

283. See, e.g., MONT. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").