DISSENTING OPINION OF ACOBA, J.

Four points are pertinent in this case.

First, there is no majority opinion as to the basis for affirming the trial court in this case. In that regard, I believe the plurality, Moon, C.J., joined by Nakayama, J., is incorrect. In relying on attendant circumstances which were not relevant to the decision of the trial court, the plurality in effect exercises on the appellate level discretion that was only the trial court's to exercise, see Hawai'i Revised Statutes (HRS) § 702-236 (1993), and which it did exercise on grounds different from those on which the plurality justifies its holding. As set forth herein, the first attendant circumstance merely reiterated the drug paraphernalia possession charged, and the latter two, the charge of driving under the influence of liquor, all of which were not challenged on appeal.

Second, with all due respect, I must disagree with the position of Justice Ramil that the de minimis statute does not apply to the offense of promoting a dangerous drug (methamphetamine) in the third degree, HRS § 712-1243(1) (1993 & Supp. 1999). In my view, there is no conflict between HRS §§ 702-236 and 712-1243, and the de minimis statute may apply, for the reasons set forth herein. Unless two justices join in this part of the opinion, there is no majority opinion on this court with respect to a rationale rebutting the position of Justice Ramil and supporting the holding in State v. Vance, 61

Haw. 291, 602 P.2d 933 (1979), and in State v. Viernes, 92 Hawai‘i 130, 988 P.2d 195 (1999).

Third, in light of the precepts set forth in Vance and Viernes, and the evils sought to be abrogated by HRS § 702-236(1)(b), the possession of an amount of drug not (1) saleable or (2) useable, i.e. capable of producing an illicit pharmacological effect, or (3) linked to the defendant's involvement in a crime to support a drug habit at the time, is the threshold qualification for establishing that the defendant's conduct either does not cause the harm sought to be proscribed by HRS § 712-1243 or does so to an extent too trivial to warrant conviction. While agreement is not reached on guidelines as to the exercise of the court's discretion in de minimis drug cases, this does not preclude the trial courts from utilizing the foregoing three factors in employing their discretion, since to do so would not "clearly exceed[] the bounds of reason or disregard[] rules or principles of law or practice to the substantial detriment of a party litigant." State v. Mara, 98 Hawai‘i 1, 10, 41 P.3d 157, 166 (2002) (citing State v. Alston, 75 Haw. 517, 538-39, 865 P.2d 157, 168 (1994)).

Fourth, the facts in this case raise serious questions of law and fact as to whether a defendant in a particular case can "knowingly" possess an unmeasurable amount of prohibited drug found in residue. Notwithstanding any question of law, the issue of whether a defendant, as a matter of fact, knowingly possessed such an amount cannot be legally foreclosed.

I.

As to the appropriate result to be reached in this case, I would hold that the circuit court of the second circuit (the court) abused its discretion in denying the HRS § 702-236 motion of Defendant-Appellant Kalawaianui F. Carmichael (Defendant) to dismiss as de minimis, the HRS § 712-1243 charge against him of possessing the dangerous drug methamphetamine in any amount. In light of the unrebutted evidence received by the court, residue weighing .002 grams containing an unknown amount of methamphetamine was not saleable or useable, i.e., capable of producing any illicit pharmacological effect. I would also hold that (1) there is no conflict between HRS § 702-236 and HRS § 712-1243 and both statutes are to be given application, where appropriate, and (2) in the absence of attendant circumstances that "threaten the harm or evil sought to be prevented by the law defining the offense[,]" HRS § 702-236(1)(b), an amount of a drug "so minuscule that it cannot be sold or used in such a way as to have any discernible effect on the human body[,]" Viernes, 92 Hawai'i at 134, 988 P.2d at 199 (citing Vance, 61 Haw. at 307, 602 P.2d at 944), qualifies as a de minimis violation of HRS § 712-1243.

II.

A.

On February 13, 1999, Maui Police Department (MPD) Officer Christopher Horton arrested Defendant, a twenty-year-old

male, for driving under the influence of intoxicating liquor. During Defendant's booking procedure at the Wailuku police station, a glass pipe containing a "white to brown" crystalline substance, a small plastic straw, and two metal scrapers were recovered from Defendant. The white-to-brown substance was later determined to weigh .002 grams and to "contain methamphetamine," a dangerous drug.

On April 12, 1999, Defendant was charged in a Maui grand jury indictment with (1) driving under the influence of intoxicating liquor (Count I), (2) promoting a dangerous drug (methamphetamine) in the third degree, in violation of HRS § 712-1243(1) (Count II), and (3) prohibited acts related to drug paraphernalia ("to wit, a glass pipe . . ."") (Count III). HRS § 712-1243 states in relevant part:

> (1) A person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount.
>
> . . . .
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> (3) Notwithstanding any law to the contrary, if the commission of the offense of promoting a dangerous drug in the third degree under this section involved the possession or distribution of methamphetamine, the person convicted shall be sentenced to an indeterminate term of imprisonment of five years with a mandatory minimum term of imprisonment, the length of which shall not be less than thirty days.

(Emphasis added.)

On June 4, 1999, Defendant filed a motion to dismiss Count II of the indictment on the ground that his alleged conduct constituted a de minimis offense under HRS § 702-236(1)(b). HRS § 702-236(1) states:

> 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:

> (a) Was within a customary license or tolerance, which was not expressly refused by the person whose interest was infringed and which is not inconsistent with the purpose of the law defining the offense; or
> (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
> (c) Presents such other extenuations that it cannot reasonably be regarded as envisaged by the legislature in forbidding the offense.

(Emphasis added.) In a supporting memorandum, he argued that, under HRS § 702-236(1)(b), possession of .002 grams of methamphetamine was a de minimis infraction because that amount could not be sold or used for either legitimate or illicit purposes. Alternatively, Defendant contended that, under HRS § 702-236(1)(c), the infinitesimal amount recovered, coupled with other factors, such as the harshness of the prescribed sentence -- a five-year indeterminate prison term without the possibility of probation -- warranted dismissal of the charge.

On June 29, 1999, Plaintiff-Appellee State of Hawai‘i (the prosecution) filed an opposing memorandum contending that Defendant's criminal conduct did meet the requirements of HRS § 702-1243(1), because knowing possession of the drug in any amount was the harm sought to be prevented by the statute. The prosecution maintained that "the evidence in this case does not negate the possibility that the drugs were for the Defendant's personal use . . . [a]nd although the substance appeared to have been previously smoked, there was still a measurable (useable) quantity of methamphetamine within the pipe." According to the

prosecution, the totality of the circumstances weighed in favor of denying Defendant's motion.

B.

On July 1, 1999, at the hearing on the motion, both parties stipulated that Julie Wood was qualified to testify as an expert in the drug identification field. It was agreed she would testify, if called as a witness, that: (1) she tested the residue found in the pipe seized; and (2) the residue (a) weighed .002 grams, (b) "contain[ed]" methamphetamine, and (c) was visible to the naked eye. In addition, the parties stipulated that a copy of the laboratory report prepared by Wood, containing such findings (Exhibit No. 4), be received into evidence.

The defense then called University of Hawai'i Emeritus Professor of Pharmacology, George W. Read, Ph.D., as its expert witness in pharmacology.[1] According to Read's own testimony and his curriculum vitae, he 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 University of Hawai'i School of Medicine; and he was chairman of a legislative task force on drug abuse and serves on the Hawai'i Commission on Drug Abuse, and has served as

[1] Read was also the expert witness in Viernes, referred to infra in the text.

its chairman several times. The court duly qualified Read as an expert in pharmacology.

Read testified that pharmacology is "the study of actions of drugs in an organism, especially man, humans," and he relied on "studies related to the effects of drugs either on people or experimental animals[,] simulating effects they would have on people." He had written approximately fifty articles relating to his pharmacological studies and has testified as an expert witness in approximately fifty cases.

Read explained that methamphetamine is a central nervous system (CNS) stimulant, which acts on the brain. Increasing doses, as recounted by Read, results in CNS stimulation and, in a certain dosage range, will produce elation and euphoria. Extrapolating data from various sources,[2] Read concluded that the minimum amount required for a "nonuser" to experience any "sort of . . . euphoria or elation" from methamphetamine would fall within "a starting dose" "range of .05 to .1 grams." As explained by Read, extrapolation was necessary because of the unavailability of data concerning the percentages of contaminants in drugs purchased on the streets, the amounts placed in individual pipes, the number of inhalations, the amount

[2] According to Read, his sources include: Drill's Pharmacology in Medicine, (J.R. DiPalma ed., 3d ed. 1965); J.G. Hardman, L.E. Limbird, P.B. Molinoff, R.W. Ruddon, & A.G. Gilman, Goodman & Gilman's The Pharmacological Basis of Therapeutics (9th ed. 1996); E.H. Ellinwood, Assault and Homicide Associated with Amphetamine Abuse, 127 Am J. Psychiatry 9 (1971); R.A. Lehne, Pharmacology for Nursing Care (1998); Poisoning & Drug Overdose, (K.R. Olson ed. 1994); R.R. Pinger, W.A. Payne, D.B. Hahn & E.J. Hahn, Drugs (2d ed. 1995); and T. Sollman, A Manual of Pharmacology (1957).

of drug absorbed from each inhalation, the duration of drug administration, and tolerance of the individual for the drug.

In reaching his conclusion, Read relied on data and studies concerning therapeutic dosages of methamphetamine (those having a "desirable effect") and amounts reportedly taken by illicit users. According to Read, "dose response" is a

> standard term in pharmacology which simply relates the amount of the drug to the effect it produces, and it is an established accepted standard in pharmacology that the more you give, the more effect you get, and you can start at such a low dose where you get no effect and then increasing the dose you would begin to see an effect.

As related by Read, the legal therapeutic uses for methamphetamine are to treat obesity, narcolepsy, and attention deficit hyperactive disorder (ADHD) in children. Obese persons generally receive between .01 and .04 grams of methamphetamine in pill form for weight control purposes, narcoleptics receive between .03 and .05 grams to combat the desire to sleep, and ADHD children receive between .005 and .015 grams to reduce their tendencies toward hyperactivity.

In questioning from the court about whether methamphetamine pills are manufactured in amounts smaller than five milligrams, Read explained "that .0025 [grams] . . . would be for children [with] ADHD." He further noted that the dose range for ADHD "is for children" because "ADHD [is] rarely treated in adults," and that the dosage for an adult would have to be "scaled . . . up," although the variability in dosage is "correct" for "body size . . . more than age."

Read also related that pilots on combat missions during World War II had received doses of methamphetamine between .01 and .04 grams to fight fatigue, although this was "a borderline acceptable use." According to Read, dosages for illicit use had been recorded as ranging from .4 grams to 2.216 grams a day. Based on the studies and research, Read concluded that the minimum effective illicit use dose for an average sized person would be "around .05 grams," although the dose for "a woman weighing eighty pounds . . . may be a little bit lower."

According to him, the "amount bought on the street . . . is usually far from a hundred percent pure." However, the .05 grams he posited in his study was based on "one hundred percent pure drug." As Read understood it, laboratories typically "measure a gross weight [of a sample] . . . so when they weigh something . . . [such as the residue,] the entire weight is not drug."

With respect to the instant case, Read opined that .002 grams of methamphetamine would be equivalent to a few salt granules. However, since the substance was residue which had been scraped from Defendant's presumably already smoked pipe, Read believed the residue would consist of "almost all inactive, inert material with very little drug." In conclusion, Read opined that .002 grams of methamphetamine was not an effective illicit dose, was unsaleable, and was incapable of producing a "pharmacological effect":

> [DEFENSE ATTORNEY] Q. Doctor Read, in your expert opinion would two milligrams or .002 grams be an effective dose or illicit dose?
> A. No.
> Q. Why not?
> A. Because it would not even be effective for these other actions which require less. We are talking about an average adult. I don't think that -- well, even in a child for ADHD, there would be a noticeable difference. It is an extremely small amount.
> Q. Would .002 grams or two milligrams be usable as an item for sale?
> A. I don't know anybody would want to buy it if they can't use it for anything. I mean in the laboratory we might give a dose that size to a physician or rats, but we would never buy it because we would not know its purity. We buy from drug companies where we know absolute purity.
> Q. In your expert opinion, could two milligrams produce a pharmacological effect on a user?
> A. Not in a human.

On cross-examination, the prosecution established that "if a drug is not very effective by the oral route, it takes far less by the inhalational route" to obtain an effect; that Defendant was "20 years old, 5'8" tall, and weighed 115 [pounds]"; that Read had not "personally used methamphetamine"; that Read had reviewed the police reports prior to the hearing but had not met Defendant, had not "look[ed] at [Defendant's] . . . weight," had not observed Defendant "under the influence of methamphetamine," and had no "familiarity . . . with Defendant's drug use history, if any." (Emphasis added.)

Also at the hearing on July 1, 1999, the prosecutor called MPD Officer Michael Callinan as a witness. Callinan stated that he had participated in over three hundred investigations involving illegal narcotics and had conducted over one hundred narcotics investigations involving methamphetamine. He explained that illicit users typically utilize drug paraphernalia like Defendant's glass pipe, straws, and metal

scrapers (Exhibits 1, 2, and 3 respectively). According to Callinan, "the methamphetamine is loaded into the pipe usually with a cut straw into the ball [sic] and to the pipe." He explained that, when a user is "low on product," the user "will [use the metal scraper to] scrape the residue into a grouping or small bunch, and then . . . resmoke the residue."

On cross-examination, Callinan reported that he had not received a degree from an accredited college in the area of physical or chemical sciences, he was never assigned to Defendant's case, and his knowledge of the case was limited to "[t]he photos and explaining what the evidence is that was recovered."

In its decision, the court indicated the following:

> THE COURT: We know the Vance case was talking about cocaine, for which there's no mandatory sentencing. We do know the legislature in addition to prohibiting possession of any amount of drug, methamphetamine, in fact requires mandatory jail terms for possession of this particular drug, so it reemphasized its intent that this is a serious drug and that the potential for harm to our society is very high.
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> In this case the amount that was -- well, let me take a step. I think the de minimis standard is essentially intended for a situation such as where a person borrows the car of another person and then they are arrested and they find some small amount of drugs in the ashtray or something like that,[3] or circumstances that don't indicate the person was actively smoking, or ingesting the drug or using the drug.[4]
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> Not that it is just -- I don't think it is intended to provide a bright line for a certain amount, and also it is apparent that even the Supreme Court is using the wrong

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[3] Of course, in the absence of "knowing" possession of the drugs, the borrower of the car would not be subject to any criminal liability unless the offense of possession was a strict liability offense. The hypothetical posed by the court is one in which the borrower would not be guilty, in which case the de minimis statute would not apply.

[4] It is not apparent what the term "actively," as used by the court, denotes. As the facts indicate, Defendant was not smoking, ingesting, or using any drug at the time of his apprehension. Accordingly, Defendant qualified for de minimis treatment under this example.

> terminology, that is to say the word narcotic. Apparently, that's not appropriate for use with the drug methamphetamine. I am interpreting that to mean any effects on the central nervous system.
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> The expert talked about, well, what he means street use, how much does it take to get a person high, which is problematical, because you have all these variables, what their tolerance might be, how much they weigh, how pure it is. We know, for instance, that a therapeutic amount is as low as .0025, and apparently pills are available in that amount for treatment for attention deficit disorder, so it is hard to say .002 is just not meant to be concerned about when we're talking about methamphetamine, and I think I have to take into consideration the circumstances here.
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> What is in evidence is that this was a pipe which is commonly used for smoking methamphetamine, that residue in a pipe can be commonly used by people to smoke methamphetamine, and I just don't feel in the totality of the circumstances of this case that I should exercise discretion of the Court and find that this was a de minimus [sic] infraction, so I am going to deny the motion. Prepare the order, please.

(Emphases added.) A written order denying the motion to dismiss was subsequently filed on July 23, 1999.

C.

On July 29, 1999, Defendant withdrew his original plea of not guilty and entered a plea of no contest as part of a plea agreement with the prosecution. As part of the agreement, Defendant reserved his right to appeal the issues raised in this case. The court accepted Defendant's no contest plea pursuant to the plea agreement, in accordance with Hawai‘i Rules of Penal Procedure Rule 11(a)(2). On September 23, 1999, the court sentenced Defendant.

III.

Defendant appeals the July 23, 1999 order denying his motion to dismiss Count II of the indictment on the ground that

the court abused its discretion. Since arguments in the briefs relate only to Count II, the judgment and sentences rendered on Counts I and III must be affirmed. The question is whether Defendant's conduct at issue in Count II amounted to a de minimis offense.

IV.

In reviewing a trial court's decision for abuse of discretion, we must determine 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." State v. Klinge, 92 Hawai'i 577, 584, 994 P.2d 509, 516 (2000) (citations omitted); see also State v. Sacoco, 45 Haw. 288, 292, 367 P.2d 11, 13 (1961). I must conclude that the court abused its discretion in denying Defendant's motion to dismiss.

V.

The prosecution's decision to charge Defendant with possession of drugs based on methamphetamine in residue recovered from the glass pipe essentially converts the crime of prohibited acts related to drug paraphernalia into two separate charges -- promoting a dangerous drug and prohibited acts relating to drug paraphernalia. The presence of the drug within the residue in the glass pipe plainly relates to the identification of the pipe as drug paraphernalia. See State v. Kupihea, 98 Hawai'i 196,

206, 46 P.2d 498, 508 (2002) ("[I]t is not the intrinsic nature of the thing that is determinative, but the culpable state of mind with which the thing is used, or possessed with intent to use, that 'convert[s] the [thing] into prohibited drug paraphernalia.'" (Quoting State v. Lee, 75 Haw. 80, 109, 856 P.2d 1246, 1262 (1993). (Some brackets added, some in original.))). Thus, the prosecution utilizes evidence for the drug paraphernalia charge to establish proof of the drug promotion charge, although the amount of drug is so infinitesimal as to be unmeasurable.

In providing for dismissal of prosecutions where the defendant's conduct did not actually cause or threaten the harm proscribed or did so in a very trivial sense, HRS § 702-236 reflects the reciprocal principle of the policy underlying the penal code of protecting against "specific offenses which constitute harms to social interests." Commentary on HRS § 701-103. In that connection, this court, in Vance, indicated that a charge under HRS § 712-1243 involving "possession of a microscopic trace of a dangerous drug" may be subject to dismissal under HRS § 702-236 as "not actually caus[ing] or threaten[ing] the harm sought to be prevented by [HRS § 712-1243] or [doing] so only to an extent too trivial to warrant condemnation of conviction." 61 Haw. at 307, 602 P.2d at 944.

While the specific drugs involved in Vance were cocaine and secobarbital, see id. 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,[5] 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.

VI.

In rejecting Defendant's motion, the court considered as attendant "circumstances" that the "pipe was commonly used for smoking methamphetamine, [and] that residue in a pipe can be commonly used by people to smoke [it]." The former circumstance reiterates nothing more than that the pipe was drug paraphernalia as charged in Count III. The latter circumstance, apparently relying in part on Officer Callinan's testimony, related only to the underlying facts constituting the offense of promoting a dangerous drug. Combined, they support a finding that Defendant violated HRS § 712-1243, a prerequisite for invocation of HRS

[5] In responding to the court's comment that "from a scientific point of view, it would be impossible for methamphetamine to have a narcotic effect," Read responded, "Right. Just the opposite. That's why it is used in narcolepsy."

§ 702-236, but not for a per se disqualification of the dispensation afforded under HRS § 702-236.

Under HRS § 702-236, the court must have "regard to the nature of the conduct alleged and the nature of the attendant circumstances[.]" Here, the nature of the conduct alleged is the possession of any amount of a dangerous drug. See HRS § 712-1243(1). It is uncontroverted that Defendant possessed a white-to-brown substance weighing .002 grams and containing an indeterminate amount -- but obviously less than .002 grams -- of methamphetamine. "[T]he possession of a microscopic amount in combination with other factors indicating an inability to use or sell the [drug] may constitute a de minimis infraction." Vance, 61 Haw. at 307, 602 P.2d at 944. Conversely, then, possession, along with circumstances demonstrating the accompanying ability to use or to sell or to distribute the drug, would disqualify a defendant from de minimis consideration. See id.

Other "attendant circumstances" may also disqualify a defendant from de minimis consideration, pursuant to HRS § 702-236(1)(b), if they implicate the "harm or evil sought to be controlled." With regard to dangerous drugs in general, the legislature had in mind a secondary purpose, which was to prevent crimes prompted by the need to obtain more dangerous drugs, which the legislature believed was caused by abuse of highly additive

drugs. Commentary on HRS §§ 712-1241 to 712-1250.[6]

As Justice Ramil notes (as did the Viernes court), the legislative history regarding amendments adopted by the legislature in 1996 confirms this secondary purpose. See Ramil, J., dissenting/concurring opinion at 6. In those amendments, the legislature "increased the penalties attendant to the possession or distribution of methamphetamines 'to counter increased property and violent crimes.'" Viernes, 92 Hawai'i at 134, 998 P.2d at 199 (quoting 1996 Haw. Sess. L. Act 308, at 970).

Thus, as in this court's view in Vance and Viernes, the legislative history, as well as the statutory scheme and its accompanying commentary, reflect that: (1) the primary harm and evil sought to be prevented in proscribing drug-related offenses is abuse; and (2) correlative to the abuse of dangerous drugs, a secondary harm and evil sought to be prevented is crime prompted by such abuse.[7] Accordingly, disqualifying attendant

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[6] As the Commentary on HRS §§ 712-1241 to 712-1250 states with regard to dangerous drugs,

> [t]hese drugs are the most fearsome in their potential for destruction of physical and mental well being. The drugs of this category are characterized by a high tolerance level which requires the user to use greater and greater amounts each time to achieve the same "high." More importantly, all the drugs, with the exception of cocaine to some extent, are highly addictive; that is, if use of the drug is discontinued, severe withdrawal symptoms occur which can be relieved only by more of the drug. The combination of a high tolerance level and addictive liability creates a physical dependence in the user which may lead, and in many cases has led, the user to commit crimes to obtain money needed to buy more narcotics.

(Emphases added.) (Footnotes omitted.)

[7] An example of attendant circumstances which "actually cause[s] or threaten[s] the harm or evil sought to be prevented by the law[,]" HRS § 702-

(continued...)

circumstances may also exist where there is evidence that a defendant committed a crime in order to obtain more drugs.[8]

There is no evidence of a sale or distribution of the dangerous drug here, or of secondary effects of the nature described supra, and neither the court in its ruling, nor the prosecution on appeal, indicate so. See also supra note 4. Rather, the court, and the parties in their briefs, focus on

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[7](...continued)
236(1)(b), is a case where the defendant, who is apprehended in the course of committing armed robbery, may have committed a crime to "feed" his drug habit. In a search incident to this arrest, a pipe containing cocaine residue is recovered, together with a scraper and a lighter, but, other than the money obtained as a result of the robbery, no other cash is recovered. Also recovered from the person of the defendant is a telephone number which, the prosecution establishes, is the phone number of a known drug dealer. In this example, attendant circumstances would suggest that the defendant may have committed the robbery in order to maintain his drug addition, one of the secondary social harms sought to be prevented by HRS § 712-1243.

[8] To the extent that Justice Ramil relies on State v. Schofill, 63 Haw. 77, 621 P.2d 364 (1980), for the proposition that "[t]raffic in narcotics can hardly be said to be a de minimis offense," id. at 84, 621 P.2d at 370, that case is readily distinguishable. In Schofill, the defendant was convicted of promoting a dangerous drug in the first degree for his involvement as a middle-man between a source and an undercover police officer. The drug involved was cocaine, the amount was a quarter of an ounce, and the price was $550.00. See id. at 78-80, 621 P.2d at 366-67. No cocaine, however, was introduced into evidence at trial and the purchase was never consummated. See id. at 80, 621 P.2d at 367-68. By statute, however, "distribution" includes an offer or agreement to sell a controlled substance. See HRS § 712-1240. On appeal, this court observed, without analysis, that the circuit court should not have dismissed the indictment on the ground that the defendant's conduct constituted a de minimis infraction. See Schofill, 63 Haw. at 84, 621 P.2d at 370. In this regard, this court merely noted that the charged offense constituted a class A felony, punishable by imprisonment for a period of twenty years, and asserted that "[t]raffic in narcotics can hardly be said to be a de minimis offense." Id. (emphasis added). Schofill is inapposite in the context of a person who merely possesses a trace amount of a controlled substance. Schofill cited State v. Caldeira, 61 Haw. 285, 602 P.2d 930 (1979). Caldeira, however, is not a case involving the de minimis statute, but whether two defendants were subject to sentencing enhancements because of their recidivism with respect to promoting controlled substances. See id. at 286-87, 602 P.2d at 931. This court rejected the defendants' contention that engaging in drug trafficking was a "nonviolent" crime and took the opportunity to discuss at some length the violence wreaked on society by the wholesalers and pushers engaged in the drug trade. See id. at 287-89, 602 P.2d at 931-33. Thus, Caldeira is not on point.

whether or not the amount of the drug involved constituted a useable amount.

VII.

In that regard, Vance established that, "where the amount [of the dangerous drug] is microscopic or is infinitesimal and [is] in fact unusable[,] . . . the possibility of unlawful . . . use does not exist[.]" 61 Haw. at 307, 602 P.2d at 944. Thus, "an inability to use . . . may constitute a de minimis infraction within the meaning of HRS § 702-236 . . . warrant[ing] dismissal of the charge otherwise sustainable under HRS § 712-1243." Id. In other words, although possession of "any amount" of methamphetamine "technically violates HRS § 712-1243," it may "nonetheless [be] de minimis pursuant to HRS § 702-236." Viernes, 92 Hawai'i at 135, 988 P.2d at 200.

The court was correct in its assessment that this court has not established "a bright line" establishing what quantity of any particular drug is "useable" and, hence, outside the scope of de minimis consideration and what quantity is "unuseable" and, thus, appropriate for such consideration. The avoidance of a "bright line approach," defining what amount of drug possessed constitutes a criminal offense, rests on this court's recognition that the legislature, in enacting HRS §§ 712-1241 to -1243, "devised [the] entire scheme of sanctions [for the offenses of promoting dangerous drugs] on the basis of the amounts involved[, t]hus . . . prohibit[ing] us from judicially amending [HRS § 712-

1243] to include a useable quantity standard." Vance, 61 Haw. at 307, 602 P.2d at 944. This proposition was reaffirmed in Viernes, because "the determination of the amount of a drug necessary to constitute an offense falls solely within the purview of the legislature." 92 Hawai‘i at 135, 988 P.2d at 200.

VIII.

In drawing a distinction between unuseable and useable amounts, this court said in Vance that, "[w]here 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." 61 Haw. at 307, 602 P.2d at 944 (emphasis added). It follows from Vance that a useable amount, which disqualifies a defendant from HRS § 702-236 consideration, is one which produces the subject drug's characteristically desired effect: in Vance, a narcotic effect, or, in this case, according to the uncontroverted testimony of Read, one of euphoria or elation. See Viernes, 92 Hawai‘i at 134 n.6, 988 P.2d at 199 n.6 ("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.'") Analogously, then, the amount of methamphetamine which would disqualify a defendant from de minimis consideration would be a "useable amount," that is, the minimal amount sufficient to produce the pharmacological effect sought by an illicit user.

IX.

According to the evidence adduced in this case, that amount, as conservatively estimated by Read, would be .05 grams "of one hundred per cent pure drug," as a first-time dose for an "average-sized" person who was not a user. The only qualification on that amount elicited from Read was that a "little less" would produce an effect in an eighty-pound person -- clearly a qualification not applicable to the five-foot, eight-inch, 115-pound adult Defendant in the instant case.

In reference to the specific facts of this case, Read's unrebutted testimony was that .002 grams of methamphetamine would not "produce a pharmacological effect on a [human adult] user" and "that . . . even in a child for ADHD, there would [not] be a noticeable difference." Despite this testimony, the court stated, "[I]t is hard to say .002 [grams] is just not meant to be concerned about." The court then, in effect, ruled that an amount even less than that of "therapeutic amount as low as .0025" (emphasis added), administered to children for ADHD, would have the prohibited effect on Defendant. In my view, this determination has no support in the evidence adduced at the hearing.

Moreover, the prosecution's laboratory report indicates that .002 grams was the gross weight of the residue that "contained methamphetamine" and, thus, was not the weight of the methamphetamine itself. Similarly uncontroverted was Read's opinion that illegal methamphetamine is not found in a pure

state, supporting the conclusion that the quantity of methamphetamine actually in the residue was further diluted. Finally, Read concluded that, after smoking, "the residue that's left is the inactive, inert material, so if it is from a pipe, it is going to be almost all inert material with very little drug." (Emphasis added.)

In sum, the prosecution adduced no evidence controverting Read's conclusion that .002 grams of residue containing an unknown amount of methamphetamine, much less .002 grams of pure methamphetamine, under the circumstances of this case, was not saleable or useable. Based on Read's undisputed testimony, because almost all of the residue was inactive, inert material, the amount of methamphetamine would have had to be less than .002 grams.

X.

The prosecution argues that (1) this case involves double the .001 grams of methamphetamine at issue in Viernes,[9] (2) methamphetamine in the amount of .0025 grams is available for children with ADHD, (3) a smaller drug dose, if inhaled, will result in more of an effect than if ingested, (4) individuals have different tolerance levels, and (5) it could be inferred that the residue was saved for future use. However, the overriding precept adduced from the evidence at the hearing was

[9] Similarly, the .001 grams in Viernes was the gross weight of the residue and not of the methamphetamine. See Viernes, 92 Hawai'i at 134 n.5, 988 P.2d at 199 n.5.

that .002 grams of a residue containing methamphetamine was not saleable or useable by an adult within the HRS § 702-236 framework set forth in Vance and confirmed in Viernes. Additionally, even accepting these contentions at face value, there was no evidence as to argument (3), i.e., that inhaling what methamphetamine was left in the .002 grams of residue would have a "pharmacological effect," argument (4), i.e., that Defendant's level of "tolerance," if proven, would result in an atypical response, or argument (5), i.e., that whatever "future use" the residue would be put to would result in a "pharmacological effect."

XI.

The plurality contends that Defendant failed to produce evidence controverting the following attendant circumstances: "(1) Carmichael's possession of multiple items associated with the use and distribution of methamphetamine and (2) his driving at excessive speed immediately prior to being apprehended; and (3) the arresting officer's determination that Carmichael appeared impaired." Plurality at 12. The first attendant circumstance merely reflects the fact that Defendant was charged with drug paraphernalia possession. The second and third circumstances relates to the separate and unassociated charge of driving under the influence of alcohol, apparently thought irrelevant or immaterial, inasmuch as they were not adressed by the trial court in its oral findings.

When we consider whether a trial court has abused its discretion in applying or refusing to apply the de minimis statute, it is necessary to examine the factors the trial court itself relied upon in reaching its conclusion. Only then can we assess whether or not the court's decision "clearly exceed[ed] the bounds of reason or disregard[ed] rules or principles of law." Klinge, 92 Hawai'i at 584, 994 P.2d at 516 (citation omitted). If facts not argued or relied upon by the trial court are considered, this court would ignore the trial judge's use (or misuse) of that discretion and usurp it. We would then be substituting our own reasoning for the court's and, in doing so, would be exercising the discretion reserved to the trial court.

Chief Justice Moon's opinion, in justifying the trial court's decision based on reasons not utilized by the court, only underscores the lack of reason in the trial court's actual decision by substituting for it grounds not announced by the trial judge. With all due respect, I believe his opinion essentially supplants the trial judge's thinking with his own. As discussed supra, Defendant did adduce considerable evidence in satisfying his burden and the basis given by the court for denying the de minimis motion was not supported by the evidence.

XII.

With respect to whether the de minimis statute applies, I must respectfully disagree with Justice Ramil. By its plain language, HRS § 712-1243 prohibits the possession of "any amount"

of methamphetamine. The intent of a statute is normally to be obtained from the language of the statute itself. See, e.g., State v. Aplaca, 96 Hawai‘i 17, 22, 25 P.3d 792, 797 (2001); State v. Rauch, 94 Hawai‘i 315, 322, 13 P.3d 324, 331 (2000). It is not controverted that HRS § 712-1243 is plain and unambiguous, see Ramil, J., dissenting/concurring opinion at 3, but, I note, no more so than HRS § 702-236.

A.

Justice Ramil reasons that HRS §§ 712-1243 and 702-236 should be construed in pari materia, and, as such, they are in irreconcilable conflict; therefore, according to Justice Ramil, the "specific" statute, HRS § 712-1243, should control over the "general" statute, HRS § 702-236. HRS § 1-16 (1993) does state that "[l]aws in pari materia, or upon the same subject matter, shall be construed with reference to each other" and that "[w]hat is clear in one statute may be called in aid to explain what is doubtful in another." "Statutes are considered to be in pari materia when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object." 2B Sutherland Statutory Construction § 51.03, at 201-02 (6th ed. 2000).

Of course, the relatedness of the statutes, in that they both appear in the Hawai‘i Penal Code (HPC) or that both may arise within the context of a single prosecution, is not determinative of whether they are in pari materia with one another. "There is more to the problem than simply finding out

whether the different statutes are related, since all statutes are related as component elements in a single legal system. The object of all statutes is the ordering of legal relationships." Id. § 51.03, at 202. In that regard, we do not believe an in pari materia construction is applicable.

B.

The in pari materia rule relates primarily to construction of an ambiguous statute. See HRS § 1-16; see also 2B Sutherland Statutory Construction, § 51.03, at 202 ("The rule of in pari materia is generally used when there is some doubt or ambiguity in the wording of the statute under consideration."). As mentioned, I do not disagree that the statutes are not ambiguous or their wording doubtful. Hence, the need to refer to either HRS § 702-236 or § 712-1243 in order to interpret the other does not arise. Nor do the statutes address the same subject matter. As Justice Ramil points out, "'where there is a "plainly irreconcilable" conflict between a general and specific statute concerning the same subject matter, the specific will be favored.'"[10] Ramil, J., dissenting/concurring opinion at 2

[10] Justice Ramil contends that the phrase within HRS § 712-1243, "in any amount[,]" "creates the inference of a zero tolerance policy that leaves no room for discussion on the quantity of drug possessed." Ramil, J., dissenting/concurring opinion at 3. According to Justice Ramil, given this clear indication that "possession of 'any amount' is intended to be an indismissible violation of the act[,]" id. at 4, application of HRS § 702-236, which "would result in a judgment or order of dismissal[,]" id. at 6, creates an irreconcilable conflict. It is argued that, "[t]hus, in accordance with statutory construction, the court is compelled to favor HRS § 712-1243, a specific statute, over HRS § 702-236, a general statute." Id. at 7. Based on the analysis infra, I do not perceive a conflict.

This "zero tolerance policy," according to Justice Ramil, is further evinced by the 1996 amendment to HRS § 712-1243, which added the words "[n]otwithstanding any law to the contrary" and a mandatory minimum term of imprisonment, dissenting opinion at 5 (quoting HRS § 712-1243(3) (1972), added

(continued...)

(quoting State v. Putnam, 93 Hawai‘i 362, 373, 3 P.3d 1239, 1250 (2000) (other citations omitted). However, HRS § 712-1243 does not supercede HRS § 702-236 because they do not relate to the same subject matter.[11]

HRS §§ 702-236 and 712-1243 reflect differing legislative objectives. As indicated in Viernes, "[t]he legislative purpose of the penal statutes relating to drugs and intoxicating compounds -- including HRS § 712-1243 -- is to respond to 'abuse and social harm.'" 92 Hawai‘i at 134, 988 P.2d at 199. HRS § 702-236, however, responds to a different legislative purpose -- that of mitigating the effects of criminal statutes, including, but not limited to, HRS § 712-1243, when the evil sought to be controlled by the statute is absent or the violation trivial. See HRS § 702-236.

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[10](...continued)
by 1996 Haw. Sess. L. Act 308, at 972), as well as the legislative history which indicates the purpose of HRS § 712-1243 is to "'respond to "abuse and social harm,"'" id. at 6 (quoting Viernes, 92 Hawai‘i at 134, 988 P.2d at 199 (other citation omitted)).

I observe, however, that the language cited, that is, "[n]otwithstanding any law to the contrary," id. at 5, deals solely with the imposition of a mandatory minimum term of imprisonment for those convicted of promoting a dangerous drug in the third degree. "Any law to the contrary" refers, then, to sentencing laws and not to laws generally, including HRS § 702-236.

[11] As developed in our case law, the reference to "same subject matter" as applied in context of the HPC has been viewed narrowly, requiring substantially similar or identical issues and not simply invoked by inclusion in the HPC itself. See State v. Kalama, 94 Hawai‘i 60, 66, 8 P.3d 1224, 1230 (2000) ("This construction is confirmed by an in pari materia reading of HRS §§ 707-734 and -733(1)(b), both of which concern exposure of a person's genitals to another person."); Putnam, 93 Hawai‘i at 370-71, 3 P.3d at 1247-48 (construing HRS §§ 706-667 and -625, both of which relate to sentencing); State v. Dudoit, 90 Hawai‘i 262, 270, 978 P.2d 700, 708 (1999) ("Construed together, HRS §§ 701-101, 701-102, 701-107, and 701-108 [which define the term 'offense,'] establish that the term 'offense,' as employed by the HPC, refers to the commission of the crime or violation and not to the procedural events that transpire as a result of that commission, e.g., prosecution, conviction (upon adjudication of guilt), and sentencing." (Footnote omitted.)).

Accordingly, the statutory scheme, which encompasses both of these legislative objectives, does not evince a "zero tolerance" policy, which would abolish the availability of the dispensation contained in the de minimis provisions. See Vance, 61 Haw. at 307, 602 P.2d at 944 ("[T]he 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 within the meaning of HRS § 702-236[.]"), and Viernes, 92 Hawai'i at 134, 988 P.2d at 199 ("[I]f 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.").

As HRS § 712-1243 and HRS § 702-236 address separate policies, one prescribing prohibited conduct in connection with drug possession and the other, dismissal of a prosecution once such conduct has been established, a fortiorari they are not concerned with the same statutory objectives. That there is no conflict between the two statutes follows from the truism that HRS § 702-236 is not operative unless the subject statute, here, HRS § 712-1243, has been violated.[12] Hence, the application of

[12] Any other analysis yields an inconsistent result when applied. Declaring that HRS § 702-236, as a general statute, is superceded by other, specific statutes within the HPC, would arguably mean that the de minimis statute could never apply to any criminal conviction. For example, HRS § 707-727(1)(b)(Supp. 2001) makes it a crime (custodial interference in the second degree) for people to "intentionally or knowingly take[] . . . from lawful custody any . . . person entrusted by authority of law to the custody of another person or an institution." Under a contrary analysis, a person who invites a minor into his home whom he or she knows has fled from foster custody in order to provide the minor with a safe haven, would be convicted of the crime.

However, this court, in State v. Akina, 73 Haw. 75, 828 P.2d 269

(continued...)

the de minimis statute does not reject, but rests on the fact that the defendant has committed the crime.

The underlying premise for the application of HRS § 702-236, then, is that a violation of the statute involved has occurred. In affirming that such culpability exists, but providing that a conviction should not be imposed if either the conduct of the defendant does not cause the harm sought to be circumscribed or that it does so to an extent too trivial to warrant condemnation, HRS § 702-236 embodies a policy intended to complement the disposition of all offenses, including one under HRS § 712-1243, that would result from violative conduct. Therefore, HRS § 702-236 does not clash with HRS § 712-1243 but, like it, confirms the fact of culpability.

C.

It is said that Viernes should be overruled based on "public policy considerations." Ramil, J., dissenting/concurring opinion at 12. The first of these considerations rests on the proposition that "applying the de minimis statute [where residue in a pipe is present] . . . would effectively . . . reward[] the

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[12](...continued)
(1992), found such behavior de minimis under HRS § 702-236(1)(b) because it was "too trivial to warrant the condemnation of conviction." Id. at 79, 828 P.2d at 272. The trial court had "rejected defendant's assertion that [HRS] § 702-236(1)(b) shielded him from prosecution, reasoning that defendant's actions fell within the terms of § 707-727(1)(a) and that a conviction would comply with legislative intent." Id. at 77, 828 P.2d at 271. This court, however, determined that the defendant's actions were too trivial to warrant condemnation, and the trial court had abused its discretion by not dismissing the charge against him. See id. Therefore, although Akina's behavior was prohibited under the plain language of HRS § 707-727, the Akina court considered the de minimis statute applicable.

person who uses more (as opposed to less) of the drug." Id. at 12-13.

While someone at some time in the past may have smoked enough drugs in a pipe to leave a trace residue, who smoked it, when, and in what amount is entirely speculative. To permit disqualification from de minimis consideration on that basis would run counter to our notion that the presumption of innocence applies as to any potential past possession by the defendant for which there is no evidence except the residue itself, and that culpability should rest on the evidence obtained. A possession offense necessarily requires more proof than mere speculation that it is likely that, at some time in the recent past, a defendant probably had drugs in his or her possession.

In People v. Sullivan, 44 Cal. Rptr. 524, 526 (Cal. Dist. Ct. App. 1965), the defendant was arrested with only trace amounts of narcotic on assorted drug paraphernalia. In reversing a conviction for knowing possession of a narcotic, the court applied case law that had held "that where a narcotic is imperceptible to the human eye and its presence can only be detected through chemical analysis, the evidence is insufficient to sustain a conviction for known possession of the narcotic." Id. at 525 (referring to People v. Aguilar, 35 Cal. Rptr. 516 (Cal. Ct. App. 1964)). In disagreeing with the prosecution's contention that the narcotic was possessed "knowingly," based upon the fact that the defendant admitted using drugs earlier in the day, the appellate court noted with disfavor the consequences which would result from such an approach:

> The logic of this contention would convert evidence of recent past possession of narcotics into proof of present possession of narcotics . . . . Were we to accept evidence of recent past possession of narcotics as equivalent to proof of present possession of narcotics, then we could charge every addict who was currently [under the influence of narcotics] with possession of a narcotic, since he [or she] must have had possession of the narcotic in the recent past in order to come under its influence.

Id. at 526. See also People v. Fein, 94 Cal. Rptr. 607, 612 (Cal. 1971), superceded by statute on other grounds as stated in People v. Lissauer, 169 Cal. App. 3d 413, 422 n.6 (1985) ("Although the presence of two burnt marijuana seeds might reasonably suggest that defendant or another occupant of the apartment formerly possessed and used marijuana, that inference would not justify their arrest for present use, possession or sale."). I believe it would contravene the objectives underlying HRS § 702-236 to rest a blanket rejection in a case involving possession of trace amounts of a drug on an unproven or speculative assumption of prior possession of a greater amount.

The second policy concern is that, in not adhering to an "any amount" standard, there would be a "distort[ion of] trials [where] the issue becomes what amount of drug was recoverable, and what 'discernible effect' that drug has." Ramil, J., dissenting/concurring opinion at 13. However, this is unlikely, inasmuch as at trial the prosecution's burden of proof regarding the elements of a HRS § 712-1243 offense, including possession and the requisite state of mind, see HRS § 712-1243; HRS § 701-114 (1993), are not disposed of by the amount of methamphetamine found. The amount becomes an issue only when a defendant has filed a motion under HRS § 702-236, which is

generally not decided at trial. Even if evidence with respect to de minimis factors are adduced at trial, evidence of such factors would not be extensive, because they are often related to the circumstances of the arrest, and any potential untoward effects may be avoided through a cautionary instruction if necessary.

The third policy consideration posited is the possibility that "application of [the de minimis statute] to drug possession cases is destined to lead to contradictory, if not absurd, results [because] the result could well differ from courtroom to courtroom and expert to expert" if expert testimony establishes criminal culpability thresholds. Ramil, J., dissenting/concurring opinion at 14 (footnote omitted). In Vance, this court recognized that the legislature determines the amount of prohibited drugs for which possession is proscribed. See Vance, 61 Haw. at 306-07, 602 P.2d at 944. In Viernes, this court adhered to that fundamental proposition, confirming that, "[a]s pointed out in Vance, the determination of the amount of a drug necessary to constitute an offense falls solely within the purview of the legislature." Viernes, 92 Hawai‘i at 135, 988 P.2d at 200 (emphasis added).

In my view, the variations in results that concern Justice Ramil may be minimized by the trial court's consideration of the three factors identified in Vance, Viernes, and the legislative history of HRS § 712-1243. See supra page 2. Any perceived variations in results would then be a consequence of the particular circumstances of individual cases. Also, I do not believe that a pharmacological expert would necessarily be

required in every case in order to establish that a substance was not useable or saleable.

The fourth consideration presented is that a defendant's prior history of drug use may be brought out at trial in order to show tolerance to drug use. See Ramil, J., dissenting/concurring opinion at 15. However, the application of HRS § 702-236 generally arises only in the course of a pretrial motion to dismiss on de minimis grounds and introduction of such prior use may be avoided in a trial by appropriate court order.

XIII.

In Vance, this court announced long ago that the de minimis statute may be applied to drug offenses. See 61 Haw. at 307, 602 P.2d at 944. In doing so, it did no more than acknowledge the scope of HRS § 702-236, which extends to all offenses. In Viernes, this court sought to harmonize the legislative objectives of HRS § 702-236 and HRS § 712-1243 in light of Vance, holding that de minimis consideration can be applied where the amount of methamphetamine possessed would not produce an illicit effect. See 92 Hawai‘i at 134, 988 P.2d at 199. Garnered from this history, then, I conclude that the threshold qualification establishing that the defendant's conduct either does not cause the harm sought to be proscribed by HRS § 712-1243 or does so to an extent too trivial to warrant conviction is possession of an amount of drug not (1) saleable or (2) useable, i.e. capable of producing an illicit pharmacological effect, or (3) linked to the defendant's involvement in a crime

to support a drug habit at the time. The foregoing three factors may be readily employed by the trial courts in exercising their discretion in de minimis drug cases, inasmuch as to do so would not constitute an abuse of discretion.

XIV.

In light of the unmeasurable amount possessed, serious questions arise as a matter of law as to whether Defendant could knowingly possess such amount. Even were the possession of an unmeasurable amount not resolvable as a matter of law, the question remains as to whether a particular defendant, as a matter of fact, knowingly possessed an unmeasurable amount contained in residue. That issue cannot be legally foreclosed; to hold so would make possession not a "knowing" offense but one of strict liability. See HRS § 702-212 (1993) (explaining that "the state of mind requirements" of the HPC "do not apply to . . . [a] crime defined by statute other than this Code, insofar as a legislative purpose to impose absolute liability for such offense or with respect to any element thereof plainly appears")

XV.

Considering the evidence adduced at the hearing, and the lack of any challenge to Read's credibility, I would hold that the court's denial of Defendant's motion exceeded the bounds of reason. Therefore, I would vacate (1) the court's July 23, 1999 order denying Defendant's motion and (2) the judgment and sentence insofar as it relates to Count II. I would remand the

case and instruct that the court enter an order dismissing Count II and that it amend the September 23, 1999 judgment and sentence accordingly.[13]

[13] Because I believe that the court abused its discretion in denying the motion to dismiss on 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).