[CAPTION]

MEMORANDUM IN SUPPORT OF DEFENSE OBJECTION TO THE ADMISSION OF A DEPOSITION IN LIEU OF TESTIMONY

The Defendant, by counsel, files this memorandum in support of his objection to the admission of the deposition of [insert witness] at trial or any other proceeding. The State has failed to prove that the witness is unavailable pursuant to Indiana Rule of Evidence 804(b)(1). Thus, the introduction of the deposition in lieu of live testimony would violate Indiana Rule of Evidence 804(B) in lieu of testimony at trial and the Defendant's rights under the Confrontation Clause and Article I, Section 13 of the Indiana Constitution.

Under I.R.E. 801 hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Generally, hearsay is inadmissible evidence at trial. I.R.E. 802. The State bears the burden to establish the admissibility of otherwise inadmissible evidence. Stidham v. Whelchel, 698 N.E.2d 1152, 1156 (Ind.1998) (citing Miller, 13 *Indiana Evidence*, 707 § 804.100 (2d ed.) (the proponent of the hearsay must establish the evidentiary foundation).

Deposition testimony of a witness, which would otherwise be hearsay, may be admissible under I.R.E. 804(b)(1) ("former testimony exception"). Under the former testimony exception to the hearsay rule evidence may be admitted if the declarant is (1) unavailable, (2) testimony [was] given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding and (3) if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. See State v. Owings, 622 N.E.2d 948, 950-52 (Ind. 1993); I.R.E. 804; Ind. Trial Rule 32(A)(3)(a).

This memo focuses on the first prong of the analysis. The first prong of the former testimony exception is that the witness must be "unavailable." A witness is "unavailable" for purposes of 804(b)(1) if they are "unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity." I.R.E. 804(a)(4). It is not relevant that the witness absconded from the jurisdiction or otherwise made themselves unavailable. See, e.g., State v. Owings, 622 N.E.2d 948 (Ind. 1993) (witness unavailable within the meaning of 804(b)(1) due to suicide). To satisfy the unavailability requirement, the prosecution must have made a "good faith effort" to secure the witness' presence. Jackson v. State, 735 N.E.2d 1146 (Ind. 2000); Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).

[INESRT FACTS: For example - The State cannot meet the plain words of the rule. The witness is not facing death or physical or mental illness or infirmity. By his own admission, the witness will be out of state attending a family reunion. The Rule is not in place o accommodate the convenience of a witness who voluntarily absents himself from the jurisdiction under non-emergency circumstances that do not constitute a physical or mental illness or infirmity. If it were, trials would become a series of pre- recorded events].

Moreover, the Sixth Amendment's Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." Article I, Section 13 of the Indiana Constitution provides that "[i]n all criminal prosecutions, the accused shall have the right to . . . meet the witnesses face to face." The Sixth Amendment and Article I, Section 13 cannot be set aside to accommodate the mere inconvenience of a witness. "[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value

to the defendant is not replaced by a system in which the prosecution presents its evidence via ex parte affidavits and waits for the defendant to subpoena the affiants if he chooses." Melendez-Diaz, 129 S.Ct. 2527, 2540 (Ind. 2009). In order for the State to present the deposition, the State must prove the witness is unavailable. Crawford v. Washington, 541 U.S. 36 (2004).

The Indiana Supreme Court has held that a mere vacation of a witness is not sufficient to circumvent the defendant's right to confrontation. Garner v. State, 777 N.E.2d 721 (Ind. 2002); see also Jackson v. State, 735 N.E.2d 1146 (Ind. 2000) (where officer was out of town at a secret service training session, but State made no effort to obtain officer's attendance, good faith or otherwise, the State did not show he was unavailable for purposes of the Sixth Amendment); Gillie v. State, 512 N.E.2d 145 (Ind. 1987) (prosecution's promise to reimburse witness for travel expense secured promise to appear; however, when witness telephoned one week later and simply said he couldn't afford the trip, and no further steps were taken, the trial court erred in finding witness unavailable); McGaha v. State, 926 N.E.2d 1050 (Ind.Ct.App. 2010) (doctor was not unavailable due to his daughter's graduation in Virginia). Other jurisdictions have agreed. A. F. Conner & Sons, Inc. v. Tri-County Water Supply Corp., 561 S.W.2d 466, 21 Tex. Sup. Ct. J. 160 (Tex. 1978) ("we ruled that a witness temporarily absent from the state on a vacation trip at the time of the second trial had not been shown to be unavailable."); Parson v. Commonwealth, 144 S.W.3d 775 (Ky. 2004)("the mere absence of the witness from the jurisdiction does not constitute 'unavailability.'").

The witness is available and his deposition should be excluded from trial. While we all strive to accommodate personal and professional lives, such cannot hinder or interfere with client's constitutional rights. The State's remedy is a continuance, and although the defense must object to this continuance to avoid the delay charged to the defense.

(Signature)