***** NOT FOR PUBLICATION *****

DISSENTING OPINION BY LEVINSON, J.

I dissent.

Armed only with a dictionary, in State v. Rulona, 71 Haw. 127, 128-29, 785 P.2d 615, 616 (1990), this court deliberately but mistakenly read the requirement of "penetration, however slight," out of the statutory construct of "sexual penetration," as defined in HRS § 707-700, when it came to the offense of sexual assault in the first degree by way of an act of cunnilingus, in violation of HRS § 707-730(1)(b), with the following whimsical flourish:

> Sexual penetration is defined, among other things, in HRS § 707-700 as including cunnilingus. Cunnilingus is not defined in the penal code. The word is derived from the Latin word "cunnus" meaning the vulva and the Latin verb "linctus[,]" the act of licking, and thus is defined as the stimulation of the vulva, or clitoris, with the lips or tongue. See Webster's New International Dictionary (3d ed. 1976).
>
> It may seem anomalous that touching the vulva with the penis, without physical penetration, would apparently constitute sexual contact[, as defined by HRS § 707-700,] and, hence, in the case of a child . . . , would constitute third degree sexual assault, while touching the same spot with the tongue, without penetration, would nevertheless constitute sexual penetration for the purposes of the [HPC], and thus be sexual assault in the first degree. Nevertheless, it is the legislature's prerogative to act anomalously if it wishes. The language of the statute is clear. . . .

Rulona, 71 Haw. At 128-29, 785 P.2d at 616 (emphasis added). We corrected our error in State v. Mueller, 102 Hawai'i 391, 394-98, 76 P.3d 943, 946-50 (2003).[1] However, by virtue of the circuit court's jury instructions regarding Count I, which

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[1] Effective May 10, 2004, and in response to Mueller, the legislature amended the definitions of "sexual contact" and "sexual penetration," pursuant to HRS § 707-700, in various material respects. See 2004 Haw. Sess. L. Act 61,, pt. I, §§ 2-3 at ___; Sen. Conf. Comm. Rep No. 35-04, in 2004 Senate Journal, at ___; Hse. Conf. Comm. Rep. No. 35-04, in 2004 House Journal, at ___; Sen Stand. Comm. Rep. No. 3121, in 2004 Senate Journal, at ___.

mischaracterized the material element of "sexual penetration by fellatio" within the meaning of HRS § 707-730(1)(c) and were therefore prejudicially erroneous, inconsistent, and misleading, the majority opinion turns a blind eye to the real risk that the jury made the same mistake in this case regarding first-degree-sexual-assault-by-fellatio that we did in Rulona regarding first-degree-sexual-assault-by-cunnilingus. Accordingly, the majority opinion wishes away the real risk that "there is a reasonable possibility that [the circuit court's] error may have contributed to [Lameg's] conviction." See State v. Rabago, 103 Hawai'i 236, 245-46, 81 P.3d 1151, 1160-61 (2003) (quoting State v. Van Dyke, 101 Hawai'i 377, 383, 69 P.3d 88, 94 (2003) (quoting State v. Aganon, 97 Hawai'i 299, 302, 36 P.3d 1269, 1272 (2001))). I am simply unable to grasp how the majority can believe, as a matter of law and beyond a reasonable doubt, that the jury in this case possessed more wisdom than this court did in Rulona.

At the close of the evidentiary phase of the trial, the circuit court charged the jury with Court's Instruction No. 33, given by agreement, as follows:

> COURT'S INSTRUCTION NO. 33
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> In Count I, the Defendant, Edison Barit Lameg, is charged with the offense of Sexual Assault in the First Degree.
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> A person commits the offense of Sexual Assault in the First Degree if he knowingly engages in sexual penetration with a minor who is at least fourteen years old but less than sixteen years old and the person is not less than five years older than the minor and the person is not legally married to the minor.
>
> There are five material elements of the offense of Sexual Assault in the First Degree, each of which the prosecution must prove beyond a reasonable doubt.
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> These five elements are:
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> 1. That, on or about October 6, 2001, in the City and County of Honolulu, State of Hawaii, the Defendant, Edison Barit Lameg, engaged in sexual penetration with [the

> complainant]; and
> 2. That the Defendant did so knowingly; and
> 3. That [the complainant] was at least fourteen years of age but less than sixteen years old at that time; and
> 4. That the Defendant was not less than five years older than [the complainant] at that time; and
> 5. That the Defendant was not legally married to [the complainant] at that time.

(Emphasis added.) Also by agreement of the parties, the circuit court charged the jury with Court's Instruction No. 34, defining "sexual penetration":

> COURT'S INSTRUCTION NO. 34
> "Sexual penetration" means vaginal intercourse, fellatio, or any intrusion of any part of a person's body into the genital opening of another person's body. It occurs upon any penetration, however slight, but emission is not required.

(Emphases added.) Over Lameg's objection, however, the circuit court charged the jury with Court's Instruction No. 35, which was taken from a dictionary, as follows:

> COURT'S INSTRUCTION NO. 35
> Fellatio means a sexual act in which the mouth or lips come into contact with the penis.

(Emphasis added.)

Obviously, the circuit court correctly instructed the jury that "[s]exual penetration means vaginal intercourse, fellatio, or any intrusion of any part of a person's body into the genital opening of another person's body. It occurs upon any penetration, however slight, but emission is not required." (Emphases added.) However, the circuit court then erroneously, inconsistently, misleadingly, and prejudicially instructed the jury that "[f]ellatio means a sexual act in which the mouth or lips come into contact with the penis" (emphasis added), thereby wrongly implying -- with echoes of Rulona -- that oral-penile "contact," without actual penetration, however slight, was

sufficient to establish "sexual penetration" for purposes of proving a violation of HRS § 707-730(1)(c).

Unlike the majority, I am convinced that there is a reasonable possibility that the circuit court's erroneous instruction may have contributed to Lameg's conviction. Although some evidence of penetration was adduced at trial via Officer Kagawa's testimony regarding what he "would say" he had observed, the prosecution's own closing argument highlighted the ambiguity of the circuit court's jury instruction, the deputy prosecuting attorney asserting that "[sexual penetration] means vaginal intercourse [and] fellatio, among other things," and that "[fellatio] includes what occurred as far as [the complainant kissing [Lameg's] penis] [and placing her] mouth around his penis." Inasmuch as "kissing" would have entailed mere "contact," as opposed to actual penetration, there is a "reasonable possibility" that the jury may have harbored reasonable doubt as to Officer Kagawa's testimony regarding penetration but still have found that the complainant kissed Lameg's penis, such that Lameg could have been convicted of sexual assault in the first degree on the basis of mere "sexual contact" and in the absence of "sexual penetration." Such an eventuality would not only have contravened the plain language of HRS §§ 707-730(1)(c) and 707-700, but would also have violated the "Modica Rule," see Mueller, 102 Hawai‘i at 396-97, 76 P.3d at 948-49 (quoting State v. Arceo, 84 Hawai‘i 1, 22, 928 P.2d 843, 864 (1996)), because Lameg's conviction of a class A felony, sexual assault in the first degree, in violation of HRS § 707-

730(1)(c), would then have been based on a finding of mere oral-penile "sexual contact," which would also have supported his conviction of a class C felony, sexual assault in the third degree, in violation of HRS § 707-732(1)(c) (Supp. 2001).

For the foregoing reasons, I would (1) affirm the circuit court's judgment of conviction and sentence as to Count II, (2) vacate the circuit court's judgment of conviction and sentence as to Count I, and (3) remand this matter to the circuit court for further proceedings consistent with this opinion.