DISSENTING IN PART AND CONCURRING IN PART
OPINION BY RAMIL, J.

Although I agree with the result reached by the plurality, Moon, C.J., joined by Nakayama, J., I respectfully dissent from the plurality's analysis. For the reasons discussed below, I believe that State v. Viernes, 92 Hawai'i 130, 988 P.2d 195 (1999), was wrongly decided and should be overruled. After Viernes, which I joined, the prosecution repeatedly requested that this court revisit the issue.[1] Having done so, I now feel compelled to file a dissenting opinion.

In Viernes, we held that "conduct may be so harmless that, although it technically violates HRS § 712-1243, it is nonetheless de minimis pursuant to HRS § 702-236." Id. at 135, 988 P.2d at 200. The question is whether the legislature intended to proscribe the possession of "any" quantity of drug (as stated in HRS § 712-1243), or whether the legislature intended to proscribe only the possession of usable quantities capable of producing an effect (as held in Viernes). A fresh look at plain meaning and statutory intent steers me to the ineluctable conclusion that Hawai'i Revised Statutes (HRS) § 702-236 (1993) may not be applied to HRS § 712-1243 (1993 and Supp.

[1] See, e.g., State v. Oughterson, Cr. No. 99-1326 (1st Cir. Haw., Dec. 10, 1999) (prosecution appealing the circuit court's holding that .012 grams of cocaine substance is de minimis), appeal filed, No. 23075 (Haw., Jan. 7, 2000). In addition, defendants have also raised this issue by appealing their convictions. In the instant case, Carmichael is appealing the circuit court's holding that holding that .002 grams of methamphetamine substance is not de minimis. See also State v. Fukugawa, Cr. No. 99-0020(2) (2d Cir. Haw., Aug. 31, 1999) (defendant appealing the circuit court's holding that .018 grams of methamphetamine substance is not de minimis), appeal filed, No. 22810 (Haw., Sept. 13, 1999).

2000) possession cases, and that accordingly, Viernes must be overruled.

I.

In interpreting statutes that appear to relate to the same subject matter, this court has adopted three rules of statutory construction:

> First, legislative enactments are presumptively valid and should be interpreted in such a manner as to give them effect. Second, laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear in one statute may be called in aid to explain what is doubtful in another. Third, where there is a plainly irreconcilable conflict between a general and a specific statute concerning the same subject matter, the specific will be favored. However, where the statutes simply overlap in their application, effect will be given to both if possible, as repeal by implication is disfavored.

State v. Putnam, 93 Hawai‘i 362, 373, 3 P.3d 1239, 1250 (2000) (quoting Richardson v. City and County of Honolulu, 76 Hawai‘i 46, 54-55, 868 P.2d 1193, 1201-02, reconsideration denied, 76 Hawai‘i 247, 871 P.2d 795 (1994), judgment aff’d, 124 F.3d 1150 (9th Cir. 1997) (internal quotation marks, brackets, and citations omitted) (emphasis added)). The pivotal determination to be made is whether HRS § 712-1243 and HRS § 702-236 are in conflict, or if they merely overlap.

I begin my analysis by first interpreting HRS § 712-1243. The court’s “foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.” Putnam, 93 Hawai‘i at 367, 3 P.3d at 1244 (quoting

Gray v. Administrative Dir. of the Court, 84 Hawai‘i 138, 148, 931 P.2d 580, 590 (1997) (citations omitted)). The language of HRS § 712-1243 is clear and unambiguous. HRS § 712-1243 provides in relevant part:

> Promoting a dangerous drug in the third degree. (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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> ....
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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 be not less than thirty days and not greater than two-and-a-half years, at the discretion of the sentencing court....

HRS § 712-1243(1) prohibits the illegal possession of dangerous drugs, expressly employing the phrase "in any amount." Accordingly, one might ask, what part of the word "any" do we not understand? In my view, the phrase "in any amount" creates the inference of a zero tolerance policy that leaves no room for discussion on the quantity of drug possessed.[2]

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[2] This court has previously stated,

> But we have rejected an approach to statutory [interpretation] which limits us to the words of a statute, no matter how clear they may appear upon perfunctory review. For we recognize "our primary duty [in interpreting statutes] is to ascertain the intention of the legislature and to implement that intention to the fullest degree," and where "there is . . . material evidencing legislative purpose and intent, there is no reason for a court to seek refuge in 'strict construction,' 'plain meaning,' or 'the popular sense of the words.'"
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> We therefore turn to the history of [the statute] to ascertain whether the legislature might have had another meaning in mind when it adopted the language in question. But "we do so with the recognition that only [a clear] showing of contrary intentions from that data would justify a limitation on the 'plain meaning' of the statutory language."

Kaiama v. Aguilar, 67 Haw. 549, 696 P.2d 839 (1985) (internal citations omitted). Accordingly, despite the plain and unambiguous meaning of the

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Second, the statutory scheme and the purpose of the statute support the clear and unambiguous language of HRS § 712-1243. In comparing the minimum quantities selected by the legislature for "dangerous drug" offenses and the minimum quantities selected for other related offenses, it becomes clear that the legislature consciously treated "dangerous drugs" with a heightened level of severity. The Commentary to Sections 712-1241 to 1250 explains that HRS §§ 712-1241 to 1250 "set forth four different offenses relating to drugs and intoxicating compounds. The offenses are: 1) promoting a dangerous drug; 2) promoting a harmful drug; 3) promoting a detrimental drug; and 4) promoting intoxicating compounds." Commentary on HRS §§ 712-1241 to 1250. Of the four different offenses, only the sections pertaining to "dangerous drugs" include the "any amount" language. Compare HRS §§ 712-1241 to 1243 with HRS §§ 712-1244 to 1250.

The legislature's statutory scheme further indicates that the possession of "any amount" is intended to be an indismissible violation of the act. As noted in State v. Vance, 61 Haw. 291, 602 P.2d 933 (1979), "HRS § 712-1243 is part of a statutory scheme designed to provide more severe punishment for possession of greater quantities of drugs. . . . The statutory design indicates that the Legislature not only carefully considered the precise amount of a drug that need be possessed to

[2](...continued)
phrase "in any amount," I shall nonetheless proceed to consider other aids to ensure a proper determination of the legislative intent of HRS § 712-1243.

constitute an offense under the relevant statute but that they devised their entire scheme of sanctions on the basis of the amounts involved." Vance, 61 Haw. at 306-07, 602 P.2d at 943-44. Thus, it cannot be presumed that the legislature accidentally or unwittingly designated "any amount" as the amount forbidden, or that the legislature did not envisage possession of trace amounts as an offense under HRS § 712-1243. In fact, it appears that the legislature specifically aimed to make trace amounts sufficient to warrant prosecution and conviction.

The language within subsection (3) of HRS § 712-1243 also demonstrates the legislature's intent to have a zero tolerance policy. In its 1996 amendment, the legislature added a clause that began with the words "[n]otwithstanding any law to the contrary," and provided for mandatory minimum terms of imprisonment for offenses involving methamphetamines. HRS § 712-1243(3) (1972) (added by Act 308, Session Laws 1996). This sweeping language evidences the legislature's determination to aggressively eliminate the use of drugs in our society. See Cisneros v. Alpine Ridge Group, 508 U.S. 10, 18 (1993) (stating that "[a] clearer statement [than a 'notwithstanding' clause] is difficult to imagine" (citations and internal quotations omitted)).

Finally, the legislative history of HRS § 712-1243 advises the court of the legislature's intent. "In addition to examining the language in a statute, the courts, when interpreting statutes, may resort to extrinsic aids in

determining legislative intent. One avenue is the use of legislative history as an interpretive tool." Putnam, 93 Hawai'i at 367, 3 P.3d at 1294. The legislative purpose of HRS § 712-1243 is to "respond to 'abuse and social harm,'" Viernes, 92 Hawai'i at 134, 988 P.2d at 199 (quoting Hse. Conf. Comm. Rep. No. 1, in 1972 House Journal, at 1040), and to "counter increased property and violent crimes." Id. (quoting 1996 Haw. Sess. L. Act 308, at 970). To effectuate these goals, the legislature created a statutory scheme and used language that would incontrovertibly set the minimum quantities at "any amount."

Turning now to whether there is a conflict between HRS § 712-1243 and HRS § 702-236, I now examine HRS § 702-236, which provides in relevant part:

> 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.
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> (2) The court shall not dismiss a prosecution under subsection 1(c) of this section without filing a written statement of its reasons.

Application of HRS § 702-236 would result in a judgment or order of dismissal. Juxtaposing HRS § 712-1243 and HRS § 702-236, however, reveals an irreconcilable conflict. The gravamen of the offense created by HRS § 712-1243 is the knowing and unlawful

possession of a dangerous drug. The statute neither specifies nor implies that a defendant must possess a particular quantity of a dangerous drug. Thus, the state must prove only the knowing, unlawful possession of a dangerous drug, and the quantity of the drug possessed is relevant only insofar as it establishes or disproves any of these elements. As HRS § 712-1243 makes criminal the possession of a dangerous drug, it cannot be reasonably argued that even a minuscule quantity would negate penal liability. Thus, in accordance with statutory construction, the court is compelled to favor HRS § 712-1243, a specific statute, over HRS § 702-236, a general statute.

II.

In addition to and in light of the above analysis, Viernes should be overruled because the Viernes court made the following errors: (1) the court inadvertently applied the usable quantity standard; (2) the court misunderstood the legislative intent of HRS § 702-1243; and (3) the court misapplied HRS § 703-236.

Somewhat ironically, it was upon the very analysis outlined in section I that the Vance and Viernes courts rejected the usable quantity standard. The Vance court examined the statutory scheme to determine legislative intent, and concluded that "the direct and unambiguous language of [HRS § 712-1243] prohibits [the court] from judicially amending the provision to include a usable quantity standard." Vance, 61 Haw. at 306-07, 602 P.2d at 943-44; see also Viernes, 92 Hawai'i at 134, 988 P.2d

at 199 (examining the legislative history of HRS § 712-1243; rejecting the usable quantity standard). The Viernes court agreed, stating 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 134, 988 P.2d at 199. What the Viernes court failed to realize, however, is that application of the de minimis statute is nothing more than a disguised application of the "usable quantity standard." To reach the conclusion that .001 grams of methamphetamine was de minimis, the Viernes court first determined that such amount "was infinitesimal and was neither usable nor saleable." Id. (emphasis added).[3] For the State to have prevailed in Viernes, the prosecution would have needed to prove that .001 grams of methamphetamine was "usable." The State thereby would have been required to satisfy the "usable quantity standard" that the Viernes court itself rejected.

To augment its inconsistent logic, the Viernes court then took the "usable quantity standard" one step further. The prosecution had argued that "inasmuch as the .001 grams of methamphetamine could be injected or smoked, it was useable." Id. at 134 n.6, 988 P.2d at 200 n.6. The court responded by differentiating between "usable substances" and "substances useable as a narcotic." See id. The differentiating factor was

[3] In the instant case, the circuit court held that .002 grams of methamphetamine substance is not de minimis. Cf. Fukugawa, Cr. No. 99-0020(2) (2d Cir. Haw., Aug. 31, 1999) (holding that .018 grams of methamphetamine substance is not de minimis); Oughterson, Cr. No. 99-1326 (1st Cir. Haw., Dec. 10, 1999) (holding that .012 grams of cocaine substance is de minimis).

whether or not the substance could produce an "effect." Id. Thus, the court required not only that the substance be usable, but that it also produce an effect. See id. There is no legislative qualifier that only possession of "a usable amount that will produce an effect" be forbidden. Accordingly, the court's creation of such a standard was impermissible judicial legislation.

The Vance and Viernes courts misconstrued the legislative intent of HRS § 712-1243. Both courts focused on the part of the de minimis statute that provides that an offense may be de minimis where it "[d]id 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." HRS § 702-236(1)(b). The error made in the Vance dicta, upon which the Viernes court relied, was determining that since the legislature wanted to curtail the use of narcotics, quantities too small to be used do not pose the sort of societal danger contemplated. See Vance, 61 Haw. at 307, 602 P.2d at 944 (suggesting that a "microscopic" or "infinitesimal" amount that is "unusable as a narcotic . . . 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). Although the courts themselves recognized that "[t]he evil sought to be controlled by [HRS § 702-1243] is the use of narcotic drugs and their sale or transfer for ultimate use," id. (emphasis added),

they failed to give full effect to the goal of controlling the "use of narcotic drugs." In application, the courts took the very narrow approach that it would control the "future use of the particular drugs found." They neglected to consider that in the larger context of drug trafficking, future use is deterred precisely by making it illegal, as HRS § 712-1243 does, to possess drugs. The legislature drafted drug laws that attack both the supply and the demand side of drug distribution. HRS § 712-1243, entitled "Promoting a dangerous drug in the third degree," leaves no doubt that the legislature views possession as part and parcel of the drug proliferation problem. Where possession of drugs, regardless of the amount, is squarely what the legislature sought to control, it cannot be concluded that possession of "mere trace amounts" of dangerous drugs does not cause or threaten the harm or evil sought to be prevented.

In short, as "[t]raffic in narcotics can hardly be said to be a de minimis offense," State v. Schofill, 63 Haw. 77, 84, 621 P.2d 364, 370 (1980) (citing State v. Caldeira, Jr., 61 Haw. 285, 602 P.2d 930 (1979)), possession of trace amounts is not too trivial to warrant a conviction. Accordingly, possession of dangerous drugs, whether or not they have a future use or are themselves saleable, was intended to be an offense under HRS § 712-1243. An interpretation favorable to drug addicts and those illegally dealing in narcotics cannot reasonably be given.

The Viernes court misapplied HRS § 702-236. HRS § 702-236, entitled "De minimis infractions," was intended to be

applied to infractions that are de minimis, not amounts that are de minimis. The underlying rationale of HRS § 702-236 indicates that the legislature intended "to make the court's power to dismiss a prosecution discretionary upon the finding that the conduct constituted a deminimis [sic.] infraction." Supplementary Commentary to HRS § 702-236 (quoting Sen. Conf. Com. Rep. No. 2, in 1972 Senate Journal, at 741; Hse. Conf. Com. Rep. No. 2, in 1972 House Journal, at 1042) (emphasis added). Thus, for the purposes of HRS § 702-236, the term "de minimis" applies to the defendant's "conduct" or "infraction," not to an isolated material element of a crime, to wit, "amount." Moreover, in State v. Park, this court adopted a "totality of the circumstances" test for determining whether an offense is to be treated as a de minimis infraction. State v. Park, 55 Haw. 610, 616, 525 P.2d 586, 591 (1974) (stating that "before the code's [§] 236 can be properly applied in a criminal case, all of the relevant facts bearing upon the defendant's conduct and the nature of the attendant circumstances regarding the commission of the offense should be shown to the judge.")[4]. The Viernes court

[4] Some of these factors that should be considered by the judge on this question under the code's s 236(1)(b) should include the following: the background, experience and character of these defendants-appellees which may indicate whether they knew of, or ought to have known, the requirements of HRS s 11-193 (Supp.1972); the knowledge on the part of these defendants-appellees of the consequences to be incurred by them upon the violation of the statute; the circumstances concerning the late filing of these statements of expense; the resulting harm or evil, if any, caused or threatened by these infractions; the probable impact of these violations upon the community; the seriousness of the infractions in terms of the punishment, bearing in mind, of course, that the punishment can be suspended in proper cases; the mitigating circumstances, if any, as to each offender; the possible improper

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erred by applying HRS § 702-236 to the amount of drug possessed, rather than to the defendant's conduct. And rather than apply Park's "totality of the circumstances" test, it examined only the quantity of the drug at issue. Based on its analysis, the Viernes Court thus incorrectly held that "the circuit court did not abuse its discretion in determining that .001 grams of methamphetamine was de minimis pursuant to HRS § 702-1243." Viernes, 92 Hawai'i at 135, 988 P.2d at 200.

III.

An overruling of Viernes is also independently compelled by public policy considerations. Policy considerations weigh in favor of precluding application of HRS § 702-236 to drug possession cases.

First, dismissal of a possession charge as de minimis would not only fail to further the legislative goals behind the drug laws, but would in fact exacerbate the drug problem sought to be eliminated. In cases where drug residue is found in a glass pipe, the question can reasonably be posed: What happened to the rest of the drugs in the pipe before it was confiscated by the police? A reasonable inference can be drawn that it was previously used by either the defendant or some other party. By applying the de minimis statute to such a situation, the court

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> motives of the complainant or the prosecutor; and any other data which may reveal the nature and degree of the culpability in the offense committed by each defendant-appellee.

Park, 55 Haw. at 617, 525 P.2d at 591.

would effectively be rewarding the person who uses more (as opposed to less) of the drug.

Second, permitting application of the de minimis statute to drug possession cases has distorted trials so that the issue becomes what amount of drug was recoverable, and what "discernible effect" that drug has. For example, in the instant case, the defense's expert witness distinguished between an "illicit use dose" and a "therapeutic dose." He stated,

> I'm making an assumption here that the abuser is seeking the elation and euphoria. I don't see why a person -- I don't think you could call it abusive. They are treating obesity. That's a therapeutic thing, so I am making a mental definition here that they are going for the elation or euphoria.

On this basis, he estimated that the minimum amount of methamphetamine required for a "nonuser" to experience "the desired effect of elation and euphoria" was within a "starting dose" "range of .05 to .1" grams. See also plurality at 6.[5] The legislature could not have intended that the court become an arena where criminal culpability is determined based on quantities other than those legislatively designated.[6] In fact,

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[5] In Fukugawa, the defense attorney asked its expert witness, "Doctor Read, in your expert opinion would eighteen milligrams or .018 grams produce a euphoric or pharmacological effect for an illicit user?" Fukugawa, Cr. No. 99-0020(2) (2d Cir. Haw., Aug. 31, 1999). In Oughterson, the defense attorney asked its expert witness, "Taking a naive user, what is the minimum dose amount that could create a CNS [central nervous system] or euphoric effect . . .," and "Given your research and your literature that you reviewed, is either . . . .012 grams or .005 grams saleable?" Oughterson, Cr. No. 99-1326 (1st Cir. Haw., Dec. 10, 1999).

[6] As a note, not only has the courtroom usurped legislative authority to establish the minimum quantities for criminal culpability, but such quantities are in fact currently being established by a single person. Professor Read was the expert witness in the instant case, in Viernes, 92 Hawai'i at 130, 988 P.2d at 195, in Fukugawa, Cr. No. 99-0020(2) (2d Cir. Haw., Aug. 31, 1999), and in Oughterson, Cr. No. 99-1326 (1st Cir. Haw., Dec.

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the legislature sought to avoid a battle of the experts by specifically making criminal "any amount." For the court to establish the minimum standard through a parade of case law would require the court to substitute its wisdom for that of the legislature.

Third, application of HRS § 702-236 to drug possession cases is destined to lead to contradictory, if not absurd, results.[7] If expert testimony is permitted to establish criminal culpability thresholds, the result could well differ from courtroom to courtroom and expert to expert. For example, in the instant case, the defense's expert witness testified that "bigger people require more, and smaller people require less." Justice Acoba states,

> In light of the unrebutted evidence produced at trial, that amount, as conservatively estimated by [defense's expert witness] would be .05 grams . . . as a first time dose for an "average-sized" person, who was not a user. The only qualification on that amount elicited from [defense's expert witness] was that a "little less" would produce an effect in

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[6](...continued)
10, 1999). In effect, Professor Read has become the legislature and the judge in all of these drug possession cases.

[7] I cannot agree with the plurality's following hypothetical: "For example, in a case where the evidence demonstrates that a defendant had knowingly recovered a quantity of methamphetamine with the intent to deliver it to the police as evidence of a crime when he was arrested and charged for possessing 'any amount' of a dangerous drug, dismissal as a de minimis offense would clearly be warranted." Plurality at 12. First, I question whether such an individual would even be charged by the prosecution -- to my knowledge, never has the situation imagined by the hypothetical ever transpired. Second, I am dubious that the court should seek to protect against unlikely scenarios, while ignoring the realities of what is occurring in practice -- that is, that trial and appellate courts are frequently misapplying the de minimis statute to dismiss cases based on the quantity of drug that is recovered. See my discussion supra n.1 (describing other cases on appeal). Third, I find the hypothetical to be ineffectual, for the plurality necessarily suggests that it finds it conceivable that the police officer, when receiving the methamphetamine, would also require the protections of the de minimis statute. Accordingly, I am not persuaded that the plurality has adequately presented a hypothetical that prevents this court from overruling Viernes.

> an eighty-pound person -- clearly a qualification not applicable to the five-foot, eight-inch, 115-pound adult Defendant in the instant case.

Acoba, J., dissenting at 21. It requires little imagination to envision how "expert testimony" thresholds create the kind of uneven administration of justice that courts must avoid.

Finally, if the test were to be applied to refer to the amount appropriate for a particular defendant's use, it would require testimony involving the defendant's past drug use or habits. For example, in the instant case, the defense's expert witness stated, "depending upon how much a person has used it, it will take more to get the same effect."[8] Introduction of such evidence, however, would bring the court close to if not within the constitutionally prohibited area regarding defendant's status as an addict. See Robinson v. California, 370 U.S. 660 (1962).

IV.

The Viernes court misconstrued HRS § 712-1243, ignoring the legislature's clear purpose in drafting it. It rejects all of the relevant reasoning in Vance, and offers a substitute rationale that appears inconsistent with legislative goals and with basic statutory interpretation. It also unambiguously overrules the main holding in Vance, though it gingerly avoids

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[8] In Fukugawa, Dr. Read testified as to the effects on an "average normal person." On cross-examination, the prosecution established that Dr. Read had not accounted for, inter alia, "[defendant's] drug use history." Fukugawa, Cr. No. 99-0020(2) (2d Cir. Haw., Aug. 31, 1999). In Oughterson, the prosecution's expert witness testified that "Cocaine's one of those drugs that's really highly variable in its responses," to which the prosecuting attorney asked, "[A] person himself is a main variable? . . . And their weight and their tolerance and all of that?" Oughterson, Cr. No. 99-1326 (1st Cir. Haw., Dec. 10, 1999).

stating that it is overruling the case itself. Finally, it latches on to the dicta in Vance, heedless of the rule that where the legislature has spoken clearly and unambiguously, the court may not elect to re-write the statute. Because I am of the notion that error once committed should not be perpetuated, I respectfully dissent.