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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 United States of America,
10 Plaintiff,
11 v.
12 Gary Arthur Brown, Jr.,
13 Defendant.

No. CR-15-01301-001-PHX-JJT
ORDER

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15 The court has read the Parties’ submissions regarding the need for unanimity
16 instruction, which also includes Defendant’s proposed new instruction on the subject.
17 (Docs. 94, 95.) *United States v. Ruiz*, 710 F.3d 1077 (9th Cir. 2013) is controlling on the
18 issue when it states that “there is no general requirement that the jury reach agreement on
19 the preliminary factual issues which underlie the verdict, since different jurors may be
20 persuaded by different pieces of evidence even when they agree on the bottom line.” 710
21 F.3d at 1081 (internal quotations omitted).

22 *Ruiz* also provides an exception to the above general rule, however, noting that if
23 there is “a genuine possibility of jury confusion, or if a conviction may occur as the result
24 of different jurors concluding that a defendant committed different acts, then an
25 instruction should be given to the effect that the jury may not convict unless it
26 unanimously agrees to a particular set of facts.” (citing *United States v. Anguiano*, 710
27 F.3d 1314, 1319 (9th Cir. 1989)(internal quotations omitted). A critical difference
28 between *Ruiz* and the instant case is that in *Ruiz*, the defendant was charged with

1 possession of firearm and ammunition, which can be a continuing offense. Here, the
2 offense of abusive sexual contact is not a continuing offense, or at least is not under the
3 evidence adduced by the government. The Court thus concludes there is a genuine
4 possibility of jury confusion, and for that reason it decided at the first trial in this matter
5 to deliver a unanimity instruction, upon Defendant's motion. For the same reason, and the
6 United States not objecting, The Court again will deliver a unanimity instruction, but it
7 will not deliver the instruction proposed by Defendant in Doc. 95. The court disagrees
8 with Defendant's argument that the unanimity instruction used in the first trial is
9 "grammatically confusing" or "fatally ambiguous," as the Ninth Circuit found the
10 challenged instruction to be in *United States v. Garcia-Rivera*, 353 F.3d 788, 792 (9th
11 Cir. 2003). The mere use of the disjunctive "or" connector is not what made the
12 instruction in *Garcia-Rivera* confusing or ambiguous. Nonetheless, the court will modify
13 the language of the previously used instruction slightly to eliminate any possible
14 ambiguity. Instruction given at trial shall read:

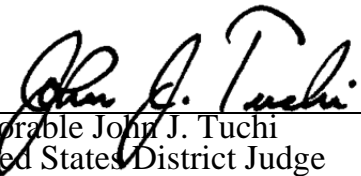
15 You have heard evidence that there was contact with Ms.
16 Claudia Frye's breast up to two times. Before you may find
17 the Defendant guilty, you must unanimously agree that the
18 first contact occurred; or you must unanimously agree that the
 second contact occurred; or you must unanimously agree that
 both contacts occurred.

19 The government cites *United States Ferris*, 719 F. 2d 1405 (9th Cir. 1983), in
20 support of its argument that no more specific unanimity instruction, and in fact no
21 unanimity instruction at all, is necessary, although the government is clear that it does not
22 object to the giving of the unanimity instruction delivered in the prior trial. While that
23 interpretation has appeal upon first reading of the case, there is again, like in *Ruiz*, a
24 critical difference between the facts of *Ferris* and the facts of the instant case. In *Ferris*,
25 the challenged jury instruction dealt with a charge of possession of controlled substances,
26 and defendant argued that evidence of several different instances of possession by him
27 were introduced, such that different jurors could have settled on different instances of
28 possession in order to convict him of the count. In *Ferris*, the Ninth Circuit concluded

1 that different instances of possession did not invalidate the required unanimity of the
2 jury's decision. But again, as in *Ruiz*, possession is a continuing offense, and the court
3 reasoned in *Ferris* that different jurors' conclusions that defendant might have been in
4 possession of controlled substance at different times was therefore not inconsistent with
5 the unanimity of the verdict. In the instant case, the charges of a different nature, and not
6 a continuing offense. For that reason, *Ferris* is inapposite, in the Court concludes that, to
7 avoid the danger of jury confusion, the unanimity instruction is at least favored, and may
8 be necessary.

9 IT IS THEREFORE ORDERED that the Court will deliver to the jury the above
10 unanimity instruction at trial.

11 Dated this 19th day of September, 2016.

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Honorable John J. Tuchi
United States District Judge