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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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E. M. RIVANDO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

vs.

PAME ANN MARY LEILANI ROMANO, Defendant-Appellant

NO. 26110

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(CASE NO. 1P103-00755 OF 8/26/03; HPD CR. NO 03024777)

FEBRUARY 27, 2007

MOON, C.J., NAKAYAMA, ACOBA, AND DUFFY, JJ.;
AND LEVINSON, J., DISSENTING

OPINION OF THE COURT BY ACOBA, J.

We hold that Defendant-Appellant Pame Ann Mary Leilani Romano (Defendant) has not established, as she argues on appeal, that (1) "[Plaintiff-Appellee State of Hawai'i (the prosecution)] failed to support a prima face [sic] case of prostitution because the [prosecution] failed to prove . . . that Defendant was not a law enforcement officer," (2) the [prosecution] failed to present sufficient evidence to support a prima face [sic] case of prostitution," (3) "there was insufficient evidence adduced to support a finding of guilt," and (4) "Lawrence v. Texas[, 539 U.S. 558 (2003),] renders Hawai'i Revised Statutes [(HRS)] § 712-

1200 et. seq. unconstitutional as applied in this case." (Capitalization omitted.) Therefore, Defendant's August 26, 2003 judgment of conviction and sentence by the district court of the first circuit (the court)[1] for the offense of prostitution, HRS § 712-1200(1) (Supp. 2006),[2] is affirmed.

I.

A.

Trial began on August 13, 2003, and the evidence following was adduced. On January 18, 2003, Officer Jeffrey Tallion was on duty with the Narcotics/Vice Division of the Honolulu Police Department Morals Detail. He testified he was on assignment investigating prostitution in the Waikīkī area. Tallion related that the investigations involved "checking into hotel rooms and then . . . either go[ing] on to the street or . . . set[ting] up appointments either in the telephone book or 'Pennysaver,' 'Midweek,' or internet cases."

In preparation for his undercover operation, Tallion obtained a hotel room at the Aston Waikiki Beach Hotel and

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[1] The Honorable Faye Koyanagi presided.

[2] HRS § 712-1200(1) states 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." HRS § 712-1200(2) defines "sexual conduct," inter alia, as "sexual contact." HRS § 707-700 (1993) defined sexual contact as:

> [A]ny touching of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts.

The definition of sexual contact in HRS § 707-700 was amended in 2004, see Haw. Sess. L. Act 61, § 3 at 303, by adding the phrase "other than acts of 'sexual penetration'" after "any touching" in the first sentence. The amendment does not affect our analysis in this case.

dressed in civilian clothes. He browsed through the "Pennysaver" newspaper and called the phone number on a massage advertisement. When Defendant answered the phone call, Tallion asked if she did "out calls." At this time, there was no discussion of any illicit conduct or sexual acts.

Tallion set up an appointment with Defendant and they met on the street in front of the Aston Waikiki Beach Hotel, but then moved to Tallion's hotel room. In court, Tallion positively identified Defendant as the individual he met outside on January 18, 2003.

Upon arriving in the room, Tallion confirmed that the price of an out call was $100 and then asked Defendant whether "she did anything else." Defendant responded, "Like what? Dance?" Tallion responded, "No," so Defendant asked, "Well, what do you have in mind?"

Tallion then answered, "Well, I was referring to a blowjob."[3] Defendant replied, "No, hands only." Tallion clarified, "So no blowjob, so handjob." Defendant responded, "Yeah, I can do that." Tallion asked the cost and Defendant responded, "Add 20." Tallion reconfirmed with, "Oh, $20 for a handjob?" and Defendant replied, "Yes." Tallion testified that a handjob is street vernacular commonly used in prostitution for "assisted masturbation."

[3] In State v. Lunceford, 66 Haw. 493, 496-97, 666 P.2d 588, 591 (1983), this court said the term "blowjob" is "recognized by a large segment of the adult population in Hawaii as [an expression] describing sexual conduct in slang" and the term could be found in The American Heritage Dictionary of the English Language under both "blow job" and "fellatio."

Following Defendant's reply, Tallion "gave a pre-determined signal" and the arrest team entered the hotel room. Tallion apprised Honolulu police officer William Lurbe of the facts and Lurbe placed Defendant under arrest.

Tallion testified that he had been with the Morals Detail for three years; he was involved in 400 prostitution cases in 2002 as either the undercover or arresting officer; maybe five of the prostitution cases were initiated from "Pennysaver" ads; and after the talk about "handjob," Defendant added $20.00 to her quoted $100.00 charge for the out-call service. On cross-examination, Tallion recounted that he found Defendant's advertisement in "Pennysaver's" Massage/Acupuncture Section and not the Adult Section. He also related that "hands only" could have meant what a masseuse actually does.

In his testimony, Lurbe testified that he arrested Defendant for prostitution on January 18, 2003, after being "informed by [Tallion] that he [had] obtained a prostitution violation from [Defendant], which was assisted masturbation for $20." On cross-examination, Lurbe indicated that Tallion notified him of the violation via cellular phone.

Following Lurbe's testimony, the prosecution rested. Defendant moved for a continuance "to subpoena, investigate and talk to witnesses who were in the room adjoining this, this room." Over the prosecution's objection, the court continued the case to August 26, 2003.

B.

On August 21, 2003, Defendant filed a "Motion to Dismiss." In the memorandum attached to the motion, Defendant asserted that Lawrence "invalidate[d] Hawaii's prostitution statutes [and] thus[,] the [prosecution's] case [against Defendant] must necessarily fail."

At the start of the proceedings held on August 26, 2003, Defendant moved for a judgment of acquittal, arguing that the prosecution had failed to prove (1) that there was an offer and agreement to engage in sexual conduct for a fee; and (2) that Defendant was "not a police officer, a sheriff, works for the sheriff's department or law enforcement acting in the course or scope of her duties." After hearing from the prosecution, the court denied Defendant's motion.

Defendant's "Motion to Dismiss" was then heard. The court denied the motion, stating that it "[did] not agree with the applicability of [Lawrence] to the instant situation."

Defendant took the witness stand in her own defense and testified that she was a self-employed license massage therapist, she had been a licensed massage therapist for "19 years, going on 20" and her license was current and up-to-date on January 18, 2003. She testified that she placed her ad under the "Body, Mind and Spirit," "Massage," or "Health and Fitness" sections and not under the "Personal" or "Adult" sections.

Defendant also recounted that on January 18, 2003, Tallion immediately asked for a blow job when she entered the

hotel room. She explained that she was "caught off guard" because she was "not the typical person that men want this from," as she was "overweight" and "old."

She reported that after Tallion asked for the "blow job," she put her hands up and stated, "Hey, I only do hands only." She also declared that she was shaking her head "no" at the same time. Defendant then indicated that Tallion repeated his question again and also asked how much it would cost. Defendant again said, "No, hands only." Defendant also maintained that Tallion was "loud," "demanding," and "boisterous."

After Defendant repeated "hands only" again, Tallion asked about handjobs. Defendant claims that she had no intent to commit any kind of sexual contact with Tallion. She explained that she only gave Tallion a figure of $20 because she felt threatened and because of Tallion's loud demands. She then testified about a 1983 incident where "[she] got beat up real bad by this person who [she] had gone to for a job for telephone soliciting."

On cross-examination, Defendant admitted that she "couldn't remember [the conversation between Tallion and herself] word for word." She also stated that Tallion did not block her way to the door leading to the hallway, Tallion did not tell her she could not leave the room, and she did not attempt to use the telephone or walk out of the room. Furthermore, Defendant indicated that she said "yes" when Tallion asked for a handjob,

she knew that handjob could mean assisted masturbation, she told Tallion that the handjob would cost $20.00 extra, and she said "yes" when Tallion reiterated $20.00 for a handjob. On redirect examination, Defendant claimed that she felt trapped because it was not her room, the room "didn't have much room in it," and "she was within arm's reach of [Tallion]."

Following Defendant's testimony, the defense rested. The court found Defendant guilty of the charged offense. Defendant was sentenced to six months' probation and fined $500.00. Judgment was entered on August 26, 2003. Imposition of sentence was continued for thirty days for perfection of appeal.

The court instructed the prosecution to prepare written findings of facts and conclusions of law. The "Findings of Fact, Conclusions of Law, and Order Finding Defendant Guilty After Jury-Waived Trial" were filed on September 26, 2003. Notice of appeal was filed on September 19, 2003.

II.

As noted previously, Defendant raised four issues on appeal.[4] In regard to issue (1), an exception to the offense of

[4] The prosecution answered (1) the prosecution did not have to prove that Defendant was a law enforcement officer acting in the course and scope of her duties, (2) there was sufficient evidence adduced at trial to support Defendant's prostitution conviction, (3) Defendant failed to prove by a preponderance of the evidence that she acted under "duress" when she agreed to engage in sexual conduct with Tallion for a fee, and (4) Hawaii's prostitution statute is not rendered unconstitutional by Lawrence.

Defendant reiterated in her reply brief that the application of HRS § 712-1200 to this case was unconstitutional. We must note that it appears a substantial part of the reply brief corresponds verbatim to the published opinion of the New York City Family Court in In re P., 400 N.Y.S.2d 455, 462-65, 467-69 (Fam. Ct. 1977), rev'd, 418 N.Y.S.2d 597, 605 (App. Div. 1979).

prostitution applies under HRS § 712-1200(5) for "any member of a police department, sheriff or other law enforcement officer acting in the course of and scope of duties." State v. Nobriga, 10 Haw. App. 353, 357-58, 873 P.2d 110, 112-13 (1994), overruled on other grounds by State v. Maelega, 80 Hawai'i 172, 178-79, 907 P.2d 758, 764-65 (1995), is instructive. According to that case, "[t]he general and well-settled common law rule is that where an exception is embodied in the language of the enacting clause of a criminal statute, and therefore appears to be an integral part of the verbal description of the offense, the burden is on the prosecution to negative that exception, prima facie, as part of its main case." Id. at 357, 873 P.2d at 112-13 (footnote and citation omitted). The Intermediate Court of Appeals (the ICA) further noted that "when the exception appears somewhere other than in the enacting clause, and is thus a distinct substantive exception or proviso, the burden is on the defendant to bring forward evidence of exceptive facts that constitute a defense" and, in such an instance, "[t]he prosecutor is not required to negative, by proof in advance, exceptions not found in the enacting clause." Id. at 358, 873 P.2d at 113 (citations omitted).[5]

[5] Further, the ICA noted that the general rule does not apply "when the facts hypothesized in the exceptive provision are peculiarly within the knowledge of the defendant, or the evidence concerning them is within the defendant's private control." Nobriga, 10 Haw. App. at 358, 873 P.2d at 113 (internal quotation marks, brackets, and citation omitted).

In Nobriga, the defendant was cited under Revised Ordinances of Honolulu (ROH) § 7-2.3 (1990),[6] "animal nuisance," for keeping numerous roosters at his home, resulting in complaints from neighbors. Id. at 355, 873 P.2d at 112. At trial, the defendant moved for judgment of acquittal on the premise that the State had failed to prove defendant's conduct did not fall within the exceptions to the animal nuisance law set forth in ROH § 7-2.4(a).[7] Id. at 356, 873 P.2d at 112. The district court denied the motion. The ICA affirmed the denial, stating that the general prohibition against animal nuisance as set forth in ROH §§ 7-2.2 and 7-2.3 govern the elements of the case and "does not incorporate ROH § 7-2.4" as "the exceptions are located in a separate and distinct section of the ordinance." Id. at 359, 873 P.2d at 113.

The ICA also indicated "the burden of proving exceptions to a criminal statute appear to be codified in the

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[6] ROH § 7-2.3 provides, in pertinent part, that "[i]t is unlawful to be the owner of an animal, farm animal or poultry engaged in animal nuisance as defined in Section 7-2.2." ROH § 7-2.2 (1990) defines "Animal nuisance," partly, as follows:

> "Animal nuisance," for the purposes of this section, shall include but not be limited to any animal, farm animal or poultry which:
>
> (a) Makes noise continuously and/or incessantly for a period of 10 minutes or intermittently for one-half hour or more to the disturbance of any person at any time of day or night and regardless of whether the animal, farm animal or poultry is physically situated in or upon private property[.]

[7] ROH § 7-2.4(a) (1990) provides that "[n]othing in this article applies to animals, farm animals or poultry raised, bred or kept as a commercial enterprise or for food purposes where commercial kennels or the keeping of livestock is a permitted use."

Hawai'i Penal Code" pursuant to HRS §§ 701-114(1)(a) (1985) and 702-205 (1985). Id. at 358, 873 P.2d at 113. The ICA declared that HRS § 701-114(1)(a) requires that "the State's burden is to prove, beyond a reasonable doubt, each element of the offense," id. at 358, 873 P.2d at 113; "the elements of an offense" include that which "[n]egative[s] a defense," id.; "HRS § 701-115(1) (1985) defines a 'defense' as 'a fact or set of facts which negatives penal liability,'" id.; but "'[n]o defense may be considered by the trier of fact unless evidence of the specified fact or facts has been presented,'" id. (quoting HRS § 701-115(2)(1985)).

In regard to the penal code requirements, the ICA reiterated that the prosecution "has the initial burden of negativing statutory exceptions to an offense only if the exceptions are incorporated into the definition of the offense." Id. at 359, 873 P.2d at 113. However, as the ICA explained, "[i]f a statutory exception to an offense constitutes a separate and distinct defense, . . . the State's burden to disprove the defense beyond a reasonable doubt arises only after evidence of the defense is first raised by the defendant." Id.

III.

Applying the foregoing formulation, the enacting clause for the offense of prostitution is HRS § 712-1200(1), because this clause "contains the general or preliminary description of the acts prohibited; i.e., proscribes the offensive deed." State v. Lee, 90 Hawai'i 130, 138 n.7, 976 P.2d 444, 452 n.7 (1999)

(citations omitted) (defining the term "enacting clause"). HRS § 712-1200(5) does not prescribe the offense, but states an exception to the offense for law enforcement officers acting "in the course and scope of duties." Similar to Nobriga, then, the exception here, HRS § 712-1200(5), is not located in the same section, HRS § 712-1200(1), as the definition of the offense.[8]

As the exception in HRS § 712-1200(5) would negative the prostitution offense, it constitutes a defense. See Nobriga, 10 Haw. App. at 359, 873 P.2d at 113. In order to claim the benefit of this defense, then, evidence that Defendant fell within the exception must have been adduced. See id. However, Defendant did not adduce any such evidence at trial. Under Nobriga, the prosecution is not required to disprove the defense until there is evidence that the defendant falls within HRS § 712-1200(5). Id. Thus, the prosecution was not required to negate the defense. See HRS § 701-115(2) (1993) ("No defense may be considered by the trier of fact unless evidence of the specified fact or facts has been presented[.]"). There was, then, no defect in the proof of a prima facie case.

IV.

As to issue (2), the prosecution must prove every element of a crime charged and the burden never shifts to the defendant. Territory v. Adiarte, 37 Haw. 463, 470-72 (1947). We recently stated that "'[t]he test on appeal in reviewing the

[8] Moreover, it may be noted that if Defendant was a law enforcement officer, this fact would be peculiarly within Defendant's knowledge or the evidence of such within Defendant's private control.

legal sufficiency of the evidence is whether, when viewing the evidence in the light most favorable to the prosecution, substantial evidence exists to support the conclusion of the trier of fact.'" State v. Agard, No. 27219, 2007 WL 158725, at *3 (Haw. Jan. 23, 2007) (quoting State v. Bui, 104 Hawai'i 462, 467, 92 P.3d 471, 476 (2004)) (other citation omitted). "Substantial evidence" is defined as "'credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to reach a conclusion.'" Id. (ellipses points, brackets, and citations omitted)).

As indicated previously, HRS § 712-1200(1) provides in relevant part that prostitution is committed "if the person . . . agrees . . . to engage in . . . sexual conduct with another person for a fee." Under HRS § 712-1200(2), "sexual conduct" includes "sexual contact," as that term is "defined in section 707-700." In pertinent part, "'sexual contact' meant any touching of the sexual or other intimate parts of a person not married to the actor[.]" HRS § 707-700.

The evidence demonstrated that Defendant agreed to give Tallion a "handjob" for a fee of $20.00. Tallion confirmed with Defendant that the charge for the "out-call" was $100.00. When Tallion said, "So no blowjob, so handjob," Defendant responded, "Yah, I can do that." Tallion then asked whether "that cost extra," and according to Tallion, Defendant answered, "Add 20." Tallion testified he confirmed, "Oh, $20 for handjob," and

Defendant replied, "Yes." This testimony indicates that the $20 added fee was[9] for the handjob.

Defendant argues that agreement for a handjob does not necessarily involve sexual conduct. She contends that Tallion never defined "assisted masturbation" and that although Tallion equated a "handjob" with sexual contact, he did admit that another licensed masseuse had given him a hand massage and, thus, the meaning of "handjob" is not always sexual in nature. The phrase "assisted masturbation" would appear susceptible to common understanding. "Masturbation" is defined, inter alia, as "the stimulation, other than by coitus, of another's genitals resulting in orgasm." Random House Dictionary of the English Language 883 (Unabr. ed. 1973). Genitals describe "the reproductive organs, especially the external sex organs." The American Heritage Dictionary of the English Language (4th ed. 2000), available at http://www.bartleby.com/61/.

Tallion testified that "'[h]andjob' is street vernacular commonly used in prostitution for assisted masturbation." Defendant also testified that she knew that the term "handjob" could mean assisted masturbation.[10] As noted, the meaning of "sexual contact" in HRS § 712-1200(1) included "any

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[9] Tallion also testified he had never been married to Defendant and he had never "lived together as man and wife with [Defendant]." See supra note 2 defining sexual contact.

[10] On cross-examination, the prosecution asked Defendant, "Did you know that 'handjob' could mean assisted masturbation?" and she replied in the affirmative.

touching of the sexual . . . parts of a person[.]" HRS § 707-700. Plainly, the reference to "hand" in the term "handjob" connotes physical contact with genitals. Hence, considered in the strongest light for the prosecution, substantial evidence was adduced that would enable a person of reasonable caution to conclude, see Agard, 2007 WL 158725, at *3, that Defendant agreed to engage in sexual contact with Tallion for a fee.

V.

As to issue (3), HRS § 702-231 (1993) provides in relevant part:

> **Duress**. (1) It is a defense to a penal charge that the defendant engaged in the conduct or caused the result alleged because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.
>
> . . . .
>
> (5) In prosecutions for any offense described in this Code, the defense asserted under this section shall constitute an affirmative defense. The defendant shall have the burden of going forward with the evidence to prove the facts constituting such defense, unless such facts are supplied by the testimony of the prosecuting witness or circumstance in such testimony, and of proving such facts by a preponderance of the evidence pursuant to section 701-115.

(Emphases added.)

"The preponderance standard directs the factfinder to decide whether 'the existence of the contested fact is more probable than its nonexistence.'" Kekona v. Abastillas, No. 24051, 2006 WL 3020312, at *6 (Haw. Sept. 26, 2006) (quoting E. Cleary, McCormick on Evidence § 339, at 957 (3d ed. 1984)) (other citation omitted). Accordingly, "[t]o prevail, [the defendant] need only offer evidence sufficient to tip the scale slightly in his or her favor, and [the prosecution] can succeed by merely

keeping the scale evenly balanced." Id. (internal quotation marks and citations omitted).

Defendant contends her claims "meet the elements of the affirmative defense of duress by a preponderance of evidence." She argues that because the duress claim was "unchallenged by the [prosecution] or the [c]ourt[,] preponderance of the evidence is indeed established." However, the court considered Defendant's affirmative defense of duress and concluded that Defendant did not meet her burden.

Specifically, in its oral finding, the court stated, "[A]s far as the duress defense, the burden--it becomes an affirmative defense and the burden then shifts to the [D]efendant to prove that the duress did in fact occur by preponderance of the evidence, which the [c]ourt does not feel the [D]efendant has met that burden." In its written findings, the court found "Defendant failed to present an adequate defense to the charge." "'A trial court's findings of fact are reviewed under the clearly erroneous standard.'" State v. Keliiheleua, 105 Hawai'i 174, 178, 95 P.3d 605, 609 (2004) (internal quotation marks and brackets omitted) (quoting Dan v. State, 76 Hawai'i 423, 428, 879 P.2d 528, 533 (1994)).

"'A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made." Foo v. State, 106

Hawai'i 102, 112, 102 P.3d 346, 356 (2004) (quoting State v. Okumura, 78 Hawai'i 383, 392, 894 P.2d 80, 89 (1995)). The record indicates that there was substantial evidence to support the finding and that it is not clear that a mistake has been made. See id. at 46, 137 P.3d at 360.

Defendant related that Tallion was "loud" and "demanding" and she only agreed to Tallion's request for a "handjob" because she felt threatened. However, upon cross-examination, Defendant conceded that (1) Tallion had not blocked her egress from the hotel room; (2) Tallion was not holding a weapon when he asked about the "blowjob"; (3) Tallion never told her that she could not leave the room; and (4) she never attempted to use the phone or walk out of the room.

Matters of credibility and the weight of the evidence and the inferences to be drawn are for the fact finder. See Agard, 2007 WL 158725, at *3 (stating that "'appellate courts will give due deference to the right of the trier of fact to determine credibility, weigh the evidence, and draw reasonable inferences from the evidence adduced'" (quoting In re Doe, 107 Hawai'i 12, 19, 108 P.3d 966, 973 (2005) (other citation omitted)) (internal quotation marks omitted)). Defendant did not testify to any "use of, or a threat of use, with unlawful force against [her] person[.]" HRS § 702-231(1). Defendant acknowledged Tallion did not block her exit and she did not attempt to leave. Under these circumstances and giving due deference to the court as fact finder, it cannot be said the

court's finding that Defendant failed to establish duress by a preponderance of the evidence was clearly erroneous. See Fisher, 111 Hawai'i at 46, 137 P.3d at 360.

VI.

As to Defendant's last issue, the dissent agrees with Defendant and argues that (1) "at the time of this court's holding in [State v. Mueller, 66 Haw. 616, 671 P.2d 1351 (1983)], there was no federal precedent addressing whether the criminalization of an utterly private sexual activity (and its associated monetary component) abridged an individual's right to privacy[but] Lawrence created just such a precedent, confirming that individual decisions by married and unmarried persons 'concerning the intimacies of their physical relationship . . . are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment[,]'" dissenting opinion at 8, and (2) "article I, section 6 does not abide the criminalization of wholly private, consensual sexual activity between adults without the state's having demonstrated a compelling interest by way of 'injury to a person or abuse of an institution the law protects,' 539 U.S. at 568[,]" dissenting opinion at 10. We must respectfully disagree with these propositions and discuss them herein.

VII.

The dissent's first position is not tenable because it runs into the specific qualification in Lawrence that excludes

prostitution as part of protected "liberty" under the federal due process clause.

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.

539 U.S. at 578 (emphases added).

Additionally, despite this clear exclusion, the dissent argues that a logical extension of Lawrence precludes the states from exercising their police power to curb prostitution.

> [W]here two consenting adults swap money for sex in a transaction undertaken entirely in seclusion, the analysis of the Lawrence majority, despite the majority's attempt to avoid the notion, leads inexorably to the conclusion that the state may not exercise its police power to criminalize a private decision between two consenting adults to engage in sexual activity, whether for remuneration or not.

Dissenting opinion at 9-10 (emphasis added). But, the dissent's position is not supportable on this premise. The Court has in the past drawn legal boundaries around its decisions, despite the fact that arguably logic would "lead[] inexorably" beyond such strictures. Thus, in State v. Kam, 69 Haw. 483, 748 P.2d 372 (1988), this court recognized that although the Court had held a state "would not be able to prohibit an individual from possessing and viewing . . . pornographic materials in the privacy of his or her own home[,]" id. at 489, 748 P.2d at 376 (citing Stanley v. Georgia, 394 U.S. 557 (1969), "[t]he . . .

Court ha[d] effectively ruled that the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others[,]" Kam, 69 Haw. at 490, 748 P.2d at 376 (internal quotation marks and citation omitted), leading to the paradoxical conflict of a "citizenry['s] . . . right to read and possess material which it may not legally obtain[,]" id. at 491, 748 P.2d at 377. Hence, although the Court's language may seemingly point to broader application, that does not portend an extension of a given proposition especially when, as here, the Court expressly limits the scope of the liberty interest protected.[11]

Furthermore, the dissent misreads Lawrence. As mentioned above, prostitution, i.e., "swap[ping] money for sex," dissenting opinion at 9, is expressly rejected as a protected liberty interest under Lawrence. Lawrence did not involve an exchange of money for sexual relations but focused on the specific sexual conduct, i.e., sodomy, as being outside the scope of legitimate government concern. It is important to remember that "[t]he question before the Court [was] the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct[,]" 539 U.S. at 562, described as "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the

[11] Contrary to the dissent's statement, see dissenting opinion at 9-10, the Court did not draw the distinction between private solicited prostitutions and public solicited prostitutions, assuming, arguendo, public solicitation is absent in this case.

penetration of the genitals or the anus of another person with an object[,]" id. (quoting Texas Penal Code Ann. § 21.01(1) (2003)). Lawrence thus contains a lengthy dissertation on homosexual conduct and sodomy dating back to 1533. Id. at 568-77. As the Court stated, the case involved "two adults who . . . engaged in sexual practices common to a homosexual lifestyle." Id. at 578 (emphasis added).

Assuming, arguendo, that "Lawrence presupposed private sexual activity between two adults fully capable of giving valid consent[,]" dissenting opinion at 22, that does not mean Lawrence sanctioned prostitution in the "[n]arrow[er]," dissenting opinion at 21, form advocated by the dissent. Lawrence simply placed no qualification on excluding prostitution from its holding.

VIII.

In Lawrence, the Court reconsidered its earlier holding in Bowers v. Hardwick, 478 U.S. 186 (1986), where "Hardwick, in his own bedroom, [was observed] engaging in [sodomy] with another adult male." Lawrence, 539 U.S. at 566. In doing so the majority adopted the dissent of Justice Stevens in Bowers, where a sodomy statute similar to that in Texas was upheld by the Bowers majority.[12] In his dissent, Justice Stevens rested on two

[12] The Georgia statute criminalizing sodomy at issue in Bowers, Georgia Code Ann. § 16-6-2 (1984), provides in pertinent part:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . .
> (b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years[.]

(continued...)

contentions.

> First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.

Bowers, 478 U.S. at 216 (Stevens, J., dissenting) (footnote and citations omitted) (emphases added). The majority in Lawrence decided that "Justice Stevens' analysis . . . should have been controlling in Bowers and should control here." 539 U.S. at 578.

Thus, Lawrence invalidated a criminal statute prohibiting the "particular practice" of sodomy because it involved the "intimacies of . . . physical relationship" and such "intimate choices" should be left to unmarried as well as married persons. Id. at 577-78 (emphasis added). Lawrence, then, was concerned with specific conduct seemingly aimed at persons engaged in homosexual relationships. Consequently, Lawrence precludes government interference or regulation of intimate sexual practices or conduct with respect to homosexual as well as heterosexual adults. Such intimate practices or conduct are not at issue in the instant case or prohibited by HRS § 712-1200, the prostitution statute. Lawrence, then, is not federal precedent for the proposition that "private sexual activity" "associated

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[12](...continued)
478 U.S. at 187-88 n.1.

[with a] monetary component," "abridged" the "right to privacy" as the dissent argues. Dissenting opinion at 8.

IX.

As to the dissent's second position, in our view Lawrence as construed above does not vitiate the holding in Mueller. In Mueller, the defendant was charged with "engag[ing] in, or agree[ing] to engage in, sexual conduct with another person, in return for a fee, in violation of [HRS §] 712-1200[,]" 66 Haw. at 618, 671 P.2d at 1354, as Defendant was so charged in the instant case. Somewhat similarly the question posed there was "whether the proscriptions of [HRS] § 712-1200 may be applied to an act of sex for a fee that took place in a private apartment." Id. at 619-20, 671 P.2d at 1354. In affirming the conviction, this court said that "we are not convinced a decision to engage in sex for hire is a fundamental right in our scheme of ordered liberty, . . . [therefore] we affirm [the defendant's] conviction." Id. at 618, 671 P.2d at 1353-54.

Unlike in the instant case, in Mueller "the activity in question took place in [defendant's] apartment, the participants were willing adults, and there were 'no signs of advertising[,]'" 66 Haw. at 618-19, 671 P.2d at 1354 (emphasis added). Despite the dissent's assertion "that the charged transaction," dissent at 22, was "wholly private," id., it is arguable in this case that "public solicitation" was implicated, inasmuch as contact with Defendant was made by way of a newspaper ad soliciting members of the public and the assignation took place in a hotel

as opposed to "the privacy of her own home." Mueller, 66 Haw. at 618, 671 P.2d at 1354.

X.

As to the right of privacy in article I, section 6 of the Hawai'i Constitution, the Mueller majority noted that (1) "a party challenging the statute has the burden of showing unconstitutionality beyond a reasonable doubt[,]" id. at 627, 671 P.2d at 1358 (internal quotation marks and citations omitted), (2) "only personal rights that can be deemed fundamental or implicit in the concept of ordered liberty are included in this guarantee of personal privacy[,]" id. at 628, 671 P.2d at 1359 (internal quotation marks and citations omitted), and (3) "[t]he defendant has directed us to nothing suggesting a decision to engage in sex for hire at home should be considered basic to ordered liberty[,]" id.

Mueller is precedent. "Precedent is an adjudged case or decision of a court, considered as furnishing an example of authority for an identical or similar case afterwards arising or a similar question of law[] . . . and operates as a principle of self-restraint . . . with respect to the overruling of prior decisions." State v. Garcia, 96 Hawai'i 200, 205, 29 P.3d 919, 924 (2001) (brackets, internal quotation marks, and citations omitted) (ellipses points in original). In this regard, "[t]he policy of courts to stand by precedent and not to disturb settled points is referred to as the doctrine of stare decisis[.]" Id. (brackets, internal quotation marks, and citation omitted).

While not having like "force . . . in the context of constitutional interpretation," id. at 206, 29 P.3d at 925, "[t]he benefit of stare decisis is that it furnishes a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; eliminates the need to relitigate every relevant proposition in every case; and maintains public faith in the judiciary as a source of impersonal and reasoned judgments[,]" id. at 205-06, 29 P.3d at 924-25 (brackets, internal quotation marks, citations, and ellipses points omitted).

Consequently, "a court should not depart from the doctrine of stare decisis without some compelling justification." Id. at 206, 29 P.3d at 925 (internal quotation marks, citations and emphasis omitted). "[W]hen the court reexamines a prior holding, [then,] its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." Id. (internal quotation marks, citation, and brackets omitted).

There is no denying that "'[w]hile the outer limits of this aspect of privacy have not been marked by the Court [or this court], it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage . . . , procreation . . . , contraception . . . , family relationships . . . , and child

rearing and education[,]'" Mueller, 66 Haw. at 627, 671 P.2d at 1359 (quoting Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977) (other citations omitted) (some internal quotation marks omitted), and now qualified intimate sexual conduct between or among consenting adults.

The right to privacy has been expanded by the Court in discrete situations. See, e.g., Kyllo v. United States, 533 U.S. 27, 34, 40 (2001) (concluding that the government's use of a thermal imaging device from a public street to detect relative amounts of heat within a private home, which would have been previously unknowable without physical intrusion, constitutes "a search" within the meaning of the Fourth Amendment, and is presumptively unreasonable without a warrant, in order to "assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted"); Roe v. Wade, 410 U.S. 113, 154 (1973) (concluding that "the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation"); Stanley, 394 U.S. at 568 (holding that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime" because although "the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his [or her] own home"); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (holding that a law which forbade the use of contraceptives

unconstitutionally interfered with the "notions of privacy surrounding the marriage relationship").

This court has also extended privacy rights under our own constitution. See, e.g., State v. Cuntapay, 104 Hawai'i 109, 110, 85 P.3d 634, 635 (2004) (holding that "under Article I, section 7 of the Hawai'i Constitution, a guest of a homedweller is entitled to a right of privacy while in his or her host's home" (footnote omitted)); State v. Detroy, 102 Hawai'i 13, 20-22, 72 P.3d 485, 492-94 (2003) (holding that Kyllo, 533 U.S. 27, was dispositive of the defendant's federal constitutional claim and, additionally, that the use of a thermal imager to measure heat emanating from the interior of the defendant's apartment violated article I, section 7 of the Hawai'i Constitution because "[i]t has long been recognized in Hawai'i that generally, a person 'has an actual, subjective, expectation of privacy in his or her home'" (quoting State v. Lopez, 78 Hawai'i 433, 442, 896 P.2d 897, 898 (1995)); State v. Bonnell, 75 Haw. 124, 146, 856 P.2d 1265, 1277 (1993) (holding that "the defendants had an objectively 'reasonable privacy expectation that [they] would not be videotaped by government agents' in the employee break room" (quoting United States v. Taketa, 923 F.2d 665, 677 (9th Cir. 1991)); Kam, 69 Haw. at 496, 748 P.2d at 380 (declaring a statute that prohibited the promotion of pornographic adult magazines unconstitutional under article I, section 6 of the Hawai'i Constitution "as applied to the sale of pornographic materials to

a person intending to use those items in the privacy of his or her home").

Thus conduct once denominated criminal has later been afforded constitutional protection under the privacy umbrella. See, e.g., Kyllo, 533 U.S. at 34, 40; Roe, 410 U.S. at 154; Stanley, 394 U.S. at 568; Griswold, 381 U.S. at 485-86; Cuntapay, 104 Hawai'i at 110, 85 P.3d at 635; Detroy, 102 Hawai'i at 20-22, 72 P.3d at 492-94; Bonnell, 75 Haw. at 146, 856 P.2d at 1277; Kam, 69 Haw. at 496, 748 P.2d at 380. And while such expansion may not be without controversy, prostitution seems almost singularly unique in historical and social condemnation.

XI.

Mueller acknowledged the resiliency of prostitution laws as noted by the drafters of the penal code.[13] This court

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[13] Mueller referred to

[t]he commentary on HRS § 712-1200 . . . in pertinent part:

> Our study of public attitude in this area revealed the widespread belief among those interviewed that prostitution should be suppressed entirely or that it should be so restricted as not to offend those members of society who do not wish to consort with prostitutes or to be affronted by them. Making prostitution a criminal offense is one method of controlling the scope of prostitution and thereby protecting those segments of society which are offended by its open existence. This "abolitionist" approach is not without its vociferous detractors. There are those that contend that the only honest and workable approach to the problem is to legalize prostitution and confine it to certain localities within a given community. While such a proposal may exhibit foresight and practicality, the fact remains that a large segment of society is not presently willing to accept such a liberal approach. Recognizing this fact and the need for public order, the Code makes prostitution and its associate enterprises criminal offenses.

(continued...)

declared that "[t]he drafters of the Hawai'i Penal Code justified the enactment of HRS § 712-1200 on 'the need for public order.' [Thus this court] would not dispute that it was reasonable for the legislature to act on that basis." 66 Haw. at 628-29, 671 P.2d at 1359-60 (footnote omitted). It was recognized that "[a] large segment of society undoubtedly regards prostitution as immoral and degrading, and the self-destructive or debilitating nature of the practice, at least for the prostitute, is often given as a reason for outlawing it. [Accordingly, w]e could not deem these views irrational."[14] Id. at 629, 671 P.2d at 1360.

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[13](...continued)
66 Haw. at 629 n.8, 671 P.2d at 1360 n.8 (emphasis added).

[14] Relatedly, there is a general consensus in the international community that prostitution has negative consequences. The Convention for the Suppression of the Traffic in Person and the Exploitation of the Prostitution of Others states that "prostitution and the accompanying evil of the traffic in person for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community." Dec. 2, 1949, 96 U.N.T.S. 271 [hereinafter the Convention].

The parties to the Convention agree to punish any person who "[e]xploits the prostitution of another person, even with the consent of that person" and "to take or to encourage, through their public and private education, health, social, economic and other related services, measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution and of the offences referred to in the present Convention." Id.

The United States has agreed to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women." Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980) [hereinafter the Convention on Discrimination]. The Convention on Discrimination was adopted in 1979 by the UN General Assembly and as of Nov. 2006, 185 countries (over 90% of the members of the UN) are parties to the Convention. Several of the countries that have ratified the treaty are Afghanistan, Australia, Austria, Cuba, China, Germany, Israel, Italy, Mexico, Netherlands, and the United States. See United Nations, Division on the Advancement of Women, http://www.un.org/womenwatch/daw/cedaw/states.htm (last visited Feb. 21, 2007).

This court has cited international authority in resolving appeals. See Almeida v. Correa, 51 Haw. 594, 602 n.9, 603, 465 P.2d 564, 570 n.9, 571 (1970) (holding "that the exhibition of a child to the finder of fact in a paternity case is not to be permitted," but that "expert testimony concerning

(continued...)

XII.

It may be that non-injurious sexual conduct by consenting adults in a private place for a fee preceded by (veiled) public advertising may one day be drawn into the protective shelter of Hawaii's privacy provision, as has other conduct once thought of as illegal. But "[t]he sum of experience," id., as elucidated in the penal code presently, seems to the contrary. See supra note 13; cf. Janra Enters., Inc. v. City & County of Honolulu, 107 Hawai'i 314, 322, 113 P.3d 190, 198 (2005) (holding that "viewing adult material in an enclosed panoram booth on commercial premises is not protected by the fundamental right of privacy enshrined in article I, section 6 of the Hawai'i Constitution"). Hence, "prudential and pragmatic considerations" do not compel a departure from the doctrine of stare decisis, Garcia, 96 Hawai'i at 206, 29 P.3d at 925, so as to justify overruling Mueller, much less based on the Court's present express holding in Lawrence.

Of course the legislature may alter the law to allow non-injurious sexual contact by consenting adults in a private

(...continued)
the resemblance of an child to the person alleged to be the father is admissible to prove or disprove the paternity of the child" and relying on a United Nations Educational, Scientific and Cultural Organization (UNESCO) document for the proposition that "'individuals belonging to different major groups of mankind are distinguishable by virtue of their physical characters, but individual members, or small groups, belonging to different races within the same major group are usually not so distinguishable'" (quoting Statement on the Nature of Race and Race Difference by Physical Anthropologists and Geneticists, Sept. 1952 (UNESCO) quoted in A. Montagu, Man's Most Dangerous Myth: the Fallacy of Race 368 (4th ed. 1964))).

place for a fee, conduct that is presently proscribed by HRS § 712-1200(1). For,

> [a]s a general rule, the role of the court in supervising the activity of the legislature is confined to seeing that the actions of the legislature do not violate any constitutional provision. We will not interfere with the conduct of legislative affairs in absence of a constitutional mandate to do so, or unless the procedure or result constitutes a deprivation of constitutionally guaranteed rights.

Schwab v. Ariyoshi, 58 Haw. 25, 37, 564 P.2d 135, 143 (1977) (citations omitted). We only decide that the considerations before us do not compel the legal conclusion that, on constitutional grounds, HRS § 712-1200 must be ruled invalid.

XIII.

Based on the foregoing, the court's August 26, 2003 judgment is affirmed.

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