

3.13 Deported Material Witness

The government has failed to produce a witness whose testimony would have been material to an issue in this case. You are allowed to infer that the testimony would have been favorable to the defendant.

Comment

The Committee cautions that a missing witness instruction will be appropriate only in limited circumstances, such as when the government deports an alien witness knowing that the witness would testify favorably for the defense. See *United States v. Leal-Del Carmen*, 697 F.3d 964, 975 (9th Cir. 2013) (holding in such circumstances that “[t]he district court abused its discretion by failing to give the missing-witness instruction”). “A missing witness instruction is appropriate if two requirements are met: (1) [t]he party seeking the instruction must show that the witness is peculiarly within the power of the other party and (2) under the circumstances, an inference of unfavorable testimony [against the non-moving party] from an absent witness is a natural and reasonable one.” *Id.* at 974.

“A missing witness instruction is proper only if from all the circumstances an inference of unfavorable testimony from an absent witness is a natural and reasonable one.” *United States v. Bramble*, 680 F.2d 590, 592 (9th Cir. 1982) (noting that absent any inference of unfavorable testimony, trial court would have erred by giving missing witness instruction; defense counsel interviewed witness and “indicated that she did not wish to have him stay around”).

Even when a missing witness instruction is not given, a judge may not forbid a jury from drawing a negative inference from a party’s failure to call a witness. *United States v. Ramirez*, 714 F.3d 1134, 1139 (9th Cir. 2013) (“By instructing the jurors to disregard any uncertainty about why the prosecution didn’t call a witness—who might have been the key witness—the court improperly inserted itself into the jury room and interfered with the jury’s role as a factfinder.”).

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