

5.0 Introductory Comment

“A defendant is entitled to have the jury instructed on his or her theory of defense, as long as the theory has support in the law and some foundation in the evidence.” *United States v. Perdomo-Espana*, 522 F.3d 983, 986-87 (9th Cir. 2008). But the instruction need not be given in the form requested, nor if it “merely duplicates what the jury has already been told.” *United States v. Lopez-Alvarez*, 970 F.2d 583, 597 (9th Cir. 1992).

There appears to be some conflict in Ninth Circuit case law as to when a district court must sua sponte instruct the jury on a specific defense. *Compare United States v. Bear*, 439 F.3d 565, 568 (9th Cir. 2006) (“[w]hen a defendant actually presents and relies on a theory of defense at trial,” in this case, a public authority defense, “the judge must instruct the jury on that theory even where such an instruction was not requested.”) *with United States v. Lillard*, 354 F.3d 850, 855 (9th Cir. 2003) (“In the absence of a request from the defendant, the omission of an alibi instruction cannot be plain error.”).

The unanimity requirement extends to affirmative defenses. *See, e.g., United States v. Ramirez*, 537 F.3d 1075, 1084 (9th Cir. 2008). In most cases the general unanimity instruction in Instruction 6.19 (Duty to Deliberate) should suffice. *See United States v. Nobari*, 574 F.3d 1065, 1081 (9th Cir. 2009); *United States v. Kim*, 196 F.3d 1079, 1082 (9th Cir. 1999). However, “a specific unanimity instruction is required if it appears that there is a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts.” *United States v. Lyons*, 472 F.3d 1055, 1068 (9th Cir. 2007). *See also* Instruction 6.27 (Specific Issue Unanimity).