

[CAPTION]

MOTION FOR CONTINUANCE DUE TO ABSENCE OF WITNESS

The Defendant, by counsel, respectfully requests this Court, pursuant to I.C. 35-36-7-1 and Trial Rule 53.5, to grant a Motion for Continuance. In support of the Motion, the Defendant states the following:

1. The Defendant is charged with [insert offense(s)].
2. This cause is set for trial on [insert date].
3. A continuance is needed based on the facts set forth on the attached affidavit which is incorporated by reference as Exhibit A.
4. If a continuance is granted for a reasonable time, the Defendant believes the witness, [insert witness' name], will be available to testify.
5. Manifest injustice would result by requiring the trial of this cause to commence as scheduled.
6. Without this witness, the Defendant will be denied his constitutional rights to a fair trial, to compulsory process and to effective assistance of counsel. U.S. Const., Sixth and Fourteenth Amendments; Ind. Const., article I, sections 12 and 13.

WHEREFORE, the Defendant requests that this Court grant a Continuance for [specify time needed], and for all other relief just and proper in the premises.

(Signature)

REFERENCES

CASEBANK D.5.a


T.R. 53.5 (continuances; substantive requirements of affidavit; no postponement if adverse party will admit substance of evidence as true)


I.C. 35-36-7-1(b) (requirements of affidavit in support of motion to continue based on absence of witness)


I.C. 35-36-7-1(d) (must file affidavit not later than 5 days before date set for trial, but can file within five days if can establish to court that delay was not his fault).

I.C. 35-36-7-1(c)(1) (denial of motion if prosecutor stipulates absent witness' testimony)

CASE LAW

Randall v. State, [474 N.E.2d 76](#)  (Ind. 1985) (whether to grant an oral motion that did not comply with statutory time requirements was within discretion of trial court; since the Defendant did not propose any time period within which absent witness could be secured and since absent witness would have given same testimony substantially as was given by other alibi witnesses, the Defendant was not prejudiced by absence of testimony and trial court did not abuse its discretion in denying continuance).

Church v. State, [471 N.E.2d 306](#)  (Ind. 1984) (where prosecutor stipulated that absent witness would testify to facts alleged in the Defendant's affidavit, the trial court properly denied motion for continuance).

Vaughn v. State, [590 N.E.2d 134, 135](#)  (Ind. 1992) (it is well settled in Indiana that where a defense motion for a continuance is made because of the absence of a material witness or other material evidence and that motion satisfies the special statutory criteria for such motions as established by I.C. 35-36-7-1, and the prosecuting attorney refuses to admit that the absent witness would testify as alleged, or that the absent evidence exists in the form alleged, then that motion should be granted; even though motion did not comply with statute, it was an abuse of discretion to deny motion).

Flowers v. State, [654 N.E.2d 1124](#) [Shepardize](#) (Ind. 1995) (trial court abused its discretion in denying the Defendant's motion for one-day continuance in order to get DNA witness, where important interests of defense would have been satisfied, and nothing in record indicated that prosecution's interests would have been substantially undermined by delay; although motion for continuance did not comply with statutory requirements of IC 35-36-7-1, the court's decision in this case to deny continuance made it impossible for the Defendant to vindicate his rights, and thus violated due process).