OPINION OF ACOBA, J., CONCURRING IN
PART AND DISSENTING IN PART

I agree with the majority's statement that it is the defendant who bears the burden of persuasion on a motion to dismiss on de minimis grounds. See Majority opinion at 23. For that reason, I would vacate Judge Bryant's ruling. However, because I believe that, otherwise, Judge Bryant was correct, I would remand only for the court to apply the appropriate burden as outlined in the majority opinion. For, in my view, there were cogent reasons for Judge Bryant to reconsider Judge Town's decision denying Defendant's motion for de minimis consideration.[1]

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[1] I also agree with the decision to publish this case. I regard the majority's decision as a departure from our law with respect to dicta in prior opinions. An opinion should be published when, for example, it includes a departure from existing law or clarifies a law. See, e.g., 4th Cir. R. 36(a) (stating that an opinion will be published if it "establishes, alters, modifies, clarifies, or explains a rule of law within [the Fourth] Circuit"). The need for publication of opinions to give guidance to the parties, counsel, trial courts, and the public cannot be understated.

Indicative of that need is the proposal that the Hawai'i Chapter of the American Judicature Society (AJS) submitted on June 14, 2002, in the "Report of the AJS Committee Reviewing Unpublished Opinions" (the Report) to the justices of the Hawai'i Supreme Court for our consideration. It recommends that this court adopt an amendment to the Hawai'i Rules of Appellate Procedure (HRAP) Rule 35. The Report explained that "[t]here is a problem perceived by the legal community with the continued use of summary disposition orders and, particularly, the inability to cite memorandum opinions despite the fact that these opinions appear to be of substantial length and content and often cite other case law as precedent for the conclusions." The Report at 4.

The AJS recommendation, inter alia, suggests an amendment to HRAP Rule 35 which would permit (1) citation to unpublished opinions as persuasive authority and (2) petitions for publication of unpublished cases. The Report at 18, 20. The recommendation would obviously affect the development of law for criminal cases. The suggested amendment adds a new subsection c and re-alphabetizes and supplements the current subsection c as follows:

> (c) Application for Publication. Any party or other interested person may apply for good cause shown to the court for publication of an unpublished opinion.
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> [(c)] (d) Citation. A memorandum opinion or unpublished

(continued...)

I.

On November 1, 1999, Judge Town orally denied Defendant's motion to dismiss based on de minimis grounds. On November 9, 1999, this court issued its opinion in State v. Viernes, 92 Hawai'i 130, 988 P.2d 195 (1999). On November 23, 1999, in the course of motions in limine, Defendant sought "to reopen the issue of de minimis and [the] motion for reconsideration," based upon the issuance of Viernes. Defendant explained that he was in the process of filing a motion for reconsideration before Judge Town and requested that Judge Bryant "either send the motion back to Judge Town for reconsideration,

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[1](...continued)
dispositional order shall not be considered nor shall be cited in any other action or proceeding as controlling authority, except when the opinion or unpublished dispositional order establishes the law of the pending case, re [sic] judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent.

> In all other situations, a memorandum opinion or unpublished dispositional order may be cited in any other action or proceeding if the opinion or order has persuasive value. A party who cites a memorandum opinion or unpublished dispositional order shall attach a copy of the opinion or order to the document in which it is cited, as an appendix, and shall indicate any subsequent disposition of the opinion or order by the appellate courts known after diligent search. If an unpublished decision is cited at oral argument, the citing party shall provide a copy to the court and the other parties. When citing an unpublished opinion or order, a party must indicate the opinion's unpublished status.

The Report at 22 (underscoring and brackets in original). This court has yet to decide on the suggested amendment.

Justice Ramil has also proposed a rule which would require publication of a case at the request of one justice. Thus, a decision would be published when the case is decided by unanimous decision, if, "[a]fter an exchange of views," any single justice votes for publication; or for publication of opinions "with a dissent or with more than one opinion . . . unless participating judges decide against publication." Doe v. Doe, --- Hawai'i ---, 52 P.3d 255, --- (2002) (Ramil, J., dissenting) (quoting Rule 36(b)(2) of the United States Court of Appeals of the First Circuit) (emphasis added).

continu[e] the trial, or take the matter under advisement [himself] and make a determination as to the facts of this case with respect to Viernes." However, Judge Bryant reserved his "right as a trial judge to make a determination after close of evidence whether th[e] alleged amount of cocaine is in fact de minimis," essentially combining the trial and the motion to dismiss on de minimis grounds.

At trial, the criminalist who testified for the prosecution, Shirley Brown, explained that the substance she recovered from the pipe weighed twelve milligrams, but that she could not determine what amount of that substance was cocaine. None of the witnesses testified that the pipe was warm, and the officer who apprehended Defendant conceded that he did not find matches or a lighter on Defendant, which would indicate recent use of the drug.

On November 24, 1999, defense counsel advised Judge Bryant that his motion for reconsideration before Judge Town had been officially filed and was scheduled for December 13, 1999. Judge Bryant then granted reconsideration and reversed Judge Town's decision, dismissing the matter based on de minimis possession.

On November 29, 1999, Judge Town entered a written order and included in his Findings of Fact No. 12, that "[t]he glass pipe was found to contain a substance weighing .012 grams which tested positive for the presence of cocaine[,]" and Finding No. 18, that "[t]he amount of cocaine that Defendant possessed,

12 milligrams, was a substantial amount." (Emphasis added.) Judge Town's order was based, in part, on hearings before him held on September 9, September 15, and November 1, 1999. At the September 15 hearing, Judge Town received, by stipulation of the parties, State's Exhibit 1, which was a copy of the police report issued for the instant case. Included in the police report was criminalist Brown's "CRIME LAB ANALYSIS REPORT" reflecting the results of her test of the pipe. Brown's report explained that she examined a "whitish to brownish substance weighing 0.012 grams." (Emphasis added; emphasis omitted.) She stated that, "[u]pon examination and analysis, the . . . substance . . . was found to contain cocaine." (Emphasis omitted.)

At the September 15 hearing, the prosecution's expert witness, Dr. Kevin M. S. Ho, testified to the effect dosages of pure cocaine have on individuals, although he conceded that rock cocaine can be sold in an impure form. Immediately after Dr. Ho clarified that his dosage estimations referred to pure cocaine, Judge Town asked Dr. Ho, "What effect, if any, in your mind would .012 grams have on someone?" Dr. Ho explained that such an amount "[c]ould produce anything from no effect to death. Cocaine's one of those drugs that's really highly variable in its response."

On December 10, 1999, Judge Bryant entered his written order. Among his findings, Judge Bryant stated in Finding No. 3, "that 0.012 grams of substance containing an immeasurable amount of cocaine leads to a reasonable inference that the amount of

cocaine in question is not [a] saleable or usable amount." (Emphasis added.) Judge Bryant's Finding No. 3 is reflective of the testimony he received, i.e., that the .012 grams of a substance recovered from the pipe contained cocaine in an unknown amount. Judge Bryant dismissed the matter before Judge Town entered his written order.

II.

A trial judge may overturn the decision of his or her colleague if there are cogent reasons for doing so. See Stender v. Vincent, 92 Hawai'i 355, 362, 992 P.2d 50, 57 (2000) ("'[U]nless cogent reasons support the second court's action, any modification of a prior ruling of another court of equal and concurrent jurisdiction will be deemed an abuse of discretion.'" (Quoting Wong v. City and County of Honolulu, 66 Haw. 389, 396, 665 P.2d 157, 162 (1983).)). In the instant case, Judge Bryant had two cogent reasons for overturning Judge Town's ruling.

III.

First, the issuance of Viernes mandated an examination of Judge Town's ruling. The majority contends that "Viernes did not upset settled precedent . . . ; . . . Viernes merely elevated to the level of a holding what had been dictum in [State v.] Vance[, 61 Haw. 291, 602 P.2d 933 (1979)]." Majority opinion at 19-20 (emphasis added.) Vance reflects that there was no "settled precedent" on the subject of de minimis drug

infractions. There, this court stated, "We mention in passing, however, that where a literal application of HRS § 712-1243 would compel an unduly harsh conviction for possession of a microscopic trace of a dangerous drug, HRS § 702-236, 'De minimis infractions' may be applicable to mitigate this result." Id. at 307, 602 P.2d at 944 (emphases added.)

As a general principle, dicta does not always constitute "settled precedent," and did not in Vance. In Robinson v. Ariyoshi, 65 Haw. 641, 658 P.2d 287 (1982), this court overruled In re Sherretz, 39 Haw. 431 (1952), which, according to Robinson, had "noted that an inferior tribunal might not be bound under the doctrine of stare decisis if the pronouncement of a superior court is actually dictum." Robinson, 65 Haw. at 654, 658 P.2d at 298 (footnote omitted) (citing Sherretz, 39 Haw. at 437). Questioning the wisdom of such a rule "that accords a statement of a superior court no precedential weight merely because the statement was not necessary to the actual adjudication of the controversy[,]" id., this court indicated that such statements may be the product of greater consideration and deliberation than "'an actual decision rendered upon little argument and consideration[,]'" id. (quoting Nobrega v. Nobrega, 14 Haw. 152, 154 (1902)), and, thus, should be given greater weight. In that regard, Robinson decided that

> a more constructive approach would be to consider a statement of a superior court binding on inferior tribunals, even though technically dictum, where it "was passed upon by the court with as great care and deliberation as if it had been necessary to decide it, was closely connected with the question upon which the case was decided, and the opinion

> was expressed with a view to settling a question that would in all probability have to be decided before the litigation was ended."

Id. at 655, 658 P.2d at 298 (quoting Nobrega, 14 Haw. at 155). The language relied upon by the majority to conclude that Vance was binding dicta in fact reflects the opposite. The Vance court's use of the phrase "[w]e mention in passing," 61 Haw. at 307, 602 P.2d at 944, demonstrates that that decision was not "passed upon by the court with as great care and deliberation as if it had been necessary to decide it," Robinson, 65 Haw. at 655, 658 P.2d at 298 (internal quotation marks and citation omitted). Moreover, the de minimis discussion in Vance was not "expressed with a view to settling a question that would in all probability have to be decided before the litigation was ended." Robinson, 65 Haw. at 655, 658 P.2d at 296 (quoting Nobrega, 14 Haw. at 155). Hence, Viernes clarified an unsettled area of the law, warranting Judge Bryant's review of Judge Town's oral decision, which was rendered before Viernes was issued.

The majority states that this opinion "attempts to denigrate" the Vance analysis regarding the de minimis statute. Majority opinion at 20 n.16. This is not so. The question is whether Vance established precedent of a binding nature. Taking it on its own terms, this court opined on the de minimis issue in "passing," and not as a matter central to its decision. By its language, Vance suggested that the de minimis statute may be used in cases where a trace amount of drugs is possessed. See Vance, 61 Haw. at 307, 602 P.2d at 944 ("[W]here a literal application

of HRS § 712-1243 would compel an unduly harsh conviction for possession of a microscopic trace of a dangerous drug, HRS § 702-236, 'De minimis infractions' may be applicable to mitigate this result." (Emphasis added.)). The fact that the Vance dicta was not settled precedent or binding is illustrated further by the following passage of the Viernes opinion:

> HRS § 702-236 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[.]" Under certain circumstances, this may, as Vance suggests, trump the "any amount" requirement of HRS § 712-1243. . . . 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 discernable effect on the human body, it follows that the drug cannot lead to abuse, social harm, or property and violent crimes. . . .
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> . . . The present holding would merely recognize, as Vance suggests, that conduct may be so harmless that, although it technically violates HRS § 712-1243, it is nonetheless de minimis pursuant to HRS § 702-236.

92 Hawai'i at 134, 135, 988 P.2d at 199, 200 (emphases added). Plainly, the fact that Viernes "recognized" what Vance had only "suggest[ed]" confirms that Vance was not in fact binding dicta.

Further, in Viernes, the prosecution relied on Vance in arguing that "'the direct and unambiguous language of HRS § 712-1243 prohibits [this court] from judicially amending the provision to include a usable quantity standard.'" 92 Hawai'i at 133, 988 P.2d at 198 (quoting Vance, 61 Haw. at 307, 602 P.2d at 944). While this court disagreed with the prosecution's stance, the prosecution's reading of Vance was within reason, and it was left to Viernes to clarify such questions.

Indeed, Judge Town himself acknowledged that the law on de minimis drug cases was not well-defined, but in a "gray" area. In rendering his oral ruling denying Defendant's motion to dismiss, Judge Town stated:

> As to Mr. Oughterson, with all respect, I'm not comfortable granting a motion when there's 12 milligrams. There's some discussion as to how much is too little but there's a substantial amount of residue found there even assuming arguendo it was all cocaine. There may be some difficulty. But I'm just not comfortable in this case dismissing that one. And that's one you have to take up on appeal. That's one of those I think that's in the gray area. And as I say, I'm learning as I go through these cases trying to craft some standards that can allow some predictability to defendants, the prosecutors and the public defenders and get some guidance to the supreme court.

(Emphases added.) Considering the fact that the trial court judges, prior to Viernes, were apparently left to fashion standards themselves for the dismissal of drug cases on de minimis grounds, Judge Town's comments were understandable; it cannot be said that Vance was "settled precedent." Thus, the publication of Viernes provided Judge Bryant a cogent reason to reexamine Judge Town's oral decision, which had been rendered without the benefit of this court's opinion in that case. Viernes, in effect, established a new standard binding upon the trial courts; Vance did not.

IV.

Second, in denying the motion to dismiss, I must conclude that Judge Town abused his discretion, based on the reasons he gave, because Defendant clearly qualified for application of HRS § 702-236. HRS § 702-236(1)(b) states that a

prosecution may be dismissed as a de minimis infraction where "the defendant's conduct . . . [d]id not actually cause or threaten to the harm or evil sought to be prevented by the law defining the offense[.]" The amount of .012 grams of substance recovered from the pipe was residue, not cocaine. As in Viernes, the amount of drug actually in the residue was not measurable, and, therefore, whatever amount was present was only a trace of the drug, not useable or saleable, a fact prefatory to qualification for de minimis treatment as set out in Vance and Viernes absent overriding surrounding circumstances.

As to relevant surrounding circumstances, first, other than Defendant's possession of the pipe for which he had been separately charged, there was no evidence that Defendant was actually using it at the time of his arrest. None of the prosecution witnesses who testified were able to establish that the pipe was warm to the touch when Defendant was apprehended and, in that connection, that matches or lighters were found on his person. Inasmuch as such indicia of use was absent, there is nothing to establish that Defendant had used the pipe on the present occasion. Second, there was no evidence Defendant was selling the substance.

Third, there was no evidence that Defendant, at the time, was involved in crimes to support any suspected drug

habit.[2] Because there was (1) an unmeasurable trace of the drug and (2) nothing to indicate that Defendant (a) had, on the present occasion, used cocaine, and (b) had committed or was committing crimes to support his drug use, I believe Judge Bryant had cogent reasons for overturning Judge Town's decision disqualifying Defendant from de minimis consideration. The only basis upon which Judge Town exercised his discretion was his belief in the amount of drug involved, which finding cannot be sustained on the record.

Although I cannot agree with Judge Town's ultimate decision, I believe he acted conscientiously in this matter, especially in light of the unsettled nature of the law in this area. My disagreement stems primarily from the manner in which the majority has characterized his and Judge Bryant's roles and the import of their decisions in this case.

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[2] The Commentary on HRS §§ 712-1241 to 712-1250 explains that the purpose of the drug statutes, as it pertains to dangerous drugs, is to deter use and commission of crimes related to obtaining funds to support such drug use:

> These 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.)

V.

In any event, Judge Bryant's decision should not be vacated, other than with respect to the burden of persuasion, because Judge Town (1) apparently mistakenly found that the 12 milligrams of residue was 100 per cent cocaine[3] and (2) issued contradictory findings as to whether the 12 milligrams were cocaine or residue.[4] "Before a trial court can address whether an offense constitutes a de minimis infraction, the court must make factual determinations regarding the circumstances of the offense; these findings of fact are reviewed under the clearly erroneous standard." State v. Balanza, 93 Hawai'i 279, 283, 1 P.3d 281, 285 (2000) (citing Viernes, 92 Hawai'i at 133, 988 P.2d at 198). A finding is clearly erroneous "when 'the record lacks substantial evidence to support the finding.'" State v. Kotis, 91 Hawai'i 319, 328, 984 P.2d 78, 87 (1999) (quoting Alejado v. City and County of Honolulu, 89 Hawai'i 221, 225, 971 P.2d 310, 314 (App. 1998)). Substantial evidence is "'credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.'" Id.

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[3] The majority characterizes as "disingenuous" this opinion's assertion that Judge Town found that the 12 milligrams of cocaine was pure cocaine. Majority opinion at 7 n.8. The majority then points out what I have in fact stated at least twice in my opinion -- that Judge Town entered a finding that would seem contradictory to this -- that is, that "[t]he glass pipe was found to contain a substance weighting .0123 grams which tested positive for the presence of cocaine." Finding No. 12. See majority opinion at 4. It is, in fact, correct that Judge Town found that the 12 milligrams of cocaine was pure cocaine. His finding that "[t]he amount of cocaine possessed, 12 milligrams, was a substantial amount," cannot be interpreted to mean anything else.

[4] In considering the record, I must rely -- as we must all -- on the findings of the court as they are written.

(quoting Roxas v. Marcos, 89 Hawai‘i 91, 116, 969 P.2d 1209, 1234 (1998)). As mentioned, in his findings of fact, Judge Town found that "[t]he amount of cocaine that Defendant possessed, 12 milligrams, was a substantial amount." (Emphasis added.)

Plainly, this was an erroneous finding. The criminologist's report that was before Judge Town reflected that the residue, and not the cocaine, weighed 12 milligrams. There was no evidence that Defendant possessed 12 milligrams of cocaine or any measurable amount, for that matter. Additionally, as stated supra, Judge Town, in rendering his ruling stated, "I'm not comfortable granting a motion when there's 12 milligrams. There's some discussion as to how much is too little but there's a substantial amount of residue found there even assuming arguendo it was all cocaine." (Emphasis added.)

Such an assumption was not supported by the testimony of the prosecution's expert witness, who conceded that cocaine can be sold in an impure form. Considering his findings of fact, on which I must rely, and his comments during his oral ruling, Judge Town reached his determination, i.e., exercised his discretion, based on an erroneous or contradictory understanding of the amount of cocaine Defendant possessed. Consequently his order cannot be sustained and there is no principled basis upon which the exercise of his discretion can be upheld on appeal.

VI.

I would thus vacate Judge Bryant's ruling, but only for the purpose of remanding the matter to him to apply the appropriate burden of persuasion.