CONCURRING AND DISSENTING OPINION BY ACOBA, J.

While I concur in the result reached by the majority, I dissent as to the majority's definition of the term "fee," as used in Hawai'i Revised Statutes (HRS) § 712-1200(1) (1993),[1] to mean money or material gain for sexual conduct. In my view, the term "fee" must be strictly interpreted to refer to money or property. This narrower interpretation is mandated by the rule of lenity, which holds that where a criminal statute is ambiguous or susceptible to more than one construction, it must be strictly construed against the government, and by due process which requires that statutes must be construed in a manner that allows a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited so that he or she may choose between lawful and unlawful conduct. See infra.

I.

The District Court of the First Circuit (the court) convicted Petitioner/Defendant-Appellant Jing Hua Xiao (Petitioner) for prostitution pursuant to HRS § 712-1200(1). The conviction arose from a police investigation during which Petitioner "slow" danced and "rubb[ed] her pelvis" against an undercover police officer after the officer purchased drinks for Petitioner. The question presented on certiorari is whether the Intermediate Court of Appeals (ICA) gravely erred in affirming

[1] HRS § 712-1200(1) provides that "[a] person commits the offense of prostitution if the person engages in, or agrees or offers to engage in, sexual conduct with another person for a fee."

Petitioner's conviction based on its conclusion that there was sufficient evidence to convict her of prostitution.

Petitioner maintains that "there is absolutely no evidence adduced that the drink [Petitioner] received constituted a fee." On appeal to the ICA, Petitioner argued that "[t]he term fee has not been defined by statute [and t]herefore, the common meaning of 'fee' is controlling." Thus, Petitioner asserted that "fee is money paid for a service." Petitioner further maintained that "[i]f the legislature in its wisdom had chosen to define fee as property or the [sic] services, it would have done so." In support of this assertion, Petitioner noted that HRS § 712-1201 (1993)[2] "defines 'profits from prostitution' as accepting or receiving money or other property pursuant to an agreement." According to Petitioner, because no such definition was provided for the term "fee," it therefore "takes on the common meaning of monetary compensation." Petitioner argues in her Application that "there is absolutely no evidence adduced that would confirm that [Petitioner] received monetary compensation from anyone for the purchase of the drink." (Emphasis omitted.)

Respondent/Plaintiff-Appellee State of Hawaiʻi (Respondent) argued on appeal to the ICA that "the term 'fee' is

[2] HRS § 712-1201, applicable to the offense of promoting prostitution, defines advancing prostitution as follows:

> A person "advances prostitution" if, acting other than as a prostitute or a patron of a prostitute, he knowingly causes or aids a person to commit or engage in prostitution, procures or solicits patrons for prostitution, provides persons for prostitution purposes, permits premises to be regularly used for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.

generally not limited to money or property." In support of its conclusion, Respondent stated that "fee" is defined as "'a charge or payment for services, a sum paid or charge for a privilege; a gratuity or tip'" or as "'payment asked or given for professional services.'" (Quoting Random House Dictionary of the English Language 521 (1973); Webster's New World Dictionary 496 (3d ed. 1988).) Thus, Respondent maintained that payment "can easily involve other consideration [and t]here is no limitation, explicit or implied, that a 'fee' consists of only money, [because] a fee is simply a payment, in whatever form, given for 'professional services.'" (Emphasis added.) Respondent argued therefore, that nothing supported Petitioner's assertion "that the common meaning of fee is 'money paid for a service.'" (Emphasis in original.)

II.

The definition of the term fee includes "property, money; akin to . . . money," "a fixed charge for admission (as to a museum)[,] a charge fixed . . . by an institution (as a university)[,] . . . compensation often in the form of a fixed charge for professional services[,]" "[to] give a gratuity [or tip,]" or "to reward or pay for . . . personal services[.]" Webster's Third New Int'l Dictionary 833 (1961). Thus, the term "fee," as used in HRS § 712-1200(1), could be defined as money or property, or could be more broadly construed to include other forms of compensation or consideration.

However, where a criminal statute is susceptible of more than one construction, the narrower or stricter construction

should be adopted pursuant to the rule of lenity. State v. Bayly, 118 Hawaiʻi 1, 15, 185 P.3d 186, 200 (2008) (stating that the rule of lenity "makes it more appropriate to adopt a less expansive meaning of the term 'collision'"); State v. Aiwohi, 109 Hawaiʻi 115, 129, 123 P.3d 1210, 1224 (2005) (stating that "if the language were viewed as ambiguous, the statute would . . . have to be strictly construed in favor of [the defendant] and against the prosecution"); State v. Shimabukuro, 100 Hawaiʻi 324, 327, 60 P.3d 274, 277 (2002) (plurality opinion) ("Where a criminal statute is ambiguous, it is to be interpreted according to the rule of lenity . . . [and u]nder the rule of lenity, the statute must be strictly construed against the government and in favor of the accused."); State v. Soto, 84 Hawaiʻi 229, 247, 933 P.2d 66, 84 (1997) (stating that under the rule of lenity, it the court's task to construe the statute strictly); State v. Bautista, 86 Hawaiʻi 207, 210, 948 P.2d 1048, 1051 (1997) ("[A]mbiguous penal statutes are to be construed in favor of the accused." (Quoting State v. Aluli, 78 Hawaiʻi 317, 321, 893 P.2d 168, 172 (1995) (Brackets in original.))) (Other citation omitted); see also, State v. Kaakimaka, 84 Hawaiʻi 280, 292, 933 P.2d 617, 629 (1997) ("'Th[e] policy of lenity means that the court will not interpret a state criminal statute so as to increase the penalty that it places on an individual[.]'" (Quoting Simpson v. United States, 435 U.S. 6, 15 (1978).)) (Brackets omitted.).

In Bayly, 118 Hawaiʻi at 3-4, 185 P.3d at 188-89, recently decided by this court, police officers were dispatched

to a parking lot where Bayly's vehicle was found hanging off the concrete parking area. Following a field sobriety test, Bayly was arrested for operating a vehicle under the influence of an intoxicant (OUI). Id. at 4, 185 P.3d at 189. Bayly was subsequently charged with OUI and inattention to driving. Id. at 3, 185 P.3d at 188. Following a bench trial, the district court acquitted Bayly of the OUI charge but found him guilty of inattention to driving in violation of HRS § 291-12.[3] Id. at 5, 185 P.3d at 190. The ICA affirmed Bayly's conviction.

On certiorari, this court first turned to State v. Williams, 114 Hawaiʻi 406, 163 P.3d 1143 (2007), and explained that

> [t]his court recently examined, although in a different context, a similar "collision" requirement in HRS § 291E-21 (Supp. 2004), which mandates that police officers take a blood sample to determine intoxication in the event of a "collision" where the officer has probable cause to believe a person involved committed an enumerated traffic offense.

118 Hawaiʻi at 12, 185 P.3d at 197 (citing Williams, 114 Hawaiʻi 406, 163 P.3d 1143). It was noted that the dictionary definition of collision stated that "'[c]ollision' is defined as 'the action or an instance of colliding, violent encounter, or forceful striking together typically by accident and so as to harm or impede.'" Id. (quoting Williams, 114 Hawaiʻi at 410, 163 P.3d at 1147 (quoting Webster's Third New Int'l Dictionary at 446)).

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[3] The statute in effect at the time of the alleged offense provided:

> **Inattention to driving.** Whoever operates any vehicle without due care or in a manner as to cause a collision with, or injury or damage to, as the case may be, any person, vehicle or other property shall be fined not more than $500 or imprisoned not more than thirty days, or both[.]

HRS § 291-12 (Supp. 2006) (emphasis added).

This court next examined Alexander v. Home Insurance Co., 27 Haw. 326, 326-27 (Haw. Terr. 1923), in which the sole question was whether the insurer was liable under the "collision clause" of its policy for damages which resulted when the insured's vehicle accidently capsized on to the road. Bayly, 118 Hawaiʻi at 12, 185 P.3d at 197. According to Bayly, the Alexander court, in concluding that the accident did not involve a collision, "relied upon the generally accepted meaning of the word, rather than what it termed the 'technical lexicographical definition,' under which the accident might be classified as the 'striking together of two bodies' and thus a 'collision.'" Id. at 13, 185 P.3d at 198 (citing Alexander, 27 Haw. at 328) (emphasis added). Notably, this court stated that "the instant case arises under the penal law, where the basic canons of statutory construction counsel in favor of a less expansive definition[,]" and "'[w]here a criminal statute is ambiguous, it is to be interpreted according to the rule of lenity. Under the rule of lenity, the statute must be strictly construed against the government and in favor of the accused." Id. at 15, 185 P.3d at 200 (quoting Shimabukuro, 100 Hawaiʻi at 327, 60 P.3d at 277). Thus, this court declared that the rule of lenity "makes it more appropriate to adopt a less expansive meaning of the term 'collision.'" Id. This court therefore adopted the definition of "collision," which requires the vehicle make "contact with a 'perpendicular object obstructing the course of the vehicle's progress.'" Id. (quoting Alexander, 27 Haw. at 328 (brackets omitted)).

Hence, under principles of lenity, "the narrower or stricter construction [of the term fee] should be adopted." Aiwohi, 109 Hawaiʻi at 129, 123 P.3d at 1224 (stating that "if the language were viewed as ambiguous, the statute would . . . have to be strictly construed in favor of [the defendant] and against the prosecution"); Shimabukuro, 100 Hawaiʻi at 327, 60 P.3d at 277 (plurality opinion) ("Where a criminal statute is ambiguous, it is to be interpreted according to the rule of lenity . . . [and u]nder the rule of lenity, the statute must be strictly construed against the government and in favor of the accused."); Soto, 84 Hawaiʻi at 247, 933 P.2d at 84 (stating that under the rule of lenity, it the court's task to construe the statute strictly); Bautista, 86 Hawaiʻi at 210, 948 P.2d at 1051 ("[A]mbiguous penal statutes are to be construed in favor of the accused." (Quoting Aluli, 78 Hawaiʻi at 321, 893 P.2d at 172. (Brackets in original.))); Kaakimaka, 84 Hawaiʻi at 292, 933 P.2d at 629 ("Th[e] policy of lenity means that the court will not interpret a state criminal statute so as to increase the penalty that it places on an individual[.]") (Brackets, internal quotation marks, and citation omitted.). Under the rule of lenity then, the term "fee" should be given the narrower or stricter construction referring to money or property.

III.

Furthermore, due process mandates that "'[s]tatutes must give the person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited so that he or she may choose between lawful and unlawful conduct.'" State v.

Gaylord, 78 Hawaiʻi 127, 138, 890 P.2d 1167, 1178 (1995) (quoting State v. Lee, 75 Haw. 80, 92-93, 856 P.2d 1246, 1254 (quoting State v. Kameenui, 69 Haw. 620, 621, 753 P.2d 1250, 1251 (1988))); see also, Aiwohi, 109 Hawaiʻi at 136, 123 P.3d at 1231 (Acoba J., concurring) ("Inhering in the [due process clause of the Hawaiʻi Constitution] is the premise that 'a penal statute is vague if a person of ordinary intelligence cannot obtain an adequate description of the prohibited conduct or [of] how to avoid committing illegal acts.'" (Quoting State v. Kam, 69 Haw. 483, 487, 748 P.2d 372, 375 (1988).)) (Brackets omitted.).

Consistent with the mandates of due process, under general principles of statutory construction, "[t]he words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning." HRS § 1-14 (1993) (emphasis added). "Words are given their common meaning unless some wording in the statute 'requires a different interpretation.'" Keliipuleole v. Wilson, 85 Hawaiʻi 217, 221, 941 P.2d 300, 304 (1997) (quoting Saranillio v. Silva, 78 Hawaiʻi 1, 10, 889 P.2d 685, 694 (1995)) (other citation omitted).

Likewise, in Bayly, after reviewing the possible interpretations of the term "collision," this court determined that "[b]ased on Williams and Alexander, as well as the mandate of HRS § 1-14 that 'the words of a law be understood in their most known and usual signification,' . . . the term 'collision' in HRS § 291-12 should be understood in a colloquial, rather than

a technical sense." 118 Hawaiʻi at 14, 185 P.3d at 199 (brackets and ellipsis omitted). As previously stated, this court thus held that, "'collision' generally refers to 'an automobile coming in contact with some other vehicle or some perpendicular object obstructing the course of its progress[,]'" because "the term 'collision' in HRS § 291-12 should carry its common meaning, and not the more expansive technical definitions used in some contexts." Id. at 14-15, 185 P.3d at 200.

It would seem that the term "fee" is most generally or popularly used to refer to money or property. The definition includes "a fixed charge for admission," "a charge fixed . . . by an institution," "compensation often in the form of a fixed charge," or "to give a gratuity [or tip]," most commonly requiring payment in money. Websters Third New Int'l Dictionary at 833 (emphases added). Thus, while one could imagine an infinite number of ways in which one could "reward or pay for . . . personal services," id., the term "fee" should be construed so as to "be understood in [its] most known and usual signification" -- that fee refers to money or property. HRS § 1-14. This interpretation would afford a person of ordinary intelligence a reasonable opportunity to know what conduct is prohibited by the statute. See Gaylord, 78 Hawaiʻi at 138, 890 P.2d at 1178. Consequently, such an interpretation would comport with due process.

IV.

However, the majority quotes Muse v. United States, 522 A.2d 888 (D.C. 1987), where that court "recognized that '[a]n essential element of prostitution is money or material gain in exchange for illicit sexual activity.'" Majority opinion at 18 (quoting Muse, 522 A.2d at 891 (emphasis in original)) (brackets in original) (bolded emphasis omitted). The majority, "persuaded by the District of Columbia Court of Appeals' interpretation of the word 'fee[,]'" as set forth in Muse, "agree[s] that a 'fee' is not explicitly limited to monetary compensation, but includes payment in the form other than money and, therefore, conclude[s] that a 'fee[]' . . . is money or a 'material gain' for sexual conduct." Id.

Additionally, the majority cites to State v. Tookes, 67 Haw. 608, 699 P.2d 983 (1985), for the proposition "that prostitution 'is triggered by a sale of sexual services[.]'" Id. at 19 (quoting Tookes, 67 Haw. at 614, 699 P.2d at 987 (brackets in original)) (emphasis added). The majority asserts that "[t]he dictionary defines 'sale' as 'the act of selling[,]'", or as "'to persuade or induce someone to buy (something).'" Id. (quoting Webster's Encyclopedic Unabridged Dictionary of the English Language 1262 (1989)) (brackets omitted).

Of historical significance, this court was previously faced with the very question of the definition of the term fee under HRS § 712-1200(1) in State v. Makalii, No. 24832, 2002 WL

31230815, at *1 (Haw, Oct. 2, 2002) (SDO).[4] In responding to the majority's assertion that a "ride into town" in exchange for a "hand job" constituted a fee, Justice Ramil stated that "[t]he word 'fee' in [HRS § 712-1200] is commonly understood in our daily lives to mean money or other property. When one thinks of the word 'fee' the most common examples that come to mind are

[4] Although the statutory term "fee" was construed in Makalii, 2002 WL 31230815, at *1, the decision was not published. The defendant pointed out that the opinion should have been published because,

> [a]nnouncing, for the first time, that "fee" for purposes of prostitution means any "item of value" by way of an unpublished summary disposition order further erodes the probable constitutionality of the majority's interpretation. As an unpublished order, Hawaii's citizens remain unaware that prostitution, by judicial interpretation, consists of soliciting or engaging in sexual contact for any "item of value," which includes transportation. Thus, the majority's order does not inform Hawaiiʻs citizens of what conduct is prohibited, nor how to act accordingly. Moreover, since the majority's order cannot be cited or relied upon as precedent, it fails to provide the requisite guidance to police officers, judges, and juries. For example, the decision cannot be cited to judges as authority for crafting jury instructions. As such, juries will not be consistently and fully instructed on the law.

2002 WL 31230815, at *2 (Order Denying Reconsideration) (Acoba, J., dissenting, joined by Ramil, J.) (emphasis added).

For this reason,

> [the] decision should [have] be[en] published, as was requested by Justice Ramil. See [Makalii, 2002 WL 31230815, at *1 n.1 (SDO)] (Ramil, J., dissenting, joined by Acoba, J.) ("Because the case at bar raises a very important issue dealing with the statutory construction of the word 'fee,' I strongly feel that it is critical for this court to publish this opinion."). . . . We, as a court of last resort, should endeavor to provide guidance to the litigants and the courts. See Zanakis-Pico v. Cutter Dodge, Inc., 98 Hawaiʻi 309, 326 n.1, 47 P.3d 1222, 1239 n.1 (2002) (Acoba, J., concurring) ("[W]e should endeavor to provide as much guidance as possible to the parties, counsel, and the trial courts[.]"). Our duty to do so in this case is obligatory for the reasons Defendant enumerates. See Shimamoto, *Justice is Blind, But Should She be Mute?*, 6 Hawaii Bar Journal 6, 7 (2002) ("'A court of final decision, . . . because it has the last word, must provide that word in order to incorporate the case into the body of law.'" (Quoting Hoffman, Publicity and the Judicial Power, 3 J. App. Prac. & Process 343, 348 (2001).)).

Id.

tuition fees, filing fees, or any tangible property given in exchange for professional services, admissions, tuition, etc." Id. (Ramil, J., dissenting, joined by Acoba, J.).

In the instant case, one describing a "fee" would not refer to it as "material gain" or a "sale," as the majority poses it. Majority opinion at 18. "Were one to refer to [a fee] . . . without giving further details, the mind of the auditor would naturally visualize" a payment for services in the form of money or property. Alexander, 27 Haw. at 328-29. Moreover, in my view, the concept of "material gain[,]" majority opinion at 18, as an alternative means of proving that a person has "engage[d] in, or agree[d] or offer[ed] to engage in, sexual conduct with another person for a fee[,]" HRS § 712-1200(1) (emphasis added), further creates ambiguity with respect to the term "fee." Under the majority's definition of "fee," in the absence of evidence that the person accused of committing the offense of prostitution received monetary compensation, the prosecution, court, and alleged offender would have the daunting task of ascertaining whether the accused had obtained a "material gain." The concept of "material gain" only substitutes one ambiguity for another. While advocating "material gain" as an alternative means of proving the element of a "fee," the majority offers no explanation for, or guidance regarding, its definition. The difficultly in applying or ascertaining whether a "ride into town," Makalii, 2002 WL 31230815 at *1, or a single alcoholic drink constitutes a material gain is abundantly apparent. The concept of "material gain" is expansive and nebulous, and where

we are called upon to define an already ambiguous term, we should refrain from interpretations that serve only to produce another layer of ambiguity.

As reiterated, the majority cites Tookes for the proposition "that prostitution 'is triggered by a sale of sexual services[.]'" Majority opinion at 19 (quoting Tookes, 67 Haw. at 614, 699 P.2d at 987 (brackets in original) (emphasis added)). The foregoing reference further injects ambiguity into HRS § 712-1200(1). That statute does not employ the term "sale" at all; to reiterate, HRS § 712-1200(1) requires proof that one "engage[d] in, or agree[d] or offer[ed] to engage in, sexual conduct with another person for a fee." The majority's interpretation however, seemingly requires proof of elements beyond those set forth in the statute, i.e., a "sale."

V.

In this case, the undercover officer purchased drinks for Petitioner. If Petitioner had actually "engage[d] in, or agree[d] or offer[ed] to engage in, sexual conduct for" money or drinks, such could, under appropriate circumstances, constitute a "fee" for purposes of HRS § 712-1200(1), inasmuch as, in my view, the term "fee" in HRS § 712-1200(1) would include money or property. While I disagree with the majority's construction of the term "fee," because I agree with the majority that there was insufficient evidence to convict Petitioner, I concur in the result.