

WITNESS - FAILURE OF THE STATE TO PRODUCE¹

During the course of this trial, reference has been made to _____(NAME OF PERSON) as a witness in this matter (as having information relevant to the matter before you) and that the State has failed to call (him/her) to testify. If you find that _____ (NAME OF PERSON) is a person whom you would naturally expect the State to produce to testify, you have a right to infer from the non-production of this witness that (his/her) testimony would be adverse to the interest of the State.

The basis for this rule is that where the State fails to produce a witness who probably could testify about certain facts in issue, it raises a natural inference that the non-producing party fears that the testimony of the witness on that issue would be unfavorable to (him/her).

An inference is a deduction of fact that may be drawn logically and reasonably from another fact or group of facts established by the evidence. Whether or not an inference should be drawn is for you to decide using your own common sense, knowledge and everyday experience. Ask yourselves is it probable, logical and reasonable. However, you are never required or compelled to draw an inference. You alone decide whether the facts and circumstances shown by the evidence support an inference and you are always free to draw or not to draw an inference. If you draw an inference, you should weigh it in connection with all the other evidence in the case keeping in mind that the burden of proof is upon the State to prove all the elements of the crime beyond a reasonable doubt.

¹ Before the trial court can give this charge, euphemistically referred to as a “Clawans” charge, State v. Clawans, 38 N.J. 162 (1962), or allow a comment in summation on the missing witness, the party seeking the charge/summation comment MUST, before the parties rest, notify the trial judge and the opposing party outside the presence of the jury, state the name of the witness/witnesses not called, and indicate why this witness/witnesses have superior knowledge of the relevant facts. State v. Hill, 199 N.J. 545, 560-61 (2009). The trial court must rule on this issue before a jury instruction OR summation comment is allowed. Id. at 561. In making its decision, the trial court must consider various factors, id. at 561, and place on the record findings as to each of these factors. Ibid. Note that this charge rarely should be given against a defendant. See Witness – Failure of the Defendant to Produce charge.