

2001

# Utah v. Pearl Topanotes : Brief of Petitioner

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH,	:	
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Plaintiff/Respondent,	:	
	:	
v.	:	
	:	
PEARL TOPANOTES,	:	Case No. 20010127-SC
	:	
Defendant/Petitioner.	:	Priority No. 13

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**BRIEF OF PETITIONER ON CERTIORARI REVIEW**

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Defendant/Petitioner.	:	Priority No. 13

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**JURISDICTIONAL STATEMENT AND OPINION BELOW**

This Court granted Petitioner Pearl Topanotes' Petition for Writ of Certiorari to the Utah Court of Appeals in State v. Topanotes, 2000 UT App 311, 14 P.3d 695. The Court's Order granting the Petition is attached hereto as Addendum A, and the court of appeals' decision in Topanotes is attached as Addendum B. Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 78-2-2(3)(a) and (5) (1996).

**STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW**

The issues presented for review are as follows:

A. Whether the court of appeals erred in failing to resolve on the existing record an issue raised by the state for the first time on appeal.

B. Whether the court of appeals' order of remand for further proceedings and a "factual determination" on an issue raised by the state for the first time on appeal was fundamentally unfair and in conflict with Utah case law.

**STANDARD OF REVIEW:** On certiorari, this Court adopts the same standard of review used by the court of appeals: questions of law are reviewed for correctness, and findings are reversed only if clearly erroneous. State v. Leyva, 951 P.2d 738, 741 (Utah 1997) (cite omitted). The court of appeals reviewed the issues on appeal in this case as follows: "[T]he determination of whether an encounter with law enforcement officers constitutes a seizure under the Fourth Amendment . . . is a legal conclusion that we review for correctness." State v. Topanotes, 2000 UT App 311, ¶4 (citing Salt Lake City v. Ray, 2000 UT App 55, ¶8, 998 P.2d 274).

### **PRESERVATION OF ARGUMENTS**

*Arguments Preserved in the Trial Court.* In the trial court, Topanotes challenged a governmental search as unconstitutional under the Fourth Amendment. The trial court upheld the search and Topanotes appealed the matter to the court of appeals. Topanotes' objections to the search are contained in the record on review ("R.") at 29-38 and 88; see also R. 98:3-9.

*Arguments Preserved in the Court of Appeals.* In the court of appeals, the state conceded that the search conducted in this case violated the Fourth Amendment, Topanotes, 2000 UT App 311, ¶8 n.3, then argued for the first time on appeal that evidence discovered during the unlawful, warrantless search was admissible against Topanotes under the "inevitable-discovery" doctrine. Id. at ¶10. Topanotes objected to the state's newly raised argument on the basis that the record failed to support application of the inevitable-discovery doctrine and the doctrine was not a proper alternative ground for affirmance.

(See Topanotes' Reply Brief of Appellant, dated July 14, 2000.)

Thereafter, the court of appeals issued its ruling in the matter. It held that the warrantless search was unlawful. Topanotes, 2000 UT App 311, ¶8. It also determined that it had insufficient information to address the issue of inevitable discovery in this case. The court of appeals then remanded the case to the trial court for "a factual determination on whether the heroin would have been inevitably discovered and for such proceedings as may be appropriate." Id. at ¶12.

In connection with the court of appeals' remand order, Topanotes filed a petition for rehearing, again objecting to the state's argument for application of the inevitable-discovery doctrine, and to the court of appeals' remand order for further proceedings on the matter. (See Petition for Rehearing, dated December 7, 2000.) The court of appeals denied that petition in an order dated December 15, 2000. Topanotes has properly preserved the issues for review in this case.

### **RULES, STATUTES AND CONSTITUTIONAL PROVISIONS**

The following provisions will be determinative of the questions presented for review: U.S. Const. amend. IV and XIV, § 1. The text of those provisions is contained in Addendum C hereto.

### **STATEMENT OF THE CASE**

#### **Nature of the Case, Course of Proceedings, Disposition in the Court Below.**

On October 13, 1998, the state charged Petitioner Pearl Topanotes ("Topanotes") with unlawful possession of a controlled substance, a third degree felony offense in violation

of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1998). (R. 7-8.)

On July 1, 1999, Topanotes filed a motion to suppress the substance giving rise to the charge in this case on the basis that the substance was discovered during an unlawful search. (R. 29-38.)

On July 15, 1999, the trial court held its first hearing on the motion to suppress. At that hearing, the prosecutor called two witnesses to testify in support of the state's claim that the substance at issue was admissible in evidence against Topanotes under the Fourth Amendment. After both state witnesses testified, the prosecutor specifically represented to the trial court that the state had no further evidence to present in connection with the matter. (R. 88:29.) Thereafter, the trial court took the motion to suppress under advisement.

On July 28, 1999, the trial court held a second hearing in the matter, wherein the prosecutor specifically represented that he would submit the issue of admissibility on the arguments and evidence contained in the record. (R. 98:3.) The trial judge then ruled on the matter, denying Topanotes' request for suppression of the evidence. (R. 98:8.)

On July 28, 1999, Topanotes entered into a conditional guilty plea (R. 56-66), "reserving the right to appeal the denial of her motion to suppress evidence." (R. 60.) The trial court entered judgment against Topanotes and sentenced her to an indeterminate prison term of up to five years at the Utah State Prison. (R. 56-57.) A copy of the judgment is attached hereto as Addendum D. While incarcerated, Topanotes appealed the trial court's ruling on the motion to suppress.

In the court of appeals proceedings, the state admitted that officers engaged in an

unlawful seizure when they detained Topanotes during the warrants check that led to the discovery of the substance giving rise to the charge in this case. The state also argued for the first time on appeal that the unlawfully seized evidence was nevertheless admissible against Topanotes under the inevitable-discovery doctrine. (Brief of Appellee, dated May 15, 2000.)

On November 9, 2000, the court of appeals issued a published decision in the matter, ruling that the officers violated Topanotes' Fourth Amendment rights when they unlawfully detained her for the warrants check. Topanotes, 2000 UT App 311, ¶8. The court then considered the state's argument concerning application of the inevitable-discovery doctrine and determined the record was insufficient on the matter. As a result of the insufficient record, the court remanded the case to the trial court "for a factual determination on whether the heroin would have been inevitably discovered and for such proceedings as may be appropriate." Id. at ¶12.

On December 7, 2000, Topanotes filed a petition for rehearing, asking the court of appeals to vacate the remand order for further proceedings, since such a remand was unprecedented and unfair. (See Petition for Rehearing, dated December 7, 2000.) On December 15, 2000, the court of appeals denied the petition. On February 13, 2001, Topanotes requested certiorari review. This Court granted Topanotes' petition and granted an extension of time to October 4, 2001, for filing the opening Brief of Petitioner.

### **STATEMENT OF FACTS**

"On October 7, 1998[,] three Salt Lake City police officers detained defendant on a public street" outside her trailer home, and requested her identification. Topanotes, 2000

UT App 311, ¶2; (R. 88:9, 21, 27). In response to the request, Topanotes produced an identification card or driver's license and handed it to Officer Hansen. (R. 88:9-11.) Thereafter, Officer Hansen handed the card to Officer Mitchell and told him to call it in for warrants. (R. 88:14, 21-22.) Officer Mitchell took the card and left to conduct the check. (R. 88:10-11.)

Officers Hansen and Mitchell admitted that when they encountered Topanotes they did not suspect that she was involved in criminal activity. (R. 88:15-16; 88:28); Topanotes, 2000 UT App 311, ¶8 n.3. Nevertheless, the officers retained possession of Topanotes' property outside her presence to run the warrants check. Topanotes, 2000 UT App 311, ¶2. When the warrants check was completed, officers discovered an outstanding warrant for Topanotes' arrest. The officers arrested Topanotes and searched her in connection therewith. During the search, officers discovered heroin in Topanotes' pocket. She "was ultimately charged with possession of a controlled substance." Id.

In the trial court, Topanotes filed a motion to suppress admissibility of the substance discovered during the warrantless search on the basis that the search constituted an unlawful level-two detention. (R. 29-38); see State v. Deitman, 739 P.2d 616, 617-18 (Utah 1987); Salt Lake City v. Smoot, 921 P.2d 1003, 1006 (Utah Ct. App.), cert. denied, 925 P.2d 963 (Utah 1996) (in order to legally effect a level-two detention or seizure, the officer must have "articulable suspicion" that the suspect has or is about to commit a crime) (citing State v. Munsen, 821 P.2d 13, 15 n.1 (Utah Ct. App. 1991), cert. denied, 843 P.2d 516 (Utah 1992)).

On July 15, 1999, the trial court held an evidentiary hearing on the matter, wherein the prosecutor presented evidence in connection with his argument that the substance discovered during the warrantless search was admissible under the Fourth Amendment. (See R. 88; 67-71.) At the conclusion of the hearing, the trial court took the matter under advisement.

Thereafter, on July 28, 1999, the trial court held a second hearing. During that hearing, the prosecutor specifically represented that he would submit the issue of admissibility on the facts and arguments already contained in the record. (R. 98:3.) The trial court then entered a ruling on the matter, denying Topanotes' motion to suppress. According to the trial court, at all times relevant, the officers were engaged in a consensual level-one encounter with Topanotes; the officers discovered the outstanding warrant and controlled substance at issue during that consensual encounter. (R. 98:3-9.)

Prior to the trial court's ruling, the state could not have known whether the court would suppress the evidence or find it admissible. In connection with its argument concerning admissibility, the state was given at least two opportunities to present the evidence it deemed relevant on the matter. (See R. 88; 98:3.) Also, the prosecutor twice represented to the trial court that he was satisfied with the evidence and arguments submitted by the state on the issue of admissibility. (See R. 88:29; 98:3.)

When Topanotes appealed the trial court's ruling to the court of appeals, the state conceded the trial court erred in its ruling. Specifically, the state admitted that when officers asked for and then retained possession of Topanotes' identification card to check



for outstanding warrants, the matter escalated to a non-consensual, unlawful level-two detention. Topanotes, 2000 UT App 311, ¶8 n.3.

While the analysis should have ended with the state's concession, the state's argument in the matter continued as follows.

According to the state, the controlled substance was admissible against Topanotes under an alternative theory raised for the first time on appeal: application of the inevitable-discovery doctrine. The state argued that if the court of appeals found the record in this case to be insufficient to support its new theory, "the proper remedy is remand to allow the trial court to make the fact sensitive determination in the first instance." (See Brief of Appellee, dated May 15, 2000, at 11 n.3.)

On November 11, 2000, the court of appeals issued a published decision, remanding the case to the trial court "for a factual determination on whether the heroin would have been inevitably discovered and for such proceedings as may be appropriate." Topanotes, 2000 UT App 311, ¶11-12. The remand order is improper. Additional facts relating to the issues on review are set forth below.

### **SUMMARY OF THE ARGUMENT**

Under Utah law, an appellate court will affirm a trial court's ruling on an alternative theory raised for the first time on appeal if the theory is apparent on the record. State v. Montoya, 937 P.2d 145, 149-50 (Utah Ct. App. 1997) (citing Limb v. Federated Milk Producers Association, 461 P.2d 290 (Utah 1969)); State v. Chevre, 2000 UT App 6, 994 P.2d 1278. That means, the existing record must support the alternative theory, otherwise,

the appellate court will not consider the matter on appeal. The Utah rule ensures fundamental fairness and due process in the proceedings below and on appeal.

In Topanotes' case, the state argued for the first time on appeal that the trial court's ruling on the motion to suppress should be affirmed under the inevitable-discovery doctrine. Inasmuch as the state had raised a new theory for affirmance on appeal, the court of appeals was required to assess whether that theory could be sustained on the existing record, or whether it must be rejected. The court of appeals refused to engage in that analysis of the matter. Rather, it remanded the case to the trial court for further proceedings. That was improper. Topanotes respectfully requests that this Court make the proper assessment for the new theory on the existing record, or remand the case to the court of appeals for that assessment. To that end, this Court or the court of appeals should find that the existing record is insufficient to support the state's argument for application of the inevitable-discovery doctrine.

Next, in the event this case is remanded to the trial court, the remand order must be limited to proceedings on the existing record. The state may not be entitled to another evidentiary hearing on remand in order to present additional evidence in the matter.

Under state and federal law, the state bears the burden of establishing the admissibility of evidence under the Fourth Amendment. To that end, the state's factual predicate for admissibility must be fully developed before appeal. If the state fails to present evidence in the original proceedings relevant to the matter, the state is not entitled to a second -- or in this case, third -- opportunity to elicit facts supporting yet a new argument to justify the officers'

warrantless conduct. See State v. Hodson, 907 P.2d 1155, 1159-60 (Utah 1995) (the state bears the burden of proof and is not entitled to a remand to put on new evidence after appeal); State v. Case, 884 P.2d 1274, 1278 (Utah Ct. App. 1994). Remand for another evidentiary hearing would be fundamentally and procedurally unfair and unprecedented. Thus, Topanotes respectfully requests that any remand of this matter to the trial court be limited to proceedings on the existing record.

### **ARGUMENT**

#### **POINT I. SINCE THE STATE RAISED THE INEVITABLE-DISCOVERY DOCTRINE FOR THE FIRST TIME ON APPEAL AS AN ALTERNATIVE GROUND FOR AFFIRMANCE, THE COURT OF APPEALS WAS REQUIRED TO RESOLVE THAT ISSUE ON THE EXISTING RECORD.**

##### **A. THE DOCTRINE OF AFFIRMING ON AN ALTERNATIVE GROUND RAISED FOR THE FIRST TIME ON APPEAL APPLIES ONLY IF DUE PROCESS IS SATISFIED.**

In Limb v. Federated Milk Producers Association, 461 P.2d 290 (Utah 1969), this Court articulated the rule for affirming a judgment on an alternative ground raised for the first time on appeal:

The law is well settled that a trial court should be affirmed if on the record made it can be. The general law is stated in 5 C.J.S. Appeal & Error §1464(1) as follows: "\*\* \* \* The appellate court will affirm the judgment, order, or decree appealed from if it is sustainable on any legal ground or theory apparent on the record, even though such ground or theory differs from that stated by the trial court to be the basis for its ruling or action, and this is true even though such ground or theory is not urged or argued on appeal by appellee, was not raised in the lower court, and was not considered or passed on by the lower court. \* \* \*."

Limb, 461 P.2d at 293, n. 2; see also Orton v. Carter, 970 P.2d 1254, 1259-60 (Utah 1998) (separate theories for affirmance were "supported by the evidence," and therefore "apparent

on the record," for purposes of the doctrine of affirming on alternative grounds). That doctrine comports with due process, as demonstrated in State v. Montoya, 937 P.2d 145 (Utah Ct. App. 1997).

In Montoya, the defendant moved to suppress evidence discovered by police during an inventory search of his car. After the trial court upheld the search under the Fourth Amendment, defendant appealed, claiming the search was invalid. Id. at 148. "The State respond[ed on appeal] by conceding that it failed to establish that the inventory search was valid, primarily because it wholly failed to demonstrate that the police department had standardized inventory procedures and what those procedures were." Id. Thereafter, notwithstanding the concession, the state asked the court of appeals to uphold the search on alternative grounds. The state asked the court to find that the search was "incident to a lawful arrest" and supported by probable cause and exigent circumstances. Id. at 148-49.

In considering the matter, the court of appeals recognized it may affirm the lower court's ruling on "any proper ground as long as there is evidence in the record supporting such an affirmance." Id. at 149. The court of appeals also stated the following:

Critical to affirmance is the requirement [that] the ground or theory be "apparent on the record." *Id.* If, in any way, the ground or theory urged for the first time on appeal is not *apparent* on the record, the principle of affirming on any proper ground has no application. To hold otherwise would invite the prevailing party to selectively focus on issues below, the effect of which is holding back issues that the opposition had neither notice of nor an opportunity to address. Because of this due process component, "apparent on the record," in this context, means more than mere assumption or absence of evidence contrary to the "new" ground or theory. The record must contain sufficient and uncontroverted evidence supporting the ground or theory to place a person of ordinary intelligence on notice that the prevailing party may rely thereon on appeal.

Montoya, 937 P.2d at 149-50. The court also specified that the alternative ground must be "well-briefed" on appeal to be considered. Id. at 150.

In Montoya, the court of appeals refused to consider new arguments raised first on appeal since the facts necessary to establish the new bases for affirmance were not apparent from the record and the arguments were not adequately briefed. Id. The state's arguments were rejected and the trial court's ruling on the motion to suppress was reversed. Id.

In Topanotes' case, the court of appeals disregarded the law articulated above.

Specifically, Topanotes argued in the court of appeals that the trial court erred in denying her motion to suppress, where officers engaged in an unlawful "level-two stop without the requisite articulable suspicion." Topanotes, 2000 UT App 311, ¶4. During the unlawful level-two detention, officers discovered a warrant for Topanotes' arrest and they searched her in connection with executing that warrant. During the search, officers discovered the controlled substance that resulted in the charge in this case.

On appeal, the state conceded the officers' conduct was unconstitutional. Topanotes, 2000 UT App 311, ¶8 n.3. Nevertheless, the state asked the court of appeals to rule that the controlled substance discovered during the unlawful detention was admissible against Topanotes on the basis that officers inevitably would have discovered that substance if they had engaged in a lawful search. (See Brief of Appellee, dated May 15, 2000.) The state argued for the first time on appeal that the inevitable-discovery doctrine applied to this case. The state's argument constituted a newly raised, alternative ground for affirmance.

In considering the state's new argument, the court of appeals should have assessed

whether the alternative ground was "apparent on the record" and whether the record placed a person of ordinary intelligence on notice in the trial court that the state may rely on that alternative ground for affirmance on appeal. Montoya, 937 P.2d at 149-50. Instead, the court of appeals stated the following:

Inevitable discovery is a valid exception to the exclusionary rule, *see State v. Northrup*, 756 P.2d 1288, 1293 (Utah Ct. App.1988), and "[t]he appropriate standard governing the inevitable discovery exception is whether 'the prosecution can establish by a preponderance of the evidence that the information ultimately would have been discovered by lawful means.'" *State v. James*, 2000 UT 80, ¶ 16, 405 Utah Adv. Rep. 31 (quoting *Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984)). More precisely, the State "must show that the evidence 'would' have been discovered, not simply that it 'could' or 'might' have been discovered." *M.V. v. State*, 1999 UT App 104, ¶ 12, 977 P.2d 494 (quoting *Genovesi*, 909 P.2d at 923 n. 8) (alterations in original).

¶ 11 Because the trial court ruled that the initial detention was legal, the issue of inevitable discovery was not addressed below. "This court has consistently recognized that [issues of search and seizure] are highly fact sensitive," *State v. Lovegren*, 798 P.2d 767, 770 (Utah Ct. App.1990), and "[i]t is not the function of an appellate court to make findings of fact because it does not have the advantage of seeing or hearing the witnesses testify." *Rucker v. Dalton*, 598 P.2d 1336, 1338 (Utah 1979). Moreover, "complete, accurate[,] and consistent findings of fact ... [are] essential to the resolution of dispute under the proper rule of law." *Id.*

¶ 12 Therefore, we remand for a factual determination on whether the heroin would have been inevitably discovered and for such proceedings as may be appropriate.

Topanotes, 2000 UT App 311, ¶¶10-12; see also State v. Howard, 509 N.W.2d 764, 767-68 (Iowa 1993) (although the trial court denied the motion to suppress on the basis that the warrant was valid, the appellate court affirmed the search on an alternative ground apparent in the record: the existing evidence supported consent to search).

The court of appeals' remand for a factual determination and further proceedings is inappropriate. Such a remand is fundamentally unfair and serves to provide the state with

an unprecedented second, or in this case third, "bite at the apple." See infra subpoint I.C., and Points II. Topanotes respectfully requests that this Court vacate the court of appeals' remand order as it relates to the inevitable-discovery doctrine, and either decide that issue here or remand the matter to the court of appeals for a resolution of the issue on the existing record.

**B. THE RECORD IN THIS CASE CONTAINS INSUFFICIENT EVIDENCE TO SUPPORT THE STATE'S ARGUMENT FOR AFFIRMANCE ON AN ALTERNATIVE GROUND RAISED FOR THE FIRST TIME ON APPEAL.**

**1. "Inevitable Discovery" Is a Fact-Intensive Issue.**

*The Exclusionary Rule.* Pursuant to Fourth Amendment law, when officers engage in an illegal search or seizure, evidence obtained in connection therewith will be suppressed under the exclusionary rule. The exclusionary rule is a remedy for a constitutional violation. See Mapp v. Ohio, 367 U.S. 643 (1961) (rule applies to States via the Fourteenth Amendment). It compels respect for the Fourth Amendment, it deters police from invading homes and interfering with an individual's personal sanctity in violation of the Fourth Amendment, and it removes an officer's incentive to disregard the constitutional guaranty.

*The Inevitable-Discovery Doctrine.* The "inevitable-discovery" doctrine is a limited exception to the exclusionary rule. It considers, among other things, whether the illegally seized evidence "ultimately" would have been discovered through lawful means. Nix v. Williams, 467 U.S. 431, 444 (1984); State v. James, 2000 UT 80, ¶16, 13 P.3d 576. The inevitable-discovery doctrine is not an "exception" to the Fourth Amendment warrant

requirement.<sup>1</sup> It is a fact-intensive doctrine that applies in limited circumstances to block application of the exclusionary rule.

The United States Supreme Court explicitly recognized the inevitable-discovery doctrine in Nix v. Williams, 467 U.S. 431. There, officers believed defendant had concealed a young girl's body near a road, ditch, culvert or abandoned building between two points on the map. See id. at 435. An officer in charge of searching the area began the process of marking off maps between the two points in a grid fashion, separating 200 volunteers into teams, and assigning them to search specific grid areas. Id. at 435, 448-49. Volunteers were instructed to concentrate their efforts on roadsides, culverts, ditches, and abandoned buildings. Id.

After volunteers began searching, defendant disclosed the location of the body during an unlawful interrogation. Id. at 435-36. The body was located near a roadside ditch in an area to be searched under the grid system. Id. at 436, 449. The Nix Court ruled that discovery of the body was inevitable as supported by the officers' testimony concerning the lawful, independent investigation relating to the search for the body. Id. at 449-50.

The Nix Court applied the inevitable-discovery doctrine where the prosecutor presented specific facts in the trial court to support that a lawful investigation inevitably would have led to the discovery.

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<sup>1</sup>Exceptions to the *warrant* requirement include consent, plain view, incident to arrest, and "probable cause to search plus exigent circumstances." See State v. Lambert, 710 P.2d 693, 698 (Kan. 1985).



In Topanotes' case, the state failed in the trial court to present evidence of a lawful investigation that ultimately would have led to the discovery of the controlled substance obtained during the warrantless search. Thus, the inevitable-discovery doctrine cannot apply as an alternative basis for affirmance on appeal.

2. The Facts in Topanotes' Case Do Not Support Application of the Inevitable-Discovery Doctrine.

In Nix, the United States Supreme Court reiterated that the inevitable-discovery doctrine is not based in speculation. Nix, 467 U.S. at 444, n.5. Rather, its application relies on “demonstrated historical facts capable of ready verification or impeachment.” Id.<sup>2</sup> That is, in the context of this case, the prosecutor was required to present basic, primary evidence of the lawful investigation that would have led ultimately to the discovery of the controlled substance obtained during the warrantless search.

By way of explanation, the factual determinations in Nix were capable of verification or impeachment. There, the prosecutor presented evidence in the trial court that -- absent the unlawful conduct -- officers ultimately would have discovered the young girl's body in connection with a lawful investigation. The evidence of the lawful investigation consisted of the following:

[T]he prosecution offered the testimony of Agent Ruxlow of the Iowa Bureau of Criminal Investigation. Ruxlow had organized and directed some 200 volunteers who were searching for the child's body. Tr. of Hearings on Motion to Suppress in

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<sup>2</sup> “Historical facts” are facts that are admitted and established in evidence. See Ornelas v. U.S., 517 U.S. 690, 696 (1996). They include a recital of the events and credibility determinations. The historical facts serve as a basis for the trial court's factual findings. See Thompson v. Keohane, 516 U.S. 99, 109-10 (1995).

State v. Williams, No. CR 55805, p. 34 (May 31, 1977). The searchers were instructed “to check all the roads, the ditches, any culverts .... If they came upon any abandoned farm buildings, they were instructed to go onto the property and search those abandoned farm buildings or any other places where a small child could be secreted.” *Id.*, at 35. Ruxlow testified that he marked off highway maps of Poweshiek and Jasper Counties in grid fashion, divided the volunteers into teams of four to six persons, and assigned each team to search specific grid areas. *Id.*, at 34. Ruxlow also testified that, if the search had not been suspended because of [defendant’s] promised cooperation, it would have continued into Polk County, using the same grid system. *Id.*, at 36, 39-40. Although he had previously marked off into grids only the highway maps of Poweshiek and Jasper Counties, Ruxlow had obtained a map of Polk County, which he said he would have marked off in the same manner had it been necessary for the search to continue. *Id.*, at 39.

\* \* \*

There was testimony that it would have taken an additional three to five hours to discover the body if the search had continued; the body was found near a culvert, one of the kinds of places the teams had been specifically directed to search.

Nix, 467 U.S. at 448-449.

Likewise, in U.S. v. Larsen, 127 F.3d 984, 987 (10th Cir. 1997), cert. denied, 522 U.S. 1140 (1998), the court looked to the primary facts of record in the trial court to determine application of the inevitable-discovery doctrine. In that case, officers obtained a warrant allowing them to search for and seize certain vehicles and vehicle titles on defendant’s property. While the officers were executing the warrant, they seized numerous unauthorized items, including “bank records.” *Id.* at 985.

After the items were seized, a state trooper involved in executing the warrant, stopped at the local bank for personal reasons. He mentioned to the bank vice president that he had recovered vehicles from defendant’s property. The bank vice president “became concerned because the bank had loaned money to [defendant] for a vehicle.” *Id.* After the officer left the bank, the vice president independently pulled his records relating to defendant and sent

a Report of Apparent Crime to the FDIC. The FDIC forwarded the Report to Agent Crabtree of the FBI. Id.

Meanwhile the state trooper, who had executed the search warrant, independently contacted a KBI agent and forwarded the unlawfully seized records to him. The KBI agent in turn contacted Crabtree. Id.

Crabtree investigated the matter, “issued subpoenas and, in accordance with standard FBI procedures, began tracing [defendant’s] banking activities. This led to issuance of subpoenas by a grand jury and discovery of the bank records on which [defendant’s] prosecution for federal bank fraud and money laundering was based.” Id. at 985.

With the charges against him, defendant moved to suppress all evidence in the matter on the basis that officers exceeded the scope of the warrant during the initial search when they unlawfully seized his bank records. Id. Defendant argued that the unlawful seizure poisoned all evidence discovered thereafter. The district court agreed and determined the excessive warrants search was unlawful. However, that court and the United States Court of Appeals for the Tenth Circuit ruled that the inevitable-discovery doctrine applied and would block application of the exclusionary rule. According to the facts, Crabtree ultimately would have discovered the fraudulent transactions when he reviewed the Report that the bank vice president sent to him. Id. at 986. Since Crabtree ultimately would have discovered the fraud through lawful means, the records seized during the excessive search were admissible against Larsen under the inevitable-discovery doctrine.

Pursuant to Nix and Larsen, the inevitable-discovery doctrine is inapplicable to

Topanotes' case as a matter of law and a matter of record. The state failed in the trial court to present evidence to support application of that doctrine in this case.

Specifically, the evidence in this case supported a single investigation. Officer Hansen encountered Topanotes outside her trailer home and requested an identification card. Topanotes produced a card and gave it to Hansen. Thereafter, Hansen handed the card to Officer Mitchell, who walked away with the card to run the warrants check, while Topanotes remained detained. The officers acknowledged that during the encounter, they did not have reasonable articulable suspicion to believe Topanotes was involved in criminal conduct. (R. 88:16, 28.) Nevertheless, the officers continued to retain possession of Topanotes' property and to detain her in connection with the warrants check until her arrest.

The officers in this case also testified that the investigation they conducted here was a matter of "common practice" or routine. (R. 88:16; 88:22.) That is, their routine practice consisted of unlawfully detaining a person and retaining possession of her property without reasonable suspicion, while conducting a warrants check. (R. 88:16, 28 (officers testified they had no reason to suspect Topanotes of criminal activity; nevertheless, they retained possession of her property and detained her for a warrants check as a matter of routine).) The routine or common practice in this case consisted of an unlawful detention.

There is no evidence in this case that officers were engaged in or contemplated any other investigation (lawful or otherwise) concerning Topanotes, and there is no indication that officers contemplated or believed they ultimately would have discovered a controlled substance in Topanotes' possession if they had pursued some lawful course of action. In the

absence of facts to support the existence of a lawful investigation, the inevitable-discovery doctrine is inapplicable. See Larsen, 127 F.3d at 987; see also Nix, 467 U.S. at 444.

**C. THE ANALYSIS SHOULD END HERE, WITHOUT FURTHER PROCEEDINGS IN THE TRIAL COURT ON THE MATTER.**

In this case, application of the inevitable-discovery rule as a unique remedy to the constitutional violation is not apparent from the record. The state did not argue the issue or present evidence in the trial court concerning the matter. (See record in general.) Topanotes was not on notice of the possible application of such a unique remedy and she had no opportunity to cross-examine Officers Hansen or Mitchell in connection with its possible application. See Montoya, 937 P.2d at 149-50. In this case, the inevitable-discovery doctrine may not serve as an alternative basis for affirmance. Id.

Furthermore, remand for additional proceedings is inappropriate and unnecessary in this matter for several reasons: First, remand would be unprecedented and fundamentally unfair. See infra, Point II. The state bears the burden of proof in establishing application of the inevitable-discovery doctrine. Nix, 467 U.S. at 444. In this matter, the state filed papers relating to its argument that the controlled substance was admissible under Fourth Amendment law, participated in oral argument, and presented witnesses to testify. (R. 67-71; 88; 98.) The state was given a full and fair opportunity to present the evidence it deemed relevant to its admissibility argument in the matter. After the evidentiary hearing, the trial court made its ruling on the facts that the state chose to present. Based on the evidence the state presented in the matter, there is nothing in the record to support that the officers

ultimately would have discovered the controlled substance through lawful means.

This Court should decide the issues based on the record the state chose to create in this matter. To that end, as a result of failing to elicit information concerning the inevitable-discovery doctrine, the state failed to develop a factual predicate in the trial court to justify application of the inevitable-discovery doctrine and it failed in its burden of proof. The state's failure to meet its burden is a sufficient basis for ruling that the inevitable-discovery doctrine is inapplicable. See Case, 884 P.2d at 1278 (trial court's order denying motion to suppress reversed where the state failed to present sufficient evidence to justify its position under the Fourth Amendment); State v. Hodson, 907 P.2d 1155, 1159-60 (Utah 1995) (“[On] the basis of the evidence now on the record, this search should not be upheld”; state failed to present sufficient evidence); State v. Gutierrez, 864 P.2d 894, 903 (Utah App. 1993) (based on evidence the state elected to submit, case would not be remanded for further proceedings; the state's evidence was insufficient to uphold confession under Miranda); Barnett v. U.S., 525 A.2d 197, 200 (D.C. 1987) (where government failed to meet its burden, it would not be given second chance on remand).

Second, remand for further proceedings on the inevitable-discovery doctrine is inappropriate from a policy standpoint since the unlawful officer conduct described in this case compels application of the *exclusionary rule*. The officers in this matter testified they routinely detain individuals on the street -- without reasonable articulable suspicion to believe such individuals have committed a crime -- in order that officers may run a warrants check on them. That routine practice offends basic principles of the Fourth Amendment.

The officers in this case may only begin to comprehend the offensive nature of their unlawful, intrusive conduct against an individual's personal liberties if the exclusionary rule is applied here. The exclusionary rule would deter these officers from engaging in further unlawful routine practices, as described herein, and it would remove all incentives for the officers to make such unlawful seizures common place. Simply, this is a case for application of the exclusionary rule.

**POINT II. THE COURT OF APPEALS' REMAND ORDER FOR A FACTUAL DETERMINATION AND ADDITIONAL PROCEEDINGS IS OVERLY BROAD. IN THE EVENT THE CASE MUST BE REMANDED FOR FURTHER PROCEEDINGS ON THE INEVITABLE-DISCOVERY DOCTRINE, THAT REMAND ORDER MUST BE LIMITED TO PROCEEDINGS ON THE EXISTING RECORD.**

**A. REMAND FOR FURTHER PROCEEDINGS OCCURS UNDER LIMITED CIRCUMSTANCES THAT DO NOT EXIST HERE.**

Utah appellate courts have remanded cases for further proceedings and additional findings in limited circumstances. Specifically, if a trial court has addressed a particular rule of law in the original proceedings but has entered inadequate findings and the facts of record are in conflict on the matter, an appellate court may remand the case for additional findings. See State v. Palmer, 803 P.2d 1249, 1253-54 (Utah Ct. App. 1990) (where state raised inevitable discovery doctrine in trial court, case would be remanded for findings on the matter), cert. denied, 815 P.2d 241 (Utah 1991). In addition, Utah appellate courts have specified that remand is limited to the entry of findings based on the facts already existing in the record. See State v. Giron, 943 P.2d 1114, 1121 (Utah Ct. App. 1997).

In State v. Giron, 943 P.2d 1114, the trial court considered and misapplied the

incident-to-arrest exception in the original proceedings. On appeal, the court of appeals articulated the appropriate legal standard for application of that doctrine, and remanded the case “for the trial court to apply the law as set forth in this opinion on the evidence previously presented to the trial court at the hearing on the motion to suppress.” Id. at 1121; see also State v. Lopez, 873 P.2d 1127, 1140 (Utah 1994) (lower court misapplied law as it related to the “pretext doctrine” requiring remand for findings under correct application of the law); State v. Genovesi, 871 P.2d 547, 548-50, 552 (Utah Ct. App. 1994) (defendant argued on appeal that trial court’s findings were inadequate; court of appeals remanded for findings on the existing record), connected case, State v. Genovesi, 909 P.2d 916, 919 (Utah Ct. App. 1995).

In Topanotes' case, the court of appeals ruled that it needed complete, accurate and consistent findings of fact to resolve application of the inevitable-discovery doctrine. Topanotes, 2000 UT App 311, ¶11. In support of that determination, the court relied on Rucker v. Dalton, 598 P.2d 1336, 1338 (Utah 1979).

There, a homeowner sued a builder over a contract dispute. Id. at 1337. The homeowner claimed that an agreement between the parties held the builder responsible for the workmanship on several aspects of the construction project. According to the homeowner, the builder’s responsibilities were listed on a “bid” relating to the agreement. The homeowner also claimed that the builder’s work was deficient as it related to those aspects of the project, and he requested damages against the builder in the amount of \$20,000. The builder counterclaimed for \$500, which constituted the balance of the price



due under the contract. Id. at 1337-38. The case was tried to the court without a jury. Id.

At the conclusion of trial, the judge entered findings of fact on the matter, and determined that the builder was responsible only for one aspect of the construction project. The trial judge entered judgment in favor of the homeowner in the amount of \$2,000, and the homeowner appealed. Id. at 1337-38. This Court reviewed the matter and found the trial court's findings to be incomplete with respect to issues raised in the proceedings. Specifically, there was no indication as to why the trial court found the builder to be responsible only with respect to one aspect of the project, when eight aspects were listed on the "bid." The findings also were inconsistent on their face. Id. at 1338-39. On that basis, this Court remanded the case for proper findings "in accordance with the evidence." Id.<sup>3</sup>

The circumstances in Topanotes' case do not compel remand for further proceedings. Here, the state raised the inevitable-discovery doctrine for the first time on appeal. The court of appeals had an undisputed record of the proceedings. It was required under the law to make its own determinations with respect to application of the inevitable-discovery doctrine,

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<sup>3</sup> In State v. Marshall, 791 P.2d 880 (Utah Ct. App.), cert. denied, 800 P.2d 1105 (Utah 1990), the court of appeals granted a petition for interlocutory appeal to consider a ruling on a motion to suppress. Id. at 881. According to the evidence, the officer initiated a traffic stop because defendant had malfunctioning equipment. The officer became suspicious that defendant was transporting drugs when defendant responded to questions in a manner in conflict with the car rental agreement. The officer requested consent to search the car. When he came upon four suitcases in the trunk, the defendant claimed they did not belong to him. Id. at 882. The officer discovered drugs in the suitcases. Id.

On appeal, defendant claimed he did not consent to a search of the suitcases; the state responded that defendant lacked standing to challenge the search. Because the trial court did not make adequate findings and both parties considered the issues to be "pivotal" to the appeal, the court of appeals remanded the matter for further proceedings. Id. at 887.

where that issue was raised for the first time in the court of appeals. See supra, Point I, herein. Instead the court of appeals remanded the case for a factual determination and further proceedings on an issue that was not raised in the lower court. The order of remand under the circumstances of this case is in conflict with Utah law. See supra, Point I, herein. Topanotes respectfully requests that this Court vacate that order as it relates to application of the inevitable-discovery doctrine.

**B. REMAND DOES NOT ENTITLE THE STATE TO ANOTHER EVIDENTIARY HEARING. THE STATE HAS HAD EVERY OPPORTUNITY IN THE TRIAL COURT TO PRESENT THE EVIDENCE IT DEEMED NECESSARY. IT WOULD VIOLATE FOURTH AMENDMENT LAW AND THE DUE PROCESS PROVISION TO PERMIT THE STATE TO ENGAGE IN ANOTHER EVIDENTIARY HEARING AT THIS JUNCTURE.**

The court of appeals' order remanding the case to the trial court for "a factual determination on whether the heroin would have been inevitably discovered and for such proceedings as may be appropriate," Topanotes, 2000 UT App 311, ¶12, is overly broad. It may be construed in this matter and in subsequent cases to provide the state with a fresh opportunity on remand to present evidence on a new Fourth Amendment issue, where the state failed in its burden of proof the first time around. Such precedent would violate fundamental fairness and due process. See U.S. Const. amend. XIV (ensuring due process and fundamental fairness); see also U.S. Const. amend. V (providing that defendant shall not be placed twice in jeopardy).

In the event this Court upholds the court of appeals' remand order for further proceedings on application of the inevitable-discovery doctrine, the order must be limited to

proceedings where the trial court will make factual determinations on the evidence already existing in the record.

1. The State Must Present Evidence Prior to the Appeal to Support Admissibility Under the Fourth Amendment.

As a matter of due process and Fourth Amendment law the state has the burden of establishing the admissibility of evidence obtained during a warrantless search. See State v. Thurman, 846 P.2d 1256, 1263 (Utah 1993) (state bears burden of proof in establishing admissibility under the Fourth Amendment); Nix, 467 U.S. at 444 (prosecutor bears burden of proof in establishing application of the inevitable-discovery doctrine); James, 2000 UT 80, ¶16 (same). Where the state has been provided with a full and fair opportunity to present the evidence it deems relevant to meet its burden of proof, the state is not entitled to a second bite at the apple with a retrospective critique of the issue from an appellate court. That is, the state is bound by the record it created during the evidentiary hearing in the original trial court proceedings. If a proper factual predicate has not been developed to justify application of the inevitable-discovery doctrine, the state is not entitled to another evidentiary hearing on the matter. Under Utah case law, it would be improper and fundamentally unfair to remand a case for further proceedings on a Fourth Amendment issue in order that the state may present additional evidence consistent with the appellate court's retrospective critique of the issue. The following cases govern the matter.

In State v. Case, 884 P.2d 1274 (Utah Ct. App. 1994), defendant claimed the officer who searched his car lacked reasonable suspicion to conduct the initial stop. Id. at 1275.

The trial court disagreed with defendant and denied the motion to suppress. Id. On appeal, the court of appeals reversed the trial court's ruling on the basis that the state failed to present sufficient evidence to justify the stop. Id. at 1278-80. As that court recognized, the state had the initial burden to establish "the articulable factual basis for the reasonable suspicion necessary to support an investigative stop." Id. at 1276. Where the state failed to present sufficient evidence, it would not be allowed to cure deficiencies on remand. "The deficiency in the factual findings was inevitable because the State failed to provide any evidence at all regarding the origin of, and basis for, the dispatcher's broadcast [leading to the initial stop]. No evidence was presented that could have shed light on the [matter]." Id. at 1278.

In State v. Hodson, 866 P.2d 556 (Utah Ct. App. 1993) (Hodson I), defendant appealed the trial court's denial of his motion to suppress and asked the court of appeals to examine whether drug enforcement agents conducted an unreasonable search. The court remanded the case for additional proceedings. Id. at 564. Thereafter, this Court granted certiorari review, and specified that since the state had the burden of proof, it would not be entitled to remand in order to put on new evidence:

Because the burden of showing reasonableness in the amount of force used and the safety of any form of "neckholds" lies with the State, it is not entitled to a remand to put on new evidence. And on the basis of the evidence now in the record, this search should not be upheld. We therefore reverse and order suppression of the evidence obtained by excessive force.

State v. Hodson, 907 P.2d 1155, 1159-60 (Utah 1995) (Hodson II) (cites omitted).

In State v. Gutierrez, 864 P.2d 894 (Utah Ct. App. 1993), the trial court refused to suppress statements obtained in violation of the law then in effect under Miranda v. Arizona,

384 U.S. 436 (1966). On appeal, the state requested remand for an evidentiary hearing. The court of appeals agreed with defendant that the authority relied upon by the state did not support remand when the state bears the initial burden of proof in the matter. Gutierrez, 864 P.2d at 903. The court stated the following:

Having concluded that remanding this case would give the State an unprecedented opportunity to bolster or modify the prosecution's original argument, taking advantage of a retrospective critique by the State, we find no legal basis for the remand requested by the State. Furthermore, remand as requested by the State would not be sound judicial policy, as it would permit successive attempts to introduce evidence overlooked in prior hearings, thus preventing final conclusion of these proceedings. Therefore, we conclude that the State's request for a remand of this case is both legally and factually untenable.

Gutierrez, 864 P.2d at 903 (footnote omitted).

2. It Would Be Fundamentally Unfair and a Violation of the Double Jeopardy Provision and the Fourth Amendment to Provide the State with Another Opportunity to Present Evidence on Remand.

Case law from other jurisdictions provides support for Topanotes' position. In Barnett v. United States, 525 A.2d 197 (D.C. 1987), the court determined the facts did not support admissibility of the evidence under the Fourth Amendment as argued by the government. The court denied the government's request to remand the case for an evidentiary hearing.

We are not persuaded by the government's argument that the case be remanded for a further hearing on the motion to suppress to determine whether Officer Willis had probable cause to believe appellant had violated § 40-627. We decline to remand for a rehearing on the motion for two reasons.

First, according to Officer Willis' testimony, there was no evidence that appellant had refused to identify himself, as required for a valid arrest under § 40-627.

...

Secondly, the government failed to meet its burden of proof in its attempt to

justify appellant's warrantless arrest. We have held that in the case of a claimed Fourth Amendment violation, absent a warrant, the burden is on the government to go forward with evidence that will bring the case within one or more exceptions to the exclusionary rule so as to vindicate the challenged police misconduct. We are not persuaded that the government should have a second chance to elicit facts supporting an affirmance of the trial court's ruling as the record indicates that it had a full and fair opportunity to present whatever facts it chose to meet its burden of justifying the warrantless arrest and resulting search and seizure.

Id. at 200 (cites omitted); Ex Parte Hergott, 588 So. 2d 911, 916 (Ala. 1991) (remand would violate Double Jeopardy Clause; state does not get second chance).

The principles identified above apply with equal force in considering whether remand is appropriate for further proceedings relating to application of the inevitable-discovery doctrine. To the extent such proceedings would include an evidentiary hearing, that would be fundamentally unfair and unprecedented.

In this case, when the state presented evidence and argument in the trial court concerning the seized heroin, it had no way to know whether the trial court would uphold the search or find it unlawful. Nevertheless, the state desired one result in the matter: that the heroin be admitted into evidence against Topanotes under the Fourth Amendment. To that end, the state presented the evidence it deemed relevant to the matter. Indeed, the state was given a full and fair opportunity to present all evidence it considered necessary to a determination concerning the admissibility of the heroin. (See R. 88; 98:3.)

During the trial court proceedings, the state determined not to present evidence concerning application of the inevitable discovery doctrine. See Palmer, 803 P.2d at 1253

(state presented evidence in the initial trial court proceedings relating to both an exception to the warrant requirement and application of the inevitable-discovery doctrine in the event search was deemed unlawful).

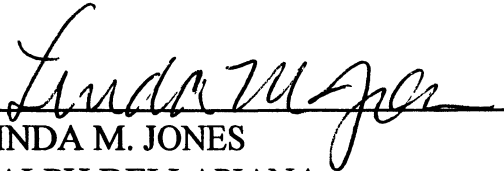
Now, after an appeal on the issues, the state should not be given a second chance -- or in this case, a third chance (R. 88 (state given opportunity to present evidence it deemed relevant); 98:3 (state given opportunity to further address the matter with the court)) -- to present evidence on matters it failed to raise in the original trial court proceedings. It would be fundamentally and procedurally unjust to allow the state to make repeated attempts to validate the admissibility of the evidence under the Fourth Amendment, particularly where the state now has a specific mission and instructions from the court of appeals as to how to cure its prior inadequacies in the matter. On that basis, Topanotes respectfully requests that this Court vacate the court of appeals' remand order for further proceedings relating to the inevitable-discovery doctrine.

### **CONCLUSION**

For the reasons set forth herein, Topanotes respectfully requests that this Court vacate the court of appeals' remand order for further proceedings on the inevitable-discovery doctrine, a doctrine raised by the state for the first time on appeal. In addition, Topanotes requests either that this Court rule on the state's newly raised ground for affirmance, or remand the case to the court of appeals for resolution of that issue on the existing record. To that end, this Court and/or the court of appeals should find that the inevitable-discovery doctrine is inapplicable to this case.

In the event this Court deems it necessary to remand this case to the trial court for any further proceedings, Topanotes respectfully requests that this Court specifically limit the matter to a remand for proceedings on the existing record.

SUBMITTED this 4<sup>th</sup> day of October, 2001.

  
LINDA M. JONES  
RALPH DELLAPIANA  
Attorneys for Defendant

CERTIFICATE OF DELIVERY

I, LINDA M. JONES, hereby certify that I have caused to be hand-delivered 10 copies of the foregoing to the Utah Supreme Court, 450 South State Street, Salt Lake City, Utah 84114, and 4 copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 4<sup>th</sup> day of October, 2001.

  
LINDA M. JONES

DELIVERED to the Supreme Court and the Attorney General's office as set forth above, this \_\_\_\_ day of \_\_\_\_\_, 2001.

\_\_\_\_\_



ADDENDA

## ADDENDUM A

7/25/01

IN THE SUPREME COURT OF THE STATE OF UTAH

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**FILED**  
UTAH SUPREME COURT

JUL 18 2001

State of Utah,  
Respondent,

v.

No. 20010127-SC  
990708-CA  
981920853

**PAT BARTHOLOMEW**  
**CLERK OF THE COURT**

Pearl Topanotes,  
Petitioner.

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ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed pursuant to Rule 48, of the Utah Rules of Appellate Procedure.

IT IS HEREBY ORDERED that the Petition for Writ of Certiorari filed on February 13, 2001, by petitioner is granted, and the Cross-Petition for Writ of Certiorari filed on March 28, 2001, by respondent is granted.

FOR THE COURT:

July 18, 2001  
Date

Richard C. Howe  
Richard C. Howe  
Chief Justice

CERTIFICATE OF MAILING

I hereby certify that on July 23, 2001, a true and correct copy of the foregoing ORDER was hand delivered to a personal representative of the following office(s) to be delivered to the parties listed below:

MARIAN DECKER  
ASSISTANT ATTORNEY GENERAL  
160 E 300 S 6TH FL  
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SALT LAKE LEGAL DEFENDER ASSOCIATION  
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and a true and correct copy of the foregoing ORDER was hand delivered to a personal representative of the court(s) listed below:

THIRD DISTRICT, SALT LAKE  
ATTN: SUZY CARLSON  
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PO BOX 1860  
SALT LAKE CITY UT 84114-1860

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COURT OF APPEALS  
450 S STATE ST  
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SALT LAKE CITY UT 84114-0230

By   
Deputy Clerk

Case No. 20010127-SC  
THIRD DISTRICT, SALT LAKE , 981920853

## **ADDENDUM B**

2000 UT App.311  
STATE of Utah, Plaintiff and Appellee,

Pearl TOPANOTES, Defendant  
and Appellant.

No. 990708-CA.

Court of Appeals of Utah.

Nov. 9, 2000.

Rehearing Denied Dec. 15, 2000.

Defendant was convicted in the District Court, Salt Lake Department, Leslie A. Lewis, J., of third degree possession of a controlled substance, and defendant appealed. The Court of Appeals, Thorne, J., held that: (1) officers' detention of defendant during time it took them to check for outstanding warrants was in violation of defendant's Fourth Amendment rights, and (2) whether police officers' discovery of defendant's outstanding warrants supported application of inevitable discovery exception to exclusionary rule was a question for the trial court, rather than the Court of Appeals.

Reversed and remanded.

#### 1. Criminal Law $\S$ 1139

The determination of whether an encounter with law enforcement officers constitutes a seizure under the Fourth Amendment is a legal conclusion that the Supreme Court reviews for correctness. U.S.C.A. Const. Amend. 4.

#### 2. Arrest $\S$ 63.4(1), 63.5(4)

##### Criminal Law $\S$ 1224(1)

Three levels of constitutionally permissible encounters between police officers and citizens exist: (1) an officer may approach a citizen at anytime and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop; and (3) an officer may arrest a suspect if the officer has

probable cause to believe an offense has been committed or is being committed. U.S.C.A. Const. Amend. 4.

#### 3. Arrest $\S$ 63.5(9)

Police officers did not have a reasonable articulable suspicion that defendant who was convicted of possession of a controlled substance had committed or was about to commit a crime, and thus officers detention of defendant during time it took them to check for outstanding warrants was in violation of defendant's Fourth Amendment right against unreasonable seizures, where reasonable person in defendant's position would not have felt free to just walk away. U.S.C.A. Const. Amend. 4.

#### 4. Criminal Law $\S$ 1134(3), 1181.5(7)

Whether police officers' discovery of defendant's outstanding warrants supported application of inevitable discovery exception to exclusionary rule was a question for the trial court, rather than the Court of Appeals, necessitating remand for factual determination as to whether heroin discovered on defendant's person would have been inevitably discovered.

#### 5. Criminal Law $\S$ 394.1(3)

To determine whether evidence obtained as a result of a violation of the Fourth Amendment can be admitted at a defendant's trial, the Court of Appeals examines whether the evidence has been come at by exploitation of the illegality or by means sufficiently distinguishable to be purged of the primary taint. U.S.C.A. Const. Amend. 4.

#### 6. Criminal Law $\S$ 394.1(3)

Inevitable discovery is a valid exception to the exclusionary rule, and the appropriate standard governing the inevitable discovery exception is whether the prosecution can establish by a preponderance of the evidence that the information ultimately would have been discovered by lawful means; the state must show that the evidence would have been discovered, not simply that it could or might have been discovered. U.S.C.A. Const. Amend. 4.

### 7. Criminal Law §1181(1)

It is not the function of an appellate court to make findings of fact because it does not have the advantage of seeing or hearing the witnesses testify; moreover, complete, accurate, and consistent findings of fact are essential to the resolution of a dispute under the proper rule of law.

Linda M. Jones and Ralph Dellapiana, Salt Lake City, for Appellant.

Jan Graham and Marian Decker, Salt Lake City, for Appellee.

Before Judges GREENWOOD,  
JACKSON, and THORNE.

### OPINION

THORNE, Judge:

¶1 Defendant Pearl Topanotes appeals from her conviction for possession of a controlled substance, a third degree felony, in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp.1999). We reverse and remand.

### BACKGROUND

¶2 On October 7, 1998 three Salt Lake City police officers detained defendant on a public street and requested her identification. The officers retained defendant's identification, outside her presence, for approximately five minutes to check for outstanding warrants. The warrant check revealed at least one outstanding warrant,<sup>1</sup> so the officers arrested defendant. The officers then searched defendant and found heroin. Defendant was ultimately charged with possession of a controlled substance.

¶3 Defendant moved to suppress the admission of the heroin. The trial court denied the motion, and defendant entered a conditional guilty plea to one count of unlawful possession of a controlled substance; however, she conditioned her plea on the right to

appeal from the trial court's denial of her motion.

### ISSUE AND STANDARD OF REVIEW

[1] ¶4 Defendant argues that the trial court erred in denying her motion because the police officers conducted a level-two stop without the requisite articulable suspicion. "[T]he determination of whether an encounter with law enforcement officers constitutes a seizure under the Fourth Amendment . . . is a legal conclusion that we review for correctness." *Salt Lake City v. Ray*, 2000 UT App 55, ¶ 8, 998 P.2d 274.

### ANALYSIS

[2] ¶5 Three levels of constitutionally permissible encounters between police officers and citizens exist:

- (1) an officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will;
- (2) an officer may seize a person if the officer has an "articulable suspicion" that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop;"
- (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed.

*Id.* (quoting *State v. Deitman*, 739 P.2d 616, 617-18 (Utah 1987)) (per curiam) (alteration in original) (citation omitted).

¶6 We addressed a similar situation in *Ray*.<sup>2</sup> In that case, two police officers approached the defendant as she stood on a walkway near a convenience store. *See id.* at ¶4. The officers asked for and then retained the defendant's identification to check for outstanding warrants, a process which took about five minutes. *See id.* Before finally determining the defendant's warrant status, one of the officers asked to search her bags. *See id.* The defendant consented to the search, and the officer found drug paraphernalia. *See id.* at ¶6. The officers then ar-

1. The nature and amount of the outstanding warrant(s) was not disclosed in the record.

2. The Utah Court of Appeals decided *Ray* on March 2, 2000, about eight months after the trial court decided this matter.

rested her and charged her with possessing drug paraphernalia. *See id.* at ¶¶ 6–7.

¶ 7 The defendant moved to suppress the admission of the drug paraphernalia. *See id.* at ¶ 7. Following a hearing on the motion, the trial court determined that the encounter did not violate the defendant's Fourth Amendment rights and denied the motion. *See id.* On appeal, we reversed the trial court, explaining that “[g]iven the totality of the circumstances, it is clear that a reasonable person in [defendant's] position would not feel free to just walk away, *thereby abandoning her identification.*” *See id.* at ¶ 13 (emphasis added).

[3] ¶ 8 In the present matter, after examining the “totality of the circumstances” surrounding the encounter between the officers and defendant, we believe that “a reasonable person in [defendant's] position would not feel free to just walk away, thereby abandoning her identification.” *Id.* Accordingly, we conclude that the detention was a level two detention made without articulable suspicion in violation of defendant's Fourth Amendment rights.<sup>3</sup>

[4, 5] ¶ 9 We must next address whether the evidence resulting from the violation can be admitted at defendant's trial. Thus, we examine “whether . . . the evidence has been come at by exploitation of [the] illegality or by means sufficiently distinguishable to be purged of the primary taint.” *State v. Northrup*, 756 P.2d 1288, 1294 (Utah Ct.App. 1988) (quoting *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)). Furthermore, we must “determine whether the [search of Topanotes] fall[s] within the recognized limited exceptions to the Fourth Amendment warrant requirement.” *State v. Genovesi*, 909 P.2d 916, 919 (Utah Ct.App.1995).

[6] ¶ 10 The State argues that the officer's discovery of defendant's outstanding warrants supports the application of the inevitable discovery exception to this case. Inev-

itable discovery is a valid exception to the exclusionary rule, *see State v. Northrup*, 756 P.2d 1288, 1293 (Utah Ct.App.1988), and “[t]he appropriate standard governing the inevitable discovery exception is whether the prosecution can establish by a preponderance of the evidence that the information ultimately would have been discovered by lawful means.” *State v. James*, 2000 UT 80, ¶ 16, 405 Utah Adv. Rep. 31 (quoting *Nix v. Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984)). More precisely, the State “‘must show that the evidence ‘would’ have been discovered, not simply that it ‘could’ or ‘might’ have been discovered.’” *M.V. v. State*, 1999 UT App 104, ¶ 12, 977 P.2d 494 (quoting *Genovesi*, 909 P.2d at 923 n. 8) (alterations in original).

[7] ¶ 11 Because the trial court ruled that the initial detention was legal, the issue of inevitable discovery was not addressed below. “This court has consistently recognized that [issues of search and seizure] are highly fact sensitive.” *State v. Lovegren*, 798 P.2d 767, 770 (Utah Ct.App.1990), and “[i]t is not the function of an appellate court to make findings of fact because it does not have the advantage of seeing or hearing the witnesses testify.” *Rucker v. Dalton*, 598 P.2d 1336, 1338 (Utah 1979). Moreover, “complete, accurate[,] and consistent findings of fact . . . [are] essential to the resolution of dispute under the proper rule of law.” *Id.*

¶ 12 Therefore, we remand for a factual determination on whether the heroin would have been inevitably discovered and for such proceedings as may be appropriate.

¶ 13 WE CONCUR: PAMELA T. GREENWOOD, Presiding Judge and NORMAN H. JACKSON, Associate Presiding Judge.



<sup>3</sup> The State concedes, on appeal, in light of *Ray*, that by failing to immediately return defendant's identification card, the encounter escalated to a level-two detention. The State also concedes that the police officers had no “articulable suspi-

cion” that defendant had “committed or was about to commit a crime,” and therefore the detention was a seizure in violation of the Fourth Amendment.



## ADDENDUM C

## CONSTITUTION OF THE UNITED STATES

### AMENDMENT IV

#### **[Unreasonable searches and seizures.]**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, 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.

## CONSTITUTION OF THE UNITED STATES

### AMENDMENT XIV

#### **Section 1. [Citizenship — Due process of law — Equal protection.]**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

#### **Sec. 2. [Representatives — Power to reduce appointment.]**

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

#### **Sec. 3. [Disqualification to hold office.]**

No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

#### **Sec. 4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]**

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

#### **Sec. 5. [Power to enforce amendment.]**

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## ADDENDUM D

JUL 28 1999

In the Third Judicial District Court  
In and For Salt Lake County, State of Utah SALT LAKE COUNTY

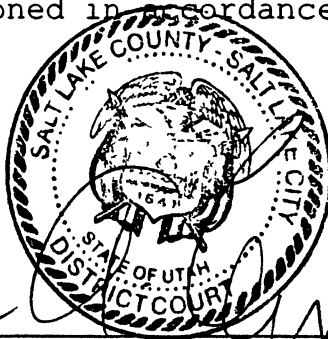
By M Snarr  
Deputy Clerk

The State of Utah : Judgment, Sentence (commitment)  
Plaintiff : Case No. 981920853  
V.S. : Count No. 1  
Pearl topanotes : Honorable Leslie A Lewis  
Defendant : Clerk M Snarr  
: Video 9:55 am  
: Bailiff Angie Chichis  
: Date 7/28/99

There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by a \_\_\_a jury; \_\_\_the court, X plea of guilty; \_\_\_plea of no contest; of the offense of Possession of a herion, a controlled substance 58-37-8(2)(a)(i), a felony of the 3rd degree, \_\_\_Class a misdemeanor, being present in court and ready for sentence and represented by Ralph Dellapina, and the State being represented by Mark Kouris, is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

- X To an indeterminate term of 0-5 years  
X And ordered to pay a fine in the amount of \$ 1,000.00 Plus an 85% surcharge  
\_\_\_ And ordered to pay restitution in the amount of \$ \_\_\_  
\_\_\_ Such sentence is to run concurrently/consecutively with \_\_\_  
\_\_\_ Defendant is granted a stay of above (\_\_\_ Prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of \_\_\_, pursuant to the attached conditions of probation.  
X Defendant is remanded into the custody of the Sheriff of Salt Lake County X for delivery to the Utah State Prison, Draper, Utah, or \_\_\_For delivery to the Salt Lake county Jail, where defendant shall be confined and imprisoned in accordance with this judgment and commitment  
X Commitment shall issue forthwith.

Dated this 28th Day of July, 1999

  
Leslie Lewis  
District Court Judge Leslie Lewis  
Page 1 of 1

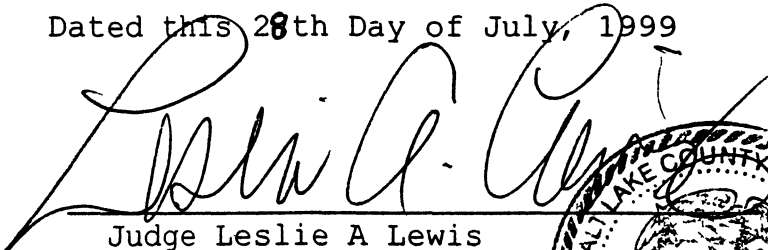
**Judge's Prison Term Recommendation**

State of Utah vs Pearl Topanotes CR 981920853  
Honorable L Lewis

Pursuant to the provisions of 77-18-5, Utah code Annotated, 1953 as amended 1980, I recommend the following.

1. The defendant be given credit for time served of 55 days while in the Salt Lake County Jail.
2. The fine be cut in half once she has obtained her G.E.D.

Dated this 28th Day of July, 1999

  
Judge Leslie A Lewis

