CONCURRING OPINION OF ACOBA, J.

The majority outlines a two-part de minimis test requiring a defendant to establish "that the amount of the drug he or she possessed is incapable of producing any pharmacological or physiological effect" (in essence, whether the drugs are useable) and, secondly, that the amount possessed "is not, in fact saleable[.]" Majority opinion at 22 (emphasis in original). I write separately (1) in favor of a third prong to be added to the test that, at the time of possession, the defendant was not engaged in a crime to support a drug habit, see State v. Carmichael, No. 22871, slip op. at 17-18 (Haw. Aug. 29, 2002) (Acoba, J., dissenting), and (2) to observe that an expert in pharmacology may not necessarily be required to establish that a drug is not useable or saleable.[1]

---

[1] Because I believe we, as a court of last resort, should endeavor to provide as much guidance as possible to the parties, counsel, and the trial courts, I agree with the decision to publish this opinion. The majority's decision modifies and clarifies a rule of law. Various jurisdictions, both federal and state, by rule, either mandate publication of opinions clarifying a rule of law or, at the very least, advise that such opinions should be published. See 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" (emphasis added)); 5th Cir. R. 47.5.1 (setting forth that an opinion is published if it "alters, or modifies an existing rule of law"); 6th Cir. R. 206(a) (stating that "whether [a decision]... alters or modifies an existing rule of law" is one of the criteria "considered by panels in determining whether a decision will be designated for publication in the Federal Reporter"); 7th Cir. R. 53(c)(1) (stating that "[a] published opinion will be filed when the decision . . . changes an existing rule of law. . . ."); Mich. Ct. R. 7.215(A)-(B) (stating that "[a] court opinion must be published if it: . . . (3) alters or modifies an existing rule of law . . . (7) creates or resolves an apparent conflict of authority, whether or not the earlier opinion was reported"); Wis. Stat. § 809.23(1)(a) (stating that "[w]hile neither controlling nor fully measuring the court's discretion, criteria for publication in the official reports of an opinion of the court include whether the opinion: 1. . . . modifies, clarifies or criticizes an existing rule. . . .").

I.

As I have indicated before, under the de minimis statute, Hawai‘i Revised Statutes (HRS) § 702-236 (1993), 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) (1993 & Supp. 1999). "[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." State v. Vance, 61 Haw. 291, 307, 602 P.2d 933, 944 (1979). "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." Carmichael, slip op. at 16 (Acoba, J., dissenting) (citing Vance, 61 Haw. at 307, 602 P.2d at 944).

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." In regard to the specific harm or evil contemplated, the legislature had in mind a secondary purpose in prohibiting dangerous drugs in general -- "to prevent crimes prompted by the need to obtain more dangerous drugs, which the legislature believed [resulted from] abuse of highly addi[c]tive

drugs." Carmichael, slip op at 16-17 (Acoba, J., dissenting) (citing Commentary on HRS §§ 712-1241 to -1250).

Thus, as in this court's view in Vance and State v. Viernes, 92 Hawai'i 130, 988 P.2d 195 (1999), 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. Thus, disqualifying attendant circumstances may also exist where there is evidence at the time of the possession that a defendant committed a crime in order to obtain more drugs.

In light of Vance, Viernes, and the legislative history of HRS § 712-1243, I believe courts faced with a motion to dismiss a drug-residue promotion of dangerous drugs case based on de minimis grounds should consider, as a threshold qualification for HRS § 712-1243 treatment, whether (1) the amount possessed was useable, or (2) the amount was saleable, or (3) the defendant was engaged in a crime to support a drug habit at the time of possession. See Carmichael, slip op at 16-17 (Acoba, J., dissenting). The foregoing three factors may be employed in the court's discretion and, in my view, would minimize any arbitrary variations among the cases.

II.

In this case, during cross-examination of the prosecution's witnesses, Defendant did attempt to produce evidence that the drug recovered from the pipe was not useable. Defense counsel asked Officer Scott Viera, the arresting officer, whether or not there were "any loose crystals when [the officer was] looking at that pipe, in or around the pipe[.]" The officer stated that he did not see any loose crystals, and also subsequently conceded that he could not assess how much methamphetamine was in the pipe, just by looking at it. The defense also elicited from Officer Viera that the pipe was not hot to the touch and that such a condition could mean that the pipe had not been used recently. Officer Viera reported that there was no other methamphetamine found in the front seat area, and that he could not remember if he recovered a lighter. Finally, the criminologist related that she "did not recover any loose methamphetamine to test[,]" and that she could not state how much of the .044 grams of substance was methamphetamine. Such evidence may have been sufficient to persuade a court, in the exercise of its discretion, that whatever methamphetamine contained in the residue weighed was not useable and, therefore, by inference, not saleable. In my view, depending upon the circumstances, a defendant need not necessarily produce an expert

in pharmacology at court to meet the burden of establishing that the drug was not useable or saleable.