DISSENTING OPINION BY ACOBA, J., IN WHICH DUFFY, J., JOINS

I respectfully dissent.

I would hold that the decision of the circuit court of the first circuit (the court) to dismiss a violation of Hawaiʻi Revised Statutes (HRS) § 134-7(b) & (h) (Supp. 2007) by Petitioner/Defendant-Appellant Tanya Rapozo a.k.a. Tanya Rapoza (Petitioner), for possession of a single bullet as de minimis under HRS § 702-236 (1993), rests within the sound discretion of the court. Accordingly, the dismissal should be affirmed because under the attendant circumstances, the court cannot be said to have "clearly" abused its discretion. State v. Hironaka, 99 Hawaiʻi 198, 204, 53 P.3d 806, 812 (2002). In my view, then, the Intermediate Court of Appeals (ICA) gravely erred in deciding otherwise. See State v. Rapozo, No. 29215, 2009 WL 1090068, at *4 (App. Apr. 20, 2009) (mem.)

On April 24, 2007, Petitioner, a convicted felon, was charged by Respondent/Plaintiff-Appellee State of Hawaiʻi (Respondent or the prosecution) with possession of ammunition, HRS § 134-7(b), in Count I of the indictment. The incident arose from Petitioner's arrest for driving under the influence and driving without a license, after which Petitioner was found in possession of the bullet, located in her brasserie. On February 26, 2008, Petitioner filed a motion to dismiss Count I as a de minimis infraction under HRS § 702-236. The court granted the motion. On April 20, 2009, the ICA vacated the dismissal. The question presented on certiorari is whether the

ICA gravely erred in concluding that the court abused its discretion in dismissing Count I.

I.

Both the plain language of HRS § 702-236 and the commentary thereto make abundantly plain that the trial court is afforded broad discretion in deciding whether to dismiss a prosecution as a de minimis infraction. HRS § 702-236 provides in pertinent part:

> (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:
>
> . . . .
>
> (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[.]

(Emphases added.) The supplemental commentary to HRS § 702-236 explains that

> [t]he Legislature deleted the mandatory "shall" and inserted in lieu thereof the permissive "may", in order "to make the court's power to dismiss a prosecution discretionary upon the finding that the conduct constituted a de minimis infraction. It is your Committee's intent to give the courts broad discretion in this matter."

(Quoting S. Conf. Comm. Rep. No. 2, in 1972 Senate Journal, at 741.) (Emphasis added.)

Hence, "[t]he authority to dismiss a prosecution under § 702-236 rests in the sound discretion of the trial court[]" and will be reversed "only if the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to a substantial detriment of a party litigant.'"[1] Hironaka, 99

[1] Although the majority states in a footnote, that "the court can decline to dismiss a prosecution even if the de minimis statute is otherwise satisfied[,]" majority opinion at 17 n.7, there is no dispute that the court's discretion permits it to dismiss or decline to dismiss a prosecution. The (continued...)

Hawaiʻi at 204, 53 P.3d at 812 (quoting State v. Viernes, 92 Hawaiʻi 130, 133, 988 P.2d 195, 198 (1999) (quoting State v. Ornellas, 79 Hawaiʻi 418, 420, 903 P.2d 723, 725 (App. 1995))). Indeed, "[t]his decision is akin to those made regarding the admissibility of certain types of evidence, which require 'judgment calls' on the part of the trial judge." Viernes, 92 Hawaiʻi at 133, 988 P.2d at 198 (citations omitted). Furthermore, "[t]he burden of establishing abuse of discretion is on appellant, and a strong showing is required to establish it." State v. Hinton, 120 Hawaiʻi 265, 273, 204 P.3d 484, 492 (2009) (internal quotation marks and citation omitted). For the reasons set forth below, it cannot be said that the court abused its discretion because a court could conclude that Petitioner's conduct constituted a de minimis infraction, without clearly exceeding the bounds of reason or violating principles of law or practice.

II.

In granting Petitioner's motion to dismiss Count I as de minimis, the court set forth the following relevant findings of fact (findings) and conclusions of law (conclusions):

Findings of Fact

1. At approximately 1:14 a.m. on September 19, 2006, [Petitioner] was driving a white pickup truck on Ala Wai Boulevard in the City and County of Honolulu,

[1](...continued)
majority acknowledges that "HRS § 702-236 provides that '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' constituted a de minimis infraction." Majority opinion at 18 (emphases, brackets, and citation omitted). The foregoing emphasizes that the court's discretion is at the crux of the de minimis statute. It is important to note that in this case, the court exercised its discretion in favor of dismissing Count I.

State of Hawaii, when she was pulled over by Honolulu Police Officer Jason Pistor for driving erratically.

. . . .

3. Officer Pistor then placed [Petitioner] under arrest for driving under the influence and without a driver's license and took her to the Central Processing Desk of the main police station.
4. At approximately 2:30 a.m. [Petitioner] was given a pat down search by police matron Laura Chun who felt something hard in [Petitioner's] brassiere.
5. Matron Chun escorted [Petitioner] into the holding cell to conduct a more extensive preincarceration search and found a single .38 caliber operable bullet in the left cup of [Petitioner's] bra.
6. [Petitioner's] explanation for possessing the bullet was that she was going to have it made into a charm for a bracelet.
7. No gun was found by either Matron Chun or police officer Pistor, nor was any other ammunition, drugs or other contraband found in [Petitioner's] possession or control.
8. [Petitioner], who has previously been convicted of Unauthorized Control of Propelled Vehicle, Promoting Dangerous Drugs in the Second Degree and Theft in the Second Degree and is prohibited from possessing or controlling a firearm and/or ammunition, was arrested and charged under HRS § 134-7(b), a class B felony.

Conclusions of Law

1. The purpose of HRS § 134-7(b) and (h) is to protect the public from criminal activity involving the use of firearms by felons convicted of certain crimes along with people under judicial restraint by prohibiting these individuals from possessing or controlling firearms and/or ammunition. In this case, the use of firearms and/or ammunition is not a relevant factor in causing the situation that led to defendant's arrest.
2. Under HRS § 134-7(b) the possession of ammunition in any amount is a violation. (See, State v. Pinero, 70 Haw. 709, 778 P.2d 704 (1989)). However, the law does recognize that under certain circumstances the infraction is so small as to make the penalty for the violation of a particular statute unreasonable. HRS Section 702-236.
3. HRS Section 702-236 provides that the [c]ourt may dismiss a prosecution if, considering all of the relevant circumstances, it finds that the defendant's conduct did not actually cause or threaten the harm sought to be prevented by the law or did so only to an extent too trivial to warrant the condemnation of conviction. (See State v. Viernes, 92 Haw. 130, 988 P.2d 185 [sic] (1999); State v. Carmichael, 99 Haw. 75, 80, 53 P.3d 214, 219 (2002)).
4. Under the facts of this case, a single bullet hidden from plain view in [Petitioner's] bra, without the capacity to fire it and which could not be used to harm anyone, does not violate the purpose of H.R.S. § 134-7(b); nor does it create the danger the statute was designed to prevent.
5. Where an infraction is so infinitesimal that the possibility of the harm sought to be prevented by a statute is minuscule, the violation may constitute a "de minimis infraction" within the meaning of HRS 702-

> 236. State v. Viernes, 92 Hawaii 30 [sic], 988 P.2d 185 [sic] (1999). In that event the [c]ourt in its sound discretion may dismiss the prosecution brought against the defendant for the statutory violation. Id.
>
> 6. Clearly, [Petitioner] has met her burden of showing that the de minimis statute applies. Therefore, in the interest of justice, this [c]ourt chooses to exercise the discretion provided by H.R.S. § 702-236 and the authorities cited herein, to dismiss Count I of the indictment with prejudice.

(Emphases added).

The court's findings are reviewed under the clearly erroneous standard. Bhakta v. County of Maui, 109 Hawaiʻi 198, 208, 124 P.3d 943, 953 (2005) (stating that "[the supreme court] reviews the trial court's [findings] under the clearly erroneous standard" (citing Ueoka v. Szymanski, 107 Hawaiʻi 386, 393, 114 P.3d 892, 899 (2005)). A "[finding] is clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction that a mistake has been committed." Casumpang v. ILWU Local 142, 108 Hawaiʻi 411, 419, 121 P.3d 391, 399 (2005). In the absence of a showing that a finding is clearly erroneous, findings are binding on this court. State v. Eastman, 81 Hawaiʻi 131, 139, 913 P.2d 57, 65 (1996) ("As the trier of fact, the judge may draw all reasonable and legitimate inferences and deductions from the evidence, and the findings of the trial court will not be disturbed unless clearly erroneous.") (Internal citation omitted.) Generally, findings not challenged on appeal are also binding on this court. Kelly v. 1250 Oceanside Partners, 111 Hawaiʻi 205, 227, 140 P.3d 985, 1007 (2006) (citations omitted). The court's conclusions, however, are reviewed de novo. State v. Hicks, 113 Hawaiʻi 60,

70, 148 P.3d 493, 503 (2006) (citing State v. Kido, 109 Hawaiʻi 458, 461, 128 P.3d 340, 343 (2006)).

A.

To determine whether an alleged infraction is de minimis under HRS § 702-236(1)(b), "[w]e must first examine the legislative intent behind the statute[.]" Ornellas, 79 Hawaiʻi at 423, 903 P.2d at 728 (citing State v. Vance, 61 Haw. 291, 602 P.2d 933 (1979) (other citation omitted)). De minimis review specifically requires the court to ascertain the legislative intent of the statute to determine whether the defendant's conduct "[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 intent of the legislature "is obtained primarily from the language of the statute." State v. Kupihea, 98 Hawaiʻi 196, 206, 46 P.3d 498, 508 (2002).

With possession crimes, however, the legislature often criminalizes possession as a means of preventing some other harm or evil. Stated differently, "the harm or evil sought to be prevented" by the statute, HRS § 702-236(1)(b), is most often, not possession itself but some other harm or evil not discernable from the face of the statute. See Viernes, 92 Hawaiʻi at 134, 988 P.2d at 199 (determining that the legislative purpose behind the statute criminalizing the possession of "any dangerous drug in any amount," is "to respond to abuse and social harm" and "to

counter increased property and violent crimes" (internal quotation marks and citation omitted)).

In sum, HRS § 134-7 prohibits certain persons from possessing firearms and/or ammunition. It is apparent that the legislature criminalized the possession of firearms and/or ammunition as a means of preventing some other harm or evil which cannot be gleaned from the plain language of the statute itself. We thus turn to the legislative history.

B.

The 1968 version of HRS § 134-7(b) provided in pertinent part:

> (b) No person who has been convicted in the State or elsewhere of having committed or attempted a crime of violence, or the illegal use, possession or sale of narcotics, or any depressant or stimulant drug, as defined by the Revised Laws of Hawaii 1955, as amended, shall own or have in his possession or under his control any firearm or ammunition therefor.

1968 Haw. Sess. Laws Act 19, § 1 at 23. The legislative history reveals the legislature's concern with "an alarming increase in the number of crimes involving the use of firearms in the State of Hawaii." 1968 Haw. Sess. Laws Act 19, § 1 at 23. The legislature noted that

> [s]ince the possession of firearms and/or ammunition by persons having prior record of convictions for crimes of violence gives rise to a reasonable apprehension that such persons might use such firearms for criminal and violent purposes, legislation prohibiting the possession or control of firearms by such persons and making such possession a felony is urgent and necessary for the protection of the general public.

Id. (emphases added).

In 1971, the scope of HRS § 134-7(b) was expanded to include all felons. 1971 Haw. Sess. Laws Act 78. The 1971 version of the statute provided in pertinent part:

> (b) No person who has been convicted in the State or elsewhere of having committed a felony or of the illegal use and possession or sale of any drug shall own or have in his possession or under his control any firearm or ammunition therefor.

Id., § 1 at 196. The legislative history pertinent to that amendment indicates that the amendment was intended "to amend existing firearms laws so that they will be more effective in deterring and preventing the proliferation of crimes involving the illegal possession and use of firearms in the State of Hawaii." S. Stand. Comm. Rep. No. 524, in 1971 Senate Journal, at 1036 (emphases added). The legislature found that "registration requirements for lawful possession of firearms . . . [would] not appreciably deter or prevent the continued increase in the number of crimes committed in the State of Hawaii by the illegal possession or use of firearms." Id. (emphases added). Furthermore, the legislature deemed increased penalties for possession of firearms or ammunition by a convicted felon as the "only meaningful method of stopping gun crimes." Id. (emphasis added). It is evident, then, that the harm or evil sought to be prevented by HRS § 134-7(b) is the prevention of "gun crimes," and "crimes involving the illegal possession and use of firearms[.]" Id.[2]

[2] On appeal, Respondent challenged conclusion 1, arguing that "it is also an important purpose of HRS § 134-7(b) to protect law enforcement officers, correctional officers, jail staff, and detainees from criminal activity involving the use of firearms and ammunition with the assistance of felons convicted of certain crimes." (Emphasis omitted.) Respondent argues that "[Petitioner] was attempting, albeit passively, to bring 'live' ammunition into the HPD main police station holding facility."

The specific focus of criminal liability raised by Respondent is not specifically or expressly noted in HRS § 134-7(b) or in its legislative history. However, Respondent's challenge is plainly subsumed under the broader purpose of HRS § 134-7(b) of protecting the public from crimes involving the illegal use and possession of firearms. See infra. The ICA also noted that conclusion 1 was correct to the extent that the court concluded the harm that HRS § 134-7(b) sought to prevent was the commission of (continued...)

III.

Once the purpose behind the statute has been ascertained, a court may determine that the defendant's conduct "[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[,]" by considering "the nature of the conduct alleged and the nature of the attendant circumstances.[]" HRS § 702-236(1)(b).

A.

The record indicates that Petitioner addressed the nature of her conduct, which was the possession of a single bullet, and all of the relevant attendant circumstances, through the declaration of counsel. In that declaration, Petitioner's counsel "declare[d] under penalty [of] law" that (1) Petitioner was stopped by police officers "for driving erratically[,]" (2) Petitioner was "placed . . . under arrest for driving under the influence and without a valid driver's license[,]" (3) when Petitioner was searched at the station, a police matron "found a single .38 caliber bullet in the left cup of [Petitioner's] bra[,]" (4) "[Petitioner's] explanation for having the bullet in her possession was that she was going to have it made into a charm for a bracelet[,]" and (5) "[n]o gun was found by [any of the officers or the police matron], nor was any other ammunition,

[2](...continued)
crimes by convicted felons by prohibiting their possession or control of firearms and/or ammunition.

drugs or other contraband found in [Petitioner's] possession or control."[3]

The court considered the declaration and likewise considered the nature of Petitioner's conduct and the attendant circumstances, as indicated by the fact that much of the foregoing was included in its findings and conclusions. The court considered the fact that Petitioner was not found in possession or control of any gun, other ammunition, drugs, or contraband. See finding 7. Based on that finding, the court concluded that Petitioner lacked the capacity to fire the bullet and therefore, it could not be used to harm anyone. See conclusion 4. The court also considered the fact that Petitioner was arrested for a traffic infraction, and therefore, the use or possession of firearms or ammunition was not a relevant factor in causing Petitioner's arrest.[4] See finding 3 and conclusion 1. Additionally, Petitioner's prior felony convictions were not

[3] I respectfully disagree with the majority's assertion that Petitioner's declaration of counsel "omitted many of the relevant attendant circumstances." Majority opinion at 3. The foregoing indicates Petitioner did in fact address her possession of the single bullet and all of the circumstances attendant to her possession. Furthermore, as discussed infra, while the majority takes issues with the fact that "[t]he only evidence offered by [Petitioner] in support of her motion was the declaration of her counsel," id., no one, much less the prosecution, objected to this manner of addressing the nature of Petitioner's conduct and attendant circumstances.

[4] The ICA concluded that the court erred in considering the fact that the use of firearms and/or ammunition was not a relevant factor leading to Petitioner's arrest and that no gun, drugs, contraband, or other ammunition was found within Petitioner's possession or control, because in its view, there "is no indication that the legislature intended to limit the possibility of a felon committing a crime with a firearm or ammunition to a specific instance." Rapozo, 2009 WL 1090068, at *3. However, a court is required to regard the attendant circumstances and therefore, the court properly considered those matters in support of its conclusion that Petitioner did not actually cause or threaten the harm sought to be prevented by HRS § 134-7.

crimes of violence[5] and did not involve the use of firearms or ammunition. See finding 8. Inasmuch as "all of the relevant attendant circumstances [must] be considered by [the court]," majority opinion at 18 (citing Viernes, 92 Hawaiʻi at 133, 988 P.2d at 198), the court did just that. Then, in exercising the discretion afforded the court under the de minimis statute, the court determined that Petitioner's conduct "[d]id not actually cause or threaten the harm or evil sought to be prevented[.]" HRS § 702-236(1)(b).[6]

B.

In considering the nature of Petitioner's conduct, the court considered Petitioner's explanation that she was going to have the bullet made into a charm for a bracelet.[7] See finding 6. Respondent challenged findings 5 (an "[officer] . . . conduct[ed] a more extensive preincarceration search and found a single .38 caliber operable bullet in the left cup of [Petitioner's] bra") and 6 ("[Petitioner's] explanation for

[5] To reiterate, Petitioner was previously convicted of Unauthorized Control of Propelled Vehicle, Promoting Dangerous Drugs in the Second Degree, and Theft in the Second Degree.

[6] While the language of conclusion 4 differs slightly from the language of HRS § 134-7, it is evident that the court determined that based on the nature of Petitioner's conduct and the nature of the attendant circumstances, Petitioner's conduct "[d]id not actually cause or threaten the harm or evil sought to be prevented[.]" HRS § 702-236(1)(b).

[7] See, e.g., Bullet Jewelry-The Latest Rage!, http://www.squidoo.com/bulletjewelry (stating that "[b]ullet jewelry has become the latest rage[]"). An internet search yields approximately 1,800,000 results for "bullet jewelry." http://www.google.com/search?hl=en&q=bullet+jewelry&btnG=Search&aq=f&aqi=&aql=&oq=&gs_rfai= (last visited June 14, 2010). Additionally, instructions to making live bullets into jewelry or charms can be found online. See, e.g., The Real Bullet Necklace or Earring, http://www.instructables.com/id/The-Real-Bullet-Necklace-or-Earring/ (last visited June 16, 2010); How to Make Bullet Jewelry, http://www.ehow.com/how_6019502_make-bullet-jewelry.html (last visited June 16, 2010).

possessing the bullet was that she was going to have it made into a charm"), but only insofar as the court characterized the item found in Petitioner's possession as a "bullet" as opposed to a "bullet cartridge or round" or as "ammunition." The ICA decided that the term "bullet" was sufficient to satisfy the meaning of ammunition under § 134-7(b). Because there is no dispute as to the other parts of findings 5 and 6 by Respondent, Petitioner's explanation that she was going to have the bullet made into a charm for a bracelet, is binding on this court.[8] Kelly, 111 Hawaiʻi at 227, 140 P.3d at 1007 (stating that "[a] court finding that is not challenged on appeal is binding on this court") (citations omitted)).

Respondent also challenged conclusion 4, insofar as the court found that "the ammunition 'could not be used to harm anyone[.]'" At the hearing on Petitioner's motion to dismiss, Respondent argued that although Petitioner was not found in possession of any gun or other weapon, a bullet can be fired from

[8] The majority seemingly acknowledges this in a footnote:

> Aside from [findings] 5 and 6, the [] court's [findings] were unchallenged by [Respondent], and are therefore binding on this court. See [Kelly], 111 Hawaiʻi [at] 227, 140 P.3d [at] 1007 []. In its Opening Brief to the ICA, [Respondent] challenged [findings] 5 and 6, insofar as they characterized the item in [Petitioner's] possession as a bullet, rather than as a bullet cartridge or round or simply ammunition . . . . In its memorandum opinion, the ICA rejected [Respondent's] contentions as unfounded because the [] court characterized the bullet as operable and it was therefore sufficient to satisfy the meaning of ammunition under HRS § 134-7(b). Given the ICA's resolution of that issue, it does not appear that there is any further dispute that the bullet in [Petitioner's] possession was ammunition within the meaning of HRS §134-7(b)

Majority opinion at 8 n.4 (quotation marks omitted).

"any home made gun such as a 'zip gun,' typically made by prisoners [and] can fire a 'bullet' and cause the same harm." While set forth under the court's conclusions, it is evident that the court's determination is a finding as opposed to a conclusion. Such a finding is binding on this court in the absence of a showing that it is clearly erroneous. See supra. It is plain the court found that because Petitioner was not in possession of any firearm or other device such as a "zip gun" that could be used to discharge or fire the bullet, the bullet could not be used to harm anyone. While one can imagine ways in which the bullet could have been used to cause harm to someone, such "theories," including that of a "zip gun," are speculative at best. The court's finding was based on attendant circumstances relevant to the instant case and therefore, cannot be said to be clearly erroneous.

C.

Furthermore, as previously discussed, the harm or evil sought to be prevented by HRS § 134-7(b) is "crimes involving the illegal possession and use of firearms[.]" S. Stand. Comm. Rep. No. 524, in 1971 Senate Journal, at 1036. Here, to reiterate, Petitioner was found in possession of a single bullet and lacked the means of firing the bullet. Additionally, no gun, weapon or other means of firing the bullet was ever found in Petitioner's possession or control. See findings 5 and 7. Petitioner was pulled over for driving erratically and arrested for driving under the influence and without a driver's license. See findings 1 and 3. Thus, she was neither arrested nor charged with any

offenses involving the use of a firearm or other weapon. At the time Petitioner was arrested and found to be in possession of the single bullet, she was neither engaged in any acts involving the use of firearms or any other weapon, nor was there any evidence that she was going to embark on any such acts. In light of the foregoing, the court did not abuse its discretion in determining that, based on the attendant circumstances, Petitioner's conduct (possession of the single bullet) did not cause or threaten the harm or evil sought to be prevented by HRS § 134-7 (crimes involving firearms). See supra.

Moreover, as stated, a review of the evolution of HRS § 134-7(b) reveals the legislature's concern in part, that the "possession of firearms and/or ammunition by persons having prior record of convictions for crimes of violence gives rise to a reasonable apprehension that such persons might use such firearms for criminal and violent purposes[.]" 1968 Haw. Sess. Laws Act 19, § 1 at 23 (emphases added). The legislature had at one time determined that "legislation prohibiting the possession or control of firearms by such persons and making such possession a felony [was] urgent and necessary for the protection of the general public." Id. Notably, none of Petitioner's prior convictions were for "crimes of violence."[9] Id. Accordingly, Petitioner was not in the category of "such persons" on which the legislature had focused as giving rise to a "reasonable apprehension" that the bullet might be used "for violent purposes." Id.

[9] See finding 8.

At the time she was found in possession of the single bullet, Petitioner's conduct did not actually cause or threaten the harm which the statute was designed to prevent, i.e., crimes involving firearms. The record supports such a conclusion, even exclusive of Petitioner's assertion that she intended to make the bullet into a charm for a bracelet, which the majority contends the court failed to determine "was credible." Majority opinion at 38.

D.

There is no dispute that Petitioner's conduct fell within the express language of HRS § 134-7(b). However, the relevant question in this case is whether the court clearly abused its discretion in deciding that Petitioner's conduct was de minimis within the meaning of HRS § 702-236, based on the nature of Petitioner's conduct and the attendant circumstances, as set forth in its findings and conclusions. Based on the foregoing, it cannot be said that the court's "judgment call," Viernes, 92 Hawaiʻi at 133, 988 P.2d at 198, that Petitioner's possession in this case "[d]id not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense," HRS § 134-7(1)(b) (emphasis added), was clearly wrong.

While one may disagree with the court's ultimate decision, where matters are left to the sound discretion of the trial court, the appellate court must exercise judicial restraint and may not overturn the court's decision in the absence of a clear abuse of discretion. Hironaka, 99 Hawaiʻi at 204, 53 P.3d at 812 (stating that because the authority to dismiss a

prosecution under HRS § 702-236 "rests in the sound discretion of the trial court[,]" the supreme court "will reverse the trial court only if the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant); Viernes, 92 Hawaiʻi at 133, 988 P.2d at 198 (stating that the court's decision "is reviewed for abuse of discretion" and will be reversed "only if the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to a substantial detriment of a party litigant") (citations omitted); see also State v. Wallace, 80 Hawaiʻi 382, 406, 910 P.2d 695, 719 (1996) (stating that matters that rest "'within the sound discretion of the trial court . . . will not be overturned unless there is a clear abuse of discretion'") (quoting State v. Maelega, 80 Hawaiʻi 172, 180, 907 P.2d 758, 766 (1995) (internal citation omitted))); cf. State v. Loa, 83 Hawaiʻi 335, 348, 926 P.2d 1258, 1271 (1996) ("'The scope and extent of cross and recross-examination of a witness is within the sound discretion of the trial judge. Under this standard, we will not disturb the trial court's exercise of its discretion unless it is clearly abused.'" (Quoting State v. Jackson, 81 Hawaiʻi 39, 47, 912 P.2d 71, 79 (1996).)). Thus, based on the matters relied on by the court, the court cannot be said to have "clearly exceeded the bounds of reason or disregarded rules or principles of law or practice[.]" Hironaka, 99 Hawaiʻi at 204, 53 P.3d at 812 (emphasis added).

IV.

On the other hand, the majority argues that the court abused its discretion in dismissing Count I because (1) Petitioner's conduct did in fact threaten the harm or evil sought to be prevented by HRS § 134-7(b) and (2) Petitioner failed to carry her burden of demonstrating that her possession of a bullet was too trivial to warrant the condemnation of conviction.[10]

[10] The majority raises this although Petitioner did not argue it. It is briefly noted that if in fact Petitioner's conduct did "actually cause or threaten the harm or evil sought to be prevented by the law defining the offense[,]" Petitioner's conduct "did so only to an extent too trivial to warrant the condemnation of conviction[.]" HRS § 702-236. State v. Akina, 73 Haw. 75, 828 P.2d 269 (1992), is instructive. In Akina, Sue, a ward of the State, had run away from her foster parents at the time she met the defendant at a beach park. Id. at 76, 828 P.2d at 270. The defendant allowed her to stay in his home for approximately two weeks, during which time he called Sue's foster parents to inform them of her whereabouts. Id. Sue returned to her foster parents upon the defendant's request but again ran away and returned to the defendant. Id. at 76-77, 828 P.2d at 270-71. The defendant drove her back to her foster parents at which time they informed him that Sue was a runaway and that it was a criminal offense to assist runaways. Id. Thereafter, the defendant again agreed to allow her to stay in his home for another week. Id. at 77, 828 P.2d at 271.

The defendant was subsequently convicted of custodial interference. Id. at 76, 828 P.2d at 270. On appeal, the defendant argued that the court had abused its discretion in failing to dismiss the case as de minimis under HRS § 702-236(1)(b). Id. This court held that the court abused its discretion in failing to dismiss the case as de minimis under HRS § 702-236(1)(b) because the defendant's conduct was too trivial to warrant the condemnation of conviction. Id. at 77, 828 P.2d at 271. It was reasoned that by the time the defendant "came on the scene, there was little he could do to worsen Sue's relationship with her custodial parents . . . [because] she had already run away from [her parents] several times before, and [her parents] themselves admitted that they had no control over her." Id. at 79, 828 P.2d at 272. Thus, it was [therefore] unlikely that his actions altered the existing custodial relationship at all." Id. (emphasis added).

Here, based on the circumstances surrounding Petitioner's arrest, it was also unlikely that Petitioner actually caused the harm the statute was intended to protect against. As recounted, Petitioner lacked the means of firing the single bullet and there was no other indication that she intended to use the bullet to cause the harm which the statute was designed to protect against (crimes involving firearms against the public). In that regard, Petitioner's conduct can be said to have caused the harm, if at all, to an extent too trivial to warrant the condemnation of conviction.

A.

With respect to its first argument, the majority cites to several cases in support of the undisputed proposition that "[a]s with all efforts to determine legislative intent, that inquiry relies primarily on the plain language of the statute." See majority opinion at 19-23 (citing Kupihea, 98 Hawaiʻi at 206, 46 P.3d at 508; Akina, 73 Haw. at 78, 828 P.2d at 271; Ornellas, 79 Hawaiʻi at 423, 903 P.2d at 728). The majority states that it "disagee[s] with the . . . assertion that 'the legislative intent cannot be discerned by looking directly to the language of the statute itself.'" Id. at 19 (quoting dissenting opinion at 20).

The intent of the legislature can often be discerned from the plain language of the statute itself. However, in the instant case, the harm or evil sought to be prevented by HRS § 134-7(b) is not clear from the plain language. Despite its protestation, the majority would not seem to disagree. The majority states that "[t]he purpose of the prohibition in HRS § 134-7(b) is to reduce the risk that persons convicted of certain crimes will commit further crimes using firearms[.]" Id. at 23. That intent cannot be gleaned from the plain language of the statute itself. For that reason, the majority itself resorts to legislative history. See id. at 27 (stating that "[t]he plain language of the statute and its legislative history support the conclusion that" Petitioner's conduct did actually cause or threaten the harm or evil sought to be prevented by the statute) (emphasis added)). The foregoing thus contradicts the majority's "disagree[ment] . . . that 'the legislative intent cannot be

discerned by looking directly to the language of the statute itself.'" Id. at 19. As acknowledged by the majority, in the instant case, the prohibition of possession of firearms or ammunition serves as a means of preventing some other harm or evil. That harm or evil is not evident from the language of the statute itself.

Furthermore, the cases to which the majority cites are inapplicable. Preliminarily, inasmuch as Akina and Ornellas did not involve possession crimes, they are not controlling. Kupihea, which did involve a possession statute, is inapplicable. In that case, the defendant argued that the court plainly erred in failing to sua sponte dismiss the paraphernalia charge as de minimis under HRS § 702-236 "where the items were everyday household items not intended or designed for use as drug paraphernalia." 98 Hawaiʻi at 206, 46 P.3d at 508 (brackets omitted). Although the defendant raised a de minimis argument, it is apparent that the defendant's challenge more specifically involved construction of the term "drug paraphernalia."

This court declined to rely on legislative history referring to "the prevalence of so-called 'head shops' selling pipes made for marijuana, for cocaine, for heroin, and all the assorted paraphernalia that accompany that[,]" id., (internal quotation marks, ellipses, brackets, and citation omitted), because "the broad definition of drug paraphernalia and the multiple examples of such contraband enumerated in [the statute] weigh[ed] against [the defendant's] contention that the ordinary nature of the containers possessed . . . did not involve the harm

or evil sought to be prevented under [the statute] or amounted to extenuations that would not have been envisioned by the legislature[,]" id. In construing the phrase "drug paraphernalia," Kupihea looked only to the plain language of the statute in construing that phrase. Inasmuch as the instant case does not involve statutory construction, as indicated, the legislative intent cannot be discerned by looking directly to the language of the statute itself.

Likewise, in Akina, 73 Haw. at 78, 828 P.2d 271, the defendant, who had been convicted of custodial interference, asserted that the statute was intended to prevent "child snatching, that is, interference of custody awarded upon divorce." The plain language of the statute however, prohibited one from "knowingly tak[ing] or entic[ing] a person less than eighteen years old from his lawful custodian, knowing that he has no right to do so." Id. (quoting HRS § 707-727). This court explained that the plain language of the statute "[made] it a crime to knowingly interfere with lawful custody of a child below the age of eighteen and is clearly intended to protect the interests of the minor and that of the minor's lawful custodian in the parent-child relationship." Id. at 79, 828 P.2d at 272. Thus, Akina concluded that custodial interference "was not limited to custody arising from divorce[.]" Id. Again, in Akina, this court consulted only the plain language of the statute in rejecting the defendant's narrow interpretation of the statute. In the instant case, inasmuch as the determination of the harm or evil sought to be prevented by the prohibition set

forth under HRS § 134-7(b) is not discernable from the statute itself, this court is not faced with an assertion by Petitioner that the statute should be narrowly construed to exclude her from the scope of the statute, as asserted by the defendants in Akina and Kupihea. Rather, Petitioner contends that her conduct in the instant case did not actually cause or threaten the harm which the statute was designed to prevent, i.e., gun crimes.

Similarly, in Ornellas, the ICA's determination of the purpose of the statute essentially tracked the language of the statute itself. The ICA concluded that the purpose of the statute entitled "Abuse of family or household members; penalty," was to "prevent violence between those persons denoted as 'household members.'" 79 Hawaiʻi at 423, 903 P.2d at 728. To reiterate, HRS § 134-7(b) states nothing about the prevention of gun crimes or "reduc[ing] the risk that persons convicted of certain crimes will commit further crimes using firearms[.]" Majority opinion at 23. Contrary to the majority's argument, unlike in the foregoing cases, the harm or evil sought to be prevented by HRS § 134-7(b) cannot be determined from the plain language of the statute. See majority opinion at 19.

B.

As stated, the majority concludes that "[t]he purpose of the prohibition in HRS § 134-7(b) is to reduce the risk that persons convicted of certain crimes will commit further crimes using firearms[,]" and the fact that "[t]he statutory language explicitly proscribes the possession of 'any firearm or ammunition' by a person convicted of a felony[,] . . . reflects

the determination by the legislature that the possession of firearms or ammunition by certain categories of people raises an unacceptable risk that those items will be used for unlawful purposes." Majority opinion at 23 (emphases in original) (quoting HRS § 134-7(b)).

First, it is undisputed that Petitioner's conduct violated the statute as the majority poses it. The relevant question is not whether Petitioner's conduct falls within the language of HRS § 134-7(b), which is not in question for purposes of HRS § 702-236, but rather, whether the circumstances satisfied the requirements of HRS § 702-236.

Second, the legislative history to which the majority cites, precisely states, as noted before, that because "the possession of firearms and/or ammunition by persons having a prior record of convictions for violent crimes gives rise to a reasonable apprehension that such persons might use such firearms for criminal and violent purposes," the legislature deemed "making such possession a felony [as] urgent and necessary for protection of the general public." 1968 Haw. Sess. Laws Act 19, § 1 at 23 (emphases added). The legislative history upon which the majority relies indicates that the legislature was manifestly concerned with felons, whose possession of firearms or ammunition the legislature deemed to give rise to a "reasonable apprehension" that such firearms or ammunition would be used for "criminal and violent purposes." Id.

Additionally, the 1971 amendment of HRS § 134-7(b) to, inter alia, expand the scope of the prohibition to include all

felons, was intended to prevent "gun crimes" and "crimes involving the illegal possession and use of firearms[.]" S. Stand. Comm. Rep. No. 524, in 1971 Senate Journal, at 1036 (emphases added); see also majority opinion at 23 (stating that "[t]he purpose of the prohibition in HRS § 134-7(b) is to reduce the risk that persons convicted of certain crimes will commit further crimes using firearms"). In that light, and considering all of the relevant attendant circumstances, including the fact that Petitioner lacked the means of firing the bullet, Petitioner's conduct did not give rise to a "reasonable apprehension" that the single bullet would be used for "criminal and violent purposes."[11] S. Stand. Comm. Rep. No. 524, in 1971 Senate Journal, at 1036. Thus, it cannot be said to that the court abused its discretion in determining that Petitioner did not actually cause or threaten that harm which HRS § 134-7 seeks to prevent.[12]

Third, HRS § 702-236 does not preclude or limit its application to any statute, much less, HRS § 134-7(b). The majority asserts that the "evolution [of the statute] reflects a steady expansion of the scope of the statute, culminating in the decision in 1971 to prohibit 'all' felons from possessing

[11] Contrary to the majority's contention, this opinion does not find Petitioner's seeming lack of culpability to be "dispositive." Majority opinion at 30. To the contrary, it is that factor, considered with all of the other factors submitted to and considered by the court, that supports upholding the court's discretion in the instant case.

[12] The majority does not indicate why, other than the fact that she was a felon, Petitioner was the "type" of felon with which the legislature was concerned.

firearms or ammunition." Majority opinion at 30-31.[13] The majority's position is seemingly that one's status (as a felon), coupled with the possession of a firearm or ammunition, ipso facto disqualifies him or her from dispensation under the first prong of HRS § 702-236(1)(b). Id. at 27. But nothing in the language of the legislative history of HRS § 702-236(1)(b) indicates that a violation of HRS § 134-7(b) could never be de minimis under the first prong. Contrary to the majority's assertion that the plain language of HRS § 134-7 does not support a finding that Petitioner's possession did not actually cause or threaten the harm of evil sought to be prevented by that statute, the plain language of HRS § 134-7 neither precludes the application of HRS § 702-236 nor limits the application of HRS § 702-236(1)(b) to the second prong. Indeed, the majority acknowledges that Petitioner's possession of a single bullet "may still constitute a de minimis infraction under HRS § 702-236(1)(b) if it 'did not actually cause or threaten the harm or evil sought to be prevented[.]'" Id. at 15 (quoting Viernes, 92 Hawaiʻi at 134, 988 P.2d at 199). The majority's acknowledgment of that fact undermines its assertion that the possession of any ammunition disqualifies Petitioner from de minimis consideration under the first prong of HRS § 702-236(1)(b). Additionally, this view has already been precluded by Viernes.

[13] Again, the "steady expansion" argument undermines the majority's assertion that in the instant case, the intent of the legislature can be ascertained simply by looking directly at the statute. See majority opinion at 19.

In Viernes, 92 Hawaiʻi at 130, 988 P.2d at 195, the prosecution argued "that the circuit court erroneously dismissed the charge against [the defendant] of promoting a dangerous drug in the third degree, pursuant to HRS § 712-1243 (1993 & Supp. 1998)." That section provided in pertinent part that "[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." Id. at 130 n.1, 988 P.2d at 195 n.1. This court rejected the prosecution's argument that the court erroneously dismissed that charge against the defendant because "the quantity of methamphetamine possessed by [the defendant] was infinitesimal and unusable as a narcotic, and was thereby incapable of causing or threatening the harms sought to be prevented by HRS § 712-1243[.]" Id. at 133, 988 P.2d at 198. Notwithstanding the statute's clear prohibition against the possession of "any dangerous drug in any amount[,]" HRS § 712-1243 (emphases added), this court explained that under HRS § 702-236, an offense of the statute "may be de minimis where it 'did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense.'" Id. at 134, 988 P.2d at 199 (brackets omitted). The Viernes court stated that "[u]nder certain circumstances, this may, . . . trump the 'any amount' requirement of HRS § 712-1243." Id. (citation omitted).

The Viernes court went on to determine that "[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.'" Id. (quoting H. Conf. Comm. Rep.

No. 1, in 1972 House Journal, at 1040). It was noted that "[t]he legislature increased the penalties attendant to the possession or distribution of methamphetamines 'to counter increased property and violent crimes.'" Id. (quoting 1996 Haw. Sess. Laws Act 308, at 970). Thus, this court concluded that "if the quantity of a controlled substance is so minuscule that it cannot be sold or used in such a way as to have any discernible effect on the human body, it follows that the drug cannot lead to abuse, social harm, or property and violent crimes." Id. To reiterate, Viernes indicates that the fact that HRS § 134-7(b) prohibits the possession of "any firearm or ammunition therefor[,]" does not ipso facto disqualify a violation of the statute from de minimis review under the first prong of HRS § 702-236.

Fourth, I respectfully disagree with the majority's assertion that because Petitioner had a prior felony conviction for third-degree promotion of a dangerous drug, she "fits squarely within [the] category of offenders that was of particular concern to the legislature." Majority opinion at 32 (emphasis added). The 1968 legislative history to which the majority cites in support of this contention specifically referenced "persons convicted of crimes involving the possession . . . of depressant or stimulant drugs" because at that time, the statute specifically prohibited persons convicted of "possession . . . of narcotics, or any depressant or stimulant drug," from possessing or controlling any firearm or ammunition. See 1968 Haw. Sess. Laws Act 19, § 1 at 23-24 (emphasis added). Most tellingly, as acknowledged by the majority, "the legislature

subsequently amended HRS § 134-7(b) in 1980 '<u>to remove from the scope of section 134-7 those who have been convicted of the use or possession of drugs, unless such conviction is a felony[.]</u>'" Majority opinion at 32 (quoting Conf. Comm. Rep. No. 30-80, in 1980 Senate Journal, at 955; 1980 Haw. Sess. Law Act 233, § 1 at 411) (emphasis added) (brackets in original). Therefore, the legislative history to which the majority cites, regarding the legislature's concern with those convicted of mere possession of drugs, was nullified.

The statute under which Petitioner was convicted of promoting a dangerous drug in the third degree states in pertinent part that "[a] person commits the offense of promoting a dangerous drug in the third degree if the person knowingly <u>possesses</u> any dangerous drug in any amount." HRS § 702-1243(1) (Supp. 2004) (emphasis added). To reiterate, HRS § 134-7(b) presently reads:

> (b) No person who is under indictment for, or has waived indictment for, or has been bound over to the circuit court for, or has been convicted in this State of elsewhere of having committed a felony, or any crime of violence, or an <u>illegal sale of any drug</u> shall own, possess, or control any firearm or ammunition therefor.

(Emphasis added.) Hence, contrary to the majority's position, with regard to offenses involving narcotics, HRS § 134-7(b) specifically references only those who have been convicted of an "illegal <u>sale</u> of any drug[,]" and not those convicted of mere possession. <u>Id.</u> (emphasis added). The majority cannot fairly rely on legislative history pertaining to a section of HRS § 134-7 that was subsequently "remove[d]."

In a seeming attempt to prove that the above-stated legislative history still applies to the current version of HRS § 134-7 applicable in the instant case, the majority asserts that because the legislature indicated that HRS § 134-7 would not apply to those convicted of mere possession of drugs, "unless such conviction is a felony[,]'" the legislature "made clear its intention that the 'use or possession of prohibited drugs[,]' where such use or possession results in a felony conviction, would remain within the prohibitions of HRS § 134-7(b)." Majority opinion at 32 (quoting Conf. Comm. Rep. No. 30-80, in 1980 Senate Journal, at 955; 1980 Haw. Sess. Laws Act 233, § 1 at 411) (brackets in original) (emphases added). That rationale is clearly tautological. Persons convicted of possession or use of drugs, where such conviction is a felony, fall within the scope of HRS § 134-7 not because the legislature was specifically concerned with such persons, but because HRS § 134-7 prohibits all felons, whether or not the conviction is drug-related, from possessing ammunition or firearms. In any event, with respect to drug related offenses, the scope of HRS § 134-7(b) expressly refers only to the "illegal sale of any drug[.]" Thus, that legislative history does not apply to the instant case.[14]

[14] Assuming arguendo, that because HRS § 134-7 encompasses persons convicted of felony drug possession, the legislative history upon which the majority relies remains applicable, Petitioner does not fall squarely within the category of persons with which the legislature was concerned. The legislative history cited by the majority states that persons convicted of crimes involving the possession or sale of depressant or stimulant drugs "are particularly dangerous when they are apprehended or when they are under the influence of narcotics or drugs, and must therefore be prevented from the possession of firearms for the public interest." 1968 Haw. Sess. Laws Act 19, § 1 at 23 (emphasis added). Thus, that legislative history reveals the legislature's concern specifically with the possession of firearms. Even if that language were to continue to apply to HRS § 134-7, the legislature felt that persons convicted of possession of drugs must be specifically prohibited

(continued...)

V.

With respect to its second argument, although the court concluded that Petitioner's conduct did not actually cause or threaten the harm sought to be prevented by HRS § 134-7(b), the majority also argues that Petitioner failed to establish that her conduct "was too trivial to warrant the condemnation of conviction[.]" Majority opinion at 33. In support of this argument, the majority contends that (a) Petitioner addressed her alleged conduct solely through the declaration of counsel, id. at 37, (b) Petitioner did not explain certain matters the majority raises sua sponte on certiorari, id.; see infra, (c) the court did not enter a finding regarding whether Petitioner's explanation for possessing the bullet was credible, id. at 38, and (d) certain "factors weigh against granting the motion[,]" id. at 47.

A.

As to contention (a), the majority asserts that "[t]he only evidence offered by [Petitioner] in support of her motion was the declaration of her counsel, which omitted many of the relevant attendant circumstances." Id. at 3. The majority further states that Petitioner "offered no further evidence or testimony to corroborate that asserted explanation."[15] Id. at

[14](...continued)
from possessing firearms and in the instant case, Petitioner possessed a single bullet without the capacity to fire it. No firearm or other weapon was found within her control.

[15] In further support of its argument that Petitioner failed to corroborate her explanation, the majority cites to State v. Carmichael, 99 Hawaiʻi 75, 53 P.3d 214 (2002). Majority opinion at 35-36. In Carmichael, after the defendant Carmichael had been arrested for driving under the influence, he was found to be in possession of a glass pipe containing a white (continued...)

37. First, there is no requirement under HRS § 134-7(b) that a defendant address her conduct in a particular manner. Second, there is no indication that Respondent challenged the fact that Petitioner addressed her conduct solely through her counsel's declaration. If Respondent wanted to challenge that procedure, it was obligated to do so in its memorandum in opposition to the motion or at the hearing on the motion. State v. Moses, 102 Hawaiʻi 449, 456, 77 P.3d 940, 947 (2004) ("As a general rule, if a party does not raise an argument at trial, that argument will be deemed to have been waived on appeal[.]") (Citations omitted.); State v. Hoglund, 71 Haw. 147, 150, 785 P.2d 1311, 1313 (1990) ("Generally, the failure to properly raise an issue at the trial level precludes a party from raising that issue on appeal." (Citing State v. Cummings, 49 Haw. 522, 423 P.2d 438 (1967).)); State v. Rodgrigues, 67 Haw. 496, 498, 692 P.2d 1156, 1158 (1985) (holding that the State, "propound[ing] only the theory of consent to the search" at the trial level, had waived the theories "of exigency and a 'good faith' exception" because "[i]t is a generally accepted rule that issues not raised at the

[15](...continued)
crystalline substance and a brown, burnt substance, two metal scrapers, a small plastic straw and several ziplock bags containing a light rock residue. Id. at 76, 53 P.3d at 215. Carmichael was charged, inter alia, with promoting a dangerous drug in the third degree, which he subsequently moved to dismiss that charge as de minimis pursuant to HRS § 702-236. Id. at 77, 53 P.3d at 216.

The majority contends that this court observed in the plurality opinion that the defendant "must 'adduce evidence regarding both the conduct alleged and the attendant circumstances in order to support a finding that the alleged conduct was de minimis.'" Majority opinion at 36 (quoting Carmichael, 99 Hawaiʻi at 80, 53 P.3d at 219. The plurality found that Carmichael failed to do so. Carmichael is manifestly inapposite inasmuch as the court in the instant case set forth detailed findings and conclusions recognizing both the conduct alleged and the attendant circumstances in support of the dismissal.

trial level will not be considered on appeal" (citation omitted)). Because Respondent did not raise that objection, the declaration cannot be viably or fairly challenged on appeal or by the majority.

Third, to reiterate, the record indicates that Petitioner did in fact address both the nature of her conduct and the nature of the attendant circumstances through the declaration of counsel. It is undisputed that the court considered this evidence and included them in its findings and conclusions. Thus, Petitioner obviously addressed the attendant circumstances surrounding her possession of the bullet. HRS § 702-236 does not require the defendant to address every conceivable question or circumstance, which the court of appeals conjures up post-hearing. Undoubtedly an infinite number of hypothetical and speculative questions could be posed. But in the instant case, the court considered all of the relevant and material circumstances attendant to Petitioner's possession. The majority does not explain why this amounts to an abuse of discretion.

B.

1.

Apparently, as to contention (b), the majority would have had Petitioner explain (1) "why, if her purpose in possessing the bullet was to make it into a charm for a bracelet, she was carrying it with her while driving at 1:14 a.m. in Waikiki[,]" (2) "why, if her purpose was benign, she concealed the bullet in an intimate part of her clothing[,]" and (3) "where

and when she obtained the bullet, and where she was traveling from and going to when she was stopped by the police." Majority opinion at 37. Notably, none of these questions were ever raised at the hearing or otherwise, much less by Respondent. Nevertheless, the majority faults the court for failing to consider all of the questions which it finds should have been addressed. However, the majority's attempt to point to questions it feels should have been answered is purely makeweight; a seeming attempt to support its assertion that Petitioner failed to present to the court, what it deems to be the relevant attendant circumstances,[16] thus cementing its usurpation of the court's discretion. The majority does not address how those questions are relevant or materially bear on the issue of whether, at the time Petitioner possessed the single bullet, she "actually cause[d] or threaten[ed] the harm or evil sought to be prevented by the law defining the offense or did so only to an

[16] The majority cites to Carmichael, noting that this court has affirmed the court's denial of motions to dismiss a charge as de minimis where "the defendant failed to address the attendant circumstances that [this court] considered to be relevant." Majority opinion at 37-38 n.12 (citing Carmichael, 99 Hawaiʻi at 80, 53 P.3d at 219). Such reliance is misplaced. In Carmichael, the plurality noted that "both at the hearing and on appeal, the defense focused on whether the amount of the drug possessed constituted a useable amount." 99 Hawaiʻi at 80, 53 P.3d at 219. This court said that the defense failed to adduce any evidence or present any argument with respect to other attendant circumstances. Id.

Likewise, in State v. Fukugawa, 100 Hawaiʻi 498, 507, 60 P.3d 899, 908 (2002), this court noted that "the defense focused solely upon the amount of methamphetamine possessed and presented neither testimony nor other evidence regarding the circumstances attendant to [the defendant's] possession of drug paraphernalia and the substance containing methamphetamine."

However, in the instant case, Petitioner did present evidence "attendant to [her] possession[.]" Unlike Carmichael, Petitioner did not focus on a single attendant circumstance. As previously noted, Petitioner addressed and the court considered her possession and all of the relevant attendant circumstances surrounding her possession. Thus, those cases are plainly inapposite.

extent too trivial to warrant the condemnation of conviction[.]" HRS § 702-236.[17]

2.

Additionally, as to contention (b), the fact that Petitioner had the single bullet in her brasserie while driving in Waikiki at 1:14 a.m. is not inconsistent with her assertion that she intended to make the bullet into a charm for a bracelet i.e. "she was going to have [the bullet] made into a charm for a bracelet." Finding 6. See supra note 7. Moreover, those facts are plainly irrelevant. If Petitioner had been driving around with the bullet at 10 a.m. and had kept it in her purse as opposed to her brassiere, would it be more likely that such possession "[d]id not actually cause or threaten the harm or evil sought to be prevented by [HRS § 134-7] or did so only to an extent too trivial to warrant the condemnation of conviction[?]" HRS § 702-236. The majority does not explain how, if answered, those questions are relevant in the instant case. Likewise, where she obtained the bullet and where she was coming from and going to, would not affect the court's determination that in light of all of the circumstances presented to the court, including the fact that Petitioner lacked the ability to fire or otherwise discharge the bullet, the possession of the single

[17] Inasmuch as the majority fails to point to any attendant circumstance that bears on the de minimis analysis, the majority's assertion that its decision "[does] not preclude the possibility that [Petitioner] could carry [her] burden at a later stage of the proceedings in the event a more fully developed record supports dismissal[,]" is illusory. Majority opinion at 3. The majority fails to indicate in any meaningful way, what more "a more fully developed record" would require. The majority references only a list of questions it has created on certiorari.

bullet did not actually "create the danger the statute was designed to prevent[,]" finding 4, i.e., the use of firearms against the public. See supra.

With all due respect, the foregoing questions which the majority poses appear out of thin air. These questions were not raised by any party in the trial proceedings or on appeal. They are not grounded in any matter of record even hinting of relevance or materiality. In my opinion, this clearly invades the province of the court and disregards the standard of review in de minimis cases.

C.

As to contention (c), the majority notes that, in its findings, the court "did not determine whether [Petitioner's] asserted explanation [set forth in finding 6] was credible." Majority opinion at 38. However, Respondent did not challenge the credibility of Petitioner's explanation in its memorandum in opposition to Petitioner's motion to dismiss or at the hearing on the motion. Respondent challenged that finding only insofar as the court characterized the item found in Petitioner's possession as a "bullet" as opposed to a "bullet cartridge or round" or as "ammunition." With the ICA having resolved that issue, Petitioner's explanation is binding on this court. See supra. Again, because Respondent failed to raise this "credibility" objection at the hearing, it cannot be viably or fairly challenged on appeal or relied on by the majority. Moses, 102 Hawaiʻi at 456, 77 P.3d at 947; Hoglund, 71 Haw. at 150, 785 P.2d at 1313; Rodgrigues, 67 Haw. at 498, 692 P.2d at 1158.

Despite the otherwise binding nature of finding 6, the majority maintains that, where a "defendant's explanation for his or her conduct is central to [the] inquiry, it is not sufficient to simply repeat the defendant's explanation without making a finding as to its credibility[.]" Majority opinion at 41. Assuming, arguendo, the centrality of Petitioner's explanation, Respondent did not challenge the credibility of Petitioner's explanation in its memorandum in opposition to Petitioner's motion to dismiss or at the hearing on the motion. In support of this proposition, the majority cites State v. Balanza, 93 Hawaiʻi 279, 283, 1 P.3d 281, 285 (2000), to the effect that "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." See majority opinion at 41 (quoting Balanza, 93 Hawaiʻi at 283, 1 P.3d at 285).[18] However, the foregoing quote by the majority makes apparent that Balanza does not require the court to make an independent finding on credibility. Indeed, Balanza says nothing about "credibility." Neither the facts nor outcome in Balanza turned on the issue of credibility. Rather, Balanza refers only to the factual determinations the court must make with regard to the circumstances of the offense. The court clearly did that in this case.

[18] It is worth noting that the quoted language appears in Balanza under the heading "Standard of Review," after which the court stated that "these findings of fact are reviewed under the clearly erroneous standard." Balanza, 93 Hawaiʻi at 283, 1 P.3d at 285 (citation omitted).

The majority further maintains that "[Respondent's] opposition to [Petitioner's] motion clearly disputed [Petitioner's] characterization of the relevant events, by arguing that '[Petitioner's] possession of ammunition that is capable of being fired, considered with all of the other attendant circumstances, shows that [Petitioner's] conduct was causing or threatening the harm or evil sought to be prevented by the law defining the offense." Majority opinion at 40 (emphasis omitted). As noted before, however, the majority acknowledges that Respondent challenged finding 6 only insofar as it characterized the item found within Petitioner's possession as a "bullet," see id. at 8 n.4, and thus, not as to the credibility of the explanation. Moreover, to assert that a general and indirect challenge to all the attendant circumstances preserves a party's right to challenge a specific finding on appeal improperly circumvents the established "general rule [that] if a party does not raise an argument at trial, that argument will be deemed to have been waived on appeal[.]" Moses, 102 Hawaiʻi at 456, 77 P.3d at 947; Hoglund, 71 Haw. at 150, 785 P.2d at 1313 ; Rodgrigues, 67 Haw. at 498, 692 P.2d at 1158.

The majority further declares that Respondent "challenged [the court's conclusion] 6," by arguing on appeal "that there was no 'determination of credibility with regard to [Petitioner's] explanation'" and therefore, rendered the credibility issue "properly before this court." Majority opinion at 40-41 (brackets omitted). But nowhere in the prosecution's oral or written submissions to the court is the term

"credibility" even mentioned, much less any argument made in that regard. As recounted supra, that argument thus cannot be raised on appeal. Moreover, an argument supporting a challenge to a conclusion on appeal does not amount to a challenge to a finding. To the contrary, inasmuch as findings are the underpinnings of the conclusions, a successful attack on a finding may invalidate one or more conclusion. See Wisdom v. Pflueger, 4 Haw. App. 455, 459, 667 P.2d 844, 848 (App. 1983). "However, an attack on a conclusion which is supported by a finding is not an attack on that finding. If a finding is not properly attacked, it is binding[.]" Id. (emphasis added).

The majority asserts that Pflueger also stated that "if a finding is not properly attacked, any conclusion which follows from it and is a correct statement of the law is valid." Majority opinion at 40 (quoting Pflueger, 4 Haw. App. at 459, 667 P.2d at 848) (internal quotation marks, brackets, and ellipsis omitted). According to the majority, because finding 6 "merely repeats [Petitioner's] explanation, . . . [conclusion] 6 does not 'follow from' [finding] 6." Id. (brackets omitted). That does not change the fact that a challenge to a conclusion (conclusion 6) does not amount to a challenge to a finding (finding 6). Even assuming arguendo, conclusion 6 did not follow from finding 6, because finding 6 was not challenged by Respondent in its memorandum in opposition to Petitioner's motion to dismiss or at the hearing, it is binding. Moses, 102 Hawaiʻi at 456, 77 P.3d at 947; Hoglund, 71 Haw. at 150, 785 P.2d at 1313 ; Rodrigues, 67

Haw. at 498, 692 P.2d at 1158. The language from Pflueger to which the majority cites has no bearing on that proposition.

Finally, the majority states that "although [the court] accurately repeated the explanation[,] . . . it did not find that it was in fact true." Majority opinion at 38 (emphasis omitted). The majority does not point to any authority suggesting a finding is not binding, or that a conclusion cannot "follow[] from" a finding, simply because the court failed to expressly state that an explanation is true. Id. at 40 (quoting Pflueger, 4 Haw. App. at 459, 667 P.2d at 848). However, it can be inferred from both the inclusion of Petitioner's explanation in its findings and in ultimately granting Petitioner's de minimis motion, that the court made an assessment as to Petitioner's explanation. The majority disagrees because in the majority's view, "the wording of [finding] 6 suggests that the [] court reserved decision on the credibility of [Petitioner's] proffered explanation." Id. at 38 n.13 (emphasis added).

The court could not have "reserved" an evaluation of the explanation inasmuch as it was one of the attendant circumstances. Thus, finding 6 had to have been made and was properly made a part of the court's findings. While the majority contends that "[i]t is not surprising that [the court] failed to make a finding on the credibility of the explanation, since there was insufficient information in the record to enable it to do so[,]" majority opinion at 38-39, on the face of the decision, Petitioner's explanation was considered and entered into the court's findings for whatever weight the court in its discretion

chose to give it. By dint of its decision, this explanation was weighed by the court in conjunction with all other circumstances. Resting on the evaluation of the attendant circumstances as a whole, the court plainly arrived at its ultimate conclusion.

Thus, in any event, based on the circumstances set forth in its written decision, the court exercised its discretion in favor of dismissal.[19] It is not within the province of this court to second-guess the court's determination on that issue. Eastman, 81 Hawaiʻi at 139, 913 P.2d at 65 ("An appellate court will not pass upon the trial judge's decisions with respect to the credibility of witnesses, . . . because this is the province of the trial judge.") (Emphasis added.)

The majority argues alternatively that even if Petitioner's explanation is accepted at face value, it does not establish that her conduct was de mimimis because "it does not state that [Petitioner] intended to render the bullet inoperable

[19] The majority cites State v. Park, 55 Haw. 610, 525 P.2d 586 (1974), for the proposition that the court must consider the surrounding circumstances. Majority opinion at 33. In Park, the defendants were primary election candidates charged with failing to file a statement of expenses. The district court dismissed the charges as to some defendants who had filed statements after the deadline but before prosecution, based on its conclusion that such infractions were de minimis. Id. at 613, 525 P.2d at 589. In Park, this court highlighted several factors which this court found the court failed to consider under the facts of that case. This court noted that "the district court did not consider the merits of this issue on an individual basis." Id. at 616, 525 P.2d at 591. This court further observed that "[t]he record in each case is utterly bare of the attendant circumstances surrounding [the] violation." Id. at 617, 525 P.2d at 592. Hence this court held that the court's dismissal was an abuse of discretion. Id.

However, in the instant case, the court did "consider the merits of [petitioner's motion] on an individual basis." Id. at 616, 525 P.2d at 591. Furthermore, unlike Park, the record is not "utterly bare of the attendant circumstances surrounding [the] violation." Id. at 617, 525 P.2d at 592. To the contrary, the court specified several circumstances surrounding the violation, including the fact that no gun, weapons, or other means of firing the bullet was found in Petitioner's possession or control. Finding 7. Additionally, Petitioner was arrested for a traffic violation and the use of firearms or ammunition was not a factor leading to Petitioner's arrest. Finding 3 and Conclusion 1.

in doing so." Majority opinion at 43. While it is difficult to see how one could make a bullet into a charm for a bracelet without rendering it inoperable,[20] it must be observed again that Petitioner's explanation in finding 6 is binding on this court. There is nothing in the record to indicate that the court's findings as to Petitioner's explanation and the surrounding circumstances were clearly erroneous. Hence, such findings circumscribe this court's review.

Moreover, the majority appears to single out Petitioner's explanation regarding her possession of the single bullet as opposed to a consideration of all of the attendant circumstances considered by the court as a whole. It is axiomatic that "[a]n appellate court will not pass upon the trial judge's decisions with respect to . . . the weight of the evidence, because this is the province of the trial judge." Eastman, 81 Hawaiʻi at 139, 913 P.2d at 65 (emphasis added). By placing greater weight upon this one factor as opposed to the other factors incorporated in the findings, the majority itself weighs the evidence and improperly invades the province of the court.

D.

As to contention (d), the majority contends that both the fact that "possession of ammunition . . . is a class B felony," and the fact that it is a felony "involving conduct that has the potential for serious public safety consequences[,]" are

[20] See supra note 7 regarding bullet jewelry.

"factors [which] weigh against granting the motion." Majority opinion at 47. This court has never held that the fact that a charge is a felony should disqualify or "weigh" against granting a de minimis motion. That proposition clashes with the express language of HRS § 702-236. Indeed, as noted before, in Viernes this court found the defendant's possession of a controlled substance to be de minimis notwithstanding the fact that any possession constituted a class C felony. 92 Hawaiʻi at 134, 988 P.2d at 199. HRS § 702-236 requires only that the court consider the nature of the defendant's conduct and all of the attendant circumstances in deciding whether to dismiss a charge as de minimis. To instruct a court on remand that certain other factors "weigh against granting the motion[,]" as the majority does, again, usurps the discretion expressly afforded the court by HRS § 702-236 and our case law.

The majority also notes that "this court and the ICA have considered the seriousness of the alleged conduct in determining whether the trial court abused its discretion in ruling on a motion[.]" Majority opinion at 46. The majority first points to State v. Schofill, 63 Haw. 77, 621 P.2d 364 (1980). In that case, the defendant agreed to sell an undercover officer a quarter ounce of cocaine in exchange for $550. Id. at 79, 621 P.2d at 367. The defendant was charged with promoting a dangerous drug in the first degree. Id. at 78, 621 P.2d at 366. The trial court dismissed the indictment based in part on its conclusion that the alleged offense was a de minimis infraction under HRS § 702-236. Id. This court reversed the trial court,

stating that "[t]raffic in narcotics can hardly be said to be a de minimis offense." Id. at 83, 621 P.2d at 370.

While Schofill rejected the argument that drug trafficking constituted a de minimis offense, this court has held that the possession of narcotics can be de minimis under certain circumstances. Viernes, 92 Hawaiʻi at 130, 988 P.2d at 195. The distinction is obvious. As previously stated, possession crimes are most often a means of preventing some other harm or evil. Thus, there inevitably will be certain circumstances where one's possession may not necessarily implicate the harm which the legislature intended to prevent. In those instances, when a court determines that one's possession did "not actually cause or threaten the harm or evil sought to be prevented . . . or did so only to an extent too trivial to warrant the condemnation of conviction[,]" the court has discretion to dismiss that charge as de minimis. HRS § 702-236. In this case, the court determined that Petitioner's possession of the single bullet did not actually cause or threaten the harm sought to be prevented by the law. Based on the circumstances in this case, it was within the court's discretion to do so.

The majority also cites State v. Johnson, 3 Haw. App. 472, 475, 653 P.2d 428, 431 (1982), for the same proposition. See majority opinion at 47. In that case, after drinking one or two beers, the defendant crossed the centerline of a highway, struck an oncoming car, and caused the death of the passenger therein. Id. at 474-75, 653 P.2d at 431. The defendant was charged with negligent homicide in the first degree. Id. at 473,

653 P.2d at 430. After trial, the defendant was convicted of negligent homicide in the second degree which stated in relevant part that "[a] person is guilty of the offense of negligent homicide in the second degree if he causes the death of another person by the operation of a vehicle in a manner which is simple negligence." Id. (quoting HRS § 707-704 (1976)).

On appeal, the defendant argued, inter alia, that the trial court erred when it denied his motion for acquittal on the ground that his conduct constituted a de minimis offense under HRS § 702-236. Id. at 484, 653 P.2d at 436-37. The ICA affirmed the trial court stating that, "where a death results from one's negligence, we deem it an assault on good sense to argue that the violator's actions were de minimis." Id. Obviously, the instant case is not one in which Petitioner's actions caused a death. HRS § 134-7(b) prohibits possession of firearms or ammunition by certain persons as a means of preventing crimes involving firearms. The instant case did not involve death, but also under the attendant circumstances, Petitioner's conduct did not threaten the risk of death. In that regard, Johnson is clearly inapplicable.

VI.

Finally, while the majority repeatedly emphasizes that "[i]nsofar as the defendant advances a motion to dismiss on de minimis grounds, it is the defendant, and not the prosecution, who bears the burden of proof on that issue[,]" majority opinion at 18, 35 (emphases omitted), the majority fails to take into consideration that, as noted before, once the court makes a

decision to dismiss a prosecution as de minimis, "the burden of establishing abuse of discretion is on appellant, and a strong showing is required to establish it." Hinton, 120 Hawaiʻi at 273, 204 P.3d at 492 (emphasis added). Accordingly, while Petitioner had the burden of establishing her conduct was de minimis in support of her motion to dismiss, once the court granted Petitioner's motion, Respondent bore the burden of establishing that the court abused its discretion by "a strong showing." Id.

As recounted, on appeal, Respondent challenged (1) conclusion 1, arguing that "it is also an important purpose of HRS § 134-7(b) to protect law enforcement officers, correctional officers, jail staff, and detainees from criminal activity involving the use of firearms and ammunition with the assistance of felons convicted of certain crimes[,]" (emphasis omitted), (2) conclusion 4, insofar as the court found that the single bullet could not be used to harm anyone, (3) finding 5, that a single "bullet" was found in Petitioner's brassiere, and finding 6, that Petitioner's explanation for possessing the "bullet" was that she was going to have it made into a charm for a bracelet, but only insofar as the court characterized the item found in Petitioner's possession as a "bullet" as opposed to a "bullet cartridge or round" or as "ammunition," and (4) conclusion 6, that Petitioner met her burden of showing that the de minimis statute applies, because the fact that the bullet was "capable of being fired, considered with all of the other

attendant circumstances," shows that "[Petitioner's] conduct was causing or threatening the harm or evil sought to be prevented."

As to challenge (1), as stated, the specific focus raised by Respondent is not specifically or expressly noted in HRS § 134-7(b) or its legislative history, but is nevertheless subsumed under the broader purpose of HRS § 134-7(b) of protecting the public. As to challenge (2), the court determined that Petitioner lacked the means of firing or discharging the bullet because no gun, weapon, or other means of firing the bullet was found in her possession or control. Therefore, the court concluded that Petitioner's possession of the single bullet could not be used to harm anyone. The court's finding was based on the attendant circumstances of this case as opposed to speculation or theories regarding the possible ways in which any bullet could have been used. As to challenge (3), the ICA adequately resolved that issue, finding that the term "bullet" was sufficient to satisfy the meaning of ammunition under § 134-7(b). To reiterate, as to challenge (4), the court looked at the attendant circumstances at the time Petitioner was found in possession of the bullet, not hypothetical or speculative theories regarding the ways in which a bullet is "capable of being fired." Additionally, the findings and conclusions support the court's conclusion 6 in this case. See supra. Therefore, it was not an abuse of discretion on the court's part to base its review on the attendant circumstances of the instant case.

In light of the foregoing, it is apparent that Respondent failed to carry its burden of making the "strong

showing" required to establish an abuse of discretion. Hinton, 120 Hawaiʻi at 273, 204 P.3d at 492. The term "strong" means, inter alia, "having particular quality in great degree," "compelling," and "well established." Webster's Third New Int'l Dictionary 2265 (1966). With the ICA having resolved Respondent's challenges as to findings 5 and 6, Respondent's remaining challenges were to (a) the court's finding that the bullet could not be used to harm anyone and (b) the court's conclusion that Petitioner met her burden of establishing that the de minimis statute applies.

In its Opening Brief, Respondent supported challenge (a) by noting that it brought to the attention of the court that "it was possible that the bullet in question could have been fired from a 'home made device.'" (Emphasis added.) Respondent states that "[a]mong the many possible scenarios that could threaten harm in these circumstances is the possibility that [Petitioner] or another detainee . . . could have . . . constructed a 'home made' firearm to harm or threaten to harm officers or other detainees." (Emphases added.) Respondent further states that "assuming arguendo that it was impossible to construct such a 'home made' firearm, there is still the possibility that the ammunition could have been exploded in a more uncontrolled fashion by striking the primer with something hard or by heating the ammunition until the gunpowder combusted." (Emphasis added.)

Respondent's burden of "strong showing" would seemingly require Respondent to point to something beyond mere speculation

and unsupported theories to overcome the court's determination that the bullet could not be used to actually cause the harm under the statute, inasmuch as no gun, weapon, or other means of firing the bullet were found in Petitioner's possession or control. In light of the actual attendant circumstances, Respondent's arguments are neither "compelling," "well established," nor of "particular quality in great degree." Webster's Third New Int'l Dictionary at 2265. Such arguments do not "strongly" show that the court's determination that at the time Petitioner was arrested, the bullet could not be used to harm anyone, was a clear abuse of its discretion.

In support of challenge (b), Respondent argues that (i) "[Petitioner] failed to produce any evidence to rebut [Respondent's] representation that the ammunition was operable and had in fact been test fired"; (ii) Petitioner failed to "present evidence that the ammunition would inevitably have been detected by the HPD matron and taken from [Petitioner] before she was placed in custody"; (iii) Petitioner failed to "present evidence that it was impossible or even unlikely that the ammunition could have been used as an explosive device by [Petitioner] or anyone who might have gained possession of the ammunition from Petitioner" (emphases added); and (iv) there was no "determination of credibility with regard to [Petitioner's] explanation 'that she was going to have [the ammunition] made into a charm for a bracelet" (brackets in original). As to argument (i), Petitioner did not dispute that the bullet was operable. The relevant question is whether possession of that

"operable" bullet actually caused or threatened that harm sought to be prevented by HRS § 134-7(b). As to arguments (ii) and (iii), Respondent in effect contends that Petitioner must present evidence to disprove every hypothetical and speculative theory regarding how the bullet could have been used to cause the harm sought to be prevented by HRS § 134-7(b).

The majority focuses on Respondent's argument (iv) in support of its argument that Petitioner failed to carry her burden of demonstrating that her possession of a bullet was too trivial to warrant conviction. See majority opinion at 37-39. However, as noted, Respondent failed to raise this issue in its memorandum in opposition to Petitioner's motion to dismiss, nor at the hearing on the motion. Therefore, Respondent's argument should not be considered on appeal. See Moses, 102 Hawaiʻi at 456, 77 P.3d at 947; Hoglund, 71 Haw. at 150, 785 P.2d at 1313; Rodgrigues, 67 Haw. at 498, 692 P.2d at 1158. Even if the credibility of Petitioner's explanation could be properly challenged on appeal, such argument would not amount to a strong showing that the court abused its discretion. As stated before, the court based its dismissal on the circumstances as a whole. Respondent has failed to demonstrate that as a whole those circumstances were either improperly considered or failed to support the decision of the court.

As stated, Respondent bore the burden of establishing that the court's decision amounted to a clear abuse of discretion. See supra. Respondent failed to address the court's reliance on the fact that the use of firearms or ammunition was

not a relevant factor in leading to Petitioner's arrest, and the fact that Petitioner's prior convictions did not include crimes of violence. Rather, Respondent focused on "home made" devices never found to be within Petitioner's possession or control, and purely speculative theories regarding the conceivable ways in which the bullet could have been used to cause harm. Additionally, on appeal, Respondent improperly questioned Petitioner's explanation for possessing the bullet. Under these circumstances, Respondent failed on appeal to carry its burden of proving an abuse of discretion, and to make the "strong showing" required to establish it.

The majority asserts that even if a "strong showing" is required, the court was required to consider all of the relevant attendant circumstances and its "failure to consider those circumstances, the consideration of which is required by HRS § 702-236, means that [the court] has disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Majority opinion at 42 (internal quotation marks and citation omitted). The majority further asserts that "[w]here the issue is whether a trial court applied incorrect legal principles in exercising its discretion, [this court] freely review[s] the court's decision to determine whether the law was correctly applied." Id. (citations omitted).

First, Respondent never argued that the court failed to consider all of the relevant attendant circumstances, much less, that such failure "means that [the court] has disregarded rules or principles of law or practice to the substantial detriment of

a party litigant." Id. (internal quotation marks and citation omitted).

Second, while the majority insists that the court failed to consider the attendant circumstances, the majority does not point out what, in addition to what was considered by the court, Petitioner should have presented. The majority asserts only that Petitioner failed to explain why she had the bullet on her at the time she was arrested, or why it was concealed in her brassiere, or where she obtained the bullet and where she was traveling from and going to at the time she was stopped. Majority opinion at 37. As noted before, these matters are patently remote from the relevant "attendant circumstances" and lack even a hint of any relevance or materiality based on the facts of the instant case. Thus these items do not support a conclusion that the court failed to consider the attendant circumstances, much less, abused its discretion.

Third, the majority alters the abuse of discretion standard of review applicable in de minimis cases. That standard of review does not allow a court of appeals to "freely review the court's decision" where there is an issue of "whether [the] trial court applied incorrect legal principles in exercising its discretion[.]" Id. at 42. The standard of review in de minimis cases is clear and well established. A court of appeals must determine whether the court abused its discretion by "clearly exceed[ing] the bounds of reason or disregard[ing] rules or principles of law or practice to a substantial detriment of a party litigant[,]" Hironaka, 99 Hawaiʻi at 204, 53 P.3d at 812;

Viernes, 92 Hawaiʻi at 133, 988 P.2d at 198, and "the burden of establishing abuse of discretion is on appellant, and a strong showing is required to establish it[,]" Hinton, 120 Hawaiʻi at 273, 204 P.3d at 492.

VII.

While one may not necessarily agree with the ultimate dismissal of the charge in Count I, it cannot be concluded that the court exceeded the bounds of reason or violated principles of law or practice in a manner that was clearly improper. Thus, as an appellate court with limited review, we are bound to uphold that dismissal. In holding otherwise, the majority manifestly usurps the office of the court.

For these reasons, I respectfully dissent.