

## A PARTY'S FAILURE TO CALL A WITNESS <sup>1</sup>

One of the issues in the case is (*specify; e.g., whether the defendant has been correctly identified as the person who committed the charged crime*).

On that issue, you have heard the testimony of: (*specify*).

The (People/defense) contend(s) that another person, (*specify*), has knowledge relevant to that issue. The (People/defense) did not call (*specify*) as a witness.

The fact that (*specify*) was not called as a witness permits, but does not require, an inference that had he/she been called his/her testimony would not have supported<sup>2</sup> the (People's/defense's) position on that issue.

*[NOTE: If in the evidence presented to the jury, an explanation for the failure to call the witness was offered, or one or more of the factors warranting the missing witness charge is in issue, then the charge may continue as follows: <sup>3</sup>*

Before you are permitted to draw that inference, however, you must be satisfied:

1. That (*specify*)<sup>4</sup> has material knowledge about that issue;
2. That he/she is in the control of the (People/defense) in that, if called, he/she would be expected to testify favorably for the (People/defense).<sup>5</sup>
3. That his/her testimony would not have been merely cumulative to other testimony or evidence in the case;
4. That he/she was available to be produced and called by the (People/defense) as a witness at this trial.<sup>6</sup>

If you are not satisfied of each of those facts, then you must not consider the fact that the People/defense did not call (*specify*) to testify. On the other hand, if you are satisfied of those facts,

then our law permits but does not require you to infer that, had (specify) testified, his/her testimony would not have supported<sup>7</sup> the (People's/defense's) position on that issue.]

Add if the inference is on the defendant's case:

Keep in mind that the drawing of this inference, if you decide to draw it, does not shift the burden of proof to the defendant. The People always retain the burden of proving the defendant guilty beyond a reasonable doubt.

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1. *People v. Smith*, 33 N.Y.3d 454 (2019) reiterated the criteria for granting a missing witness instruction. "In *Gonzalez*[68 N.Y.2d 424(1986)], we established the analytical framework for deciding a request for a missing witness instruction. The proponent initially must demonstrate only three things via a prompt request for the charge: (1) that there is an uncalled witness believed to be knowledgeable about a material issue pending in the case, (2) that such witness can be expected to testify favorably to the opposing party, and (3) that such party has failed to call the witness to testify. The party opposing the charge can defeat the initial showing by accounting for the witness's absence or demonstrating that the charge would not be appropriate. This burden can be met by demonstrating, among other things, that the testimony would be cumulative to other evidence. If the party opposing the charge meets its burden by rebutting the prima facie showing, the proponent retains the ultimate burden to show that the charge would be appropriate. . . . [W]e have never required the proponent of a missing witness charge to negate cumulativeness to meet the prima facie burden." (quotation marks and citations omitted).

2. *People v Paylor*, 70 N.Y.2d 146 (1987)

3. *People v. Thomas*, 262 A.D.2d 213 (1st Dept 1999) ("The court properly gave a missing witness charge concerning a material witness who was available and under defendant's control within the meaning of *People v Gonzalez* (68 N.Y.2d 424, 427-428). Contrary to defendant's argument, he did not establish the unavailability of the witness, whose current address was concededly known to defendant. Moreover, the court's fair and balanced instruction directed the jury not to draw an unfair inference against defendant unless it was satisfied as to control and availability." )

4. *People v. Gonzalez*, 68 N.Y.2d 424, 427-430 (1986); *People v. Savinon*, 100 N.Y.2d 192 (2003); *People v. Keen*, 94 N.Y.2d 533, 540 (2000); *People v Kitching*, 78 N.Y.2d 532, 537-538 (1991).

5. *People v. Gonzalez*, 68 N.Y.2d at 429 (“A missing witness charge would be appropriate however, if it is demonstrated that the party had the physical ability to locate and produce the witness, and there was such a relationship, in legal status or on the facts, as to make it natural to expect the party to have called the witness to testify in his favor.”)

6. See *Crosby v. Beaird*, 93 A.D.2d 852 (2<sup>nd</sup> Dept 1983) (When giving a missing witness charge, the trial court in a civil matter erred by failing to instruct “the jury to consider the infant’s age and the circumstances surrounding the accident in determining whether or not they deemed it appropriate in this case to invoke the permissible inferences authorized in such a charge”).

7. *People v Paylor*, 70 N.Y.2d 146 (1987).