

6.10.1 Missing Witness

(1) A party normally is expected to produce witnesses who are available to be called, are knowledgeable about a material issue, and would be expected to testify favorably on behalf of that party.

(2) (a) A party's failure to call a person to testify who is knowledgeable about a material issue and can be expected to testify favorably for that party may warrant an "adverse inference" that permits the finder of fact to infer that, had the witness been called to testify, the witness's testimony on the issue of which the witness possessed knowledge would not have supported the position of the party that failed to call the witness.

(b) A request for the adverse inference specified in paragraph (a) may be defeated by satisfactorily accounting for the witness's absence: by demonstrating that the witness is not knowledgeable about the issue; that the issue is not material or relevant; that, although the issue is material or relevant, the testimony would be "cumulative" of other evidence; that the witness is not "available"; or that the witness is not under the party's "control," meaning that the witness would not be expected to testify in the party's favor.

(3) A request for the adverse inference must be timely, that is, it must be made as soon as practicable. Whether a request is timely depends on when the requesting party knew or should have known that a basis for a missing witness charge existed, and any prejudice that may have been suffered by the other party as a result of the delay.

(4) The failure to request or the denial of the missing witness (adverse inference) charge does not preclude fair comment in summation on the failure of a party who presented evidence to call a witness.

(5) (a) When a witness, who may have knowledge about a material issue and would be expected to testify favorably for a party, will not be called as a witness by that party, the court may in its discretion permit that party to present evidence that purports to explain the witness's absence.

(b) Should a witness be unavailable as a matter of law to testify, the court should instruct the jury that the witness has become unavailable for reasons beyond the party's control and that, consequently, no adverse inferences may be drawn from the witness's failure to appear.

Note

Subdivision (1) is derived from decisional law about what constitutes a “missing witness” in both criminal and civil proceedings, the seminal case being *People v Gonzalez* (68 NY2d 424 [1986]), discussed in this Note. (See *DeVito v Feliciano*, 22 NY3d 159, 165-166 [2013] [the “preconditions for (a missing witness) charge (are) applicable to both criminal and civil trials”]; see generally PJI 1:75; CJI2d[NY] General Applicability, A Party's Failure to Call a Witness.)

Subdivision (2) draws substantially from *Gonzalez*, which has been reaffirmed repeatedly. (See *People v Smith*, 33 NY3d 454, 458-459 [2019]; *People v Hall*, 18 NY3d 122, 131 [2011]; *People v Savinon*, 100 NY2d 192, 196 [2003].) As *Gonzalez* (at 427-428) explains:

“Once the party seeking the charge has established prima facie that an uncalled witness is knowledgeable about a pending material issue and that such witness would be expected to testify favorably to the opposing party, it becomes incumbent upon the opposing party, in order to defeat the request to charge, to account for the witness' absence or otherwise demonstrate that the charge would not be appropriate. This burden can be met by demonstrating that the

witness is not knowledgeable about the issue, that the issue is not material or relevant, that although the issue is material or relevant, the testimony would be cumulative to other evidence, that the witness is not ‘available’, or that the witness is not under the party’s ‘control’ such that he would not be expected to testify in his or her favor.”

The meaning of “materiality,” “control,” “availability” and “cumulative testimony,” as articulated by *Gonzalez*, needs to be further explained and distinguished.

“Materiality” requires an identifiable witness who can give testimony on an issue that is relevant to the case. (*Gonzalez*, 68 NY2d at 428.) The failure to identify a particular witness will preclude application of the rule. (1A NY PJI3d 1:75 at 124 [2021].)

“Control” refers to the relationship (not availability) between a party and a witness. As the Court explained in *Savinon* (100 NY2d at 200): “Where there is ‘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 [or her] favor,’ the so-called control element is satisfied.” While a witness may be “available” to both sides, one party may have a relationship to the witness that makes the witness “favorable to or under the influence of one party and hostile to the other” such that the witness would be expected to testify favorably for that party. (*Gonzalez* at 429.) It matters not that the testimony may prove not favorable; it is the relationship between the party and the witness that gives rise to the expectation that the witness’s testimony would be favorable and thus the witness must be called, or the finder of fact instructed on the adverse inference. “Thus, the fact that a witness is ‘equally available’ to both sides, standing alone, is insufficient to defeat a timely request for the charge. Rather, it must also be demonstrated that the witness is not in the ‘control’ of the party who would have been expected to call him [or her]—that is, the witness, by nature of his [or her] status or otherwise, would not be expected to testify favorably to one party and adversely to the other.” (*Gonzalez* at 429; *see Hall*, 18 NY3d at 131; *People v Fields*, 76 NY2d 761, 763 [1990] [a police officer would be “expected to testify favorably to the People”]; *People v Rodriguez*, 38 NY2d 95, 98 n 1 [1975] [“A spouse or relative (of a defendant) is perforce deemed to be under the defendant’s control”].)

“Availability” is a “separate and distinct” consideration from “control.” (*People v Keen*, 94 NY2d 533, 540 [2000].) It refers to the ability to call a witness to the stand who is competent to testify. (Guide to NY Evid rule 6.01.) “Though a genuine inability to locate a witness will foreclose a missing witness instruction, a witness may be readily accessible and even in the courtroom but still be unavailable

within the meaning of the rule. Thus, a witness who on Fifth Amendment grounds refuses to testify will be considered ‘unavailable’ although the witness’s presence is known and apparent.” (*Savinon* at 198.)

“Cumulative” testimony refers to testimony favoring the party controlling the uncalled witness; that testimony, however, is not necessarily cumulative simply because it would provide additional testimony on a material issue. If the additional testimony would serve a meaningful purpose, such as to confirm or contradict testimony on a disputed material issue, it is not cumulative. (*Gonzalez* at 430 [the missing witness’s testimony on the identification of the perpetrator would not have been cumulative because the “prosecution’s case rested entirely upon the complainant’s testimony and identification of the defendant (and) complainant’s credibility had been impeached on cross-examination such that corroboration of her testimony was crucial”]; *People v Fields*, 76 NY2d at 763 [“there was evidence that if (the detective) were called, his testimony (about the interrogation of the defendant) would have been inconsistent with (Detective) D’Ambrosio’s testimony” and was accordingly not cumulative]; *DeVito v Feliciano*, 22 NY3d at 166 [“our holding is that an uncalled witness’s testimony may properly be considered cumulative only when it is cumulative of testimony or other evidence favoring the party controlling the uncalled witness. . . . (A) witness’s testimony may not be ruled cumulative simply on the ground that it would be cumulative of the opposing witness’s testimony”]; compare *People v Macana*, 84 NY2d 173, 180 [1994] [“There is nothing in the record to indicate that the missing officer would have testified differently or in accordance with defendant’s claim that the gun was retrieved from the living room hutch. It is not incumbent upon the prosecution to call at trial every witness to a crime or to make a complete and detailed accounting to the defense of all law enforcement investigatory work, and there is ample support in the record that the missing officer’s testimony would have been cumulative and therefore not a proper subject of a missing witness charge” (internal quotation marks and citations omitted)].)

Notably, *People v Smith* (33 NY3d at 459) held that it is not the burden of the proponent of the adverse inference “to negate cumulativeness to meet the prima facie burden” for a missing witness instruction. “The proponent of the charge typically lacks the information necessary to know what the uncalled witness would have said and, thus, whether the testimony would have been cumulative. The party opposing the charge is in a superior position to demonstrate that the uncalled witness’s testimony would be cumulative. The opposing party therefore appropriately bears the initial burden with respect to cumulativeness.” (*Id.* at 459-460; see Hutter, *‘People v. Smith’: Missing Witness Charge as Applied in Criminal and Civil Actions Revisited*, NYLJ, July 31, 2019.)

In a criminal proceeding, the defense that presents evidence may, like the People, be subject to the consequences attending the failure to call a noncumulative

witness, with knowledge of a material issue, who would be expected to testify favorably for the defense. (*Rodriguez*, 38 NY2d at 98 [“Ordinarily, a court may not comment upon a defendant’s failure to testify or otherwise to come forward with evidence, but, once a defendant does so, his failure to call an available witness who is under defendant’s control and has information material to the case may be brought to the jurors’ attention for their consideration”]; *People v Wilson*, 64 NY2d 634, 635-636 [1984] [“Although defendant had no burden to come forward with alibi evidence, once he did so, his failure to call an available witness to support the alibi could be brought to the jury’s attention inasmuch as it appeared that the witness, defendant’s wife, would be favorable to him and hostile to the prosecution and the testimony would not be trivial or cumulative”].)

An exception to applying the missing witness rule to the defendant “obtains where the person not called as a witness by defendant is a codefendant, an accomplice not presently on trial, or one already adjudged guilty of perpetrating the same act or offense as that for which defendant is being prosecuted” (*People v De Jesus*, 42 NY2d 519, 525 [1977]), or a witness who would invoke the Fifth Amendment. (*Macana*, 84 NY2d at 178.)

Once a prima facie showing of a “missing witness” is established, a statement by the opposing party that the witness’s testimony would be cumulative or that the witness is not available, which is not supported by the record, does not rebut the prima facie showing. (*Smith*, 33 NY3d at 460 [the People’s “conclusory argument” that the “missing witness” would not “be able to provide anything that wasn’t provided by (the victim)” was “insufficient to satisfy the People’s burden in response to defendant’s prima facie showing”]; *People v Savinon*, 100 NY2d 192, 200 [2003] [“If unavailability could be established by a pro forma or unsupported assertion, a party (be it the defendant or the prosecution) might merely go through the motions of asking a witness to testify, or might ask with a ‘wink and a nod.’ The witness would thus be free to decline and thereby serve the party’s ulterior goal of keeping the witness off the stand”]; *Macana*, 84 NY2d at 178-179 [verification may be required “when the defendant is the only source of proof of either the existence of the uncalled witness or that favorable testimony of that witness would be self-incriminating”].)

People v Paylor (70 NY2d 146, 149 [1987]) set forth the inference the finder of fact may draw from a missing witness: “if the witness had been called [the witness] would not have supported the . . . testimony [of the party who did not call the witness] on the issue of which [the witness] possessed knowledge. If the fact finder elects to draw an inference from the failure to produce a witness, it may not speculate about what the witness would have said, nor may it assume that the witness could have provided positive evidence corroborating or filling gaps in the People’s proof. The inference is merely negative and allows the fact finder to infer

that the missing witness would not have supported or corroborated defendant's evidence."

For specific examples of where courts have held that the granting or denying of a "missing witness" instruction was proper, see PJI 1:75; Donnino, New York Court of Appeals on Criminal Law (ch 17, Evidence, part XII, Missing Witness [3d ed]).

Subdivision (3) is derived principally from *People v Carr* (14 NY3d 808, 809 [2010]), which held:

"A party seeking a missing witness instruction has the burden of making the request 'as soon as practicable.' Whether such a request is timely is a question to be decided by the trial court in its discretion, taking into account both when the requesting party knew or should have known that a basis for a missing witness charge existed, and any prejudice that may have been suffered by the other party as a result of the delay" (citation omitted).

See *Gonzalez* (at 427-428), explaining that in "some instances, [the information about a 'missing witness'] may be available prior to trial; at other times, it may not become apparent until there has been testimony of a witness at trial. In all events, the issue must be raised as soon as practicable so that the court can appropriately exercise its discretion and the parties can tailor their trial strategy to avoid 'substantial possibilities of surprise' " (citation omitted). A timely request may provide the respondent an opportunity to call the "missing witness" to avoid the adverse inference.

In *Carr*, the defendant's request for the adverse inference was not timely where the "defendant knew at the outset of the trial that the People did not intend to call three of the victim's relatives who were present at the time of the alleged crime" and the defendant made the request "more than a week after the People provided their witness list, and after the People had rested their case-in-chief." (*Carr* at 809; see *People v Gumbs*, 195 AD3d 450, 451 [1st Dept 2021] [defendant's request, made after the People had rested their case-in-chief, was properly denied as untimely]; *People v Torres*, 169 AD3d 506, 506-507 [1st Dept 2019] ["Although defendant was made aware at the end of jury selection that the People did not plan to call this witness, defendant waited until both sides had rested to make his request. Accordingly, the request was untimely"]; *People v Pearson*, 151 AD3d 1455, 1457 [3d Dept 2017] [the defendant was "aware that the CI would not testify at the conclusion of the People's case, but did not make this charge request until after the close of proof and, thus, the request was untimely"].)

Subdivision (4) sets forth a decisional law rule that the failure to request or the denial of the missing witness (adverse inference) charge does not preclude fair comment in summation on the failure of a party who presented evidence to call a witness.

Thus, the Court of Appeals has explained that, where a defendant introduced evidence in his defense, the prosecutor's comments in summation about the defendant's failure to call "significant witnesses" who were available and had material noncumulative information relevant to the defense "did not constitute an impermissible effort to shift the burden of proof," and the People were not "obliged" to satisfy the burden required for a missing witness charge because the summation "comments were not made in bad faith and were merely efforts to persuade the jury to draw inferences that supported the People's position." (*People v Tankleff*, 84 NY2d 992, 994-995 [1994]; see *People v Floyd*, 97 AD3d 837, 837 [2d Dept 2012] [where the defendant presented an alibi defense, "his failure to call significant witnesses in support of his defense may be brought to the jury's attention by the prosecutor, provided that the prosecutor's comments are not made in bad faith and are merely efforts to persuade the jury to draw inferences supporting the People's position"]; *People v Cochran*, 29 AD3d 365, 366 [1st Dept 2006] [fair comment on missing alibi witness]; see also *People v Katzman*, 161 AD3d 770, 771-772 [2d Dept 2018] [The prosecutor's comment highlighting the defendant's failure to produce documentary evidence that he testified established the truth of his defense was not improper].)

Similarly, even though a defendant may not be entitled to a "missing witness" charge, the defendant "may nonetheless try to persuade the jury to draw inferences from the People's failure to call an available witness with material, noncumulative information about the case." (*People v Williams*, 5 NY3d 732, 734 [2005].) Thus, in *Williams*, the defendant "was entitled to argue that the jurors should consider the People's failure to call the ghost [backup] officer to corroborate the single-witness identification in support of his defense that the People's evidence was uncorroborated and 'skeletal.'" (*Id.* at 734-735; *People v Thomas*, 21 NY3d 226, 231 [2013] [defense counsel had "no obligation to make an offer of proof as a predicate for a missing witness argument (in summation). It is a premise of such an argument, as it is of a missing witness instruction, that the witness is in the control of the party that failed to call him" (citation omitted)]; but see *People v Vega*, 37 AD3d 351, 352 [1st Dept 2007] [the "court properly precluded defendant from commenting in summation on the People's failure to call the buyer (of drugs) as a witness, and properly instructed the jury to disregard the buyer's absence from the proceedings. Defendant had no good faith basis for such a comment. The buyer's sole connection with the prosecution was adversarial" (citation omitted)].)

People v Modeste (1 Misc 3d 315, 316 [Sup Ct, Kings County 2003]) is instructive. There the defendant stabbed her boyfriend (the complainant) with a knife. Neither the prosecution nor the defendant called the complainant. The court ruled that neither was entitled to a “missing witness” charge: “The boyfriend’s status as a complainant would infer that he would provide testimony favorable to the prosecution’s version of the events. The family and living relationship between the defendant and her boyfriend indicate control by the defendant.” (*Id.* at 320 [citations omitted].) Instead, the court permitted the defense to comment on the missing complainant, and, if the defense did, the prosecutor to comment on “the boyfriend’s living and familial relationship with the defendant as well as his immigration issues.” (*Id.*)

Subdivision (5), paragraph (a), allows the trial court in its discretion to permit a party who may have an explanation for the absence of a favorable witness to introduce evidence of that explanation. (CJI2d[NY] General Applicability, A Party’s Failure to Call a Witness; PJI 1:75.)

A witness is clearly unavailable when the witness has died or become mentally or otherwise incapacitated or is unavailable as a matter of law, for instance, when the witness will invoke the privilege against compelled self-incrimination. In contrast, where a foundational requirement for the “missing witness” charge or the inference a party on summation asks the finder of fact to draw is in dispute, the finder of fact will need to resolve that issue, and thus have the information necessary to do so. (*See Gonzalez* at 431 [The party against whom the “missing witness” charge is directed “can seek to explain the witness’ absence by reference to evidence in the record”]; *People v Berg*, 59 NY2d 294, 300 [1983] [where the complainant in an assault case refused to testify, the Court held that the trial court’s decision to permit the People to call the complainant was not an abuse of discretion, “given the State’s strong interest both in attempting to induce this witness to testify and to avoid the unfavorable inference arising from a failure to produce the victim of the assault, coupled with the curative instruction concerning (the complainant’s) refusal to testify”].) In *Keen* (94 NY2d at 539-540), the court properly granted the People a “missing witness” instruction but left it to the jury to decide whether the witness was in “control” of the defendant.

Paragraph (b) is derived from *People v Thomas* (51 NY2d 466, 473-474 [1980]). In *Thomas*, the jury became aware that a witness for the defense “might possess information that would be helpful to the defendant’s case.” (*Id.* at 473.) That witness, however, was prepared to invoke the privilege against compelled self-incrimination. In that instance, the Court of Appeals held that “the trial court should, upon request, give the jurors a neutral instruction advising them that the witness has become unavailable for reasons beyond the defendant’s control and

that, consequently, no adverse inferences may be drawn from the witness' failure to appear." (*Id.* at 473-474.)