STATE CONSTITUTIONAL LAW—SEARCH AND SEIZURE—HAWAI'I'S EXCLUSIONARY RULE PROTECTS INDIVIDUAL PRIVACY IN ADDITION TO DETERRING POLICE MISCONDUCT. *STATE v. RODRIGUES*, 286 P.3D 809 (HAW. 2012).

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I. INTRODUCTION

In *State v. Rodrigues*,[1] the Hawai'i Supreme Court held that a quantity of methamphetamine discovered in a defendant's pocket during an illegal search was inadmissible under Hawai'i's exclusionary rule[2] when the State could not offer clear and convincing evidence that the methamphetamine would have been inevitably discovered.[3] This

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1. 286 P.3d 809 (Haw. 2012).

2. Hawai'i's exclusionary rule is justified under article I, section 7 of the Hawai'i Constitution. *Id.* at 822. The text reads:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

HAW. CONST. art. I, § 7.

This provision is almost identical to the Fourth Amendment but for the inclusion of an express protection against invasions of privacy and the last seven words, which appear to expressly protect against searches and seizures of modern conveniences such as telephones. U.S. CONST. amend. IV. Strangely, the Intermediate Court of Appeals ("ICA") which ruled on the *Rodrigues* case before the Hawai'i Supreme Court found as a matter of law that "[a]rticle I, [s]ection 7 of the Hawaii Constitution is identical to the Fourth Amendment to the United States Constitution." State v. Rodrigues, 225 P.3d 671, 674 (Haw. Ct. App. 2010). No explanation is offered for this inaccurate description.

3. Additionally, the Hawai'i Supreme Court held that the trial court's absence of findings regarding the petitioner's transport to the police station was not reversible error as it was the prosecution that had the burden of proving evidence would have been discovered

Comment will provide a brief overview of the inevitable discovery rule in federal law and the varying approaches taken by several states, as well as analyze the decision under relevant Hawai'i law. Ultimately, this Comment will conclude that the court's decision in *State v. Rodrigues* is consistent with Hawai'i law, and furthermore that Hawai'i's exclusionary rule provides additional protection not afforded by its federal and state counterparts.

II. THE EXCLUSIONARY RULE AND INEVITABLE DISCOVERY EXCEPTION IN FEDERAL AND STATE LAW

A. *The origin of the inevitable discovery rule and its status under federal law*

The exclusionary rule in American jurisprudence has its origin in the 1914 case *Weeks v. United States*,[4] in which the U.S. Supreme Court read the Fourth Amendment to demand the return of wrongfully seized evidence, precluding its use by the prosecution.[5] The Supreme Court first articulated the inevitable discovery exception, which applies to the exclusionary rule, in the 1984 case *Nix v. Williams*.[6] The inevitable discovery exception essentially gives a prosecutor a second chance to admit otherwise inadmissible evidence if he can demonstrate, by a preponderance of the evidence,[7] that the evidence would have inevitably been discovered in the absence of the illegal police search.[8] The inevitable discovery exception is rooted in the same rationale that justifies the alternative "independent source" exception, "allow[ing] admission of

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during an inventory search. *Rodrigues*, 286 P.3d at 818. Also, the court found that the trial court entered sufficient findings that the inventory search of the petitioner took place and thus found no reason to remand on the same issue. *Id.* at 818–19.

4. 232 U.S. 383 (1914).

5. *Id.* at 398. The wrongfully seized evidence in question included certain stock and bond certificates and various family heirlooms. *Id.* at 387.

6. 467 U.S. 431 (1984).

7. See *infra* note 9, for a brief discussion of the burden of proof.

8. In *Nix*, the Supreme Court upheld the admissibility of information, and all related evidence regarding a dead body in a criminal trial, even though the location of the body was provided during an interrogation that violated the defendant's right to counsel. 467 U.S. at 447–50. Chief Justice Burger, who crafted the majority opinion, stated that a search party, which was already operating nearby at a distance of only two and a half miles from where the remains would later be found, would have inevitably discovered the body independent of the illegally conducted interrogation. *Id.* at 449–50.

evidence that has been discovered by means wholly independent of any constitutional violation."[9]

The primary justification recognized by the Court under current law does not embrace personal privacy concerns. Rather, the exclusionary rule in federal law exists mainly to deter police misconduct.[10] The rationale behind the federal exclusionary rule is not a particularly generous one and its effectiveness has been called into question.[11]

B. *The inevitable discovery rule under alternative state law*

The Supreme Court applied the exclusionary rule to the states in 1961 following the decision in *Mapp v. Ohio*.[12] Among the states, this federal baseline rule, which aims only to deter police misconduct, is rarely departed from.[13] Though most state supreme courts have declared that their respective canons of constitutional law reserve the right to

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9. *Id.* at 443. In his dissent in *Nix*, Justice Brennan agreed that the "independent source" and "inevitable discovery" exceptions have a similar rationale, but must be distinguished from each other as an inevitable discovery exception occurs only when the seizure of evidence independent of a constitutional violation is purely hypothetical. *Id.* at 459 (Brennan, J., dissenting). A legitimate seizure has, by necessity, not yet occurred. Justice Brennan argued that increasing the burden of proof from preponderance of the evidence to the clear and convincing evidence standard would better protect the "fundamental rights served by the exclusionary rule." *Id.* at 459–60. This language is in disagreement with the majority-recognized justification that the exclusionary rule exists only to deter police misconduct. *See infra* note 10 and accompanying text. The distinction between protecting individual privacy and deterring police misconduct is subtle. Alas, the Court's "zealous efforts to emasculate the exclusionary rule" prevailed. *Nix*, 467 U.S. at 459 (Brennan, J., dissenting).

10. "The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections." *Nix*, 467 U.S. at 442–43.

11. *See* Alicia M. Hilton, *Alternatives to the Exclusionary Rule After* Hudson v. Michigan*: Preventing and Remedying Police Misconduct*, 53 VILL. L. REV. 47 (2008). Hilton argues for a reconsideration of the exclusionary rule as the default Fourth Amendment remedy on the basis that it provides no remedy when rights are violated and may even encourage law enforcement officers to commit illegal acts in order to secure convictions. *Id.* at 47.

12. 367 U.S. 643 (1961). In *Mapp*, obscene materials were recovered from the defendant's home after an illegal search. *Id.* at 644–45. At the time, Ohio law prohibited the knowing possession of pornographic materials, with the statute imposing a rather severe penalty consisting of a monetary fine between two hundred and two thousand dollars, and a jail term of one to seven years. *Id.* at 643 n.1.

13. For a broad review of each state's approach to this issue, see Michael J. Gorman, *Survey: State Search and Seizure Analogs*, 77 MISS. L.J. 417 (2007).

embrace broader protections[14] than those afforded under federal law, state search and seizure jurisprudence is generally coextensive with federal law rather than *more* extensive.[15] Ohio's case law is typical of this phenomenon. Its supreme court once stated: "We are disinclined to impose greater restrictions in the absence of explicit state constitutional guarantees protecting against invasions of privacy that clearly transcend the Fourth Amendment."[16]

Some states do offer greater protections in the context of search and seizure. These exceptions are the result of a state's constitutional emphasis on individual privacy. Alaska's case law is instructive, with a constitutional provision that explicitly states "the right of the people to privacy is recognized and shall not be infringed."[17] Similar provisions exist in several other state constitutions, including Montana and Florida.[18] At least one state, New Jersey, specifically requires that a prosecution satisfy a heightened clear and convincing evidentiary standard to admit evidence based on an inevitable discovery argument.[19]

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14. *See generally id.* Arizona, like other states, reserves its right to depart from the federal standard but has not articulated a test separate from the federal one. *Id.* at 420. Colorado is similarly situated, having articulated no separate test of its own. *Id.* at 422–23. Illinois represents another example; its supreme court expressed an unwillingness to find additional privacy protections in the absence of specific constitutional provisions or instructive language in the constitutional convention's debates and committee reports. *Id.* at 428–29. The Kentucky Supreme Court was clear that "[s]ection 10 of the Kentucky Constitution provides no greater protection than does the [F]ederal Fourth Amendment." *Id.* at 431–32 (quoting Colbert v. Commonwealth, 43 S.W.3d 777, 780 (Ky. 2001)). Section 10 of the Kentucky Constitution is nearly identical to the Fourth Amendment. KY. CONST. § 10.

15. Maine, for example, offers protection against unreasonable searches and seizures stated to be identical to the Fourth Amendment. Gorman, *supra* note 13, at 433.

16. State v. Geraldo, 429 N.E.2d 141, 145 (Ohio 1981).

17. ALASKA CONST. art. I, § 22. The Alaska Supreme Court once observed that "the Alaska constitutional guarantee against unreasonable searches and seizures is broader in scope than [F]ourth [A]mendment guarantees under the United States Constitution, at least in part because of the more extensive right of privacy guaranteed Alaskan citizens by article I, section 22 of our state constitution." Reeves v. State, 599 P.2d 727, 734 (Alaska 1979). That provision of the Alaska Constitution is not unlike article I, section 7 of the Hawai'i Constitution. *See supra* note 2.

18. Montana and Florida have specific constitutional provisions. Gorman, *supra* note 13, at 425–26, 439–40. Some state supreme courts, such as that in Mississippi, have read greater privacy protections into their constitutions in the absence of an explicit mention of increased privacy protections. *Id.* at 438.

19. State v. Sugar, 495 A.2d 90, 103–04 (N.J. 1985). This is the same standard required in Hawai'i as articulated by the case at the center of this Comment, *State v. Rodrigues*. *See infra* Part III.

C. *The inevitable discovery rule under Hawai'i state law*

In *State v. Lopez*, the Hawai'i Supreme Court announced for the first time that the exclusionary rule would also serve to protect the privacy rights of citizens as described in article I, section 7[20] of the Hawai'i Constitution, and not merely to deter illegal police conduct.[21] The court noted that while the U.S. Supreme Court had unequivocally stated that the federal rule's primary purpose was to deter police misconduct, the rule's purpose under Hawai'i law had yet to be fully defined by the state's supreme court.[22] Having thus reserved room to maneuver on the issue, the court held that interpreting the exclusionary rule in Hawai'i to protect privacy rights in addition to deterrence was consistent with the court's previous interpretations of article I, section 7.[23] That provision[24] of the Hawai'i Constitution is largely the same as the Fourth Amendment to the U.S. Constitution, but with a key difference which impacts the interpretation of the inevitable discovery rule in Hawai'i, namely an express privacy protection clause which reads: "The right of the people to be secure . . . against . . . invasions of privacy shall not be violated . . . ."[25]

20. See *supra* note 2 for the text of the state's constitutional provision. The dual purpose of Hawai'i's exclusionary rule is to be contrasted with more lax standards that allow for greater admission of evidence secured in invalid searches. *See supra* Part II.B.

21. 896 P.2d 889, 902 (Haw. 1995). In *Lopez*, a drug crime suspect's non-cohabitating mother gave permission for a detective to search the suspect's house for evidence of drug possession, though the mother had no actual authority to consent to this search. *Id.* at 894, 901. The court, relying on this greater constitutional right to privacy, held that reasonably relied upon apparent authority to consent to a search was not sufficient to make the search valid. *Id.* at 903. The court determined that actual authority to consent to a search was required, representing another rejection of a federal standard, as the court pointed out that apparent authority to consent to a search is the accepted standard under federal law. *Id.* That federal standard was announced in 1990. Illinois v. Rodriguez, 497 U.S. 177 (1990). In that case, a woman who had recently moved out of an apartment consented to the police performing a search there. *Id.* at 179. The police did so after the woman referred to the apartment as "our[s]" and represented that she had clothes and furniture there. *Id.* Apparently believing that the woman still lived there, the police conducted their search and arrested the occupant for drug possession. *Id.* at 180. The Supreme Court held that no Fourth Amendment violation takes place when the police reasonably believe the person consenting to the search had authority to do so. *Id.* at 187–89. Prior to this pronouncement in *Lopez*, the Hawai'i exclusionary rule functioned like the federal one, merely as a tool for deterring police misconduct. State v. Furuyama, 637 P.2d 1095, 1104 (Haw. 1981).

22. *Lopez*, 896 P.2d at 902.

23. *Id.* The court held that this interpretation was consistent with previous interpretations "whether or not the interpretations were based on the added privacy protection afforded by our constitution." *Id.* Curiously, the court did not cite or refer to any of these previous interpretations with specificity when saying so.

24. See *supra* note 2, for the text of the Hawai'i constitutional provision.

25. HAW. CONST. art. I, § 7.

One of the authorities cited as justification by the court in *Lopez* was the earlier Hawai'i case *State v. Kaluna*, in which the state's supreme court held that compliance with article I, section 5 of the Hawai'i Constitution required that "governmental intrusions into the personal privacy of citizens of this State be no greater in intensity than absolutely necessary under the circumstances."[26] Relying on two separate constitutional provisions that encouraged privacy protection, the *Lopez* court established privacy protection as a central purpose of the exclusionary rule.[27] Thereafter, the *Lopez* court then turned to modifying the inevitable discovery rule's standard of proof to comply with that dual purpose.

The court held that because the inevitable discovery rule requires speculation on the part of a court, and because of the abovementioned privacy protections explicitly afforded by the Hawai'i Constitution, a heightened burden of proof was necessary to ensure that speculation, which impacts the privacy rights of Hawaiian citizens, be "as close to correct as possible."[28] Rejecting the federal preponderance of the evidence standard,[29] the Hawai'i Supreme Court held that clear and convincing evidence was the only acceptable standard for application of the inevitable discovery rule.[30]

III. STATEMENT OF THE CASE

On November 23, 2008, Officer Scott Williamson observed petitioner-defendant Marco Rodrigues at Hanamaulu Beach Park sleeping in a car with an expired safety sticker.[31] Upon waking the petitioner, the officer requested that the petitioner provide his license and vehicle registration, which the petitioner was unable to do, though he did verbally identify himself.[32] The officer learned from his dispatcher that there were three

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26. 520 P.2d 51, 58–59 (Haw. 1974). This language evinces much different priorities than those advanced by the U.S. Supreme Court, which opined that excluding even ill gotten evidence was an "admittedly drastic and socially costly course." Nix v. Williams, 467 U.S. 431, 442 (1984).

27. *Lopez*, 896 P.2d at 902.

28. *Id.* at 907.

29. *Nix*, 467 U.S. at 444.

30. *Lopez*, 896 P.2d at 907. See *supra* note 9, for a brief discussion of Justice Brennan's dissenting opinion in *Nix*. The Hawai'i Supreme Court found his opinion persuasive and adopted his position when deciding *Lopez*. 896 P.2d at 907. The evidence suppressed in *Lopez*, a bag of cocaine obtained in an invalid, warrantless search of a private residence, was deemed by the court not to be "inevitably discovered" because the prosecution failed to meet the clear and convincing evidence standard. *Id.* at 893.

31. State v. Rodrigues, 286 P.3d 809, 811 (Haw. 2012).

32. *Id.*

outstanding bench warrants for the petitioner, so he placed the petitioner under arrest.[33]

Officer Williamson handcuffed the petitioner, though the record contains no evidence indicating whether his hands were placed in front of or behind him while handcuffed.[34] While the petitioner was handcuffed, the officer proceeded to search his person, pulling his pockets out from the outside.[35] Within the petitioner's left pocket the officer discovered a small plastic bag containing methamphetamine.[36] The officer placed the petitioner under arrest and transported him to the cellblock at the Kaua'i police station, and he was subsequently charged with a drug offense.[37] Before trial the petitioner filed a motion to suppress the methamphetamine, arguing that it was seized during an illegal search of his pockets in violation of his rights under the Fourth and Fourteenth Amendments to the U.S. Constitution and article I, section 7 of the Hawai'i Constitution.[38]

The petitioner argued that the methamphetamine was not found in a legitimate search incident to a lawful arrest. Under Hawai'i law, such a search can only be conducted where it is "reasonably necessary to discover the fruit or instrumentalities of the crime for which the defendant is arrested, or to protect the officer from attack, or to prevent the offender from escaping."[39] Additionally, the arresting officer did not first conduct a pat-down search which would give reason to believe that the petitioner was concealing contraband.[40]

In response, the State argued that the search was a valid search incident to arrest which afforded the officer an opportunity to discover hidden weapons or means of escape.[41] Alternatively—and more

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33. *Id.* The outstanding bench warrants were for contempt of court. *Id.*

34. No testimony was offered in court to show that the petitioner was handcuffed; this information comes from the petitioner's motion to suppress. *Id.* at 811 n.3. The location of the petitioner's hands while handcuffed seems irrelevant, but is important to the applicability of Hawai'i's exclusionary rule in this case.

35. *Id.* at 811.

36. *Id.*

37. *Rodrigues*, 286 P.3d at 811. That offense was "Promoting a Dangerous Drug in the Third Degree." HAW. REV. STAT. § 712-1243 (2004).

38. *Rodrigues*, 286 P.3d at 811–12. See *supra* note 2, for the text of article I, section 7 of the Hawai'i Constitution. The Fourth Amendment is almost identical to this provision. The search of the petitioner's pockets was asserted to be illegal under *State v. Enos*. 720 P.2d 1012 (Haw. 1986). *Enos* states that a police officer is entitled only to a pat-down search when there is no expectation that fruits or instrumentalities of the crime for which the suspect is arrested will be found. *Id.* at 1014–15.

39. *Rodrigues*, 286 P.3d at 812 (quoting *Enos*, 720 P.2d at 1014).

40. *Id.*

41. *Id.*

importantly—the State argued that even if the search was illegal, the evidence should not be suppressed under the inevitable discovery exception to the exclusionary rule as the methamphetamine would have been found in a "pre-incarceration custodial search" once the petitioner had been brought to the cellblock.[42]

The trial court granted the motion to suppress.[43] The prosecution appealed the decision to the ICA arguing that the trial court erred when it found that the State had failed to "establish by clear and convincing evidence that the methamphetamine was admissible pursuant to the rule."[44] The ICA agreed and remanded the case back to the trial court to make a determination; the trial court did so and once more granted the motion to suppress.[45] The State appealed again, and the ICA once more vacated the suppression order and remanded the case.[46] The petitioner appealed to the Hawai'i Supreme Court—alleging that it was error to hold that the State had met its clear and convincing evidentiary burden—and was granted certiorari.[47] The state supreme court held that the State did not show by clear and convincing evidence that the petitioner's methamphetamine would have been inevitably discovered regardless of the intervening illegal search, and Hawai'i's exclusionary rule barred admission of the methamphetamine.[48]

IV. THE COURT'S REASONING

The Hawai'i Supreme Court's opinion in this case was unanimous.[49] The court looked at the petitioner's argument over the inevitable discovery exception as two related arguments: first, "the ICA majority erred in concluding the court failed to make the necessary findings relevant to inevitable discovery," and second, "the ICA majority erred in

42. *Id.*
43. *Id.* at 813.
44. *Id.* (citing State v. Rodrigues, 225 P.3d 671, 675 (Haw. Ct. App. 2010)).
45. *Rodrigues*, 286 P.3d at 813.
46. *Id.* at 815.
47. *Id.* at 817. The petitioner brought up another issue in addition to questioning whether the ICA gravely erred in finding that the State had met its clear and convincing burden: "[w]hether the ICA gravely erred in failing to disregard [] points of error" alleged by the State in its ICA appellate brief that the petitioner holds were not properly brought to the attention of the ICA as required by Hawai'i Rules of Appellate Procedure 28(b)(4). *Id.* at 816. The supreme court found against the petitioner on this question, holding that the respondent had "preserved its points of error in its filings with the court." *Id.* at 817–18.
48. *Id.* at 810.
49. Justice Acoba drafted the opinion. *Id.*

concluding [the] [r]espondent met its burden of proving the methamphetamine would have been inevitably discovered."[50]

The court found that the lower court had made ample findings relevant to inevitable discovery and that the ICA was incorrect in holding otherwise.[51] The petitioner pointed to specific numbered findings of fact and conclusions generated by the lower court to support its conclusion, but the supreme court held that "*all* of the court's findings relate to its conclusion."[52] The court pointed out that the findings in question "were based on the evidence presented by [the] [r]espondent concerning [the] [p]etitioner's arrest, the unlawful search of [the] [p]etitioner during which the methamphetamine was discovered, the matters that transpired up until the point [the] [p]etitioner was placed in a cellblock, and the inventory search."[53]

The court was unconvinced by the State's argument to the ICA that the lower court had failed to make any findings about what occurred when the petitioner was placed in the police car after being arrested and handcuffed.[54] Pointing out that it was the respondent's burden to introduce clear and convincing evidence, the court suggested that the State *could* have offered evidence of how the petitioner was restrained, whether he could access his pockets to discard contraband, and whether he was being continuously observed.[55] The State had, of course, offered no such evidence.

Additionally, the respondent's argument that the lower court's findings were insufficient because they failed to include an express

50. *Id.* at 818. The court stated that the petitioner had "essentially adopt[ed] the position of the ICA dissent." *Id.* Judge Reifurth, sitting on the ICA panel, filed a dissent in which he argued that the lower court made no reversible error and that the evidence should have been suppressed under Hawai'i's exclusionary rule. *Id.* at 815–16 (citing State v. Rodrigues, No. 30692, 2012 WL 917514, at *11 (Haw. Ct. App. Mar. 19) (Reifurth, J., dissenting), *vacated*, 286 P.3d 809 (Haw. 2012)).

51. *Rodrigues*, 286 P.3d at 819.

52. *Id.* at 818. Specifically, the petitioner pointed out the lower court's findings and conclusions that: 1) the officer testified that he had no reason to believe the petitioner was concealing anything; 2) the inevitable discovery rule did not apply because the State did not produce clear and convincing evidence demonstrating that the petitioner was incapable of discarding the contraband; 3) the officer failed to testify that the petitioner was restrained in such a way that he would be unable to discard the contraband; 4) the State did not present evidence that an officer continuously observed the petitioner after arrest; and 5) the petitioner never testified or acknowledged that he could not retrieve and discard the contraband. *Id.* at 813–14.

53. *Id.* at 818.

54. *Id.* at 818–19.

55. *See id.* at 818. These rulings appear to be lifted directly from the findings and conclusions of the lower court, which pointed out that no such evidence had been introduced. *See supra* note 34.

assignment of credibility and weight given to Officer Williamson's testimony fell on deaf ears. The court pointed out that no such requirement to make an express finding exists.[56] Furthermore, the court stated that the credibility of the officer's testimony had little bearing on the lower court's decision and that the lower court had, at any rate, accepted the officer's testimony as true.[57]

Next, the court addressed the respondent's contention that this case mirrored another Hawai'i inevitable discovery case to the extent that the previous case's result should control. That case was *State v. Silva*,[58] in which drug paraphernalia recovered from a defendant under broadly similar circumstances was held admissible under the inevitable discovery exception.[59] The court distinguished the present case from *Silva* for several reasons. First, if the police version of events in that case was to be believed, the search was validly made incident to arrest.[60] If the defendant's version of events was to be believed, the contraband would have been inevitably discovered "because the defendant testified that he was unable to access his pockets while his hands were handcuffed."[61] The court pointed out that in the present case the respondent offered testimony that the officer "pulled out [the petitioner]'s pocket to look for a means of escape," suggesting that the petitioner could have accessed his pockets after being handcuffed.[62]

The court went on to address the second argument raised by the petitioner: that the ICA erred in holding that the respondent had shown by clear and convincing evidence that police would have inevitably discovered the methamphetamine.[63] Before resolving this issue, however, the court provided an overview of how Hawai'i's inevitable discovery

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56. *Rodrigues*, 286 P.3d at 819.

57. *Id.* "None of the parties disputed his testimony. The court concluded based on [the] [r]espondent's evidence, and particularly Officer Williamson's testimony, that [the] [r]espondent had not established by clear and convincing evidence that the methamphetamine would have been inevitably discovered . . . ." *Id.*

58. 979 P.2d 1137 (Haw. Ct. App. 1999).

59. *Rodrigues*, 286 P.3d at 819–20. Interestingly, the *Silva* court made no conclusion about the validity of the search. The ICA's holding that the contraband would have been inevitably discovered rendered that inquiry irrelevant. *Id.* at 820.

60. *Id.* (citing *Silva*, 979 P.2d at 1147–48).

61. *Id.* The question of which version of events was the correct one was never resolved. It is worth noting that Justice Acoba also crafted the language quoted by the *Rodrigues* court from *Silva* on this issue in a concurring opinion. *Id.* (citing *Silva*, 979 P.2d at 1147 (Acoba, J., concurring)).

62. *Id.* (quoting State v. Rodrigues, No. 30692, 2012 WL 917514, at *9 (Haw. Ct. App. Mar. 19) (Reifurth, J., dissenting), *vacated*, 286 P.3d 809 (Haw. 2012)).

63. *Id.* at 816–17, 820.

exception functions and how it differs from the federal rule which inspired it.[64]

Unlike the federal rule, Hawai'i's inevitable discovery exception does not simply function to deter police misconduct. In 1995, the Hawai'i Supreme Court pronounced, "an equally valuable purpose of the exclusionary rule under article I, section 7, is [to protect the privacy] rights of our citizens."[65]

V. AUTHOR'S ANALYSIS

The court in *Rodrigues* provided a thorough and grounded legal justification for its application of the inevitable discovery rule under Hawai'i law. Part A will assert that the court's legal analysis was directly in line with Hawai'i precedent; Part B will explore the possible implications of the inevitable discovery rule as it is applied in Hawai'i; and Part C will recommend that Hawai'i's approach be encouraged insofar as it provides greater constitutional privacy protections.

A. Soundness

The interpretation of the court in *Rodrigues* was correct and in accordance with Hawai'i law. The court adhered to Hawai'i's uncommon interpretation of the exclusionary and inevitable discovery rules, recognizing that: 1) in Hawai'i, the exclusionary rule exists to protect privacy as well as discourage police misconduct, and 2) in Hawai'i, the evidentiary burden for proving inevitable discovery is the clear and convincing standard.[66] The *Rodrigues* court relied principally on *Lopez*,[67] which established both the dual-purpose role of Hawai'i's exclusionary rule and the evidentiary standard for inevitable discovery under Hawaiian law. The court also interpreted Hawai'i's inevitable discovery rule correctly per the guidelines established in *Silva*, a factually similar case in which Hawai'i's inevitable discovery rule was *successfully* invoked.[68]

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64. *Id.* at 820. Within the case, a discussion of *Nix v. Williams*, 467 U.S. 431 (1984) follows. *See supra* note 8.

65. State v. Lopez, 896 P.2d 889, 902 (Haw. 1995).

66. *See Rodrigues*, 286 P.3d at 822–23.

67. *Id.* at 821–23.

68. State v. Silva, 979 P.2d 1137, 1147 (Haw. Ct. App. 1999). In *Silva*, a drug pipe was deemed admissible because the prosecution was able to show by clear and convincing evidence that the evidence would have been inevitably discovered. *Id.* at 1146–47. This satisfaction of the clear and convincing evidence standard served as a model for the *Rodrigues* court. *See* 286 P.3d at 822–23.

1. Consistency with Hawai'i's dual-purpose exclusionary rule

The court properly applied the law established in *Lopez* to the facts in *Rodrigues*. To its credit, the *Rodrigues* court provided a lengthy and thorough discussion of the development of Hawai'i's exclusionary rule, paying particular attention to the greater privacy protections afforded under Hawai'i law.[69] This focus on the *Lopez* court's insistence on a legal framework which better protects citizen privacy is well placed, providing a bedrock upon which the *Rodrigues* court's own legal analysis is based. Consistent with that controlling authority in *Lopez*, the *Rodrigues* court opined that to allow the prosecution to admit this illegally obtained evidence without a stronger showing of its inevitable discovery would effectively rubberstamp the gains of illegal searches as long as the police later transported the defendant to a cellblock and conducted a search after the fact.[70] This dicta relays the *Lopez* conclusion that it is not simply the prosecution's burden to prove that evidence would still have been there when police later performed the search, but that the burden itself is quite high. The court in *Rodrigues* opined that there are only "discrete exceptions" to article I, section 7's general prohibition on unreasonable searches and seizures.[71] The court was clearly mindful of the focus on privacy announced in *Lopez* when it stated that to allow police procedure to overcome the general prohibition would render the discrete exceptions void.[72] Such a broad—and easily applied—exception to the prohibition on unreasonable searches and seizures would be contrary to article I, section 7's express declaration of a right to be free from invasions of privacy.[73]

Additionally, the *Rodrigues* court further demonstrated its reliance on existing law when it cited to specific language in the *Lopez* opinion, which grounds the greater Hawaiian right to privacy in another provision of the Hawai'i Constitution.[74] That provision is article I, section 5, which the *Lopez* court acknowledged as requiring that "governmental intrusions into the personal privacy of citizens of this State be no greater in

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69. *Rodrigues*, 286 P.3d at 820–23.

70. *Id.* at 823–24. The court opined that "virtually every unconstitutional search incident to arrest, or any unconstitutional search of a defendant after his or her arrest . . . would be validated upon a showing by the State that, after the search, the defendant was transported to the cellblock and an inventory search conducted." *Id.*

71. *Id.*

72. *See id.*

73. HAW. CONST. art. I, § 7.

74. *Rodrigues*, 286 P.3d at 823 (citing State v. Lopez, 896 P.2d 889, 902 (Haw. 1995)).

intensity than absolutely necessary."[75] The court held that turning the *Rodrigues* petitioner's pockets inside out was not necessary to search for the instrumentalities or fruits of the crime for which he was arrested; accordingly, the search was an unreasonable violation of his privacy.[76]

2. Consistency with the clear and convincing evidence standard

The court's application of the clear and convincing evidence standard is appropriate under existing Hawaiian law. The court stuck tightly to guidelines established in a factually similar case, *State v. Silva*.[77] In that case, as in *Rodrigues*, police recovered drug evidence after a search of a defendant's pockets.[78] Unlike in *Rodrigues*, however, the *Silva* prosecution was able to show by clear and convincing evidence that the items recovered from the defendant would still have been there at a cellblock inspection because of the defendant's inability to throw them away.[79] The most compelling evidence to support this was testimony from the defendant himself in which he stated that he was unable to access the pockets from which the police officer removed the evidence in question because the officer had handcuffed him.[80] The court clearly found this distinction important, pointing out that the prosecution in *Rodrigues* offered no evidence that the handcuffed petitioner was unable to reach his pockets or otherwise remove evidence carried on his person; indeed, the prosecution offered evidence to suggest that the *Rodrigues* petitioner

75. *Lopez*, 896 P.2d at 901–02 (quoting State v. Kaluna, 520 P.2d 51, 58–59 (Haw. 1974)). The *Kaluna* court dealt with the admissibility of drugs recovered in a police station search of an arrestee. 520 P.2d at 54. The court held that since the arrestee was detained in connection with a violent robbery involving a pistol, a search could be conducted only to the extent absolutely necessary to turn up instrumentalities or fruits of that crime. *Id.* at 59. The drugs recovered from the arrestee were in a small paper packet in which it was unlikely that any instrumentalities or fruits of the crime were secreted away. *Id.* Thus, the opening of the packet by police personnel was held to be an unreasonable search. *Id.* at 59–60.

76. *Rodrigues*, 286 P.3d at 823. Officer Williamson arrested the petitioner for outstanding bench warrants issued for contempt of court; it is unlikely Officer Williamson would have discovered any instrumentalities or fruits of that crime in an exhaustive search of the petitioner's person. *See supra* text accompanying notes 31–33.

77. 979 P.2d 1137 (Haw. Ct. App. 1999).

78. *Id.* The *Silva* court entered no finding as to the validity of the search but found it unnecessary to do so as the prosecution singularly relied upon an inevitable discovery argument. *See supra* note 59.

79. *Silva*, 979 P.2d at 1146.

80. *Id.* at 1140. The defendant's exact words were: "I wasn't able to go into any other pockets to get out any contents that was in there because I was already handcuffed." *Id.*

could access his pockets.[81] It is important that the court made this distinction, as it forces compliance with the *Lopez* standard which might be missed if a less intensive inquiry of the facts were conducted.[82] The court's insistence on such a fact-specific inquiry is entirely consistent with Hawai'i law.[83] To require less depth in reviewing the facts would rob the clear and convincing standard adopted in *Lopez* of its utility and permit the sort of inevitable discovery rubberstamping that the court wished to avoid.[84]

B. Implications

The court's interpretation of the inevitable discovery rule to exclude evidence of methamphetamine recovered in an invalid search proves the high court's willingness to diverge from federal law and embrace the broader protections explicit in its state constitution.[85] The textual differences between article I, section 7 of the Hawai'i Constitution and

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81. *Rodrigues*, 286 P.3d at 820. The arresting officer in *Rodrigues* offered as a justification for illegally searching the petitioner's pockets his concern that the petitioner was concealing a means of escape such as a handcuff key or lock pick. *Id.* The court held that this testimony suggested the petitioner was in fact able to access his pockets. *Id.* See *supra* note 52, for a complete list of the lower court's findings, which indicated a distinct lack of evidence to meet the elevated clear and convincing burden.

82. The *Rodrigues* court, which was greatly persuaded by Judge Reifurth's dissenting opinion in the ICA, noted his point that

> [a]rrestees 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.

286 P.3d at 816 (alteration in original) (quoting State v. Rodrigues, No. 30692, 2012 WL 917514, at *11 (Haw. Ct. App. Mar. 19) (Reifurth, J., dissenting), *vacated*, 286 P.3d 809 (Haw. 2012)).

Judge Reifurth provided as examples three out-of-state cases in which handcuffed defendants had allegedly hidden cocaine while being transported in the back seat of a patrol car: *State v. Jimenez*, 808 A.2d 1190 (Conn. App. Ct. 2002), *Simmons v. State*, 681 S.E.2d 712 (Ga. Ct. App. 2009), and *Williams v. State*, 784 S.W.2d 428 (Tex. Crim. App. 1990). *Rodrigues*, 2012 WL 917514, at *8 (quoting State v. Rodrigues, 225 P.3d 671, 677 (Haw. Ct. App. 2010)).

83. The *Lopez* court echoed the sentiment of Justice Brennan's dissent in *Nix v. Williams*, stating: "[B]ecause 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 . . . ." State v. Lopez, 896 P.2d 889, 907 (Haw. 1995).

84. *See supra* note 70 and accompanying text.

85. *Rodrigues*, 286 P.3d at 823. "As *Lopez* declared, our exclusionary rule differs from its federal counterpart insofar as it protects individual privacy rights." *Id.* In a footnote to the *Rodrigues* opinion, the court noted its absolute freedom to interpret its state constitution to afford greater protections than its federal counterpart. *Id.* at 812 n.8.

the Fourth Amendment to the U.S. Constitution may be minor, but the substantive differences are quite significant.[86] While more cynical observers could comment that the ruling in *Rodrigues* benefits a criminal by preventing his effective prosecution, it is broadly a reinforcement of Hawai'i law which trends toward increased privacy protection. By indicating the extent of the high court's willingness to protect privacy, this ruling could force greater compliance with Hawaiian law upon police officers,[87] whose procedures could be sensibly modified to prevent privacy violations under the Fourth Amendment and article I, section 7 of the Hawai'i Constitution.[88]

C. Recommendations

The Hawai'i Supreme Court's application of both the dual-purpose exclusionary rule and the clear and convincing evidence standard for inevitable discovery are admirable to the extent that they prioritize the protection of individual privacy. Notwithstanding concerns about social costs in allowing evidence of criminal activity to be excluded,[89] the Hawaiian trend toward greater constitutional protections for privacy is to be encouraged particularly in this age of casual government intrusion into citizen's lives.[90] An exclusionary rule with a dual purpose of deterring misconduct and protecting individual privacy—which requires an elevated burden of proof for a showing of inevitable discovery—could potentially be a powerful tool in challenging the indiscriminate collection of personal data for law enforcement purposes by a slew of government agencies.[91]

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86. See *supra* note 2, for a discussion of the textual differences.

87. The controversy in this case would likely never have arisen had the arresting officer refrained from reaching into the petitioner's pockets and contented himself with the *Enos* pat-down. See *supra* note 38, for a brief discussion of the *Enos* pat-down standard in Hawaiian law.

88. *But see* supra note 11. Hilton argues that circumstances often encourage police to lie to advance police objectives, potentially threatening civil liberties. Hilton, *supra* note 11, at 72–73. If this phenomenon is widespread, the exclusionary rule may still be an insufficient remedy without some additional penalty applied to infringing law enforcement officers.

89. See *supra* note 10, for the *Nix*-era U.S. Supreme Court's views on the dangers of excluding evidence in a prosecution.

90. *See generally* David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62 (2013) (discussing the methods, dangers, and constitutionality of government mass surveillance).

91. *Id.* at 63–64 (discussing the extent of FBI and NSA surveillance programs, which gather personal data through telecommunications and internet access providers).

VI. CONCLUSION

In *State v. Rodrigues*, the Hawai'i Supreme Court held inadmissible evidence recovered from an arrestee which the prosecution argued would have been inevitably discovered in a cellblock inspection. In so doing the court reinforced longstanding notions of greater privacy protections under the Hawai'i Constitution and the steep evidentiary burden imposed on the State to circumvent those privacy protections. The court's holding is to be commended, and Hawai'i's approach should be seriously considered as an alternative to the less protective standard so frequently applied at the federal level and in other states.