Approved 6/14/10

WITNESS - FAILURE OF THE DEFENDANT TO PRODUCE[1]

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 defendant has failed to call (him/her) to testify. If you find that _____ (NAME OF PERSON) is a person whom you would naturally expect the defendant 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 defendant.

The basis for this rule is that where the defense fails to produce a witness who probably could testify about certain facts in issue, it raises a natural inference that the defense believes that the testimony of the witness on that issue would be unfavorable to its case.[2]

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 choose to draw this inference, however, you cannot consider it to be affirmative evidence either of defendant's guilt of the crime(s) charged, or of his/her consciousness of guilt. The inference simply permits you to assign more or less weight to the evidence that has been offered on the point that _____(NAME OF PERSON) would have testified about. I remind you that the State bears the burden of proving defendant's guilt beyond a reasonable doubt.[3]

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[1] In State v. Hill, 199 N.J. 545 (2009), our Supreme Court ruled that a "missing witness" charge or a comment in summation about a missing witness ordinarily "has no proper place being used against a criminal defendant." Id. at 567. The Supreme Court theorized that such a charge might be appropriate if a defendant has "voluntarily asserted some proof to create an affirmative defense . . . or assert[ed] new facts about an alibi defense," id. at 569, but did not reach the issue. Ibid.

[2] 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.

[3] State v. Velasquez, 391 N.J. Super. 291, 314 (App. Div. 2007)