

DISSENTING OPINION OF REIFURTH, J.

I respectfully dissent.

This case addresses the government's burden of proof when it wishes to admit at trial unlawfully seized contraband evidence that, it claims, would inevitably have been discovered by lawful means. Contrary to federal law and that of some other states, Hawai'i law requires that the government first show "clear and convincing evidence"^{1/} of such inevitable discovery. *State v. Lopez*, 78 Hawai'i 433, 451, 896 P.2d 889, 907 (1995).

The majority concludes that there was clear and convincing evidence that the packet containing methamphetamine would have inevitably been discovered when the police conducted their inventory search prior to admitting Rodrigues into the KPD cellblock. Mem. Op. at 9. The conclusion appears to be based on the majority's (i) observation that the circuit court did not make factual findings regarding the events relevant to the issue of inevitable discovery, and (ii) disinclination to require that the State introduce evidence tending to exclude^{2/} "other possible

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"[C]lear and convincing" evidence may be defined as an intermediate standard of proof greater than a preponderance of the evidence, but less than proof beyond a reasonable doubt required in criminal cases. It is that degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established, and requires the existence of a fact be highly probable.

Masaki v. Gen. Motors Corp., 71 Haw. 1, 15, 780 P.2d 566, 574 (1989)

^{2/} The majority uses the word "excluding" rather than "tending to exclude" when it states that "the circuit court appeared to require, as a matter of law, that evidence excluding other possible scenarios be presented by the prosecution . . . in order to carry its burden of proof. We decline to endorse such a requirement, absent any evidence that those alternative scenarios could reasonably have occurred." Mem. Op. at 10. It may be that the majority refers to conclusion of law ("COL") 8, where the circuit court states that "the state failed to produce clear and convincing evidence which would demonstrate that the defendant was incapable of retrieving and discarding the contraband from his person without an officer's notice between the time of his arrest and the inventory search[.]" I assume that neither the circuit court, in adopting the phrase "demonstrate that the defendant was incapable," or the majority, in adopting the word "excluding," intended anything more than what the clear and convincing test requires: that the State present evidence demonstrating that it was *highly probable* that the defendant was incapable of retrieving or discarding the contraband during the time in question. If the majority believed that the circuit court applied the wrong test, presumably it would have remanded for further findings under the proper test rather than vacating the Order and directing that trial proceed on the underlying charge. See, e.g., *State v. Salinas*, 715 S.E.2d 262, 263-64 (N.C. Ct. App. 2011).

scenarios" in order to carry its burden of proof absent any evidence from Rodrigues that those alternative scenarios occurred. Mem. Op. at 10.

The majority's conclusion is undermined by its premises. The circuit court made factual findings related to the issue of inevitable discovery, although it mislabeled several of them. And, although the majority correctly focuses on the evidence necessary to satisfy the burden of proof under hypothetical scenarios, it excuses the State's failure to satisfy its burden by imposing upon Rodrigues a novel obligation to first introduce evidence that an alternative scenario could reasonably have occurred. As a result, I would affirm.

I. The Circuit Court Made Findings Necessary to Suppress

The circuit court made factual findings regarding the events relevant to the issue of inevitable discovery. Finding of fact ("FOF") 9 in the August 5, 2010 Order was newly added and addressed Officer Williamson's contemporaneous belief concerning the possibility of Rodrigues accessing his pockets while handcuffed. In addition, the fact that the circuit court mislabeled its newly added COL 9, 10, and 11 as COL rather than FOF does not change the fact that they were also newly-added FOF related to the issue of inevitable discovery. "A determination that embraces an ultimate fact is a factual finding subject to the clearly erroneous standard of review even though classified as a COL." *Crosby v. State Dep't. of Budget & Fin.*, 76 Hawai'i 332, 340, 876 P.2d 1300, 1308 (1994).

While the majority is correct that "[t]he circuit court's Order does not contain either credibility or weight determinations," Mem. Op. at 7-8, it is incorrect to state that the Order "does not include findings of fact regarding the events relevant to the inevitable discovery rule." *Id.* at 8. In fact, the Order includes all the findings necessary in order to justify the circuit court's conclusion. See *Lopez v. Tavares*, 51 Haw. 94, 97, 451 P.2d 804, 806 (1969) (the court needs only to issue brief, definite, and pertinent findings sufficient "to disclose to this court the steps by which the trial judge reached his

ultimate conclusion on each factual issue").

II. The State's Hypothetical is Incomplete and Unproven

Taken together, the logic of the State's hypothetical - Officer Williamson's stated belief that Rodrigues was not concealing weapons, drugs, contraband or needles - and the fact that Rodrigues was already handcuffed, made it reasonable for the circuit court to require that the State offer some evidence that the contraband would remain on Rodrigues's person during transport as part of satisfying its burden. Rather than address the issue, however, the State simply claimed that contraband evidence unlawfully seized upon Rodrigues's arrest would have inevitably been discovered upon a subsequent cellblock inventory search, without offering any evidence concerning the transport.

The State relied, as it must in an inevitable-discovery case, on a hypothetical.^{3/} The State's hypothetical is that Rodrigues was originally arrested based on three outstanding bench warrants; he was searched incident to that arrest, but that the search, yielding a clear plastic bag containing what appeared to be crystal methamphetamine, exceeded the lawful scope of that search; and he was placed in Officer Williamson's vehicle and transported to the police cellblock where an inventory search was conducted on Rodrigues's person, including his pockets,

^{3/} The inevitable discovery exception to the exclusionary rule involves consideration of a hypothetical constructed and offered by the State explaining how, if the underlying illegal seizure had not occurred, the contraband would nevertheless have been inevitably discovered by legal means.

The inevitable discovery exception necessarily implicates a hypothetical finding that differs in kind from the factual finding that precedes application of the independent source rule. . . .

To ensure that this hypothetical finding is narrowly confined to circumstances that are functionally equivalent to an independent source, and to protect fully the fundamental rights served by the exclusionary rule, I would require clear and convincing evidence before concluding that the government had met its burden of proof on this issue.

State v. Lopez, 78 Hawai'i at 450-51, 896 P.2d at 906-07 (citations omitted) (quoting *Nix v. Williams*, 467 U.S. 431, 459-60 (1984) (Brennan, J., dissenting)) (adopting the inevitable-discovery exception and the clear-and-convincing-evidence standard for use in Hawai'i).

consistent with standard procedures. Mem. Op. at 9.

The State's hypothetical did not address, and the State offered no evidence addressing, the likelihood of the contraband remaining in Rodrigues's possession during his transport to the KPD cellblock. Specifically, the State offered no evidence on the issue of Rodrigues's inability, while handcuffed, to discard or destroy the contraband, or any police procedures in place that would have resulted in recovery of any discarded evidence. Consequently, the circuit court concluded that the State failed to satisfy its burden to present clear and convincing evidence that the contraband would have inevitably been discovered.

State v. Lopez requires that the court addressing an inevitable discovery claim consider carefully the outcome of the proffered hypothetical circumstances so as to assure that its "speculation as to the outcome of [the] hypothetical" is "as close to correct as possible." 78 Hawai'i at 451, 896 P.2d at 907. Since the evidence supporting the State's proposed hypothetical was clearly incomplete, I would concur with the circuit court that the State failed to present clear and convincing evidence on the inevitable discovery of the contraband.

The majority's decision reduces to the conclusion that it was not necessary for the State to present any evidence on the question of whether Rodrigues could access his pockets while handcuffed and discard or destroy the contraband while in transit because Rodrigues did not raise the issue himself. The State argues that it is not obligated to demonstrate that Rodrigues would not or could not have discarded the evidence, observing that "[i]n neither [*Lopez* nor *Silva*] is there any discussion at all about the possibility that the defendant could have or would have discarded or destroyed evidence before it would have been inevitably discovered by police." Neither *Lopez* nor *Silva*, however, supports the State's position.

In *Lopez*, the Hawai'i Supreme Court held that the prosecution failed to sufficiently demonstrate that the evidence suppressed at trial would inevitably have been discovered via lawful means. 78 Hawai'i at 452, 896 P.2d at 908. While the

decision does not explicitly discuss the possibility that the defendant might have discarded or destroyed the contraband evidence, the Court's ruling is premised specifically on the fact that "the record lacks the clear and convincing evidence necessary to show that the evidence recovered from the [co-defendant's] home as a result of [the] illegal search, *would have still been there.*" *Id.* (emphasis added).

Silva, on the other hand, involved a similar post-arrest transport to the cellblock where an inventory search would be conducted. Although this court did not discuss whether the defendant might have discarded or destroyed the evidence, it nevertheless held that it was not clearly erroneous for the trial court to conclude that the State had produced clear and convincing evidence that the contraband evidence would have been retrieved under the inevitable discovery rule. 91 Hawai'i at 121, 979 P.2d at 1147. In coming to that conclusion, however, it was unnecessary to address the possibility that the defendant might discard or destroy evidence while handcuffed in transit because *Silva* had testified that he was unable to access his pockets while he was handcuffed.^{4/} *Id.* at 114, 979 P.3d at 1140.

The State goes further and impliedly argues that the circuit court should have held as a matter of law that Rodrigues could not discard any evidence contained in his pocket because "in Hawaii, there is no legal precedent for recognition of a defendant's right to discard evidence." Recognition of the State's failure to present facts sufficient to justify the application of the inevitable-discovery rule in this case,

^{4/} The State also argues that the circuit court in COL 11 erroneously distinguished this case from *Silva*. The State contends that "as a matter of policy, it was improper for the [circuit court] to weigh [the fact that Rodrigues did not testify or acknowledge that he was unable to retrieve the contraband evidence after being handcuffed, unlike the defendant in *Silva*] in favor of suppression and to rely on it to distinguish this case from *Silva*" because, the State argues, the prosecution typically does not call a defendant to testify at suppression hearings and cannot compel a defendant to do so. As explained above, however, the circuit court properly distinguished *Silva*. Furthermore, the State's argument misses the point. The State is not required to obtain testimony from the defendant that he could not reach his pants' pockets while handcuffed, but it is required to offer *some* clear and convincing evidence that the contraband evidence would remain on the defendant's person until it could be discovered at the cellblock inventory search. Thus, the circuit court did not erroneously distinguish *Silva*.

however, does not amount to creating a right to discard evidence. There is no such right, and it is not a part of the analysis. Arrestees have been known to discard evidence, and it is the State's burden, once the underlying search has been determined to be illegal, to establish by clear and convincing evidence that an arrestee would not be able to discard the evidence that the State contends would inevitably have been discovered. As we noted in *Rodrigues I*:

In support of this proposition, Rodrigues cites several cases from other jurisdictions wherein defendants have been able to retrieve and discard similar baggies from their persons while handcuffed. See, e.g., *Williams v. State*, 784 S.W.2d 428 (Tex. Crim. App. 1990) (police found cocaine beneath the patrol car's backseat where the handcuffed defendant was seated); *State v. Jimenez*, []808 A.2d 1190 ([Conn. App. Ct.] 2002) (police officer found cocaine in backseat of police car after transporting defendant who had been handcuffed and frisked for weapons); *Simmons v. State*, []681 S.E.2d 712 ([Ga. Ct. App.] 2009) (officer discovered cocaine wedged in backseat of police car even though defendant had been searched and handcuffed).

122 Hawai'i at 235, 225 P.3d at 677. Whether Rodrigues could access the contraband evidence from his pocket after being handcuffed and thereafter discard or destroy it is a question of fact, not a question of law.

As we noted above, *supra*, at 2-3, the State's own evidence and arguments tended to suggest that Rodrigues might have been able to access his pocket after his arrest. Officer Williamson testified that despite the fact that he had no reason to believe that Rodrigues was concealing any type of contraband, was armed, or had needles, he pulled out Rodrigues's pocket to look for a means of escape. In the State's opposition to the Motion to Suppress, the State posited that an officer needed to pull out an arrestee's pocket to look for a "means of escape like a handcuff key or lock pick."

If an officer searches for a handcuff key or lock pick in an arrestee's pocket even though the arrestee is to be handcuffed and transported to a cellblock for an inventory search, it at least suggests that the officer believes that the arrestee may be able to access his pocket while handcuffed. If an arrestee cannot access his pocket after being handcuffed, it

would not appear to matter that his pocket contained a handcuff key or lock pick.

Since it was the officer's own pat-down practice and explanation that suggested that Rodrigues might access his pocket after being handcuffed, the circuit court reasonably concluded that it was the State's obligation to present clear and convincing evidence that Rodrigues could not discard the contraband evidence from his pocket after he was arrested but before a cellblock inventory search could be conducted.

Here, the State proposes only one hypothetical circumstance upon which it would base the inevitable-discovery exception: that the contraband evidence would have been discovered after transport upon the cellblock inventory search. The circuit court's requirement that the State establish the predicate facts (that the contraband would have been on Rodrigues's person at the time of the cellblock inventory search) before accepting the State's claim of inevitable discovery was properly calculated to assure that the State's proffered hypothetical was as close to correct as possible. See *State v. Lopez*, 78 Hawai'i at 451, 896 P.2d at 907.

III. The Majority's Decision Would Reverse the Burden of Proof Necessarily Accompanying the Clear-and-Convincing Standard

The State further argues that the circuit court erred because there was no evidence or argument that the contraband evidence would or could have been discarded. Rodrigues, however, is not required to present evidence or argument to disprove the State's claim of inevitable discovery. The defendant "is in possession of no independent evidence concerning whether the evidence that had been seized unlawfully would have otherwise been discovered through lawful means." See *State v. Sugar*, 495 A.2d 90, 103 (N.J. 1985). Thus, the State carries the burden to establish the secure transport of the evidence.

Cases on chain of custody are instructive. To establish a foundation for the admission of evidence, such as drugs, that is not readily identifiable, the proponent of the evidence must show a chain of custody for the item "with

sufficient completeness to render it improbable that the original item has . . . been contaminated or tampered with." *United States v. Cardenas*, 864 F.2d 1528, 1531 (10th Cir. 1989) (quoting E.W. Cleary, MCCORMICK ON EVIDENCE § 212 at 668 (3d ed. 1984)) (internal quotation marks omitted); see also *State v. Olivera*, 57 Haw. 339, 344, 555 P.2d 1199, 1202 (1976). Once the threshold showing of a sufficiently complete chain of custody has been made, deficiencies in the chain go to the weight of the evidence, not its admissibility. *Cardenas*, 864 F.2d at 1531.

Here, no threshold showing was made as the State offered no evidence at all on the issue of the secure transport of the contraband evidence to the KPD cellblock. As such, I would hold that the circuit court did not err in concluding that the State did not satisfy its burden by merely alleging that the contraband would inevitably have been discovered after Rodrigues was transported to the cellblock.

In sum, the logic of the State's argument is incomplete and, if applied, would excuse the State's failure to meet its burden of proof. In order to establish its theory of inevitable discovery, the State must present clear and convincing evidence of the predicate fact that Rodrigues would arrive at the cellblock with the contraband evidence on his person. The State, however, failed to address the issue at all. It presented no testimony or any credible evidence to support the proposition that Rodrigues would have remained in possession of the contraband while he was transported in the back seat of Officer Williamson's vehicle and that the evidence would have been in his possession at the time of the cellblock inventory search. Irrespective of the fact that it might have been easy for the State to satisfy its obligation, the fact is that it did not.

Was Officer Williamson able to observe Rodrigues throughout the transport to the cellblock?^{5/} Did another officer

^{5/} The State appears to concede in its reply brief that Officer Williamson was not able to observe Rodrigues, understandably, due to the requirements of careful driving. The State contends that Rodrigues would have this court require that the State must show continual, active observation by an officer to prevail in an inevitable discovery argument. As should be evident from the discussion above, such a requirement is not a part of this (continued...)

keep his attention focused on Rodrigues throughout the ride? Did the police search the vehicle before and after the transport to determine if anything was left behind during the ride? Or were the handcuffs themselves sufficiently restraining that Rodrigues could not access his pants' pockets while seated in the vehicle? These and similar questions were unaddressed by the State. The circuit court might reasonably have found evidence of any one of them to be sufficient, but none was offered. Rather, the State argues and the majority appears to agree that the singular hypothetical that Rodrigues, with contraband in his front pants' pocket, was handcuffed, placed into a police vehicle, and transported to the KPD cellblock where an inventory search would take place clearly and convincingly demonstrates that the contraband would have remained on Rodrigues's person and inevitably would have been discovered during the inventory search.

Under the inevitable discovery exception, "the privacy rights of the citizens of the State of Hawai'i may turn upon the outcome of the hypothetical[.]" *State v. Lopez*, 78 Hawai'i at 451, 896 P.2d at 907. Consequently, it is "incumbent upon us to assure that our speculation is as close to correct as possible." *Id.* Thus, "because we want to ensure that the added protection in the Hawai'i Constitution is not vitiated by a 'bad guess,' we require the prosecution to present clear and convincing evidence that any evidence obtained in violation of article I, section 7[of the Hawai'i Constitution] would inevitably have been discovered by lawful means before such evidence may be admitted[.]" *Id.*

If we are to "safeguard[] the privacy rights of our citizens against unlawful government intrusions[,]" *id.* at 451 n.29, 896 P.2d at 907 n.29, and if the heightened standard is meaningful, it must mean at least that the prosecution's burden is not conditioned upon the defendant, from whom evidence has already been illegally seized, explaining first the logical

^{2/}(...continued)
analysis, nor would we need to adopt a "beyond a reasonable doubt" standard of proof in order to affirm.

failings in the State's own hypothetical. In the absence of any supporting facts from the State regarding transport security, I would hold that the circuit court did not err in concluding that the State failed to meet its burden.

Consequently, I would affirm.

Lawrence M. Reicht