

DISSENTING OPINION OF ACOBA, J.,
WITH WHOM RAMIL, J., JOINS

I agree with Defendant-Appellant Cheyenne Makalii (Defendant) that the rule of lenity applies in the case at bar. The rule requires that in criminal cases, "[w]hen language [in a statute is] reasonably susceptible of two constructions[,] . . . ordinarily [the narrower or stricter] construction . . . will be adopted." State v. Vallesteros, 84 Hawai'i 295, 302, 933 P.2d 632, 639 (1997) (quoting State v. Rogers, 68 Haw. 438, 444, 718 P.2d 275, 278 (1986)). The term "fee," as employed in Hawai'i Revised Statutes (HRS) § 712-1200 (1993) is ambiguous, and thus, the narrower interpretation supported by common usage – that fee refers to money or tangible property – should be applied.

I further agree with the assertion by Defendant that a decision in this case should be published, as was requested by Justice Ramil. See State v. Makalii, No. 24833, slip op. at 2 n.1 (Haw. Oct. 2, 2002) (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."). As Defendant points out in his motion, the majority, in

[a]nnouncing, for the first time, that "fee" for purposes of prostitution means any "item of value" by way of an unpublished summary disposition order further erodes the probable constitutionality of the majority's interpretation. As an unpublished order, Hawaii's citizens remain unaware that prostitution, by judicial interpretation, consists of soliciting or engaging in sexual contact for any "item of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 Hawaii's 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.

(Emphasis added). 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 Hawai'i 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).)).

Accordingly, I would grant reconsideration and order that this case be published.