FOR PUBLICATION

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IN THE
COURT OF APPEALS OF INDIANA

JAMES MALONE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0701-CR-18
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Sheila A. Carlisle, Judge
Cause No. 49G03-0605-FB-80765

March 20, 2008

OPINION - FOR PUBLICATION

KIRSCH, Judge

May police officers seize a handgun from an individual standing on the front porch of his home without a search warrant and in the absence of an articulable basis for concerns of officer safety or a reasonable belief that a crime was afoot? We hold that they may not, and we reverse the trial court's denial of the motion to suppress filed by James Malone.[1]

We reverse.

FACTS AND PROCEDURAL HISTORY

Indianapolis Police Officers Mark Rand, Thomas Figura, and Joseph Kraeszig responded to a report that a man was standing on the front porch of a house, located at 818 N. Tuxedo Street, armed with a shotgun. Upon arrival, the officers encountered Malone, his wife, his brother-in-law, and a cable TV installer on the porch. There was no shotgun present. The officers questioned the group for several minutes and informed them that the display of a shotgun is not illegal, but may be upsetting to neighbors. Malone then announced that they were going inside. At this point, Officer Rand noticed an object along Malone's waistband and observed a "metal glint" from either under or through Malone's shirt. *Tr.* at 9. Officer Rand then shouted "gun," pushed Malone away from the group, and removed a pistol from Malone's waistband. *Id.* at 9-10. Subsequent investigation revealed that Malone had been convicted of a crime[2] set forth in I.C. 35-47-4-5. Malone was arrested and charged with unlawful possession of a firearm by a serious

[1] James Malone is now known as Mangwiro Sadiki-Yisrael. We acknowledge the name change, but since all events here relevant occurred when Mr. Sadiki-Yisrael was known by the name of James Malone, we use his former name.

[2] Malone was convicted of conspiracy to commit murder when he was seventeen (17) years old.

violent felon, a Class B felony. Malone filed a motion to suppress the handgun, which the trial court denied. Malone now appeals.

DISCUSSION AND DECISION

When reviewing the trial court's ruling on a Motion to Suppress, this court does not reweigh the evidence, but determines if there is substantial evidence of probative value to support the trial court's ruling. *State v. Straub,* 749 N.E.2d 593, 597 (Ind. Ct. App. 2001). We look to the totality of the circumstances and consider all uncontroverted evidence, together with conflicting evidence that supports the trial court's decision. *Id.*

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures by the Government. *State v. Atkins*, 834 N.E.2d 1028, 1032 (Ind. Ct. App. 2005). Generally, a search warrant is a prerequisite to a constitutionally proper search and seizure. *Halsema v. State*, 823 N.E.2d 668, 676 (Ind. 2005). The defendant has the burden of showing a constitutional infirmity if a search or seizure was carried out pursuant to a warrant. *U.S. v. Esser*, 451 F.3d 1109, 1112 (10th Cir. 2006). However, when a search is conducted without a warrant, the State has the burden of proving that an exception to the warrant requirement existed at the time of the search. *Coleman v. State*, 847 N.E.2d 259, 262 (Ind. Ct. App. 2006), *trans. denied* (citing *Burkett v. State*, 785 N.E.2d 276, 278 (Ind. Ct. App. 2003)).

One such exception is that a police officer may briefly detain a person for investigatory purposes without a warrant or probable cause if, based upon specific and articulable facts together with rational inferences from those facts, the official intrusion is reasonably warranted, and the officer has reasonable suspicion that criminal activity

"may be afoot." *Moultry v. State*, 808 N.E.2d 168, 170-71 (Ind. Ct. App. 2004) (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

In addition to detainment, *Terry* permits a reasonable search for weapons for the protection of the police officer, where the officer has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. *Id.*

The *Terry* stop and frisk rule, however, applies to cases involving a brief encounter between a citizen and police officer on a public street. *Atkins*, 834 N.E.2d at 1032 (citing *Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000)). The encounter in this case did not occur on a public street and, therefore, was not a *Terry* stop. The State concedes that *Terry* does not apply.

In this case, since a warrant was not obtained to seize the weapon from Malone, it is necessary to determine if seizure of the gun was justified by some exception. The State contends that Officer Rand removed the weapon to protect the safety of the officers. Officer safety is of paramount importance. Police officers are daily placed in difficult and dangerous situations, some of which are life threatening. The law has to provide protections for such officers. At the same time, in a free society there must be a reasonable basis for a warrantless search of our persons and homes; hence, our constitutional protections against unreasonable searches and seizures. Between these

extremes, courts engage in a very difficult undertaking balancing these competing values and determining where the line separating the reasonable and unreasonable should be drawn. Here, it is significant that although the State claims on appeal that the seizure of the weapon was done in the interest of officer safety, none of the officers testified to any such concerns.

In this case, prior to the seizure of the gun, police did not express any concerns about officer safety. They did not inquire about the presence of weapons or pat down anyone present. Neither Malone, nor anyone else present had threatened the police officers either verbally or physically. In fact, Officer Figura testified that Malone was respectful and polite. *Tr.* at 27. It was only when Malone asked the police officers to leave and began to walk back into his house that Officer Rand saw what he believed indicated the presence of a gun and seized it from Malone.

Furthermore, at the time they seized the gun, the officers did not have information leading them to believe that Malone had been convicted of any crime, which could render him a serious violent felon or his possession of a weapon illegal. They had no information leading them to believe that a crime had been or was about to be committed. The only reason for their presence at Malone's home was a report of someone possessing a shotgun on the premises, which is not a crime.

Finally, at the hearing on the motion to suppress, none of the officers testified that he felt any concern for officer safety. In the absence of an articulable basis that either there is a legitimate concern of officer safety or a belief that a crime has been or is being committed, a pat-down search pursuant to a *Terry* stop is not justified, nor is seizure of a

weapon from one standing on the front porch of his home. Here, neither condition was satisfied, and we conclude that the seizure of the weapon on Malone's person was illegal. As such the trial court should have suppressed the evidence.

Reversed.

ROBB, J., and BARNES, J., concur.

IN THE INDIANA COURT OF APPEALS
CASE NO. 49A02-0701-CR-000018

JAMES MALONE, Appellant (Defendant Below),	)	Interlocutory Appeal from the Marion County Superior Court, Criminal III,
v.	)	Cause No.: 49G03-0605-FB-080765,
STATE OF INDIANA, Appellee (State).	)	THE HONORABLE SHELIA A. CARLISLE, JUDGE.

APPELLANT'S BRIEF ON INTERLOCUTORY APPEAL

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STATEMENT OF THE ISSUE

Whether the trial court erred in denying Mr. James Malone's ("Mr. Malone")[1] Motion to Suppress the handgun found on his person subject to illegal search and seizure on his property, without probable cause a crime had been committed, and pat-down therewith?

[1] Mr. Malone's legally changed his name to Mangwiro Sadiki-Yisrael 16 years earlier, and he is referred to by both names in the underlying record. Tr. p. 35

STATEMENT OF THE CASE

A. Nature of the Case.

The nature of this case is interlocutory appeal of the trial court's order denying suppression of the evidence of a handgun found on Mr. Malone incident to search and seizure of his person. Appellant's App. p. 2.

B. Course of the Proceedings Relevant to Issue Presented for Review.

On May 5, 2006, Mr. Malone was arrested by Indianapolis Police Department[2] Officer Figura[3] and charged with unlawful possession of a firearm by a serious violent felon.[4] Appellant's App. p. 2.

On August 31, 2006, Mr. Malone filed his Motion to Suppress. Appellant's App. p. 2. The basis of the Motion to Suppress was that the search and seizure was in violation of the search warrant or exigent provisions of applicable constitutional law. Appellant's App. p. 14-15.

The trial court heard the Motion to Suppress on September 27, 2006. Tr. p. 1. Thereafter, it allowed the parties to submit post-hearing briefs on the topic and made no ruling at the hearing. Tr. p. 110. Appellant's App. 16-39 (briefs).

C. Disposition of the Issue by the Trial Court.

On November 20, 2006, the trial court denied Mr. Malone's Motion to Suppress.[5]

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[2] This police department is now known as the Indianapolis Metropolitan Police Department.

[3] Officers Rand and Kraeszig also assisted. Tr. p. 4-6.

[4] Ind.Code § 35-47-4-5.

[5] For clarification, this denial is stamped on the Motion to Suppress, signed by the judge, and dated November 20, 2006. Appellant's App. p. 40.

Ultimately, the trial court certified the matter for interlocutory appeal on December 7, 2006. Appellant's App. p. 2.

On February 6, 2007, this Court granted Mr. Malone's Motion for Acceptance of Jurisdiction of Interlocutory Appeal, and this appeal ensued.

STATEMENT OF THE FACTS

On May 5, 2006, Mr. Malone was on the front porch of his home with some other people, said home being located at 818 Tuxedo, Indianapolis, Indiana. Tr. p. 6-7. The police responded to this location on the 911 call report that someone on the front porch had a gun. Tr. p. 9.

Upon entering Mr. Malone's curtilage and proceeding to front porch of his residence, the police proceeded to conduct investigations for about 20 minutes. Tr. p. 6. During this time, Mr. Malone expressed that the police should not be at his home and should leave.[6] Tr. p. 27

During some point of this investigation, Officer Figura advised Mr. & Mrs. Malone that they were not breaking the law (apparently despite their investigation) but the sight of a firearm may be distressing to their neighbors.[7] Tr. p. 29.

Officer Rand then "noticed a metal glint[8] coming from either under or through" Mr. Malone's jersey, and for officer safety pushed passed the other officers, patted down Mr. Malone and "discovered" a handgun on his person. Tr. p. 9, 12. This metal glint was the silver clip (attachment device) affixed to the holster. Tr. p. 10.

Mr. Malone was then arrested and charged with unlawful possession of a firearm by a serious violent felon. Appellant's App. p. 2.

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[6] Depending upon which officer's testimony is to be believed, lead and arresting Officer Figura characterized Mr. Malone as "respectful and polite" to the police, while Officer Rand characterized Mr. Malone as "extremely agitated, argumentative." Tr. p. 9, 27.

[7] Indeed, no provision of Indiana law governing weapons and instruments of violence makes mere presence a crime. Ind.Code § 35-47, *et seq.*

[8] Interestingly, the holster was missing by the time of the suppression hearing. Tr. p. 26, 32.

SUMMARY OF THE ARGUMENT

With all due respect to the trial court's determination not to suppress the evidence of the handgun, and the comprehensive analyses and arguments by Mr. Malone's defense counsel (Appellant's App. p. 18-25) and the prosecutor (Appellant's App. p. 33-35), this case is much simpler in legal analysis and disposition than as argued and briefed on suppression of the issue.

Clearly, this case is determined by Fourth Amendment, United States Constitution, analyses. However, it is not a brief detention of Mr. Malone, for an investigatory stop purpose, without a warrant or probable cause, based on specific articulable facts, together with rational inferences from those facts, as would be constitutional under a *Terry* stop, *infra*. This is because this was not an on-street encounter where *Terry* is applicable.

This was an encounter on Mr. Malone's own property, in a place he had a right to be. Therefore, instead of reasonable suspicion for a *Terry* stop, there had to be probable cause for the search and seizure of Mr. Malone's property and person. There was not. The only activity the IMPD police officer's were investigating was the report of a shotgun on the front porch, which even Officer Figura admitted on cross-examination, at the suppression hearing, was not illegal or criminal:

> A I spoke with Mr. Sadiki-Yisrael's wife and I believe Mr. Sadiki-Yisrael was present about, although there wasn't any law so to speak that was being 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. Tr. p. 29.

Thus, when later in the transaction while Mr. Malone was challenging the officers' right to be on his property, and Officer Rand claimed to "notice a metal glint" from Mr. Malone's shirt area, pushed passed the other officers, patted Mr. Malone down, and pulled the handgun in question for suppression from his waistband, it was the product of an illegal search. Tr. p. 9.

In short, Officer Rand, and the other officers, had no right to be on Mr. Malone's property, investigating activity they knew was not criminal, and correspondingly no right to encounter and stop Mr. Malone on his own property and pat him down and find a handgun. A lawful pat down, a search and seizure activity, is always predicated upon lawful police activity.

Indeed, here there was no reasonable suspicion to justify the stop, much less probable cause for search or seizure on Mr. Malone's property or of Mr. Malone. For these reasons, with very simple Fourth Amendment analysis, it is overwhelmingly clear that the trial court decision not to suppress the evidence of the handgun was in error considering the totality of circumstances. This Court should reverse with instructions to suppress the handgun and, thereafter, dismiss the case.

ARGUMENT

A. Statement of the Issue.

The trial court erred in denying Mr. Malone's Motion to Suppress the handgun found on his person subsequent to the unlawful seizure of his property without probable cause and pat-down of his person in connection therewith.

B. Standard of Review.

In reviewing a motion to suppress, this Court does not reweigh the evidence but determines if there is substantial evidence of probative value to support the trial court's ruling. *State v. Straub*, 749 N.E.2d 593, 597 (Ind.Ct.App.2001). It does so by looking to the totality of the circumstances together with conflicting evidence that supports the trial court's decision. *Id.*

C. Fourth Amendment.

The Fourth Amendment to the United States Constitution prohibits "unreasonable searches and seizures" by Government, which reads, in part: "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated[.]" United States Constitution, Fourth Amendment. The purpose of this provision is to protect citizens from State intrusions into their homes. *See, e.g., Ware v. State*, 782 N.E.2d 478, 481 (Ind.Ct.App.2003), citing *Esquerdo v. State*, 640 N.E.2d 1023, 1026 (Ind.1994).

This noted, the Fourth Amendment and its safeguards extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest. *Moultry v. State*, 808 N.E.2d 168, 170 (Ind.Ct.App.2004) (citing *United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002)). Inasmuch, a police officer may briefly detain a person for investigatory purposes, without a warrant or probable cause if, based upon specific and articulable facts, together with

rational inferences from those facts, the official intrusion is reasonably warranted and the officer has a reasonable suspicion that criminal activity "may be afoot." *Id.* at 170-71 (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S.CT. 1868, 20 L.Ed.2d 889 (1968)).

Reasonable suspicion is a "somewhat abstract" concept, not readily reduced to "a neat set of legal rules." *Id.* at 171 (citing *Arvizu*, 534 U.S. at 274, 122 S.Ct. 744). When making a reasonable suspicion determination, reviewing courts examine the "totality of circumstances" of the case to see whether the detaining officer had a "particularized and objective basis" for suspecting legal wrongdoing. *Id.* (citing *Arvizu*, 534 U.S. at 273, 122 S.Ct. 744).

The reasonable suspicion requirement is met where the facts known to the officer at the moment of the stop, together with the reasonable inferences arising from such facts, would cause an ordinary prudent person to believe criminal activity has occurred or is about to occur. *Id.* We review a trial court's determination regarding reasonable suspicion de novo. *Id.* (citing *Arvizu*, 534 U.S. at 275, 122 S.Ct. 744; *Williams v. State*, 745 N.E.2d 241, 244 (Ind.Ct.App.2001).

This noted, where a person's home is involved, "[s]earches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment–subject only to a few specifically established and well delineated exceptions." *Warner v. State*, 773 N.E.2d 239, 245 (ind.2002) (quotation omitted). One common exception is when exigent circumstances exist. *Smock v. State*, 76 N.E.2d. 401, 404 (Ind.Ct.App.2002).

This probable cause and warrant doctrine is applicable to a person's home ***and*** curtilage. (emphasis added). In fact, "[t]he United States Supreme Court has explained the protection afforded to curtilage as one of 'family and personal privacy in an area intimately linked to the home and

physically and psychologically, where privacy expectations are most high.'" *Rook v. State*, 679 N.E.2d 997, 999-1000 (Ind.Ct.App.1997) (quoting *California v. Ciraolo*, 476 U.S. 207, 212-13, 106 S.Ct.1809, 90 L.Ed.2d 210 (1986)).

D. Analyses.

In this case, on May 5, 2006, IMPD police officer's, Figura, Kraeszig, and Rand, responded to a 911 call regarding 818 Tuxedo, Indianapolis, Indiana. Tr. p. 26. This was the residence of Mr. & Mrs. Malone. Tr. p. 35. The basis of the 911 call was that someone had a shotgun on the front porch of this residence. Tr. p. 27.

When the police arrived, they immediately began search and seizure activities, entered Mr. Malone's property, and began questioning those on Mr. Malone's front porch, including apparently even the cable telephone man. Tr. p. 7.

This is despite the fact that Officer Figura admitted on cross-examination that, even if this had been true (i.e., someone had a shotgun in plain view), there was no crime being committed.

> A I spoke with Mr. Sadiki-Yisrael's wife and I believe Mr. Sadiki-Yisrael was present about, although there wasn't any law so to speak that was being 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. Tr. p. 29.

Indeed, it takes little imagination to postulate a myriad of situations that may be observable to neighbors that might be disturbing and resulting in a 911 call: A person standing on the porch holding a running chain saw. A person with a car flare in one hand and a can of gasoline in the other. A person holding, fill in the blank _____, with ax, ice pick, machete. However, bad form, bad judgment, and bad neighboring does not amount to a crime. This is exactly the point conceded by Officer Figura on cross-examination.

While Mr. Malone has no issue that the police could have observed, conducted intelligence, canvassed neighbors, or anything of the like, they cannot execute search and seizure activities on Mr. Malone's curtilage or his home without a search warrant or exigent circumstances. They had neither. What IMPD officers did was run rough-shod over Mr. Malone's constitutional Fourth Amendment rights and completely ignored basic fundamentals of long-established Fourth Amendment law. To conduct police activities on one's curtilage and in one's residence, the police ***always*** need a search warrant without exigent circumstances. (emphasis added).

Even assuming *arguendo* that a less-stringent *Terry* stop was permitted and applicable, namely this encounter fell within the public-street, police-citizen encounter Fourth Amendment analysis, there was still no specific, articulable facts and inferences, that criminal activity was a foot to even briefly detain Mr. Malone or pat him down. Simply put, a person can own/possess a shotgun and can maintain it in public view (especially, here, on this his own property). This happens every day in every county in the State at WalMart sports department, sporting goods stores, gun ranges, or while hunting. Thus, even search and seizure under this more relaxed Fourth Amendment standard also fails.

While undoubtedly the State will emphasize officer safety as a grounds to support the pat-down, detention, and other search and seizure on Mr. Malone's property and of Mr. Malone, and while Mr. Malone concedes officer safety is always a legitimate concern, it, standing alone cannot ever form the singular basis of a valid investigatory stop, let alone a warrantless search based on probable cause of a crime. *See Webb v. State*, 714 N.E.2d 787, 788 (Ind.Ct.App.1999) (reasonable suspicion not established when defendant who turned away from officer and placed his hands down the front of his pants was subjected to search for officer safety); *Terry*, 392 U.S. at 32-33, 88 S.Ct.

1868 (Harlan J., concurring) ("[I]f the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a forcible stop. Any person, including a policeman, is at liberty to avoid a person he considers dangerous."); *United States v. Burton*, 228 R.3d 524, 528 (4th Cir.2000) ("Before [officer] was entitled to allay his safety concerns and conduct a protective search, he had to be presented with objective facts that would justify an investigatory Terry stop–a reasonable suspicion that a crime had been committed or that criminal activity was taking place.").[9] In summary, therefore, a pat down is contingent upon constitutional search and seizure act under the Fourth Amendment.

Central to reversing the trial court based on its erroneous failure to suppress the handgun obtained through this illegal search and seizure of Mr. Malone's property and himself, this Court has passed upon precisely the same case, except that affirmed the trial court's proper suppression of the handgun and the State appealed. This case is *State v. Atkins*, 834 N.E.2d 1028 (Ind.Ct.App.2005), *trans. denied.* In *Atkins*, Police Officer DeJong was dispatched to a domestic disturbance call. *Id.* at 1031. He arrived and was largely unaware of the circumstances occurring regarding this home. *Id.* He knocked on the door, but soon heard the rear door slam. *Id.*

Officer DeJong then proceeded toward the side of the house and encountered Atkins. *Id.* He ordered him to stop, drop his jacket, kneel to the ground, and put his hands behind his head. *Id.* Atkins complied, and DeJong then conducted a pat-down and found a handgun in his beltline. *Id.* Officer DeJong seized the gun, and ultimately, Atkins was arrested and charged with unlawful possession of a firearm by a serious violent felon. *Id.*

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[9] Other than perhaps lawful noisy protest, the record is devoid of anything but cooperation by Mr. Malone.

Prior to trial, Atkins filed a motion to suppress the evidence of the handgun alleging it was found as the result of an unconstitutional investigatory stop and a pat-down. The trial court granted the suppression and the State appealed. *Id.* On appeal, this Court affirmed. *Id.* at 1035. This noted, however, the *Atkins* court made clear that because Atkins was on his property, namely in his side yard, *Terry*-stop analysis, does not apply. *Id.* at 1032. This is because *Terry's* stop and frisk rule applies only to a case involving a brief encounter between a police officer and a citizen on a public street. *Id.* This Court went on to hold, as follows:

> "Here, there was not an on-street encounter. Atkins was on his own property, in a place where he had a right to be. Therefore, the trial court properly suppressed evidence of the handgun because, absent probable cause, Officer DeJong had no right to encounter and stop Atkins on his own property. Indeed, here there was not reasonable suspicion to justify the stop, much less probable cause." *Id.* at 1032.

The Atkins Court went further and acknowledged that officer safety concerns were always important, but are always hinged, viz-a-vie suppression, on lawful search and seizure activity, which was not the case. Officer DeJong was conducting a search and seizure of Atkins and his property without probable cause of a crime. Therefore, the trial court was proper in suppressing the evidence of the handgun.

Mr. Malone's case presents exactly the same way. IMPD officers responded to an anomalous 911 call that did not report a crime. The IMPD officers did not observe any activity thereat to allow a search and seizure on Mr. Malone's property without a warrant based on probable cause of a crime. Then, they conducted illegal search and seizure activities upon Mr. Malone's property and then, ultimately, the pat-down of Mr. Malone and found a gun. Since a pat down is contingent upon a lawful seizure, the trial court erred in not suppressing the evidence of the handgun of Mr. Malone, also a serious violent felon in possession of a handgun, as was the case in Atkins. Thus, under the

totality of the circumstances, and considering all uncontroverted evidence, together with conflicting evidence it does not support the trial court's decision.

CONCLUSIONS

Based on the foregoing analysis, it is clear that the trial court's denial of Mr. Malone's Motion to Suppress was error and this Court should reverse and remand to the trial court to reverse and enter an order of dismissal.

Respectfully submitted,

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APPEALED ORDER OR JUDGMENT

CERTIFICATE OF SERVICE

I, Bryan Lee Ciyou, certify that a true and accurate copy of the foregoing was served, by hand, upon the Indiana Attorney General this 20th day of June, 2007, at its mail basket located in the Indiana Rotunda.

_____

Bryan Lee Ciyou