**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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