IN THE
INDIANA COURT OF APPEALS
NO.:_____

[redacted], Appellant/Defendant Below	**)**	**INTERLOCUTORY APPEAL from the [redacted]**
vs.	**)**	
STATE OF INDIANA, Appellee.	**)**	**Cause No.: [redacted]**

DEFENDANT'S, [redacted], PETITION TO ACCEPT JURISDICTION OF INTERLOCUTORY APPEAL

Comes now the Appellant/Defendant Below, [redacted] by counsel, [redacted], pursuant to Appellate Rule 14(B)(2), and files Defendant's Petition to Accept Jurisdiction of Interlocutory Appeal (herein "Petition"), as follows:

Relevant Dates by Appellate Rules

A. The Date of the Interlocutory Order.

On [redacted], [redacted] filed his Motion to Suppress a handgun found in his possession incident to a police stop. The trial court heard the Motion to Suppress on [redacted]. Tr. p. 1. Subsequently, the trial court ordered both the State and the Defense submit post-trial briefs on the legal and factual issues raised by suppression. On [redacted], the trial court timely entered its oOrder denying [redacted]'s Motion to Suppress ("Exhibit "1").

B. The Date the Motion for Certification was Filed in the Trial Court.

Thereafter, and timely, on [redacted], [redacted] filed his Defendant's Motion for Certification of the Interlocutory Order Denying Suppression of the Evidence of the Handgun.

C. The Date the Trial Court Certified its Interlocutory Order.

After additional hearing on [redacted] (to explain to [redacted] the implications of an interlocutory appeal for his right to timely trial), the trial court issued its Order Granting Motion to Certify for Interlocutory Appeal the Order Denying Suppression of Handgun (Exhibit "2").[1]

Legal Analysis

D. The Reasons the Court of Appeals Should Accept this Interlocutory Appeal.

1. No basis for a Terry stop.

The facts central to accepting this appeal, based on [redacted]'s assertion of an illegal investigatory stop, are undisputed and/or refuted; that is, unlike the typical interlocutory (or post-guilty finding) appellate case regarding sufficiency, [redacted] is not asking this Court to merely re-weigh the evidence. That is, the stop was illegal as a matter of pure law.

Precisely, in this case, the police responded to a 911 "report of a shotgun on a porch" of a residential home. (Suppression Testimony of [redacted], Tr. 22, 24, who was the lead officer on the scene, Tr. p. 33). After entry of [redacted]'s property through the gate, and not observing a shotgun, the police were instructed to leave by [redacted]. The discovery of the handgun on the person of [redacted] was made subsequently, for which he was arrested and charged for possession by a serious violent felon.

Under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 889 (1968), a police officer can stop and detain an individual on the basis of "reasonable suspicion" for an amount of time to investigate whether probable cause exists for a search or arrest. In making a determination of

[1] On the same day, namely [redacted], the trial court entered its Order Vacating Trial and Issuing Stay Pending Appeal.

"reasonable suspicion", reviewing courts look at the "totality of circumstances" of each case to see whether the detaining officer had a particularized and objective basis for suspecting legal wrong doing." United States v. Cortez, 449 U.S. 411, 101 S.Ct.690, 66 L.Ed.2d 621 (1981). Moreover, this process allows officers to draw their own inferences from deductions about the cumulative information available. *Id.*

Here, in [redacted]'s case, there were no facts or inferences to deduce criminal wrong-doing of any type. While [redacted] does not dispute that a dispatch 911 call reported this matter to police, he submits that a host of police emergency calls are placed based on conduct that is in no way suspicious, let alone criminal. Such an erroneous report of lawful activity in his case, however, does not lead to suspicion of illegal activity, as the penal code reflects no prohibition to same. Ind.Code 35-47-2-1. While a shotgun is a "firearm" (IC 35-47-1-5) and thereby a "deadly weapon" (IC 35-41-1-8) under Indiana law, possession of same in no way is a crime or a waiver of any Fourth Amendment rights; **and it (possession of a shotgun on [redacted]'s property if indeed such possession of the shotgun was the case) is, in fact, permitted (possession of a longgun on one's property) by the penal code.** *See, e.g.,* Ind.Code 35-47-2-1 (even presence of a handgun on one's property is permissible).

Moreover, a host of other every-day items are encompassed (or could be) within the term, "deadly weapon", and could also have been possessed on the porch of this home which are deadly weapons and not illegal or a basis for suspicion of any crime:

- A person holding a chainsaw, ax.
- A person carrying or holding a can of gasoline.
- A person possessing a stun gun or taser.

Thus, presence of a longgun, standing alone, even if with other irrelevant or innocent facts,

cannot be transformed into a suspicious conglomeration. *State v. Quirk*, 842 N.E.2d 334 (Ind.2006). There was no criminal activity of any type or nature reported by the 911 caller, observed by the police upon arrival, nor any inferences therefrom.

And it can be no surprise that observation of firearms in the course of daily life is to be expected. That is, there are over 223 million firearms (ATFE Estimate, 1994) in the United States, which is roughly the same number as the 243 million registered passenger vehicles in the United States (DOT Estimate 2004). Both are a part of every-day life. In addition, cars and firearms (IC 35-47-1-5) are or may be deadly weapons. *DeWhitt v. State*, 829 N.E.2d 1055 (2005) (crime of ramming gate causing injury to victim enhanced because defendant was armed with the deadly weapon of the car).

Nor does this situation leave the police hamstrung from their duties. If there had been any report or observation by the police (or 911 caller) that a shotgun was being brandished or pointed at someone, this would have constitutionally permitted a *Terry* stop. Ind.Code § 35-47-4-43. There was not. Moreover, as a policy matter, the suppression doctrine is a stop-gap measure that effectuates this police-privacy balance in closer cases, although this clearly was not so. This, again, was not a "close call" case. There was no criminal activity.

In fact, lead Officer [redacted] admitted as much at the suppression hearing. No shotgun was observed, and he was there for twenty (20) minutes (before arresting [redacted] for a handgun observed by an assisting officer), and for so long, because he wanted to make sure [redacted] understood this sight of a longgun may be distressing neighbors, even though he was not breaking any law. That is, Officer [redacted] himself acknowledged that the police officers had no basis for a Terry stop: "although there wasn't any law . . .broken regarding having a shotgun on the porch . . .I tried to express to them that it was somewhat distressing to the neighbors to be on

the front porch with a shotgun in broad daylight, the reason that we were there."

Simply put, there was no crime occurring for a *Terry* stop and the ensuing lawful discovery of a handgun on [redacted] while he still was detained by the police twenty (20) minutes later. The discovery was clearly the product of the illegal investigatory stop and must be suppressed under 4th Amendment jurisprudence.

2. Impermissible Length of Terry stop.

Clearly, an investigative stop must be temporary and last no longer than is necessary to effectuate the purpose of the stop. *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983); *Miller v. State*, 498 N.E.2d 53, 56 (Ind.Ct.App.1986). Here, it must be remembered that there was no basis for the stop.

Even assuming and positing, *arguendo*, that there was some basis for the stop, and even advocating a right to walk around the home, to make sure any longgun that was lawfully possessed on same was not being used inappropriately, the twenty (20) minutes of the stop was well beyond the point necessary to effectuate same under the 4th Amendment. This was in broad daylight and there were three (3) officers present, which should have allowed a walk around to be done in seconds, not minutes. Moreover, it is clear that the officer stayed there to just make their point (and lecture) that having a gun outside on the porch was not appropriate, although not illegal. Tr. 24-25.

3. Patdown Predicated Upon Lawful Stop.

Under *Terry*, clearly there was no basis for an investigative stop. Even assuming *arguendo* that this was not the case, the officer's had no basis to believe their safety was in danger to conduct a patdown. Officer [redacted] never saw the handgun until retrieved by Officer [redacted], despite being the lead officer at the scene for twenty (20) minutes. Tr. p. 24.

Officer [redacted]'s taped statement given to defense counsel was that [redacted]'s jersey raised up where he could see then gun. Yet when reminded of and shown its length at the suppression hearing, he guessed that perhaps [redacted] pulled up the shirt to wipe his face. Officer [redacted] could not, nor did he, explain the inaccuracies in his statements; presumably this was because he could not explain away the law of inertia and gravity.

Officer [redacted], however, did testify during his taped statement that he could see the handgun by a holster and silver clip, the proverbial "glint of silver", through the perforation holes of [redacted]'s shirt, which was how he was able to observe and retrieve it. Yet, at the suppression hearing, he too was at a loss to explain his prior statement when he examined the shirt and found it contained no holes and he could not see a wristwatch through it.

Mysteriously, moreover, the one (1) piece of exculpatory or incriminatory evidence in existence, the holster and silver clip confiscated during the course of the investigation, was missing from the property room.

The other witnesses for [redacted] testified at the suppression hearing that the police were just doing indiscriminate pat-downs. Thus, there was no believable basis for a patdown in this illegal investigatory stop as a basis for officer safety. Stated differently, if any of the officers had a concern for their safety, it was Officer [redacted] yet his story varied so widely that even he could not articulate how he saw the gun, let alone explain his fears. To this end, it is well to remember the holding in *State v. Adkins*, 834 N.E.2d 1028 (Ind.Ct.App.2005): Officer safety is always a legitimate concern, but a lawful investigatory stop is the predicate for a patdown. The investigatory stop and pat-down were unlawful and a violation of the 4th Amendment. The trial court erred in weighing this testimony otherwise, namely a review of the facts in evidence leads to the conclusion that a mistake has been made.

WHEREFORE, [redacted] prays that this Court accept interlocutory jurisdiction of this case and decide this matter, ordering suppression of the handgun because there was no constitutional basis for the search and seizure, and for all other relief just and proper in the premises.

Respectfully submitted,

[redacted]

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[redacted]

[redacted]

CERTIFICATE OF SERVICE

I, [redacted], certify that two (2) true and accurate copies of the foregoing were served upon the Attorney General in person by mail receptacle at the Indiana Government Center

this [redacted] day of [redacted]

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[redacted]