

# CHAPTER TWELVE

## Continuances

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# CHAPTER TWELVE

## CONTINUANCES

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### I. MOTION BY DEFENSE

#### A. IN GENERAL

##### 1. Motions for Continuance are Not Favored

Continuances are not favored and are to be granted only in furtherance of justice on showing of proper ground. Keel v. State, 160 Ind.App. 707, 313 N.E.2d 711 (1974); Lee v. State, 439 N.E.2d 603 (Ind. 1982).

##### 2. Statutory Continuances

###### a. Grounds

Motions to postpone trial are more likely to be granted if they comply with the statutory form:

- (a) absence of evidence. Ind. Code § 35-36-7-1(a).
- (b) absence of witness. Ind. Code § 35-36-7-1(b).
- (c) illness of defendant or witness. Ind. Code § 35-36-7-1(e).

Gordon v. State, 609 N.E.2d 1085 (Ind. 1993) (set out each element of statutory basis for continuance in motion, especially elements relating to due diligence).

###### b. File No Later Than 5 Days Before Trial Date

Defendant must file affidavit for continuance no later than five days before date set for trial. If defendant fails to file affidavit by this time, defendant must show court he is not at fault for failing to file at earlier date. Ind. Code § 35-36-7-1(d).

###### c. Should be Granted

Defense motion for continuance should be granted because of absence of material witness or other material evidence where:

- the motion satisfies the special statutory criteria in Ind. Code § 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."

See Vaughn v. State, 590 N.E.2d 134 (Ind. 1992); and Carter v. State, 632 N.E.2d 757 (Ind. Ct. App. 1994).

Roberts v. State, 188 Ind. 713, 124 N.E. 750 (1919) (defendant who complied with statutory requirements was entitled to continuance due to absence of evidence unless prosecutor admitted the truth of the facts to which the absent witness would have

testified).

Torphy v. State, 188 Ind. 30, 121 N.E. 659 (1919) (whenever defendant brought himself within requirements of former statute, which related to continuance on account of absence of material witness, he could demand continuance as matter of right).

See also Cutler v. State, 42 Ind. 244 (1873).

### 3. Discretionary Continuances

Granting of a continuance on non-statutory grounds is within the trial court's discretion. Trial Rule 53.5.

The trial court should consider the adverse impact on the opposing party's interests and the benefit to the interests of the movant when deciding whether to alter the schedule. Vaughn v. State, 590 N.E.2d 134 (Ind. 1992).

Chinn v. State, 511 N.E.2d 1000 (Ind. 1987) (broken air conditioner did not justify continuance, despite alleged effect on counsel's performance and juror's attentiveness).

Brown v. State, 448 N.E.2d 10 (Ind. 1983) (no abuse of discretion in denying defendant's non-statutory motion for continuance to investigate allegations of juror misconduct in commenting on motive in arson/felony murder charge).

### 4. Adverse impact on Endangered Adult or Child under 16

Indiana Code § 35-36-7-3 requires court to consider whether postponement of trial or other court proceeding will have adverse impact on the alleged victim or witness who is an endangered adult or a child who is under 16 years old. The statute applies to criminal actions for felonies listed in Ind. Code § 11-8-8-4.5(a) (sex offenses), for neglect of a dependent (Ind. Code § 35-46-1-4), battery offenses included in Ind. Code § 35-42-2 if the victim is less than 18 or an endangered adult), and for attempts of those felonies (Ind. Code § 35-41-5-1).

If a motion is made to postpone a trial or other court proceeding that involves an offense in Indiana Code § 35-36-7-3(a), the court shall consider whether a postponement will have an adverse impact upon an endangered adult or a child less than 16 who is the alleged victim of an offense listed above or will be a witness in a trial. Ind. Code § 35-36-7-3(b).

Faulisi v. State, 602 N.E.2d 1032, 1040 (Ind. Ct. App. 1992) (court was within discretion to deny continuance of child molestation case, case had already been continued several times and another postponement might have had adverse effects on young witness).

### 5. Joint Motion by Defendant and Prosecutor

The court is not bound by agreement of parties to continuance. Zambrana v. State, 483 N.E.2d 59 (Ind. 1985).

**PRACTICE POINTER:** Courts are generally more willing to grant continuances when the parties make a joint motion, or when neither party objects.

## B. THREE STATUTORY GROUNDS

### 1. Absent Evidence

If a continuance is necessary due to absent evidence, motion must be made on affidavit showing that: (a) the evidence is material; (b) due diligence was used to try to obtain evidence; and (c) the location of the evidence. Ind. Code § 35-36-7-1(a).

Stout v. State, 528 N.E.2d 476 (Ind. 1988) (defendant requested a continuance to obtain records allegedly relevant to issue of sanity; denial of motion was not an abuse of discretion where nine months had elapsed since defendant's arrest and five months had elapsed since defense counsel filed notice regarding defense of mental disease or defect, and defendant failed to further specify steps to be taken and to identify precise additional time required to obtain additional evidence), *post-conviction relief granted* 580 N.E.2d 676, *appeal after new trial* 612 N.E.2d 1076.

Smith v. State, 496 N.E.2d 778 (Ind. Ct. App. 1986) (defendant was not entitled to continuance so that expert witness could observe accident scene; expert's affidavit did not allege absence of evidence and expert conceded he could develop sufficient information to reconstruct circumstances even without a continuance).

### 2. Absent Witness

When a defendant requests a continuance due to the absence of a material witness, and the statutory criteria are met, the defendant is entitled to a continuance as a matter of right. Macklin v. State, 701 N.E.2d 1247, 1250 (Ind. Ct. App. 1998). If a continuance is necessary due to an absent witness, the motion must be by affidavit. Yager v. State, 437 N.E.2d 454 (Ind. 1982). The affidavit must show:

- (a) name and address of witness, if known;

Brewer v. State, 449 N.E.2d 1091 (Ind. 1983) (no error in denying motion for continuance where defense counsel stated he did not know whereabouts of witnesses referred to by co-defendant during trial and didn't know what their testimony would be).

- (b) probability of procuring witness' testimony within reasonable time;

Smith v. State, 445 N.E.2d 85 (Ind. 1983) (defendant's failure to show witnesses would be located with overnight recess negates court's abuse of discretion); see also Blackburn v. State, 130 N.E.3d 1207 (Ind. Ct. App. 2019).

- (c) absence of witness had not been procured by act of defendant;

- (d) facts to which defendant believes witness will testify, with statement that defendant believes those facts are true; and

Smith v. State, 445 N.E.2d 85 (Ind. 1983) (specific substance of testimony not indicated)

- (e) unable to prove facts by other witness whose testimony can be as readily procured.

Pearson v. State, 441 N.E. 2d 468 (Ind. 1982) (no error where other defense witness testified as to effects of hypnosis and there was no showing absent expert could provide additional facts).

Ross v. State, 844 N.E.2d 537 (Ind. Ct. App. 2006) (no error in denial of defendant's oral motion for continuance on day of trial due to an unavailable witness; record did not reflect that defendant would be able to procure the witness's testimony within a reasonable time).

**a. Prerequisites for Continuance**

**(1) Subpoena**

Defendant must properly subpoena witnesses or run risk of having continuance denied. Rowe v. State, 444 N.E.2d 303 (Ind. 1983); Shoultz v. State, 995 N.E.2d 647 (Ind. Ct. App. 2013).

**(2) No Continuance if Prosecutor Admits Facts**

Trial may not be postponed if:

- (1) Prosecuting attorney admits absent witness will testify to facts as stated by defendant; or
- (2) Prosecuting attorney admits written or documentary evidence exists.

Walker v. State, 471 N.E.2d 1089 (Ind. 1984) (prosecutor required to stipulate absent witness would testify in manner outlined in affidavit. Prosecutor need *not* admit witnesses' statements true).

See Ind. Code § 35-36-7-1(c).

**(3) Alibi Witness**

Brown v. State, 516 N.E.2d 29 (Ind. 1987) (despite conformity with I.C. § 35-36-7-1(b), defendant not entitled to continuance based upon sheriff's inability to locate and serve subpoena upon defendant's sole alibi witness; sheriff testified that after considerable effort, he had exhausted all leads trying to locate witness and defendant offered no evidence witness's testimony could be procured within reasonable time).

Randall v. State, 474 N.E.2d 76 (Ind. 1985) (no abuse in denying defendant's motion for continuance during trial after subpoenaed alibi witness failed to appear and court issued arrest warrant. No written affidavit filed nor was lack of timeliness explained).

Woodfork v. State, 594 N.E.2d 468 (Ind. Ct. App. 1992) (defendant not prejudiced when judge refused to continue trial to permit defense witness to obtain sign-in log that would have allegedly corroborated defendant's alibi claim where witness testified regarding contents of log, including time defendant had signed out on day of crime).

#### (4) Examples - Failure to Show Materiality of Witness

There is no constitutional violation in denying a continuance when the absent witness cannot provide personal observations regarding material evidence. Marshall v. State, 621 N.E.2d 308 (Ind. 1993); United States v. Tanner, 941 F.2d 574 (7th Cir. 1991).

Gebhart v. State, 525 N.E.2d 603 (Ind. 1988) (defendant not prejudiced by court's refusal to grant continuance requested on morning of trial to secure attendance of witness who was occupied in another courtroom at time of trial; defendant did not offer to prove specific facts to which witness would testify, and defense counsel indicated witness could not establish alibi for defendant).

Perry v. State, 541 N.E.2d 913 (Ind. 1989) (continuance not required to permit defendant to locate two witnesses mentioned as being present at time of drug sale in tape-recorded interview with person claimed by defendant to be actual seller of controlled substances; sale was alleged to have been made in defendant's house in his presence and defendant would have known of existence of these individuals apart from tape recording).

### 3. Illness

Pursuant to Ind. Code § 35-36-7-1(e),

If a motion for a continuance is based on the illness of the defendant or of a witness, it must be accompanied by:

- (1) Oral testimony, given in open court; or
- (2) A written statement;

of a physician or hospital official having the care or custody of the defendant or witness, presenting the nature of the illness and the probable duration of the person's incapacity to attend trial. Such a written statement must be sworn to by the person making the statement before an officer authorized to administer an oath. The court may appoint a physician to examine the defendant or witness and report to the court on the nature of the person's illness and of his incapacity to attend trial. The court shall by order provide for compensation for such a physician.

#### a. Defendant's Illness

Kindred v. State, 521 N.E.2d 320 (Ind. 1988) (*pro se* defendant not entitled to continuance because of laryngitis; physician determined defendant's voice would not get any worse or become permanently afflicted, and on day motion was heard, defendant argued *pro se* numerous motions at length thus demonstrating ability to speak).

Clarkson v. State, 486 N.E.2d 501 (Ind. 1985) (no abuse of discretion in denial of defendant's motion for continuance on day of trial; defense counsel's assertion that proceeding with trial would be detrimental to defendant's health insufficient).

#### b. Witness' Illness

Vaughn v. State, 590 N.E.2d 134 (Ind. 1992) (defendant was entitled to continuance

when a defense witness was in labor on the morning of trial, even though an audiotape of her testimony at earlier trial was available; her testimony directly conflicted with State's evidence, defense counsel first became aware of witness's labor on morning of trial, and prospective jurors had not yet been questioned).

### C. NON-STATUTORY GROUNDS - TR 53.5

Judge has broad discretion to grant or to deny continuances. See Morris v. Slappy, 461 U.S. 1, 11-12 (1983); Crabtree v. State, 470 N.E.2d 725 (Ind. 1984).

**PRACTICE POINTER:** The trial court's discretion is not absolute, so protect the record by making a detailed statement of the reasons why a continuance is needed.

#### 1. Continuance as Remedy to Discovery Abuses

A continuance is usually the proper remedy for the State's failure to comply with discovery. Vanway v. State, 541 N.E.2d 523 (Ind. 1989). See IPDC Pretrial Manual, Chapter 6.

Taylor v. State, 515 N.E.2d 1095 (Ind. 1987) (trial court did not abuse discretion in denying defendant's motion for continuance based on State's disclosure of criminal history of State's witness only six days prior to defendant's trial, where defense counsel able to thoroughly explore, on cross-examination, witness' criminal history and his motives for testifying; no showing additional time for investigation or consultation would have better equipped defense counsel to conduct cross-examination).

Smith v. State, 475 N.E.2d 27 (Ind. 1985) (prosecutor filed additional discovery last working day before trial; denying defendant's motion for continuance was not error; allowing defendant 30 minutes to speak to each of two new witnesses listed was an adequate remedy).

##### a. Exercise Due Diligence before Trial

A trial court does not abuse its discretion by denying a continuance when the defendant has not been diligent in seeking information before trial.

##### (1) Depositions

Day v. State, 643 N.E.2d 1 (Ind. Ct. App. 1994) (although State filed notice one day before trial of three witnesses that would provide 404(b) prior sexual misconduct evidence, denial of continuance did not prejudice defendant or deny him opportunity to interview witnesses before they testified).

Brewer v. State, 449 N.E.2d 1091 (Ind. 1983) (not abuse of discretion to deny continuance during trial to take co-defendant's deposition, when defendant knew in advance that co-defendant would testify).

Caccavallo v. State, 436 N.E.2d 775 (Ind. 1982) (defendant failed to move to depose child/victim of molest until five days prior to trial although prosecutor previously agreed to cooperate. Motion for continuance day of trial properly denied).

When events beyond the defendant's control frustrated discovery, denying the

defendant a continuance may be an abuse of discretion.

Brewer v. State, 362 N.E.2d 1175 (Ind. Ct. App. 1977) (witnesses failed to appear at deposition before trial as ordered; reversible error to deny defendant's motion for continuance).

## **(2) Disclose Witnesses**

Counciller v. State, 466 N.E.2d 456 (Ind. 1984) (defendant knew five months before trial that the State had failed to disclose the names and addresses of some witnesses but waited until the day of trial to request a continuance. No error in denying motion and compelling State to disclose all witnesses and addresses, resulting in 11 new witnesses' names), *overruled on other grounds by* Wright v. State, 658 N.E.2d 563, 570 (Ind. 1995).

## **2. Witnesses**

### **a. Continuance to Recall or Interview Witness**

Jackson v. State, 575 N.E.2d 617 (Ind. 1991) (no abuse of discretion in denying continuance to permit defendant to recall attempted murder victim for additional examination regarding description of perpetrator; victim identified defendant by name on date of shooting).

Robinson v. State, 512 N.E.2d 855 (Ind. 1987) (continuance, rather than exclusion of victim's testimony, was proper remedy for victim's lack of cooperation and failure to permit defendant to interview her until day before trial when State cooperated with defendant in attempting to facilitate conference with victim and agreed to continuance).

Barber v. State, 911 N.E.2d 641 (Ind. Ct. App. 2009) (trial court erred in denying defense motion for continuance filed on morning of bench trial, where two new witnesses had just been discovered who supported defense of involuntary intoxication, where there was no evidence of bad faith on part of defense; in light of due process right to present defense, lack of substantial prejudice to state, and no jury trial to reschedule, trial court should have granted continuance).

But see Laster v. State, 956 N.E.2d 187 (Ind. Ct. App. 2011) (no abuse of discretion to deny continuance based on new potential witness, when there was no apparent likelihood of locating witness and jury trial would need to be rescheduled).

### **b. Witness' Pretrial Statement**

Kindred v. State, 540 N.E.2d 1161 (Ind. 1989) (refusal to grant continuance so defendant could review State witness's pretrial statement given to him approximately ten minutes before trial did not prejudice defendant in prosecution for forgery and theft; defendant failed to point to any inconsistencies between pretrial statement and witness' testimony).

### **c. Surprise Witness**

Defendant must show resulting harm from court's denial of motion because of the surprise.



Hergenrother v. State, 215 Ind. 89, 18 N.E.2d 784 (1939) (error to deny continuance where surprise witness testified to defendant's commission of other crimes wholly independent of that for which defendant was on trial).

Johnson v. State, 384 N.E.2d 1035 (Ind. Ct. App. 1979) (abuse of discretion to deny motion for one-day continuance to depose surprise State expert who would testify on likelihood of accidental discharge of gun).

Cf. Roller v. State, 602 N.E.2d 165 (Ind. Ct. App. 1992) (denial of continuance, sought after State decided six days before trial to call person involved in drug transaction with which defendant was charged, was not abuse of discretion; trial court could properly determine that six days was sufficient time to prepare for cross examination of witness).

Rowe v. State, 496 N.E.2d 585 (Ind. Ct. App. 1986) (not abuse of discretion to deny defendant's request for one-month continuance as result of decision to admit testimony of newly discovered witnesses for State, given defense counsel's extensive and effective cross-examination of witnesses and trial court's granting one day continuance).

Hopper v. State, 489 N.E.2d 1209 (Ind. Ct. App. 1986) (where the State had earlier provided defendant with copies of statements by adult witnesses containing child's statement, defendant's claim that the prosecutor failed to inform him of the State's intention to offer the child's statement did not entitle him to a continuance on the morning of a hearing on the child's competency to testify).

### **3. Continuance to Substitute or to Obtain Counsel**

#### **a. Violation of Right to Counsel**

Denial of continuance to obtain counsel, or counsel of one's choice, may violate the right to counsel. See Lewis v. State, 730 N.E.2d 686 (Ind. 2000) for a discussion and overview of the law. See also the discussion of the right to counsel of one's choice at IPDC Pretrial Manual, Chapter 15 § II.A and § II.B.

Forcing a defendant to proceed to trial without counsel has been held to violate the Canons of Judicial Conduct.

Matter of Cox, 680 N.E.2d 528 (Ind. 1997) (judge violated Canons 1, 2A, 3B(2), and 3B(9) by misrepresenting the law to a defendant and forcing her to choose between proceeding to trial without counsel, or exercising her right to counsel and facing contempt and incarceration).

Continuances sought shortly before trial to hire a new attorney are disfavored. Lewis v. State, 730 N.E.2d 686 (Ind. 2000).

Lewis v. State, 730 N.E.2d 686 (Ind. 2000) (not an abuse of discretion to deny continuance on morning of trial where private counsel stated that he would not enter appearance unless a continuance was granted, and public defender who had been on the case for eight months stated that she was ready to go to trial that day);

Vacendak v. State, 431 N.E.2d 100, 105 (Ind. 1982) (whether denial of request for continuance to obtain counsel is violation of Sixth Amendment depends on facts of each case).

Rice v. State, 220 Ind. 523, 44 N.E.2d 829 (1942) (trial court permitted defendant's attorneys to withdraw day before trial; defendant attempted to secure other counsel, but no lawyer would accept his case without a continuance; trial court refused to grant continuance, forcing defendant to appear *pro se*; court overturned conviction, quoting Powell v. Alabama, 287 U.S. 45, 53 (1932), for proposition that in such situations trial courts should either deny motion to withdraw or permit continuance).

Sixth Amendment concerns require less drastic available alternatives be considered before forcing unrepresented defendant to go to trial. Fitzgerald v. State, 254 Ind. 39, 257 N.E.2d 305 (1970); Poynter v. State, 749 N.E.2d 1122 (Ind. 2001).

Cf. Ungar v. Sarafite, 376 U.S. 575, 84 S.Ct. 841 (1964) (five days to hire defense counsel is not too short a time to require of defendant who is an attorney. Denial of continuance was discretionary).

Olson v. State, 563 N.E.2d 565 (Ind. 1990) (trial court did not abuse discretion when it refused to continue case even though counsel had been appointed just two days prior to trial; appointed counsel was familiar with case and had been defendant's proper counsel for months before trial but had been removed at defendant's request).

Hamilton v. State, 864 N.E.2d 1104 (Ind. Ct. App. 2007) (no abuse in discretion where trial court denied defendant's motion for continuance when counsel learned of additional charges the day before trial; any prejudice that inured to defendant was caused by her own delay in hiring counsel two days before the jury trial).

#### **b. First Motion for Continuance**

Appellate courts will scrutinize the denial of a first motion for continuance more closely than subsequent motions.

Suits v. State, 451 N.E.2d 375 (Ind. Ct. App. 1983) (court abused discretion in denying defendant's first motion for continuance to obtain counsel where request was justifiable), *disapproved on other grounds by* Kimberling v. State, 520 N.E.2d 442, 444 (Ind. 1988)

#### **c. Impeding Judicial Process**

Untimely motions impeding judicial process may be denied without error.

Turner v. State, 508 N.E.2d 541 (Ind. 1987) (denial of continuance on first day of trial to replace appointed counsel and hire private attorney was not abuse of discretion where defendant's disagreement with counsel regarding acceptance of plea bargain had been going on for some time, and defendant had already had adequate time to find new counsel).

Risner v. State, 604 N.E.2d 13 (Ind. Ct. App. 1992) (denying motion for continuance made by substitute counsel the day before trial was not an abuse of discretion;

defendant retained new counsel after a previous motion for continuance was denied; defendant's decision to discharge counsel revealed a desire to circumvent judicial process and earlier ruling, and the defendant knew that the State would vigorously oppose motion), *overruled in part on other grounds by Robinson v. State*, 805 N.E.2d 783, 794 (Ind. 2004)

Denial by court is not improper if motion is merely a dilatory tactic.

Timm v. State, 644 N.E.2d 1235 (Ind. 1994) (no error in denying defendant's motion for continuance, where defendant changed counsel on Friday before trial. Defendant not abandoned by counsel and in no danger of having to represent himself. Trial judge fully informed defendant of possible adverse consequences of changing representation so close to trial, indicating that new attorneys would not be well prepared for trial. Parties may not manipulate judicial process by using motion to withdraw as counsel to secure continuance at eleventh hour).

Jones v. State, 449 N.E.2d 1060 (Ind. 1983) (defendant moved for new counsel day of trial based on fact that public defender had once been a prosecutor. No showing defendant could not obtain new counsel. Court believed continuance was a delaying tactic by the defendant), *overruled on other grounds by Seay v. State*, 698 N.E.2d 732, 734-735 (Ind. 1998).

Minneman v. State, 466 N.E.2d 438 (Ind. 1984) (no abuse of discretion in refusing defendant's request for continuance to prepare for trial; defendant elected to dismiss his attorney and proceed *pro se* the morning of trial).

#### **d. To Obtain Private Counsel**

See IPDC Pretrial Manual, Chapter 15, Right to Counsel.

### **4. Unavailability of Counsel**

#### **a. Due to Illness**

Trial courts have wide discretion to grant recesses and continuances when the illness of defense counsel requires it.

Morris v. Slappy, 461 U.S. 1, 103 S.Ct. 1610 (1983) (defendant's midtrial motion for continuance, because his original public defender unavailable due to emergency surgery, was not timely, where original counsel became ill six days before trial and substitute counsel stated he was fully prepared and "ready" for trial).

Schumann v. State, 360 N.E.2d 277, 172 Ind.App. 383 (1977) (denial of defendant's motion for continuance on grounds of trial counsel's illness was not abuse of discretion absent a showing of prejudice).

#### **b. Due to Scheduling Conflict**

When counsel represents that they cannot meet the set trial date and requests a continuance, the court must weigh the defendant's right to counsel of his choice, as well as the public's interest in prompt and efficient administration of justice. Smith v. State,

452 N.E.2d 160, 164 (Ind. Ct. App. 1983).

Key factors:

- (1) Length of delay requested;
- (2) Prior continuances requested;
- (3) Inconvenience to other parties;
- (4) Basis for delay;
- (5) Whether defendant contributed to underlying circumstances;
- (6) Co-counsel availability;
- (7) Prejudice to defendant from denial;
- (8) Complexity of case;
- (9) Other relevant factors.

Gordon v. State, 609 N.E.2d 1085 (Ind. 1993) (defense counsel's involvement in another felony jury trial at time defendant's trial was scheduled to commence did not entitle defendant to continuance; discovery had been completed and counsel could not point to any area in which he was unprepared for trial, and record did not demonstrate that trial counsel failed to vigorously defend client or was unprepared in any respect).

## 5. Amending Pleadings

Upon permitting an amendment to an information or indictment, the trial court shall, upon motion by the defendant, order any continuance of the proceedings which may be necessary to accord the defendant adequate opportunity to prepare the defendant's defense. Ind. Code § 35-34-1-5(d). This statute does not mandate a continuance; rather, the trial court's decision on a continuance motion is reviewed for an abuse of discretion. Henderson v. State, 173 Ind.App. 505, 508, 364 N.E.2d 175, 177 (1977). A defendant's failure to seek a continuance under this section to allow "adequate opportunity to prepare his defense" will preclude appellate review of his claim of permitting prejudicial pretrial amendment of information. Riley v. State, 506 N.E.2d 476, 478 (Ind. 1987); Wilson v. State, 931 N.E.2d 914, 917 (Ind. Ct. App. 2010).

Howard v. State, 122 N.E.3d 1007 (Ind. Ct. App. 2019) (trial court abused its discretion in permitting State to amend charging information without giving defendant reasonable time to develop defense against new charges).

### a. Adding Habitual Offender Charge

The State may be permitted to add allegation of habitual offender status at any time up to the moment of trial upon a showing of good cause if the amendment does not prejudice the defendant. Ind. Code § 35-34-1-5(e). However, if the court allows a habitual offender charge to be filed less than 30 days before trial, "the court shall grant a continuance" if the defendant requests one "for any reason." Ind. Code § 35-34-1-5(e)(2).

### b. Pending Postconviction Proceedings

Stanek v. State, 587 N.E.2d 736 (Ind. Ct. App. 1992) (defendant was not entitled to a continuance to await completion of post-conviction challenges of previous guilty pleas

from predicate offenses for instant habitual offender charge; enhanced sentence would be vacated later if post-conviction challenges were successful), *aff'd in part, vacated in part on other grounds* 603 N.E.2d 152 (Ind.).

## 6. Pretrial Publicity

Continuances because of pretrial publicity are discretionary. But the defendant's right to a fair trial limits the trial court's discretion. See Resnover v. State, 460 N.E.2d 922 (Ind. 1984).

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 563-64 (1976) (prejudicial publicity or public hostility that threatens to impair defendant's constitutional right to trial by impartial jury may also support a motion for "postponement of the trial to allow public attention to subside").

Patton v. Yount, 467 U.S. 1025, 1034, 104 S.Ct. 2885 (1984) ("That time soothes and erases [public prejudice] is a perfectly natural phenomenon, familiar to all.").

Before a defendant is entitled to a continuance to reduce effect of pretrial publicity, he or she must show prejudice. Eguia v. State, 468 N.E.2d 559 (Ind. Ct. App. 1984).

Drollinger v. State, 274 Ind. 5, 408 N.E.2d 1228 (1980) (no error where defendant failed to show that continuing trial would have decreased the amount of media attention or made it less likely that juror would hear about the case).

Taylor v. State, 515 N.E.2d 1095 (Ind. 1987) (court did not err in denying defendant a continuance to subpoena radio transcripts to show pretrial publicity; the cautious and extensive *voir dire* process was sufficient to weed out potential jurors who might not have been impartial; counsel could effectively question jurors about newspaper articles on the trial; and if the radio broadcasts in question had contained something not in the newspaper articles, the information should have surfaced from interviews with the potential jurors who had heard the broadcasts).

See IPDC Pretrial Manual, Chapter 5, Change of Venue.

## 7. Additional Preparation Time

### a. Disfavored

Continuances to allow more time for preparation are generally disfavored in criminal cases and will only be granted in furtherance of justice. Risner v. State, 604 N.E.2d 13 (Ind. Ct. App. 1992), *overruled in part on other grounds by Robinson v. State*, 805 N.E.2d 783, 794 (Ind. 2004).

Robinson v. State, 91 N.E.3d 574 (Ind. 2018) (trial court did not abuse its discretion in denying defendant's last-minute motion to continue his sentencing hearing).

Gibson v. State, 43 N.E.3d 231 (Ind. 2015) (trial court did not err in denying defendant's request for a fourth continuance; he made no showing how additional time would aid or avoid harm to him or why two full months was not sufficient time to get the remainder of discovery completed).

Hazelwood v. State, 609 N.E.2d 10 (Ind. Ct. App. 1993) (denial of defendant's motion for additional continuance to allow more time for preparation was not abuse of discretion, where motion was made immediately before scheduled trial date, trial court knew that State's presentation would be lengthy, and defense counsel had additional time to prepare during State's presentation).

Jackson v. State, 758 N.E.2d 1030 (Ind. Ct. App. 2001) (defendant's receipt of formal report setting forth DNA test results two weeks before trial was not sufficient cause for grant of non-statutory continuance, where defendant had been informed of results, orally and by letter, two weeks before receiving official report, and defendant had same amount of time to analyze results as did the State).

Carter v. State, 512 N.E.2d 158 (Ind. 1987) (continuance to prepare for trial when discovery materials arrived late was not improperly denied; no compromise of defendant's right to counsel shown).

Davis v. State, 487 N.E.2d 817 (Ind. 1986) (trial court did not abuse discretion in denying defendant's motion for continuance to allow him to prepare insanity defense, where time shortage was because the defendant did not advise counsel of defense sooner, and defendant failed to show how continuance would have assisted in preparing better insanity defense).

Hamilton v. State, 864 N.E.2d 1104 (Ind. Ct. App. 2007) (no abuse of discretion where trial court denied defendant's motion for continuance when counsel learned of additional charges the day before trial; any prejudice that inured to defendant was caused by her own delay in hiring counsel two days before the jury trial).

Evans v. State, 855 N.E.2d 378 (Ind. Ct. App. 2006) (no abuse of discretion where court denied continuance despite fact defendant received PSI one day before sentencing and defendant wanted to hire sentencing consultant who might be able to compile mitigation evidence. See also Echeverria v. State, 146 N.E.3d 943, 951 (Ind. Ct. App. 2020).

Hyppolite v. State, 774 N.E.2d 584 (Ind. Ct. App. 2002) (it should not have occurred to defendant for first time on morning of trial that he might want a voice expert to examine audiotape of charged undercover drug transaction).

#### **b. Denial of Right to Fair Trial**

Defense motions for continuance on grounds that counsel is being rushed and has inadequate opportunity to prepare for trial should be grounded in the defendant's federal and state constitutional rights to counsel and a fair trial. It should not be based solely to the general equities of the situation. Denials of ample time for defense preparation have been held to violate those constitutional guarantees.

Powell v. Alabama, 287 U.S. 45, 71, 53 S. Ct. 55 (1932) (Sixth Amendment right to counsel guarantees more than that the defendant should have a lawyer. It assures "effective aid in the preparation and trial of the case.").

Vance v. State, 640 N.E.2d 51 (Ind. 1994) (where two days elapsed between time counsel was appointed and the juvenile waiver hearing, a continuance was required

for the statutorily required full investigation to take place).

Ramirez v. State, 186 N.E.3d 89, 99 (Ind. 2022) (holding “it is unrealistic to expect the defense, within a few hours, to investigate... new allegations, evaluate the evidence, adapt trial strategy, and complete final preparations.”).

See IPDC Pretrial Manual, Chapter 12 § I.C.5, *above*.

## **8. Plea Bargaining**

### **a. In Progress**

Where the defendant does not make a showing of prejudice, the trial court has discretion to deny a non-statutory motion for continuance, even where the defendant may lose the opportunity to plea bargain as a result.

Zambrana v. State, 483 N.E.2d 59 (Ind. 1985) (factual basis inadequate where five months’ time had been available).

### **b. Co-Defendant Pleads Guilty**

Castile v. State, 492 N.E.2d 287 (Ind. 1986) (defendant not harmed by co-defendants’ decisions to plead guilty. Co-defendants did not testify, and State made no reference to co-defendants during trial; no error in denying continuance).

## **9. Competency Re-Examination**

Lewis v. State, 512 N.E.2d 1092 (Ind. 1987) (trial court properly denied motion where defendant requested continuance on morning of trial for competency reexamination; court had appointed two doctors to examine defendant less than one month prior to trial).

Anderson v. State, 466 N.E.2d 27 (Ind. 1984) (epileptic seizure during trial; no error in denying continuance after one-hour recess for examination and treatment, where counsel acknowledged he was not having communication problems with defendant).

## **10. Street Clothes for Defendant**

Shackelford v. State, 498 N.E.2d 382 (Ind. 1986) (denial of continuance so that defendant could obtain clothing to wear to trial did not deprive defendant of fair trial, where the defendant failed to show that he was compelled to go to trial in clothes in which he appeared before jury and did not allege or show that such clothing was readily identifiable as jail attire).

Green v. State, 470 N.E.2d 333 (Ind. 1984) (defendant waived right to be present during jury selection expressly and voluntarily, even though the only alternative was to appear before the jury in jail clothes; the defendant had ample time to arrange for civilian clothing and did not request a continuance or object to court’s statement that they would proceed).

## **11. Trying Defendant in Absentia**

Fletcher v. State, 537 N.E.2d 1385 (Ind. 1989) (denying motion for continuance and trying defendant in absentia was not an abuse of discretion, where defendant was present when trial

date was set, had absconded, and his whereabouts were unknown).

## 12. Newly Discovered Evidence

Wine v. State, 539 N.E.2d 932 (Ind. 1989) (denying defendant's pretrial motion for continuance due to newly discovered evidence was not abuse of discretion; defendant discovered just prior to trial that witness for prosecution had attempted suicide a few days earlier; attempted suicide was placed in evidence and witness was questioned at length concerning episode, and he testified in a very lucid and forthright manner, both on direct and cross-examination).

Silvers v. State, 114 N.E.3d 931 (Ind. Ct. App. 2018) (denial of continuance to investigate jail phone call recordings did not violate due process because recordings did not prejudice defendant).

## D. APPELLATE REVIEW

### 1. Denial Based on Non-Statutory Grounds

The appellate courts will review claims of trial court error in denying non-statutory continuances for abuse of discretion, which involves a two-step inquiry. Ramirez v. State, 186 N.E.3d 89, 96 (Ind. 2022). First, the reviewing court considers whether the trial court properly evaluated and compared the parties' diverse interests that would be impacted by altering the schedule, and if not, whether prejudice resulted. Id.

See also Carter v. State, 632 N.E.2d 757 (Ind. Ct. App. 1994) and Ind. Trial Rule 53.5.

#### a. Requires Showing of Prejudice

For denial of continuance to be reversible error, the defendant must demonstrate the prejudicial abuse of discretion by a specific showing that additional time would have aided the defense. Clark v. State, 539 N.E.2d 9, 11 (Ind. 1989).

Vaughn v. State, 590 N.E.2d 134 (Ind. 1992) (denying defendant's motion for continuance was error; basis for defendant's motion clearly predominated over prejudice to State, material witness was in labor and prospective jurors had not been questioned; even though court admitted audiotape of testimony of defendant's witness from first trial, which resulted in hung jury).

Ramirez v. State, 186 N.E.3d 89 (Ind. 2022) (trial court erroneously denied defendant's motion for continuance to review new evidence submitted one day before trial; defendant made specific showings as to why additional time was necessary and how it would have benefitted the defense).

Rhinehardt v. State, 477 N.E.2d 89 (Ind. 1985) (although defendant specifically alleged in his motion to correct errors what the objects of further investigation would have been, he failed to demonstrate that the absence of such evidence established the specific harm requisite to showing of an abuse of trial court's discretion in denying his motion for a continuance).



## 2. Denial Based on Statutory Grounds

Trial court has less discretion in ruling on statutory motions for continuance. Appellate review of such denials is stricter. Vaughn v. State, 590 N.E.2d 134 (Ind. 1992).

Vaughn v. State, 590 N.E.2d 134 (Ind. 1992) (convictions reversed, denial of defendant's motion prejudiced defense at trial; defendant requested continuance to permit defense witness to personally appear at trial and to give her live testimony before jury, clearly predominates over basis for opposition to motion presented by prosecution).

Denial of continuance where a motion does not comply with statutory form is within the trial court's discretion. Chinn v. State, 511 N.E.2d 1000 (Ind. 1987).

Appellate court will review the denial under an abuse of discretion standard only after defendant shows prejudice. Gordon v. State, 609 N.E.2d 1085 (Ind. 1993).

## II. MOTION BY PROSECUTOR

### A. IN GENERAL

#### 1. Statutory Continuance - Required When Witness Absent

Prosecutor may move to postpone a trial because of the absence of a witness whose name is endorsed on the indictment or information. Ind. Code § 35-36-7-2(a).

Akins v. State, 429 N.E.2d 232 (Ind. 1981) (not reversible error to grant State's motion for continuance for absence of witness whose name was not endorsed on the indictment where defendant was fully informed concerning witness and her anticipated testimony and had ample time thereafter to prepare for trial).

McIntyre v. State, 460 N.E.2d 162 (Ind. Ct. App. 1984) (defendant cannot claim surprise upon learning State intended to call alleged victims as witnesses in attempting to prove commission of offenses; record showed State was ordered to furnish defense with list of all witnesses and copies of their written statements and summaries of any oral statements and defendant made no claim of noncompliance with discovery order).

#### a. Requirements

Pursuant to Ind. Code § 35-36-7-2(a):

- (a) A prosecuting attorney may move to postpone the trial of a criminal cause because of the absence of a witness whose name is endorsed on the indictment or information, if he makes an official statement:
  - (1) containing the requirements of subsections (b) (1) and (b) (2) of section 1 of this chapter;
  - (2) showing that the absence of the witness has not been procured by the act of the prosecuting attorney;
  - (3) stating the facts to which he believes the witness will testify, and include a statement that he believes these facts to be true; and
  - (4) stating that the prosecuting attorney is unable to prove the facts specified in

accordance with subdivision (3) through the use of any other witness whose testimony can be as readily procured.

Upon request of the defendant the court shall order that the prosecuting attorney's motion and official statement be made in writing.

The prosecutor's motion may be made orally, absent a request by the defendant that the motion be in writing. Kleinrichert v. State, 260 Ind. 537, 297 N.E.2d 822 (1973).

Sims v. State, 267 Ind. 215, 368 N.E.2d 1352 (1977) (no error in granting State's oral motion for continuance where record disclosed no request from defendant that motion be made in writing).

#### **b. Timeliness of Motion**

Indiana Code § 35-36-7-2 makes no mention of a time for making the request for a continuance. Under the predecessor statute, the prosecuting attorney had to make motion for continuance at least five days before the date set for trial. Ind. Code § 35-1-26-2 [repealed 1981.]

### **2. Avoiding State's Continuance**

A trial may not be postponed if after a motion by the prosecuting attorney because of the absence of a witness, the defendant admits that the absent witness would testify to the facts as alleged by the prosecuting attorney in his official statement. See Ind. Code § 35-36-7-2(b)(1).

**PRACTICE POINTER:** Defendant need not admit facts are true, only that the witness would testify as indicated in prosecution's affidavit. Request an instruction concerning stipulation, both preliminary and final.

Likewise, the trial may not be postponed if, after a motion by the prosecuting attorney to postpone because of the absence of written or documentary evidence, the defendant admits that the written or documentary evidence exists. Ind. Code § 35-36-7-2(b)(2).

Hill v. State, 773 N.E.2d 336, 345 (Ind. Ct. App. 2002) (trial court committed error in granting State's motion to continue trial despite defendant's stipulation to certain evidence but error was harmless under the circumstances).

### **3. Non-Statutory Continuances**

Motions for continuance not based upon statutory grounds, or not made in compliance with the statute, are granted within the broad discretion of trial court. King v. State, 531 N.E.2d 1154, 1157 (Ind. 1988).

#### **a. Reviewed for Abuse of Discretion**

Trial court will not be reversed on appeal absent an abuse of discretion prejudicing the complaining party. Gregory v. State, 259 Ind. 295, 286 N.E.2d 666, 668 (1972).

Kindred v. State, 524 N.E.2d 279 (Ind. 1988) (State properly granted continuance

two days before scheduled trial due to unavailability of two witnesses, although State's motion was arguably deficient with respect to one witness because it neither stated facts to which State believed witness would testify nor stated that State was unable to prove same facts through use of another witness, and second witness's name was not listed on information).

McConnell v. State, 436 N.E.2d 1097 (Ind. 1982) (court did not abuse its discretion in granting one day continuance to State, despite claim statutory rules not followed; defendant did not ask court for relief with regard to one-day continuance at time it was granted or show in what way he was harmed, trial court had justifiable ground for granting continuance in that State had another trial set for same day in same court and certified copies of defendant's prior felony convictions were not yet available).

Crocker v. State, 563 N.E.2d 617 (Ind. Ct. App. 1990) (no abuse of discretion in granting continuance to State upon witness' failure to appear for trial, even though State failed to produce witness' address, if known, and prosecutor's statements may not have been sufficient to show that witness could be procured within reasonable time, where defendant made no showing that he was in any way prejudiced by continuance).

For argument that courts use double standard when excluding defense witnesses. See IPDC Pretrial Manual, Chapter 6, Discovery.

**b. Alibi Evidence**

Dorsey v. State, 490 N.E.2d 260 (Ind. 1986) (State was properly granted motion for continuance, where defendant did not file notice of his alibi until six days before trial date; the State, in an attempt to determine what evidence would be used in support of defendant's alibi, became aware of co-defendant's testimony that another person was responsible for the burglary, and the police needed to make fingerprint comparisons), *overruled in part on other grounds by* Wright v. State, 658 N.E.2d 563, 570 (Ind. 1995).

**c. Newly Elected Prosecutor**

Rose v. State, 219 Ind. 44, 36 N.E.2d 767 (1941) (no abuse of discretion in continuing prosecution from January 2 to February 19, upon prosecuting attorney's motion alleging that he had been elected prosecuting attorney in preceding November, and assumed duties of office January 1, and would not have time to prepare case for trial).

**4. Speedy Trial and Other Issues**

**a. Congestion of Court Calendar**

**(1) Prosecutor's Motion**

In a motion for continuance, prosecutor shall state there was insufficient time to try defendant within 6 months, 70 days, or 1 year, due to congestion of court calendar. Motion should be filed not later than 10 days prior to date set for trial. If filed less than 10 days prior to trial, prosecuting attorney shall show the delay in filing motion was not his fault. Crim.R. 4(A), (B)(1), (C).

Fortson v. State, 269 Ind. 161, 379 N.E.2d 147, 151 (1978) (on November 19, 1976, the State filed a timely motion for continuance which alleged congestion of the court's calendar. Trial court granted the motion and continued the case to January 3, 1977. Congestion of a trial court's calendar is a legitimate basis for extending the time periods of Rule 4).

See IPDC Pretrial Manual, Chapter 11, Speedy Trial.

## **(2) Trial Court on its Own Motion**

Trial court may take note of congestion or an emergency without necessity of a motion, and upon so finding may order continuance and set case for trial within reasonable time. Crim. R. 4(A), 4(B) (1), 4(C).

See IPDC Pretrial Manual, Chapter 11, Speedy Trial.

Kimbrough v. State, 911 N.E.2d 621 (Ind. Ct. App. 2009) (trial court did not abuse its discretion in continuing trial for four weeks to obtain a second alternate juror even though Defendant wanted to proceed with only 13 jurors by moving one of the alternate jurors into the empty slot; the trial court's decision to continue the trial until additional jurors could be summoned was fair to both parties, defendant was not denied a speedy trial and did not show that any evidence was lost or destroyed or that the short delay adversely affected any of the witnesses' memories).

### **b. State's Motion for Continuance after Defendant "Brought to Trial"**

Under CR 4(B)(1), defendant shall be discharged if not "brought to trial" within 70 days from date of motion for early trial.

Robinson v. State, 180 Ind. App. 555, 389 N.E.2d 371 (1979) (defendant was "brought to trial" within meaning of CR 4(B) when jury was selected and sworn and state's motion for a continuance after that point was not controlled by such rule).

### **c. Continuance to Procure Evidence for State**

Crim.R. 4(D) provides:

If when application is made for discharge of a defendant under this rule, the court be satisfied that there is evidence for the state, which cannot then be had, that reasonable effort has been made to procure the same and there is just ground to believe that such evidence can be had within ninety (90) days, the cause may be continued, and the prisoner remanded or admitted to bail; and if he be not brought to trial by the state within such additional ninety (90) days, he shall then be discharged.

Mickens v. State, 439 N.E.2d 591 (Ind. 1982) (court had discretion to set trial beyond 70-day time limit; witness unavailable because he required surgery).

Fortson v. State, 269 Ind. 161, 379 N.E.2d 147, 151 (1978) (absence of an essential witness through no fault of State has been held to be good cause for extending the time period requirement for a speedy trial).

McGhee v. State, 192 N.E.3d 1009 (Ind. Ct. App. 2022) (trial court acted within its discretion in granting State's request to continue trial in murder prosecution beyond speedy trial rule's 70-day period because forensic scientist whose name was endorsed on information was unavailable to testify, even if State failed to comply with each technical aspect of statutory requirements for such continuance; State described how scientist, who performed DNA analysis, was supposed to testify about DNA results and her method of DNA analysis or statistical calculation, which was fairly new, State showed that it did not procure scientist's absence, and State showed that scientist could be procured to testify within reasonable time).

See IPDC Pretrial Manual, Chapter 11, Speedy Trial.

## **5. Agreement by Defense Counsel**

Mengon v. State, 505 N.E.2d 788 (Ind. 1987) (grant of State's motion for continuance on ground that State's witness was hospitalized and would be unavailable for trial was not erroneous, where court reset trial date agreed upon by defense counsel and prosecuting attorney and allowed defendant to recover his costs for service of subpoenas issued to witnesses for originally scheduled trial date).

Wheeler v. State, 163 Ind. App. 1, 321 N.E.2d 233 (1975) (granting State a continuance was not prejudicial to defendant and was within trial court's discretion where defense counsel agreed to the continuance).