[CAPTION]

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS (TERRY STOP)

A. The police lacked reasonable suspicion to stop the Defendant and, thus, violated the Fourth Amendment

"[T]he police may, without a warrant or probable cause, briefly detain an individual for investigatory purposes if, based on specific and articulable facts, the officer has a reasonable suspicion that criminal activity 'may be afoot." Stalling v. State, 713 N.E.2d 922, 924 (Ind.Ct.App. 1999) (citing Terry v. v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). However, the burden rests on the State to show that the warrantless search falls under an exception to the warrant requirement under the U.S. Constitution. Webb v. State, 714 N.E.2d 787 (Ind.Ct.App. 1999). Thus, "[t]he investigatory stop remains a relatively narrow exception to the warrant requirement and cannot be used to provide a haven for unjustified stops. Stalling, 713 N.E.2d at 924 (Ind.Ct.App. 1999) (citing C.D.T. v. State, 653 N.E.2d 1041 (Ind.Ct.App. 1995)).

Furthermore, the United States Supreme Court has unanimously refused to create a firearms exception to the Terry standard. Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000). The Court held that just because someone tells the police that the man on the corner is carrying a gun, the police cannot search the man on the corner for the gun. The same goes here. Just because gunshots were heard, police could not search anyone within the area. There must be some evidence connecting the person searched to the crime, even if the crime involves a handgun.

Although there was a "possibility that some crime might have been occurring," the officer lacked the "necessary articulable facts" leading him to believe that Defendant was involved in the crime. In order to stop someone to investigate, the police must have "a nexus between the very real possibility that some crime might have been occurring in the area and the necessary articulable facts from [the officer] leading him to believe that [the Defendant] was involved in a crime." Webb v. State, 714 N.E.2d 787, 789 (Ind.Ct.App. 1999). In every case where the police have been permitted to stop an individual and

investigate a crime which has occurred in the vicinity, the police have possessed more than just knowledge of a near-by crime to connect the individual searched or stopped with the alleged crime. See, e.g., State v. Smith, 638 N.E.2d 1353 (Ind.Ct.App. 1994) (police officer stopped truck which matched description and license plate number of truck which was reported over police radios as being driven erratically); Moody v. State, 448 N.E.2d 660 (Ind. 1983) (police properly stopped vehicle which matched description of vehicle used in robbery); Wilson v. State, 670 N.E.2d 27 (Ind.Ct.App. 1999) (police properly stopped person who was fleeing; however, if person did not flee, argument that police lacked reasonable suspicion would have been enhanced). In the instant case, the police have nothing linking the Defendant to the alleged shooting.

1. The area in which the Defendant was walking does not create reasonable suspicion that the Defendant was involved in criminal activity.

The police cannot rely on the fact that the Defendant was walking in the area of the gunshots because there is nothing unusual about walking down the street at 10:30 p.m. on a mild night that would create a reasonable suspicion that he was involved in the gunshots about. In Green v. State, 461 N.E.2d 108 (Ind. 1984), the police were justified in stopping Green who was the only person two blocks from a reported break-in at 3:30 a.m. When Green became belligerent and could not produce a believable reason for being in the area at such a late hour, the police were justified in further detaining the individual.

There are two important differences between Green and the instant case. First, in Green, the police stated that Green was the only person out at 3:30 a.m.; in the instant case, the State has failed to show whether there were other people in the area where the Defendant was stopped at 10:30 p.m. Second, in Green, the State established that Green was only two blocks from a reported break-in; in the instant case, the State has been unable to pinpoint the location of the alleged crime, and thus, cannot show how far the Defendant was from the gunshots. Therefore, Green's presence at 3:30 a.m. two blocks from a known break-in was unusual enough to create reasonable suspicion to investigate his presence. It would be unconstitutional to expand Green to permit a stop of Defendant who was walking at 10:30 p.m., when

the State has neither shown that it was unusual to be out at 10:30 in September or that the Defendant was very near to the gunshots.

Because the State failed to show how the Defendant's walking down the street linked him to the shots heard by other police officers, the officer's conduct falls within the line of cases holding that, without any type of evidence that the person has engaged or is about to engage in illegal activity, a person cannot be stopped simply for being in a certain area. Brown v. Texas, 443 U.S. 47, 99 S.Ct 2637, 61 L.Ed.2d 357 (1979) (walking in high-crime neighborhood and looking suspicious is not sufficient to overcome Fourth Amendment protections against arbitrary and abusive police practices); Green v. State, 719 N.E.2d 426 (Ind.Ct.App. 1999) (fact that Defendant was on property where marijuana is grown and it was around harvest time did not justify stop); Tumblin v. State, 664 N.E.2d 783 (Ind.Ct.App. 1996) (two black males turning and walking in opposite direction of squad car in high crime area did not rise to level of reasonable suspicion); U.S. v. Johnson, 170 F.3d 708 (7th Cir. 1999) (suspicions about apartment did not justify stop of people leaving apartment). The most recent of these cases, Webb v. State, held that "standing by a car in the parking area of an apartment complex shortly after 12:00 on a summer night [was] not a particularly suspicious `time and place." 714 N.E.2d at 789.

Here, the Defendant was simply walking. A shot occurred ten minutes earlier in an area somewhere north east of the Defendant; however, there was no evidence indicating the Defendant was involved in the shooting. If the police are permitted to stop the Defendant based solely on the shots heard on his side of town, the police are permitted to stop a person because of the neighborhood in which he is walking. This is a violation of the Fourth Amendment of the U.S. Constitution.

2. Fact that the Defendant was wearing a coat which the officer believed was too heavy for the time of year was merely a hunch and did not create a reasonable suspicion that the Defendant was involved in the shots heard.

The fact that the Defendant was wearing a coat which the officer believed was too heavy for the temperature and that the Defendant acted nervous when the officer approached him while telling him to put his hands up and turn around does not create reasonable suspicion that the Defendant was involved in the shots heard by the other police officers. An officer's hunch based only on a vague and general

characterization of the Defendant's demeanor does not rise to the level of reasonable suspicion. Cannon v. State, 722 N.E.2d 881 (Ind.Ct.App. 2000).

In Williams v. State, 477 N.E.2d 96 (Ind. 1985), the court held that an investigatory stop of the defendant was unconstitutional when it was based on Williams being the only person on the street in a high crime area at 1:30 a.m. and carrying an object (a coat) under his arm. "Nothing about [Williams'] activity suggested criminality." Id. at 99. Just as the officers in Williams lacked reasonable suspicion, so did the officers in the instant case. Carrying or wearing a coat which could conceal a gun does not constitute reasonable suspicion, regardless of the person's location.

In addition to Williams, other courts have held that innocent activities, that may be abnormal, do not justify police intrusions. Cannon, *supra* (nervous and suspicious behavior of driver did not constitute reasonable suspicion to detain driver while police get a canine to search his car); Carter v. State, 692 N.E.2d 464 (Ind.Ct.App. 1997) (walking out of a restaurant when the Defendant sees the police did not constitute reasonable suspicion); Stalling, supra (police only had a hunch that person who was leaving scene when officers approach and was sticking something in the waist line of his pants was engaged in criminal activity); People v. Saint-Veltri, 945 P.2d 1339 (Colo. 1997) (cupped handshake in public area which is know for drug trafficking did not constitute reasonable suspicion). Thus, following the above cited cases, the officer lacked reasonable suspicion where the Defendant was wearing a coat and acting nervous when the officer yelled at him' to put his hands up and turn around as he was walking down the street. At most, demeanor created a hunch of criminal activity, but falls far short of creating a reasonable suspicion.

B. The police did not support the search of the Defendant with reasonable suspicion that the Defendant was armed and dangerous.

During an investigative detention, a police officer may conduct limited frisk of individual where the officer has reason to believe that his safety or that of others is in danger. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). However, an officer must support his search with articulate specific facts which caused the officer to fear for his safety. A general assertion of "officer safety" will not suffice

to support a search for weapons. L.A.F. v. State, 698 N.E.2d 355 (Ind.Ct.App. 1998). In L.A.F., an officer properly stopped the Defendant for a curfew violation. He then searched the Defendant for "officer safety." However, the officer failed to identify any specific and articulable facts which justified an additional frisk that resulted in a gun being discovered. The officer did testify that the pat-down was conducted for "officer safety," but this general assertion did not articulate specific facts which caused the officer to fear for his safety. Even if the officer was aware of additional facts and circumstances which caused him to believe that the Defendant was armed and dangerous, the State failed to present them. Id.

As the State failed to meet its burden of justifying the search for weapons in L.A.F, the State in the instant case also failed to meet its burden of justifying the search for weapons. In the probable cause affidavit, the police officer states that he conducted a search based on "officer safety." Nowhere in the probable cause affidavit does the officer state why he feared for his safety. Thus, the search for weapons was a violation of the Fourth Amendment of the U.S. Constitution.

(Signature)

NOTE: Although this memorandum does not include a challenge to the stop and search based on Article I, Section 11 of the Indiana Constitution, such a challenge should be made. See, e.g., Litchfield v. State, 824 N.E.2d 356 (Ind. 2005) (setting for the Indiana constitutional analysis); Webster v. State, 908 N.E.2d 289 (Ind.Ct.App. 2009) (finding search of Defendant's purse violated article I, section 11 of the Indiana Constitution); Brown v. State, 900 N.E.2d 820 (Ind. Ct. App. 2009) (finding a random encounter with Defendant violated article, I, section 11).