

5.1 Alibi

Evidence has been admitted that the defendant was not present at the time and place of the commission of the crime charged in the indictment. The government has the burden of proving beyond a reasonable doubt the defendant was present at that time and place. The defendant does not have the burden of proving an alibi defense, nor does the defendant have to convince you that [he] [she] was not present at the time and place of the commission of the crime.

If, after consideration of all the evidence, you have a reasonable doubt that the defendant was present at the time and place the crime was committed, you must find the defendant not guilty.

Comment

See Fed. R. Crim. P. 12.1 (Notice of Alibi) as to a defendant's notice of defense.

"[T]here is no burden of proof on the accused regarding an alibi." *Leavitt v. Arave*, 383

F.3d 809, 833 (9th Cir. 2004) (per curiam). It is error to refuse a request for an alibi instruction when there is evidence to support this theory. *United States v. Lillard*, 354 F.3d 850, 855 (9th Cir. 2003); *United States v. Hairston*, 64 F.3d 491, 495 (9th Cir. 1995); *United States v. Zuniga*, 6 F.3d 569, 571 (9th Cir. 1993). It does not matter which party introduces the alibi evidence; the instruction should be given even if the alibi evidence is "weak, insufficient, inconsistent or of doubtful credibility." *Hairston*, 64 F.3d at 495 (citations omitted). However, the failure to give an alibi instruction sua sponte is not plain error. *Lillard*, 354 F.3d at 855-56.

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