No. 13-30000

Before: Hon. Susan P. Graber, Hon. Richard R. Clifton, and Hon. Milan D. Smith, Jr., Circuit Judges

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANCIS SCHAEFFER COX,

Defendant-Appellant.

On Appeal from United States District Court
for the District of Alaska
District Court Case No. CR11-22-RJB

The Honorable Robert J. Bryan
United States District Judge

PETITION FOR PANEL REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Michael Filipovic
Federal Public Defender
Ann K. Wagner
Assistant Federal Public Defender
Attorneys for Francis Schaeffer Cox
Federal Public Defender
1601 Fifth Avenue, Suite 700
Seattle, Washington 98101
(206) 553-1100

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I. STATEMENT OF COUNSEL

En banc review should be granted because the panel decision upholds federal jurisdiction for a conspiracy to murder federal employees conviction despite the fact that the primary factual basis for that conspiracy was Cox's plan to defend against a "completely fictitious" federal hit team. This decision conflicts with *Feola v. United States*, 420 U.S. 671 (1975), which requires that where the object of the attack is not specifically identified and one cannot conclude that had the attack been carried out the victim would have been a federal officer, a court cannot conclude that the mere act of agreement to assault poses a sufficient threat to federal personnel or functions. *Id.* at 695–96. The panel's decision on conspiracy is also inconsistent with the panel's own application of the *Feola* requirement and reversal of the conviction for solicitation to murder federal agents based on that identical theory. Because the panel opinion contradicts the jurisdictional test set forth by a decision of the United Sates Supreme Court, consideration by the full court is necessary to secure and maintain uniformity of *Feola*'s application in all Ninth Circuit cases to which it applies.

En banc review should also be granted because this case presents the following question of national application and exceptional importance for which there is need for national uniformity: whether a contingent conspiracy may be

based on a condition that was highly unlikely to occur but which the conspirators subjectively believed was likely to occur?

The panel opinion concluded that such a subjective belief was sufficient even when the contingencies—the coming of "Stalinesque martial law" and the participation by federal employees in "mass arrests and purges"—were objectively unreasonable. This decision is inconsistent with the First Circuit, which focuses on the objective likelihood that such a condition would be fulfilled, *United States v. Palmer*, 203 F.3d 55, 64 (1st Cir. 2000) (applying the test announced by *United States v. Dworken*, 855 F.2d 12, 19 & n.6 (1st Cir. 1988)), and presents the unanswered question posed by Judge Posner in *United States v. Podolsky*, 798 F.2d 177, 179 (7th Cir. 1986) ("[W]e need not decide in this case how to deal with the situation where an agreement is conditioned on an event that is highly unlikely ever to occur.").

En banc review should also be granted to secure and maintain uniformity of this Court's decisions because the panel's holding that Cox's substantial rights were not affected by instructions telling the jury it did not have to find the critical mens rea elements of "malice aforethought" and "premeditation" for the object offense of murder in a conspiracy to murder charge conflicts with *United States v. Alferahin*, 433 F.3d 1148, 1158 (9th Cir. 2006), and other decisions of this Court

finding plain error where the instructions omit or misstate an essential element on a material issue and the evidence against the defendant is not overwhelming.

II. STATEMENT OF THE CASE

Francis Schaeffer Cox was convicted after a jury trial of, among other counts, conspiracy to murder and solicitation to murder federal officers or employees (Counts 12 and 16), in violation of 18 U.S.C. §§ 1111, 1114, and 1117 and 18 U.S.C. §§ 1114, 373, respectively. As described in overt acts submitted to the jury, the primary basis for the solicitation and conspiracy counts was a plan to provide "armed security and protection for Cox based on Cox's stated belief that a federal (and completely fictitious) 'hit team' had been sent to Fairbanks to assassinate him." Supp. ER 32, 58.[1] The panel held that this "fictitious" federal assassin theory lacked federal jurisdiction under *Feola*, 420 U.S. at 695–96, and vacated the solicitation conviction, but not the conspiracy conviction (which it reviewed *de novo*), on that ground. Opinion at 3–4.

At trial, the government alleged two other theories to support the conspiracy charge. (A complete summary of relevant facts is available in Cox's opening brief. Sub. Opening Br., Dkt. 112 at 3–31.) First, the government asserted Cox and Mike

[1] "ER" refers to Appellant's Excerpts of Record filed at Dkts. 65-1 through 65-3; "Supp. ER" refers to Appellant's Supplemental Excerpts of Record filed at Dkt. 113-1; "AER" refers to Appellee's Excerpts of Record filed at Dkts. 123-1 through 123-7; and "FER" refers to Appellant's Further Excerpts of Record filed at Dkt. 144.

Anderson had "agreed" to create a database of government employees. The evidence showed that Cox and Anderson discussed using the database in the event that government as we know it collapsed and "Stalinesque" martial law, characterized by "mass arrests [and] purges," was imposed in the United States. AER 266–67. Anderson testified under immunity that they had discussed using the database to help "identify who was [carrying out the mass arrests and mass purges]," and only then did they contemplate "kill[ing]" those individuals "before they could come for us." AER 268. The database consisted entirely of 15–20 state employees, but Cox had also asked Anderson to add the names of three federal employees he knew of. FER 3, 5–6, 10. There was no evidence that either Cox or Anderson had identified specific people in the database as individuals who had carried out mass arrests or purges, because no such mass arrests or purges occurred.

The remaining theory was based on meetings in which a hypothetical "2-4-1" scenario was discussed. The discussion, based on deterrence, was about "arresting" state troopers, other state employees, or generic law enforcement, if a member of Cox's "militia" was arrested, or killing state employees or generic law enforcement, if a member was killed. ER 382–416. Federal employees and federal employment categories were never discussed. Before the alleged coconspirators were asked to agree to any plan, and immediately before Cox decided to risk arrest

by failing to appear for a state court date, Cox disavowed the 2-4-1 discussion and offered the following "definitive plan for Monday": "try[ing] to lay low Monday and avoid—if they do—if they're coming out with bench warrant, avoid it and try to hit them with paperwork every way I can." ER 411–12. In the event that Cox was arrested or killed, he suggested, "the thing that you probably could get everybody to go in on"—*i.e.*, agree to—"is just raise hell. . . . by having—picketing and just like—well, not quite a riot, but almost, you know? And on the radio and on TV and—sit-ins and just every kind of, you know, peaceful protest and just get everybody's panties in a wad . . . ." ER 412–13. There was never any agreement to kill as part of the 2-4-1 discussions, as opposed to an agreement to exercise First Amendment rights, and specifically no agreement to kill any federal employee.

In jury instructions, the district court failed to include the mens rea elements of "malice aforethought" and "premeditation" in the conspiracy-to-convict instruction, and affirmatively told the jury it did *not* need to find those elements. Supp. ER 57, 63; ER 71–73. The panel held that even if this error was plain, it did not affect Cox's substantial rights. Opinion at 2.

III. ARGUMENT

A. Panel Rehearing Is Merited so the Panel May Consider How Its Solicitation Holding, Based on *Feola v. United States*, Applies to the Identical "Fictitious Federal Assassins" Theory Underlying the Conspiracy Conviction Given the Controlling Supreme Court Precedent of *Yates v. United States*.

In vacating Cox's solicitation conviction, the memorandum opinion correctly recognized that "because the federal 'hit team' that [Cox's] security team was supposed to guard against did not exist, the solicitation to murder a member of that hit team did not 'constitute[ ] a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction,'" citing *Feola*, 420 U.S. at 695–96. Opinion at 4. But the fictitious federal hit team (a theory referred to in shorthand as KJNP, the television station where a "security detail" was set up to defend against the fictitious assassins) was also presented to the jury as the primary basis for convicting Cox of Count 12, conspiracy to murder federal officials. *See* FER 36–37; ER 249 ("Let's talk about KJNP on November 23rd, 2010, since this is the basis of the government's charge of conspiracy to commit murder in . . . Count 12. . . ."); 6/13/2012 Tr. 174 ("Now the issue here is, as charged in the indictment, whether there was a conspiracy, a conspiracy to murder federal officials, those being the fictitious FBI agents that Francis Schaeffer Cox thought were after him."); 6/14/2012 Tr. 39 ("The evidence is overwhelming in terms of . . . conspiracy to kill federal employees or officers at KJNP. . . ."). The panel should

rehear the case to determine the impact of its fictitious assassin holding on Cox's conspiracy conviction under the controlling precedent of *Yates v. United States*, 354 U.S. 298, 312 (1957), *overruled on other grounds*, *Burks v. United States*, 437 U.S. 1 (1978).

The fact that the government argued three separate theories of conspiracy liability from the time of the superseding indictment to its brief on appeal, including the fictitious assassin theory, does not automatically save the conspiracy conviction under *Yates*. *See* ER 14–15, 18–19, 26–27; Sub. Resp. Br., Dkt. 126 at 101–10. Assuming the panel's decision rested, as Judge Milan Smith signaled at oral argument with a question about *Schad v. Arizona*, 501 U.S. 624 (1991), on the ground that the three theories were alternative means of commission rather than separate conspiracies, *Yates* requires that a general verdict that could have rested on a *legally* inadequate alternative means be reversed, absent harmless error. *See Yates*, 354 U.S. at 312; *see also Griffin v. United States*, 502 U.S. 46, 59 (1991) (noting that "[j]urors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law," whereas they are well equipped to analyze *factual* inadequacy); *United States v. Williams*, 441 F.3d 716, 721 (9th Cir. 2006) (holding that despite some critical language in *Griffin*, "*Yates* remains the controlling rule"). The panel's holding that the fictitious assassin theory could not give rise to federal jurisdiction is a species of legal inadequacy,

not factual inadequacy, so *Yates* rather than *Griffin* applies. *See United States v. Fuchs*, 218 F.3d 957 (9th Cir. 2000)*; see also id.* at 969 (Graber, J., dissenting).

The error was not harmless. First, *Hedgpeth v. Pulido* makes clear that if the same defect "categorically 'vitiat[es] *all* the jury's findings,'" harmless error analysis does not apply. *Hedgpeth v. Pulido*, 555 U.S. 57, 61 (2008) (per curiam) (quoting *Neder v. United States*, 527 U.S. 1, 11 (1999)). Here, applying *Feola* to the remaining theories of liability for the conspiracy conviction shows that they, too, lack federal jurisdiction. *See infra* at B.

Second, even if the panel has doubts about how *Feola* applies to the remaining theories, an error is only harmless if a court, after a "thorough examination of the record," is able to "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Neder*, 527 U.S. at 19. If the defendant "raised evidence sufficient to support a contrary finding," then the error was not harmless. *Id.* Closing arguments focused heavily on the federal assassins for a reason: they were the only unambiguous "targets" that were also unambiguously federal. The jury here could have rationally concluded that Cox did not agree (with premeditation and malice aforethought) to murder the three federal employees mentioned in connection with Anderson's database because Cox and Anderson had no thought of attacking anyone in the database unless one of those individuals was responsible for carrying out Stalinesque mass arrests and purges

that never in fact occurred. FER 10; AER 323–28. As for the 2-4-1 theory, federal employees were not mentioned during those discussions, ER 378–416, so a jury could have rationally concluded the discussions did not constitute a conspiracy to murder federal employees.

A comparison with *United States v. Skilling*, 638 F.3d 480 (5th Cir. 2011), after the Supreme Court rejected one of the alternative theories for a securities fraud conviction and remanded for harmless error analysis, shows why panel rehearing is necessary here. The Fifth Circuit recognized that the *Neder* standard required a searching review of the evidence supporting the remaining theory and a conclusion, beyond a reasonable doubt, that the jury *would have* reached the same verdict even if the defective theory had not been included. *Skilling*, 638 F.3d at 482–88. Because the panel did not reach this conclusion with respect to the verdict absent the fictitious assassin theory, rehearing is necessary so it may conduct the omitted analysis.

Ultimately, Cox's conspiracy conviction must be vacated under the same logic and precedent requiring vacation of Cox's solicitation count; *Yates v. United States* remains controlling precedent and the error was not harmless.

B. Consideration by the Full Court Is Necessary to Ensure That the Jurisdictional Test Announced by *Feola v. United States* Is Faithfully Administered in All Contexts in Which It Applies.

Regarding the conspiracy conviction, the panel held, applying a partial quotation from *Feola*, that "[a] rational trier of fact could . . . conclude that 'the agreement, standing alone, constituted a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction.'" Opinion at 3 (quoting *Feola*, 420 U.S. at 695).

Feola, which was a conspiracy case, specifies the legal test to be applied in making this determination:

> Where, however, there is an unfulfilled agreement to assault, it must be established whether the agreement, standing alone, constituted a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction. If the agreement calls for an attack on an individual specifically identified, either by name or by some unique characteristic, as the putative buyers in the present case, and that specifically identified individual is in fact a federal officer, the agreement may be fairly characterized as one calling for an assault upon a federal officer, even though the parties were unaware of the victim's actual identity and even though they would not have agreed to the assault had they known that identity. *Where the object of the intended attack is not identified with sufficient specificity so as to give rise to the conclusion that had the attack been carried out the victim would have been a federal officer, it is impossible to assert that the mere act of agreement to assault poses a sufficient threat to federal personnel and functions so as to give rise to federal jurisdiction.*

Feola, 420 U.S. at 695–96 (emphasis added). Because the fictitious assassins were not identified with sufficient specificity to ensure that a completed attack would

have been on actual federal officers, *Feola* forbids a conspiracy conviction on those facts. Supp. ER 32.

The panel's conclusion that *Feola* applies to the solicitation conviction applies equally to the remaining two conspiracy theories.

In the first theory posited by the government, Cox and Anderson agreed to create a database of government employees. AER 266–68. Cox and Anderson discussed using the database to help "identify" individuals carrying out the mass arrests and purges pursuant to "Stalinesque" martial law. AER 268. Only if an individual in the database turned out to be responsible for mass arrests or purges did Cox and Anderson contemplate using the information in the database to "kill them before they could come for us." *Id.* Because there was no suggestion that the three federal employees (as opposed to the 15 to 20 state employees) discussed in connection with the database had begun to carry out mass arrests or purges, "the object of the intended attack [was] not identified with sufficient specificity so as to give rise to the conclusion that had the attack been carried out the victim would have been a federal officer," *Feola*, 420 U.S. at 695–96, and "it is impossible to assert that the mere act of agreement to [kill] poses a sufficient threat to federal personnel and functions so as to give rise to federal jurisdiction." *Id.* at 696.

The same conclusion is compelled by *Feola* with regard to the third government theory, the 2-4-1 discussion. The hypothetical 2-4-1 discussion, which

never developed into an agreement to murder anyone, *see* Reply Br., Dkt. 143 at 40–43, concerned state employees such as state troopers and generic law enforcement. *See* Dkt. 126 at 107–10. Federal employees were never mentioned. *See* ER 378–416. A threat against state troopers or law enforcement generally cannot give rise to federal jurisdiction under the *Feola* test.

C. Rehearing *En Banc* Is Merited Because the Panel Opinion Enters a Circuit Split on the Necessary Showing for a Conspiracy Based on an Objectively Unlikely Contingency, and the Case Presents an Important Unanswered Question: Whether a Conspiracy Conviction Can Be Based on a Contingency Which Is Highly Unlikely to Ever Occur.

The panel opinion upheld the conspiracy conviction against Cox's sufficiency challenge because "[d]efendant and his coconspirators agreed to attack government officials—including federal officers—in the event of certain conditions *they subjectively thought were likely to occur*." Opinion at 3 (emphasis added). As discussed in the briefing, whether a contingent conspiracy may be based on a condition that was not objectively likely to occur but which the conspirators subjectively believed was likely to occur is the subject of a preexisting circuit split in which the Ninth Circuit had not taken a position. Dkt. 112 at 67–68 (citing *Palmer*, 203 F.3d at 64 (1st Cir. 2000) (applying the test announced by *United States v. Dworken*, 855 F.2d 12 (1st Cir. 1988), which held that "liability should attach if the defendant *reasonably* believed that the conditions would obtain," *id.* at 19 (emphasis added)); Dkt. 126 at 112 (citing *United States v.*

Podolsky, 798 F.2d 177, 179 (7th Cir. 1986) (rejecting a test based on subjective or objective likelihood, but reserving the precise question presented here)). In *Podolsky*, Judge Posner left open the question whether a conspiracy conviction could be based on a contingency which was "highly unlikely to ever occur." 798 F.2d at 179. The Cox case presents both questions, whether a subjective belief in a contingency is sufficient where it is objectively unlikely to occur, and whether the answer changes if the contingency is "highly unlikely to ever occur."

In Cox's case, the multiple layers of conditions precedent were not merely objectively unlikely but the product of paranoid fantasy: the appearance in reality of federal assassins from Aurora, Colorado, in one theory, and the collapse of the United States government, the imposition of martial law characterized by mass arrests and purges, *and* the identification of individuals (whom the alleged conspirators did not agree would necessarily be federal employees) who carried out such mass arrests and purges, in another. Where fantasy pervades an apparent agreement, the very limits of conspiracy law are being tested. *Cf. United States v. Valle*, 807 F.3d 508 (2d Cir. 2015).

Two critical policy considerations are presented by this circuit split and merit rehearing by the full court. First, as the Supreme Court has cautioned, "[T]he looseness and pliability of the [conspiracy] doctrine present inherent dangers which should be in the background of judicial thought wherever it is sought to

extend the doctrine to meet the exigencies of a particular case." *Krulewitch v. United States*, 336 U.S. 440, 449 (1949) (Jackson, J., concurring). This case is at the extreme edge of conspiracy liability; neither counsel nor the court has identified any § 1117 conspiracy to murder (or § 111 conspiracy to assault) case with conditions even remotely similar to the unlikely events of historical proportion presented here. Furthermore, the "Stalinesque" mass-arrest contingency was a critical link in a chain of probability-defying inferences the panel had to make under *Feola* in order to conclude that federal employees, as opposed to state employees, would have been the victims in any completed attack. Not only would mass arrests pursuant to martial law have to occur, but the mass arrests would have to be carried out by federal employees. The intersection of this jurisdictional issue with the contingency circuit split makes this case exceptionally important: The Supreme Court has been vigilant about policing the boundaries of federal jurisdiction in the criminal context, because "[s]tates possess primary authority for defining and enforcing the criminal law," and "[o]ur national government is one of delegated powers alone." *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993), and *Screws v. United States*, 325 U.S. 91, 109 (1945) (plurality opinion)).

Second, the Supreme Court has directly justified conspiracy liability with reference to the likelihood that a conspiracy's object will be accomplished. *See*

Feola, 420 U.S. at 694 ("[A]t some point in the continuum between preparation and consummation, the likelihood of a commission of an act is sufficiently great and the criminal intent sufficiently well formed to justify the intervention of the criminal law."). The line *Feola* draws is that once "[c]riminal intent has crystallized, [ ] the likelihood of actual, fulfilled commission warrants preventative action." *Id*. But the existence of baroque conditions such as these both impedes the "crystalliz[ation]" of intent (is intent to violently resist Stalinesque mass arrests and purges, regardless of whether state or federal workers are responsible, truly a "premeditated" agreement with "malice aforethought" to murder a federal employee?) and makes the actual commission of the offense against a federal employee an extremely remote risk.

The panel opinion's failure to acknowledge the circuit split it was entering and its failure to discuss or analyze the important policy considerations at issue on the extreme edge of conspiracy liability merit rehearing *en banc*.

D. The Panel Opinion Rests Its Rejection of Cox's Clearly Meritorious Mens Rea Claim on Substantial Rights, but Fails to Distinguish the Analogous Ninth and Fifth Circuit Cases Demonstrating Prejudice.

The jury was affirmatively told that the government did not have to prove the essential mens rea elements of malice aforethought and premeditation, contradicting *United States v. Kim*, 65 F.3d 123, 126 (9th Cir. 1995), and other precedent. *See* Dkt. 112 at 37–46. The panel opinion held with a conclusory

citation to *United States v. Olano*, 507 U.S. 725, 734–35 (1993), that even if this error was plain, it did not affect Cox's substantial rights. Opinion at 2. But the rigorous mens rea requirements in a first-degree murder conspiracy—as well as the way that the concepts of "premeditation" and "malice aforethought" intersect with the jurisdictional requirement that the target be identifiable as a federal employee—make it likely that a properly instructed jury would not have reached the same result, as multiple Ninth Circuit cases about instructional error have held. *See Alferahin*, 433 F.3d at 1158 ("Other cases have also upheld convictions rendered on incomplete or erroneous jury instructions, but like *Neder* [*v. United States*], these cases have relied on the existence of 'strong and convincing evidence' that the missing element of the crime had been adequately proved by the prosecution."); *United States v. Murphy*, 824 F.3d 1197, 1204–05 (9th Cir. 2016). Indeed, Cox supplied the panel with a Fifth Circuit conspiracy to murder case where killings of ATF agents were actually carried out: the jury in that case, after being properly instructed as to mens rea, acquitted eleven defendants of the conspiracy charge. *United States v. Branch*, 91 F.3d 699 (5th Cir. 1996). The grave instructional error clearly affected Cox's substantial rights and rehearing *en banc* is necessary to maintain uniformity of the court's decisions.

IV. CONCLUSION

The panel should grant rehearing or this Court should grant *en banc* review so that Cox's conspiracy conviction can be vacated and the case remanded for resentencing, or in the alternative, a new trial on that count can be granted.

DATED this 10th day of October, 2017.

Respectfully submitted,

s/ *Michael Filipovic*
Federal Public Defender

s/ *Ann K. Wagner*
Assistant Federal Public Defender

Attorneys for Francis Schaeffer Cox

CERTIFICATE OF COMPLIANCE

Under Circuit Rule 40-1, the attached petition is proportionately spaced, has a typeface of 14 points, and contains 3,988 words.

DATED this 10th day of October, 2017.

s/ *Michael Filipovic*
Federal Public Defender
Attorney for Francis Schaeffer Cox

CERTIFICATE OF SERVICE

I certify that I filed the foregoing Petition for Panel Rehearing and Suggestion for Rehearing *En Banc* with the Clerk of the Court for the Ninth Circuit Court of Appeals by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

I mailed one copy of this Petition for Panel Rehearing and Suggestion for Rehearing *En Banc*, first-class postage prepaid, to Francis Schaeffer Cox at USP Marion.

DATED this 10th day of October, 2017.

s/ *Suzie Strait*
Paralegal

FILED

AUG 29 2017

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. FRANCIS SCHAEFFER COX, Defendant-Appellant.	No. 13-30000 D.C. No. 3:11-cr-00022-RJB-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
Robert J. Bryan, District Judge, Presiding

Argued and Submitted August 16, 2017
Anchorage, Alaska

Before: GRABER, CLIFTON, and M. SMITH, Circuit Judges.

Defendant Francis Schaeffer Cox appeals his convictions for conspiracy to murder a federal officer in violation of 18 U.S.C. §§ 1117 and 1114 and for solicitation to murder a federal officer in violation of 18 U.S.C. §§ 373 and 1114. We affirm Defendant's conspiracy conviction, vacate his solicitation conviction, vacate his sentences, and remand to the district court for resentencing.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1. Defendant challenges several aspects of the jury instructions. First, he argues that the instructions failed to inform the jury that it had to find that he conspired with the mental state required for first-degree murder in order to convict him of conspiracy to commit first-degree murder. Reviewing for plain error, we conclude that any error in that instruction did not affect Defendant's substantial rights. United States v. Olano, 507 U.S. 725, 734–35 (1993). Second, Defendant argues that the instructions were deficient because they did not inform the jury that it had to find that the conspiracy was not one for self-defense. We conclude that, even assuming that Defendant has preserved the argument, the instructions adequately covered his theory of self-defense, United States v. Gomez-Osorio, 957 F.2d 636, 642–43 (9th Cir. 1992), they were not misleading, Stoker v. United States, 587 F.2d 438, 440 (9th Cir. 1978) (per curiam), and the district court did not abuse its discretion in formulating the instructions as it did, United States v. Knapp, 120 F.3d 928, 930 (9th Cir. 1997). Finally, Defendant argues that the lack of an instruction to the effect that the jury had to agree unanimously as to the target(s) of the conspiracy confused the jury. Reviewing for plain error, we conclude that it is not "obvious" or "clear" that the district court erred by not giving a specific unanimity instruction as to the intended target(s) of the conspiracy. See

Puckett v. United States, 556 U.S. 129, 135 (2009) (noting that, for an error to be "plain," it "must be clear or obvious, rather than subject to reasonable dispute").

2. Defendant next challenges the sufficiency of the evidence on the conspiracy charge. We assume, without deciding, that Defendant has properly preserved this challenge, so that our review is de novo. See United States v. Phillips, 704 F.3d 754, 762 (9th Cir. 2012). We conclude that, "consider[ing] the evidence presented at trial in the light most favorable to the prosecution[,] . . . [that] evidence, so viewed, is adequate to allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." United States v. Nevils, 598 F.3d 1158, 1164 (9th Cir. 2010) (en banc) (internal quotation marks and alteration omitted). Defendant and his co-conspirators agreed to attack government officials—including federal officers—in the event of certain conditions that they subjectively thought were likely to occur. A rational trier of fact could find beyond a reasonable doubt that the agreement was not merely one for self-defense. A rational trier of fact could also conclude that "the agreement, standing alone, constituted a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction." United States v. Feola, 420 U.S. 671, 695–96 (1975).

3. Defendant also challenges the sufficiency of the evidence on the solicitation charge. We review for plain error, but "plain-error review of a sufficiency-of-the-evidence claim is only theoretically more stringent than the standard for a preserved claim." United States v. Flyer, 633 F.3d 911, 917 (9th Cir. 2011) (internal quotation marks omitted). We conclude that it is clear that no rational trier of fact could find Defendant guilty of solicitation to murder a federal official, for two independent reasons. First, no rational trier of fact could conclude that the circumstances surrounding the formation of the security team for the television station event "strongly confirm[ed] that [D]efendant actually intended" for anyone to commit first-degree murder. United States v. Stewart, 420 F.3d 1007, 1020–21 (9th Cir. 2005). Second, because the federal "hit team" that the security team was supposed to guard against did not exist, the solicitation to murder a member of that hit team did not "constitute[] a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction." Feola, 420 U.S. at 695–96.[1] The error affected Defendant's substantial rights and seriously affected the fairness, integrity, or public reputation of a judicial proceeding, and we

[1] The Government's theory at trial was that Defendant's actions in connection with the formation of the security team for the television station event constituted solicitation to murder a federal official. No rational trier of fact could conclude that Defendant's other actions—those not related to the creation of the security team—amounted to solicitation within the meaning of 18 U.S.C. § 373.

will correct it. See Flyer, 633 F.3d at 917 ("When a conviction is predicated on insufficient evidence, the last two prongs of the plain-error test will necessarily be satisfied." (brackets omitted) (quoting United States v. Cruz, 554 F.3d 840, 845 (9th Cir. 2009)); Cruz, 554 F.3d at 845 (holding that the last two prongs of the plain-error test are necessarily met "when [a] court, as a matter of law, ha[d] no jurisdiction to try [a defendent] for the alleged offense").

4. Defendant next argues that several of the district court's evidentiary rulings were erroneous. Reviewing for plain error, we conclude that the court's decision to admit evidence about Defendant's political speech and activities was not plainly erroneous. And assuming, without deciding, that Defendant has properly preserved his challenge to the district court's rulings on his requested limiting instruction, we conclude that neither the court's particular formulation of the limiting instruction nor the court's refusal to give an instruction at the time the evidence of political activity was presented to the jury constituted an abuse of its discretion. See United States v. Campanale, 518 F.2d 352, 362 (9th Cir. 1975) (per curiam) ("Appellants place special emphasis on the refusal of the judge to give cautionary instructions on the statements of co-conspirators at the time evidence was admitted. This subject was covered at the conclusion of the trial. There was

no prejudicial error in the judge's failure to give such an instruction also on other occasions during the trial." (citation omitted)).

5. We decline to reach Defendant's ineffective-assistance-of-counsel claim. See United States v. Jeronimo, 398 F.3d 1149, 1155 (9th Cir. 2005) ("[A]s a general rule, we do not review challenges to the effectiveness of defense counsel on direct appeal."), overruled on other grounds by United States v. Jacobo Castillo, 496 F.3d 947 (9th Cir. 2007) (en banc).

6. We vacate Defendant's sentences on all counts of conviction and remand with instructions to resentence Defendant in light of our reversal of his solicitation conviction. See United States v. Evans-Martinez, 611 F.3d 635, 645 (9th Cir. 2010) (holding that an appellate court has "the power to vacate all of the sentences imposed by a district court when the district court erred with respect to one of the sentences," and "remand of all sentences is often warranted").

AFFIRMED in part, REVERSED in part, VACATED in part, and REMANDED.