

6.3 Defendant's Decision Not to Testify

A defendant in a criminal case has a constitutional right not to testify. In arriving at your

verdict, the law prohibits you from considering in any manner that the defendant did not testify.

Comment

If this instruction is requested by the defendant, it must be given. *Carter v. Kentucky*, 450 U.S. 288, 305 (1981); *see also United States v. Soto*, 519 F.3d 927, 930 (9th Cir. 2008) (per curiam). However, “[i]t may be wise for a trial judge not to give such a cautionary instruction over a defendant’s objection.” *Lakeside v. Oregon*, 435 U.S. 333, 340-41 (1978).

In *United States v. Padilla*, 639 F.3d 892 (9th Cir. 2011), the Ninth Circuit held the following language sufficient:

[T]he law prohibits you in arriving at your verdict from considering that the defendant may not have testified.

Id. at 897. The Ninth Circuit also held in *Padilla* that in that particular case, the district court did not plainly err in failing to repeat this instruction at the end of the case when it had been given four days earlier after the jury was sworn. *Id.* at 898. The Ninth Circuit suggested, however, that a lengthy period between the delivery of the instruction and commencement of deliberations might alter the analysis. *Id.*

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