DISSENTING OPINION OF ACOBA, J.

I believe that Defendant-Appellant Ivan Fukagawa (Defendant) met the threshold requirements for a de minimis dismissal in this drug possession case and that the denial of his motion to dismiss on the grounds announced by the circuit court of the second circuit (the court) was an abuse of discretion.[1] I do not agree, as the majority contends, that a disqualifying "inquiry" for drug de minimis cases is whether the amount of a drug possessed is capable of producing any pharmacological or physiological effect. See majority opinion at 17. That standard is not tied to illicit use and, thus, would embrace instances where the harm or evil sought to be prevented by the drug offense statutes did not exist. I note further that the majority, by citing grounds not depended on by the court in its decision to reject Defendant's motion, has, on the appellate level, erroneously exercised the discretion reserved only to the court on the trial level. See Hawai'i Revised Statutes (HRS) § 702-236 (1993). Thus, I respectfully dissent.

I.

The following are the undisputed circumstances of the case. On March 5, 1998, Defendant was stopped for speeding by an officer of the Maui Police Department. The officer detected a

[1] While I do not agree with the trial court, I believe it acted conscientiously in this case.

strong odor of liquor coming from Defendant's breath. Defendant was arrested. His breath test at the station house showed a BAC of 0.135%. At the station house, a glass pipe was recovered from Defendant's left pants pocket. Defendant was later indicted for driving under the influence (DUI) of intoxicating liquor, for promoting a dangerous drug in the third degree, and for possession of drug paraphernalia.

On July 1, 1999, at the hearing on the motion, both parties stipulated that the residue found in the pipe seized was tested, that the residue weighed .018 grams, that it "contain[ed] methamphetamine," and that the residue was visible to the naked eye. No evidence was adduced concerning the amount of methamphetamine in the residue.

In a memorandum in support of his motion to dismiss Count II, promoting a dangerous drug in the third degree, HRS § 712-1243(1) (1993), Defendant argued that, under HRS § 702-236(1)(b), possession of .018 grams of methamphetamine was a de minimis infraction because that amount could not be sold or used for either legitimate or illicit purposes.[2]

On June 10, 1999, Plaintiff-Appellee State of Hawai'i (the prosecution) filed an opposition memorandum contending that Defendant's criminal conduct did meet the requirements of HRS

[2] Alternatively, Defendant contended that, under HRS § 702-236(1)(c), the amount recovered, coupled with other factors such as the harshness of the prescribed sentence -- a five-year prison term without the possibility of probation -- warranted dismissal of the charge.

§ 712-1243(1) because knowing possession of the drug in any amount was the harm sought to be prevented by that statute.

In relevant part, HRS § 702-236(1) states:

> **De minimis infractions.** (1) The court may dismiss a prosecution if, having regard to the nature of the conduct alleged and the nature of the attendant circumstances, it finds that the defendant's conduct:
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> . . . .
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> (b) Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
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> (c) Presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.

(Emphasis added.)

A.

The defense called University of Hawai'i Emeritus Professor of Pharmacology, George W. Read, Ph.D., as its expert witness.[3] The court duly qualified Read as an expert in the field of pharmacology. Read's testimony established that: (1) pharmacology is "the study of chemicals on living organisms and any effect of the drug on all aspects of it"; (2) "dose response" is "a classical fundamental form of pharmacology, and dose response relationship merely states that the more of a drug you give, the more effect you get from it"; (3) he relied on data and studies concerning methamphetamine dosages for therapeutic

[3] According to Defense Exhibit B, "Curriculum Vitae of George Wesley Read, September 26, 1998," Professor Read is emeritus professor of pharmacology at the University of Hawai'i School of Medicine. He received his bachelor's degree in biology from Stanford University, master's degree in physiology from Stanford University, and Ph.D. in pharmacology from the University of Hawai'i School of Medicine. Read has published approximately fifty articles on pharmacology.

uses and amounts of methamphetamine reportedly taken by illicit users; (4) average dosage amounts and three current legal therapeutic uses of methamphetamine are .01 to .04 grams for treating obesity, .05 to .06 grams for narcolepsy, and .005 to .015 grams for attention deficit hyperactive disorder (ADHD) in children; (5) during World War II, pilots on combat missions received between .01 and .04 grams to fight fatigue; and (6) dosages for illicit use had been recorded as ranging from .4 grams to 1.7 grams a day.

Using various sources,[4] Read concluded that the minimum amount of dosage required for a "naive user"[5] or for a first time user to experience "the desired effect [of euphoria and elation] from methamphetamine would fall within a starting dose range of ".05 to .1 grams"; and the minimum effective illicit use dose for an average sized person "depended on body size, so a very small person would use .05 grams and a large person .1 grams." Read extrapolated the .05 to .1 gram minimum effective dose range for illicit use on the basis of the purity of drug samples purchased

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[4] According to Read, his sources included: J. DiPalma, Drill's Pharmacology in Medicine (3d ed. 1965); J. Hardman, L. Limbird, P. Molinoff, R. Ruddon, A. Gilman, Goodman & Gilman's The Pharmacological Basis of Therapeutics (9th ed. 1996); Ellinwood, Assault and Homicide Associated with Amphetamine Abuse, 127 Am. J. Psychiatry 9 (1971); R. Lehne, Pharmacology for Nursing Care (1998); K. Olson, Poisoning & Drug Overdose (1994); R. Pinger, W. Payne, D. Hahn, Drugs (2d ed. 1995); and T. Sollman, A Manual of Pharmacology (1957) (taken from G. Read, "Methamphetamine Doses for Various Actions," Defense Exhibit C (May 10, 1999) (unpublished table)).

[5] Read describes a "naive user" as "someone who [is] not tolerant, or a person who used [the drug] irregularly and . . . didn't have opportunity to develop tolerance [who] could take a lot smaller dose and achieve the same euphoria and elation [as regular users.]"

on the streets and other information pertinent to each individual drug user.[6]

More importantly, Dr. Read stated that what is left in the pipe after the substance is smoked are "trace amounts of the drug" that "might just be a few percent of the active drug."

> You almost have to talk about a specific product, some specific products that's been analyzed, and then you see very clearly what the purity is, but it is very clear that there are salts that go along with it from which the free-base is precipitated, and then this is put into a pipe and smoked, and the salts are not volatile, so they remain in the pipe and the drug, itself, -- the active ingredient volatizes from the heat and can be inhaled, and so that leaves the residue behind which is just -- has trace amounts of the drug, so there is a difference between what's actually purchased and what is actually found in a pipe because what's found in the pipe is the remainder after most of the drug is gone. That might just be a few percent of the active drug.

(Emphasis added.) In responding to the question of what he meant by "trace amounts," Dr. Read testified that "[t]here are also things present in trace amounts which would be like a few percent, so trace amounts means very, very small compared to the major item in a product." (Emphasis added.)

With respect to the instant case, Read related that, even if the sample had been "pure," without contamination and purchased from a reputable drug company, it would still not produce the high that an illicit user would seek. Read explained that a pure sample of .018 grams would have, at most, therapeutic use. In conclusion, Read opined that .018 grams of a substance containing methamphetamine was not an effective illicit dose, was

[6] See supra note 4.

unsaleable, and was incapable of producing an illicit "pharmacological effect":

> Q. [DEFENSE ATTORNEY] Doctor Read, in your expert opinion would eighteen milligrams or .018 grams produce a euphoric or pharmacological effect for an illicit user?
> A. No. A person of -- average normal person I would not expect that would produce any of the effects that they would be after. If it were pure methamphetamine, if that was .018 of methamphetamine, even then I don't think it would produce the high that would be sought after.
> Q. In your opinion would a person be able to use that .018 grams as an item for sale?
> A. Not for illicit use. If it were from a drug company and known to be pure, it would have use therapeutically. At that level it could be used, but no physician or researcher would buy an uncertified drug . . . .

(Emphases added.)

On cross-examination, the prosecution established that Read had not "done any kind of particular factoring of . . . [Defendant's] weight to come up with dose response"; that Read had not accounted "for his height," "his drug use history," "his muscle-to-body fat ratio," "or his overall physical health." But, as Read responded, if Defendant were not a first-time user, more of the drug would be required to produce an effect:

> A. All I have given is a range here which would encompass the minimum to the maximum for a naive user. Now, if the person were not a naive user, it would take considerab[ly] more than this. It would take like the [Ellinwood] study in tolerant users, would take a lot more, so it would be even harder to have an effect.
> Q. Somebody who doesn't generally use all the time is going to have an effect with a lower dose?
> A. Right.

The court asked how specific dosages physically impact those persons taking methamphetamine for legitimate purposes. Dr. Read responded that there would be no detectable effect below the "minimum effective dose" and that .015 grams would have an effect on children for therapeutic purposes:

Q. So any amount of this methamphetamine that a person takes is going to affect the central nervous system, correct? . . .

A. When you get below the minimum effective dose, there's no detectable effect.

Q. What amount is that?

A. Well, by definition minimum effective dose would be the minimum that would have an effect, and it would depend on what action you are looking for. . . .

Q. .015 [grams] would have an effect? . . . That would be the highest end for treatment of [ADHD]?

A. Right . . . in children. . . . They treat them for years and years. They don't become addicted.

(Emphases added.)

B.

For the prosecution, police officer Dennis Lee testified that he was a narcotics investigator with the Maui County Division and had received formal training in the testing and identification of illegal drugs and drug paraphernalia.[7] Although Lee was questioned with respect to drug and drug

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[7] Police officer Dennis Lee described his training as follows:

A. I received eight hours of specialized training from Bectin Dickinson instructors in the field testing of illegal drugs.

Q. [PROSECUTOR] How about in drug identification?

A: Yes.

Q: Investigation?

A: I received forty hours of basic investigation and drug identification from the Drug Enforcement Administration.

. . . .

Q: Are you certified by the Maui Police Department to field test evidence for the presence of illegal drugs?

A: Yes.

. . . .

Q: . . . [H]ave you had to test evidence in the past for the presence of methamphetamine?

A: Yes, sir.

Q: And can you estimate how many times you may have done that?

A: Well over a hundred.

(Emphasis added.)

paraphernalia identification, the prosecution did not offer Lee as an expert at all.

When asked by the prosecution, "Can you tell me if the residue in the pipe you tested prior to your scraping and field testing was of an amount sufficient to be used by somebody?" Lee replied, "Possibly yes." Defense counsel objected to the question on the ground that Lee was not qualified to answer it. The court overruled the objection on the ground that the answer went to the weight of the evidence. After doing so, the court again asked Lee to state his answer to the previous question. He said, "Yes."

On cross-examination, Lee reported that he had not received a Bachelor of Science degree in any physical chemistry sciences and that the test he performed does not indicate the amount of methamphetamine in the substance he tested.

C.

The court identified the following grounds for denying Defendant's de minimis motion:

> The amount that was actually measured here in the lab which apparently was less than the actual amount of amphetamine . . . is more than the maximum dosage used . . . to correct [ADHD]. It is more than the maximum dose recommended by one of the studies, one of three studies for obesity, and it is more than the maximum dosage recommended by one of the four studies for the treatment of narcolepsy, so it is obvious that while one might debate how much is enough to get a person high, that this was an amount that was usable, and then, also, the evidence shows that it was in a pipe and so on.
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> It was obviously there to be used by the [D]efendant. He probably used it, in fact. So it was not the kind of situation where a person borrowed a car and [there] just happened to be something in the ashtray. It was a very small amount, and we are looking at a fact situation where

> [it would] be really a miscarriage of justice for the person to end up with felony conviction because of inadvertance or something like that.
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> Here we have a person who had the equipment to use it, no doubt was using it, and that is the very harm that the statute is intended to address.
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> Now, [State v. Vance, 61 Haw. 291, 602 P.2d 933, reh'g denied, 61 Haw. 291, 601 P.2d 933 (1979),] as pointed out talks about the possibility of applying the de minimis standard if there's -- the amount is microscopic or infinitesimal, and in fact unusable as a narcotic. I am reading the word narcotic to include with -- what do you call it -- stimulant, and what I am assuming the Court means a drug that has, at least, potential for and affects the central nervous system or the mind, and here I think the amount clearly could do that, and that the de minimis standard would be inappropriate to apply, and I am going to deny the motion.

(Emphases added.) A written order denying the motion to dismiss was subsequently filed on July 12, 1999.

II.

Defendant appeals the July 12, 1999 order denying his motion to dismiss Count II of the indictment on two grounds. The first ground is that the court erred in admitting Lee's testimony that the residue scraped from the pipe was a useable amount; the second ground is that the court abused its discretion when it denied Defendant's motion to dismiss his possession as a de minimis violation under HRS § 702-236(1).[8]

III.

As to his first ground, Defendant argues that Lee's testimony characterizing the residue as useable should not have been admitted, because Lee was not qualified as an expert witness

[8] Since the arguments in the briefs relate only to Count II, the judgment and sentences rendered on Counts I and III must be affirmed.

under Hawai'i Rules of Evidence (HRE) Rule 702 (1993). He maintains that Lee's testimony involved knowledge not known to lay witnesses pursuant to HRE Rule 701 (1993), and no foundation was laid for this type of testimony. The defense thus contends that Lee's testimony could not have been admitted as expert testimony. Additionally, Defendant urges that, inasmuch as Lee's opinion was a lay one and he had not been qualified as an expert, the court's ruling that an expert's testimony goes to weight rather than admissibility is not applicable. I believe Defendant is correct, and the court erred in overruling his objection.

IV.

Before expert testimony can be admitted into evidence, the witness must be qualified as an expert. See HRE Rule 702. Whether a witness is qualified to give evidence as an expert is governed by HRE Rule 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Thus, a witness may qualify as an expert if he or she possesses a background in any one of five areas contemplated by HRE Rule 702: knowledge, skill, experience, training, or education. See id. (citing 29 C. Wright & V. Gold, Federal Practice and Procedure: Evidence, § 6263, at 191 (1997).[9]

[9] I refer to authorities construing the Federal Rules of Evidence (FRE) because the HRE are patterned after those rules. See State v. Ito, 90 (continued...)

In Neilson v. American Honda Motor, Co., 92 Hawai'i 180, 989 P.2d 264 (App.), cert. dismissed, 92 Hawai'i 180, 989 P.2d 264 (1999), the Intermediate Court of Appeals acknowledged that other cases have held in the past that "'[i]t is not necessary that the expert witnesses have the highest possible qualifications to testify about a particular matter[.]'" Id. at 189, 989 P.2d at 273 (quoting Larsen v. State Savings & Loan Ass'n, 64 Haw. 302, 304, 640 P.2d 286, 288 (1982)). "'Once the basic requisite qualifications are established, the extent of an expert's knowledge of the subject matter goes to the weight rather than the admissibility of the testimony.'" Id. (quoting Larsen, 64 Haw. at 204, 640 P.2d at 288). Police officers have been determined to qualify as experts by reason of experience or specialized training. See State v. Lloyd, 61 Haw. 505, 515, 606 P.2d 913, 920 (1980) (citing State v. Maupin, 330 N.E.2d 708 (Ohio 1975)). See also State v. Nishi, 9 Haw. App. 516, 523, 852 P.2d 467, 480 (1993) (holding that a police officer's testimony should be admitted as expert testimony, especially where a foundation for knowledge and skills possessed by the officer was laid by counsel).

V.

Substantively, Lee's statements consisted of more than

[9](...continued)
Hawai'i 225, 236 n.7, 978 P.2d 191, 202 n.7 (App. 1999) (HRE covering "admission of scientific evidence are patterned after [FRE Rules] 702 and 703").

the mere opinion testimony of a lay witness. A lay witness can only testify as "to those opinions or inferences which are (1) rationally based on the perception of the witness, and (2) helpful to a clear understanding of witness'[s] testimony or the determination of a fact in issue." HRE Rule 701. Instead, Lee testified as to knowledge not generally known in the populace and for which he had received training by the Maui police department. A foundation was laid by the prosecution with respect to Lee's qualifications in the area of drug and drug paraphernalia identification and basic investigation, but not in connection with any "euphoric or pharmacological" effect that might result from trace amounts of methamphetamine. Lee was not qualified as an expert and the prosecution did not attempt to so qualify him. Accordingly, Lee's testimony that residue might "possibly" be "used by somebody" would be inadmissible insofar as it related to any "effect" of the residue on a person.

VI.

With respect to Defendant's second ground, we review a court's decision for abuse of discretion by assessing whether the court "clearly exceed[ed] the bounds of reason or disregard[ed] rules or principles of law or practice to the substantial detriment of a party litigant" is required. State v. Klinge, 92 Hawai'i 577, 584, 994 P.2d 509, 516, reconsideration denied, 92 Hawai'i 577, 994 P.2d 509 (2000) (citations omitted); see also

State v. Sacoco, 45 Haw. 288, 292, 367 P.2d 11, 13 (1961). I must conclude that the court did abuse its discretion.

Although possession of "any amount" of methamphetamine "technically violates HRS § 712-1243," it may "nonetheless [be] de minimis pursuant to HRS § 702-236." State v. Viernes, 92 Hawai'i 130, 135, 988 P.2d 195, 200 (1999). In a charge under HRS § 712-1243, circumstances disqualifying a defendant from HRS § 702-236(1)(b) consideration must directly implicate the harm or "evil sought to be controlled." Vance, 61 Haw. at 307, 602 P.2d at 944. This implication includes the "possession of a microscopic amount in combination with other factors such as the ability to use, to sell, or to distribute the drug which must be introduced as evidence." Id. One of the evils sought to be controlled by statutes prohibiting possession of drugs is crime linked to the perpetuation of a drug habit. Thus, an additional consideration is whether, at the time of possession as charged, the defendant was engaged in a crime to support a drug habit. See State v. Carmichael, 99 Hawai'i 75, 100, 53 P.3d 214, 239 (2002) (Acoba, J., dissenting).

It is undisputed that there was no evidence in the surrounding circumstances of a sale or distribution of the dangerous drug here or that Defendant was involved in a crime to support a drug habit at the time. See supra Part I. The pivotal question, then, is whether there was evidence adduced that the trace amount of methamphetamine in the residue was useable.

VII.

The majority posits that the "proper inquiry" to apply in drug de minimis cases "is whether the amount possessed could produce a pharmacological or physiological effect." Majority opinion at 17 (citing State v. Hironaka, 99 Hawai'i 198, 53 P.3d 806 (2002); State v. Balanza, 93 Hawai'i 279, 285, 1 P.3d 281, 287 (2000); Viernes, 92 Hawai'i at 134, 988 P.2d at 199). This standard as employed by the majority, however, is meaningless, because it has no reference to the "harm or evil sought to be prevented by the law defining the offense," HRS § 702-236(1)(b), and, thus, could result in convictions where the harm or evil sought to be alleviated by the law is not threatened. In Vance, this court related that dismissal on de minimis grounds should not be entered if the amount of drug possessed, in that case cocaine, was sufficient to cause a "narcotic" effect, inasmuch as an amount having that characteristic was likely to be used or sold:

> The evil sought to be controlled by the statutes mentioned above is the use of narcotic drugs and their sale or transfer for ultimate use. Where the amount of narcotics possessed is an amount which can be used as a narcotic, the probability of use is very high and the protection of society demands that the possession be proscribed. However, where the amount is microscopic or is infinitesimal and in fact unusable as a narcotic, the possibility of unlawful sale or use does not exist, and proscription of possession under these circumstances may be inconsistent with the rationale of the statutory scheme of narcotics control. Thus, the possession of a microscopic amount in combination with other factors indicating an inability to use or sell the narcotic, may constitute a de minimis infraction[.]

Vance, 61 Haw. at 307, 602 P.2d at 943 (emphases added). The genesis of this court's de minimis analysis, as it applies in

drug cases, thus lies in the recognition that it is an amount that produces an illicit effect that is germane to our inquiry. That proposition applies to methamphetamine, inasmuch as it is, like cocaine, a dangerous drug.[10] It was similarly recognized in Viernes that, "if the quantity of a controlled substance is so minuscule that it cannot be sold or used in such a way as to have any discernible effect on the human body, it follows that the drug cannot lead to abuse, social harm, or property and violent crimes." Viernes, 92 Hawai'i at 134, 988 P.2d at 199 (emphases added). The Commentary on HRS §§ 712-1241 to 712-1250, the statutes enumerating drug offenses, identifies the ultimate harm sought to be avoided as "physical dependence in the user" which stems from "a high tolerance level" to drugs and "addicti[on]." The standard in our cases that objectively relates to the de minimis standard, then, is not whether a trace amount is capable of producing any pharmacological or physiological effect which, by definition, would encompass a legal therapeutic dosage, but

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[10] As was previously mentioned,

> [w]hile the specific drugs involved in Vance were cocaine and secobarbital, see [61 Haw.] at 305, 602 P.2d at 943, and, thus, "narcotic drugs," as the court noted, the fact that methamphetamine is not a narcotic drug would not preclude application of the principles set forth in Vance. Id. As Read explained, the term "narcotic" refers to a drug that is a depressant, although the term has "evolved" into a definition for an "addict[ive]" drug. In Vance, this court's analysis generally concerned "a literal application of" HRS § 712-1243 in a prosecution "for possession of a microscopic trace of a dangerous drug," id. at 307, 602 P.2d at 944 (emphasis added), and, therefore, pertained to all such "dangerous drugs," not only those drugs which could be said to have a narcotic or addictive effect.

Carmichael, 99 Hawai'i at 93, 53 P.3d at 232 (Acoba, J., dissenting).

rather, whether the trace amount involved is capable of producing an illicit effect. See Carmichael, 99 Hawai‘i at 95, 53 P.3d at 234 (Acoba, J., dissenting); Vance, 61 Haw. at 307, 602 P.2d at 943.

As Vance indicates, the de minimis test in drug cases must be focused on whether the effect is one achieved by the illegal use of drugs, not on beneficial doses that have been medically approved. For example, the fact that a certain dosage of methamphetamine is used to treat obesity or ADHD in children is not relevant to the question of whether the amount possessed threatened the harm the possession statute was intended to prevent. In this case, no witness testified that the drug possessed would produce an illicit pharmacological effect; to the contrary, Dr. Read, the only witness qualified to testify to that issue, declared that the amount of residue recovered from the pipe, even if pure methamphetamine, would not produce the euphoria or elation sought by illegal users of the drug. That was the only competent evidence presented to the court on the question of whether the trace amount was useable as contemplated under HRS § 702-236(1).

VIII.

With all due respect, it would be disingenuous to suggest that the effect prohibited, pertinent to the application of the de minimis statute, is any effect, rather than that effect

sought in the criminal use of the drug.[11] Vance established that only an amount that would produce a "narcotic[, i.e., illicit] effect[,]" Vance, 61 Haw. at 304, 602 P.2d at 942, would implicate the harm sought to be prevented, as opposed to an amount "in fact unusable as a narcotic" as to which "the possibility of unlawful sale or use does not exist." Id. at 307, 602 P.2d at 944. Viernes adopted the foregoing proposition from Vance.

> [W]here the amount is microscopic or is infinitesimal and in fact unusable as a narcotic, the possibility of unlawful sale or use does not exist, and proscription of possession under these circumstances may be inconsistent with the rationale of the statutory scheme of narcotics control.

Viernes, 92 Hawai'i at 134, 988 P.2d at 199 (quoting Vance, 61 Haw. at 307, 602 P.2d at 944) (emphasis omitted) (emphasis added). Hence, when Viernes referred to a "discernible effect," it was in the context of the Vance formulation.

> As *Vance* suggests, however, if the quantity of a controlled substance is so minuscule that it cannot be sold or used in such a way as to have any discernible effect on the human body, it follows that the drug cannot lead to abuse, social harm, or property and violent crimes. Accordingly, "proscription of possession under these circumstances may be inconsistent with the rationale of the statutory scheme of narcotics control." [Vance, 61 Haw. at 307, 602 P.2d at 944].

Viernes, 92 Hawai'i at 134, 988 P.2d at 199 (emphases added). The phrase "pharmacological or physiological effect" set out in Viernes was used to refer to the Vance formulation of what was

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[11] It is also incorrect to assert that "Read did not testify that the substance recovered in the instant case could not produce a pharmacological effect[,]" majority opinion at 19, because it is undisputed that the amount was unmeasurable.

"useable" or "saleable," i.e., that which would have an illicit effect.

> [The defendant] adduced uncontroverted evidence that .001 grams of methamphetamine (1) could not produce any pharmacological action or physiological effect and (2) was not saleable. Inasmuch as the .001 grams of methamphetamine was infinitesimal and was neither useable nor saleable, it could not engender any abuse or social harm.

Viernes, 92 Hawai'i at 134-35, 988 P.2d at 199-200 (emphases added) (footnote omitted). Understandably, then, in Viernes, this court emphasized the fact that the potential evil related only to that amount that produced an illicit effect. Indeed, this court labeled as "specious" the contrary position the majority now apparently adopts.

> The prosecution argues that, inasmuch as the .001 grams of methamphetamine could be injected or smoked, it was useable, and therefore an "evil sought to be controlled by the statute." See Vance, 61 Haw. at 307, 602 P.2d at 944. This argument is specious. The Vance court did not suggest that any "useable" substance posed a potential evil, but, rather, only those substances "which can be used as a narcotic." Id. (emphasis added).

Viernes, 92 Hawai'i at 134 n.6, 988 P.2d at 199 n.6 (emphases added). Therefore, contrary to the majority's declaration, Viernes was precedent at the time this case was decided, and indicated it was an illicit or prohibited effect that was germane to the de minimis issue.[12] Plainly, the majority's position clashes with and is inconsistent with Vance and Viernes.

[12] State v. Oughterson, 99 Hawai'i 244, 54 P.3d 415 (2002), Hironaka, and State v. Balanza, 93 Hawai'i 279, 285, 1 P.3d 281, 287 (2000), cited by the majority, see majority opinion at 14, 17, were issued after this case was decided below.

IX.

Inexplicably, the majority suggests that the term "narcotic" is limited to its use in HRS § 329-1 (1993). See majority opinion at 17-18. That section was not cited to, quoted, or relevant to this court's discussion of the term in Vance. Its suggestion that Vance "evinces this court's recognition of the narrow statutory definition of 'narcotic drug[,]'" majority opinion at 17, then, is erroneous. The term "narcotic" has not been precisely employed in our cases.[13] Thus in Viernes, the majority itself referred to methamphetamine, although not a narcotic, as a "narcotic." See Viernes, 92 Hawai'i at 133, 988 P.2d at 198 (this court disagreed with the prosecution "[i]nasmuch as the quantity of methamphetamine possessed by [the defendant] was infinitesimal and unusable as a

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[13] This point and Dr. Read's position regarding the term "narcotic" was covered before:

> While the specific drugs involved in *Vance* were cocaine and secobarbital, *see* [*Vance*, 61 Haw.] at 305, 602 P.2d at 943, . . . [referred to as] "narcotic drugs[]" [by the trial] court . . . , the fact that methamphetamine is not a narcotic drug would not preclude application of the principles set forth in *Vance*. *Id.* As [Dr.] Read explained, the term "narcotic" refers to a drug that is a depressant, although the term has "evolved into a definition for an "addictive" drug. In *Vance*, this court's analysis generally concerned "a literal application of" HRS § 712-1234 in a prosecution "for possession of a microscopic trace of a *dangerous drug*," *id.* at 307, 602 P.2d at 944 (emphasis added), and, therefore, pertained to all such "dangerous drugs," not only those drugs which could be said to have a narcotic or addictive effect.

Carmichael, 99 Hawai'i at 93, 53 P.3d at 232 (Acoba, J., dissenting) (footnote and brackets omitted) (emphasis added). Furthermore, the majority concedes that its definition of a "'narcotic drug' conflicts with Dr. Read's testimony in this case regarding the pharmacological definition of the same term." Majority opinion at 16 n.10.

narcotic, and was thereby incapable of causing or threatening the harms sought to be prevented by HRS § 712-1243" (emphases added)). Obviously, the term "narcotic," as used in the vernacular, has come to refer to any addictive drug, and the misleading discourse as to that only obfuscates the issue.

As the discussion in the text infra indicates, the question is whether the amount involved produced the prohibited effect. Contrary to the majority's view, Vance did not make a distinction between two drugs for de minimis purposes. What was relevant was whether the amount of the drug could be used or sold, and that depended on whether the amount could produce the illicit or prohibited effect.

X.

The majority mistakenly "note[s]" that I "ha[ve], on occasion, agreed" that "the proper inquiry in de minimis cases is whether the amount possessed could produce a pharmacological or physiological effect[,]" majority opinion at 17-18, referring to my concurring opinion in Hironaka. To the contrary, in Hironaka, I did not agree with the majority's standard. Rather, I proposed a standard based on Vance and Viernes which, as restated above, identified the relevant physiological effect as one that produced an illicit or prohibited effect; i.e., an amount that would be useable or saleable:

> In light of *Vance*, *Viernes*, and the legislative history of HRS § 712-1243, I believe courts faced with a motion to dismiss a drug-residue promotion of dangerous drugs case based on de minimis grounds should consider, as a

> threshold qualification for HRS § 712-1243 treatment, whether (1) the amount possessed was useable, or (2) the amount was saleable, or (3) the defendant was engaged in a crime to support a drug habit at the time of possession.

Hironaka, 99 Hawai‘i at 210, 53 P.3d at 818 (Acoba, J., concurring) (emphases added).

XI.

Finally, in comparison to the majority's position, I do not "advocate[]" a new standard, see majority opinion at 17, but only that formulation that is set out on the face of Vance & Viernes. Viernes being precedent, it binds not only the court, but this court as well. The only standard applicable, as demonstrated in the foregoing discussion, is the one first expressed in Vance and later ratified in Viernes by the majority, which now dubs it as a "misinterpret[ation]." Majority opinion at 17. The so-called pharmacological or physiological effect has always been tied to the prohibited or illicit effect of a drug. The term "pharmacological effect" originated in Read's testimony in Viernes. The term was employed in the context of illicit use. See Viernes, 92 Hawai‘i at 132, 988 P.2d at 197 (responding to the question of whether ".001 [grams of crystalline substance found in the defendant's possession] could . . . in any way be used for sale or illicit use or even clinical use by an adult male[,]" Read stated, "Nowhere near enough to produce any action, pharmacological action that I'm aware of."). Hence, contrary to the majority's position, the term "pharmacological effect" taken from Read's testimony refers to illicit use. In conclusory

fashion, the majority in a revisionist approach abrogates the express formulation of this court in Vance and its own decision in Viernes.

XII.

The court, in its decision, apparently rested its rejection of the de minimis motion on four grounds. None of these grounds is accurately or rationally supported by the evidence.

A.

As its first ground, the court mistakenly stated that "the amount that was actually measured . . . was less than the actual amount of amphetamine . . . more than the maximum dosage . . . to correct [ADHD] . . . [or] recommended by . . . one of three studies for obesity and . . . one of the four studies for treatment of narcolepsy . . . and [thus] this was an amount that was useable[.]" In fact, the .018 grams was residue. Thus the amount that was measured "in the lab," .018 grams, was more, not less than "the actual amount of methamphetamine" which, according to Dr. Read, amounted to "trace amounts of the drug." (Emphasis added.)

It is true that a select group of Read's studies referred to by the court listed maximum dose amounts of under .018 grams. The Lehne, Olson, and Pinger studies all suggested a .015 grams maximum for ADHD in children. The Lehne study

suggested a .015 grams maximum for obesity (where other studies list maximums of .040 and .030 grams), and the Olson study suggested a .015 grams maximum for narcolepsy (where other studies list maximums of .050, .060, and .040 grams). See supra note 4. However, all the dosage amounts listed by the Read chart were based on pure samples of methamphetamine rather than on residue containing unknown trace amounts of methamphetamine, as in the instant case.

Thus, the court's reliance on amounts used for legal purposes is misplaced. In each of the instances related above, the drug would be administered for legal, rather than illicit purposes. The maximum dose for treating ADHD in children is obviously inapplicable to Defendant, who was not a child. The majority's assertion that, because, as a general matter, .005 grams of pure methamphetamine could be "used to treat ADHD" and, thus, "is sufficient to produce a pharmacological effect[,]" majority opinion at 18, simply skirts the question of whether the drug was useable for illicit purposes under the circumstances of this case.

Read's extrapolated dose range of .05 to .1 grams, as that amount of pure methamphetamine that would produce an illicit, euphoric effect, is based on an evaluation of many sources, including the Ellinwood study on the dosages taken by illicit users. See supra note 4. Read opined that this amount would be required for a starting user to achieve euphoria and elation, with higher dosages required for those who have abused

the drug for a longer period of time. The amount of residue possessed by Defendant, .018 grams, clearly falls below the low end of Read's effective dosage range.[14]

The prosecution failed to adduce any contrary evidence as to this one of Read's conclusions. Assuming arguendo that Officer Lee's testimony that the drug residue was useable was admissible, such testimony amounted only to speculation. The officer offered no supporting facts for this conclusion and was not qualified to give it. His testimony was not adopted by the court in its findings. Nevertheless, the majority relies in part on Lee's testimony. See majority opinion at 19 (Lee testified "that the substance recovered from Fukagawa's pipe may have constituted an amount sufficient to be 'used' by someone."). In doing so, it usurped the court's role and exercised the court's discretion under HRS § 702-236. See Carmichael, 99 Hawai'i at 96, 53 P.3d at 235 (Acoba, J., dissenting) (explaining that the plurality, by substituting its reasoning for that of the trial court, "essentially supplants the trial judge's thinking with [its] own").

B.

For its second ground, the court suggested it would grant a de minimis motion "where a person borrowed a car and [there] just happened to be something in the ashtray." Under the

[14] Although Lee opined that a dose of .018 grams "possibly" could have been "used" by somebody, Lee, even if accepted as an expert in this area, did not testify as to whether this amount would cause the prohibited effect.

example used by the court, promotion of a dangerous drug would be a strict liability offense. If the drug "just happened to be . . . in the ashtray," the defendant would lack any culpable state of mind, and under the facts posited, would be entitled to an acquittal. See Carmichael, 99 Hawai'i at 100, 53 P.3d at 239 (Acoba, J., dissenting) (indicating that "knowing[] possess[ion] of an unmeasurable amount contained in residue" must be proved . . . "insofar as a legislative purpose to impose absolute liability for such offense" did not plainly appear). The de minimis paradigm announced by the court would be impossible to satisfy unless the defendant were not guilty, in which case the de minimis statute would not apply.

C.

As its third basis, the court observed Defendant was "a person who had the equipment to use it, [and] no doubt was using it." As to the former observation, Defendant does not contest his conviction for possessing the glass pipe, and as to the latter, there is no evidence that he was "using" the residue at the time of his arrest, and he was not charged with such use. Because Defendant is charged with possession, the question is whether the trace amount of methamphetamine left in the residue would produce an illicit effect. All the admissible evidence before the court indicated the residue would not produce such an effect. The prosecution presented no evidence of the amount of useable methamphetamine left in the residue.

D.

As to its fourth ground, the court agreed that under the case law, the question is whether the amount of methamphetamine is "in fact unuseable as a narcotic. . . . I am assuming the [supreme] court means a drug that has, at least potential for and affects the central nervous system or the mind." The court was substantially correct. However, the evidence before it was that whatever amount of methamphetamine was in the residue would not produce a euphoric or pharmacological effect.

The prosecution adduced no admissible evidence to rebut Read's conclusion that .018 grams of residue containing an unknown amount of methamphetamine was not useable or saleable. Even the smallest amount of methamphetamine to be legitimately prescribed, .015 grams for ADHD, is calculated based on a one hundred percent pure sample of methamphetamine rather than mere residue. The laboratory report indicates that .018 grams was the gross weight of the residue that "contained methamphetamine"; thus, the amount of pure methamphetamine had to be less than .018 grams. Read's testimony that the residue was not saleable or useable was not validly disputed.

XIII.

The majority contends it may affirm the court "on any ground in the record that supports affirmance," majority opinion at 19, thus admitting that the reasons given by the court did not

support its denial of the motion. As indicated supra, however, there is no ground in the record to support affirmance, considering (1) the unrebutted competent evidence produced by Dr. Read and (2) the absence of any surrounding circumstances that would disqualify Defendant from de minimis consideration.

The majority implies that the defense failed to present "testimony [or] other evidence regarding the circumstances attendant to [Defendant's] possession." Majority opinion at 20. The surrounding circumstances were never questioned by the court or disputed by the parties inasmuch as such circumstances were not in controversy, i.e. the charge of driving under the influence of intoxicating liquor and a BAC of 0.135, and recovery of the glass pipe at the time of Defendant's booking. Accordingly, Defendant carried his burden of proof.[15]

XIV.

Considering the evidence adduced at the hearing and the lack of any challenge to Read's credibility, I conclude the court's denial of Defendant's motion exceeded the bounds of reason. Therefore, in my view, the court's July 12, 1999 order

[15] The majority states that Defendant "bears the burden of establishing that 'his or her conduct neither caused nor threatened to cause the harm or evil that the statute, under which he or she is charged, seeks to prevent[,]'" majority opinion at 20, citing Oughterson, 99 Hawai'i at 427, 54 P.3d at 256. That case was issued after the trial court had decided the instant case. The written order denying Defendant's motion to dismiss was filed on July 12, 1999. Nevertheless, Defendant clearly met his burden of proof as set forth supra.

denying Defendant's motion, and the August 31, 1999 judgment and sentence insofar as it relates to Count II, should be reversed.[16]

[16] Because I conclude the court abused its discretion in denying the motion to dismiss under the grounds set forth in HRS § 702-236(1)(b), I do not consider the arguments of the parties with respect to HRS § 702-236(1)(c).