DISSENT BY ACOBA, J.

I respectfully disagree and would grant certiorari inasmuch as there appears to be a need for further review on the question of whether the conviction of operating a vehicle under the influence of an intoxicant (OVUII) was based on sufficient evidence and was consistent with prior case law in Hawai'i. I would affirm the conviction for leaving the scene of an accident.

Petitioner/Defendant-Appellant Jerry Lee (Petitioner) filed an application for writ of certiorari on January 2, 2007, requesting that this court review the September 15, 2006 Summary Disposition Order (SDO) of the Intermediate Court of Appeals (the ICA), affirming the May 4, 2005 judgments of the district court of the first circuit (the court) convicting and sentencing Petitioner for OVUII, Hawai'i Revised Statutes (HRS) § 291E-61(a)(1) (Supp. 2004),[1] and leaving the scene of an accident

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[1] HRS § 291E-61 stated, in relevant part, as follows:

> **Operating a vehicle under the influence of an intoxicant.** (a) A person commits the offense of operating a vehicle under the influence of an intoxicant if the person operates or assumes actual physical control of a vehicle:
>
> (1) While under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty[.]

HRS § 291E-1 (Supp. 2006) defines "operate" in relevant part as "to drive or assume actual physical control of a vehicle upon a public way, street, road, or highway[.]" (Emphasis added.) A "[p]ublic way, street, road, or highway" includes:

> (1) The entire width, including berm or shoulder, of every road, alley, street, way, right of way, lane, trail, highway, or bridge;
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> (2) A parking lot, when any part thereof is open for use by the public or to which the public is invited for entertainment or business purposes;

(continued...)

involving damage to vehicle or property (leaving the scene), HRS § 291C-13 (1993).[2]

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[1](...continued)

(3) Any bicycle lane, bicycle path, bicycle route, bikeway, controlled access highway, laned roadway, roadway, or street, as defined in section 291C-1; or

(4) Any public highway, as defined in section 264-1.

Id. (emphases added.) "Public highways" are defined as:

> (a) All roads, alleys, streets, ways, lanes, bikeways, and bridges in the State, opened, laid out, or built by the government are declared to be public highways. Public highways are of two types:
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> (1) State highways, which are all those under the jurisdiction of the department of transportation; and
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> (2) County highways, which are all other public highways.
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> . . . .
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> (c) All roads, alleys, streets, ways, lanes, trails, bikeways, and bridges in the State, opened, laid out, or built by private parties and dedicated or surrendered to the public use, are declared to be public highways . . . as follows:
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> (1) Dedication of public highways . . . shall be by deed of conveyance naming the State as grantee in the case of a state highway or trail and naming the county as grantee in the case of a county highway or trail. . . .
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> (2) Surrender of public highways . . . shall be deemed to have taken place if no act of ownership by the owner of the road, alley, street, bikeway, way, lane, trail, or bridge has been exercised for five years and when, in the case of a county highway, in addition thereto, the legislative body of the county has, thereafter, by a resolution, adopted the same as a county highway or trail. . . .
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> (d) All county public highways . . . once established shall continue until vacated, closed, abandoned, or discontinued by a resolution of the legislative body of the county wherein the county highway or trail lies. All state trails once established shall continue until lawfully disposed of pursuant to the requirements of chapter 171.

HRS § 264-1 (1993) (emphases added).

[2] HRS § 291C-13 provided:

> **Accidents involving damage to vehicle or property.** The driver of any vehicle involved in an accident resulting only in damage to a vehicle or other property which is driven or attended by any person shall immediately stop such vehicle at the scene of the accident or as close thereto as possible, but shall forthwith return to and in every event shall remain at the scene of the accident until the driver

(continued...)

I.

The relevant facts, taken from Petitioner's application, follow.

> On October 17, 2004, at about 10:10p.m., . . . at 250 Iolani Avenue[, Alison Avelero (Ms. Avelero)] . . . had just parked her car[. A]s she was getting out of her car, . . . she felt "the car bump forward." . . . [She] saw [Petitioner's] car "just coming out of the reverse[.]" . . . [Petitioner] continued maneuvers to park his car by pulling forward, and as he backed up again, he hit the car next to Ms. Avelero, then pulled into his stall.
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> . . . Ms. Avelero felt [Petitioner] appeared to be "drunk." . . . [H]is face looked pale. . . .
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> . . . "[He was] staggering all over the place[.] . . . [H]e had no idea that he actually hit the car, no idea because he just looked at me for a second and then he just stumbled up to his apartment."
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> . . . [F]ive minutes later, [Petitioner] returned from his apartment and "got back into his car and drove away." . . . [Petitioner] was holding a beer can in his hand[.] . . . [S]he believed the can to be open and [Petitioner] was walking and drinking. A few minutes later, [Petitioner] returned . . . with his wife driving. [Petitioner] appeared to be asleep[.] . . . [A] minute later, [Petitioner's] wife came back, got in the car and drove off with [Petitioner] in the car. . . . The defense rested without calling any

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[2](...continued)

> has fulfilled the requirements of section 291C-14. Every such stop shall be made without obstructing traffic more than is necessary. Any person failing to stop or to comply with the requirements of this section under such circumstances shall be fined not more than $100 or imprisoned not more than ten days for a first conviction; fined not more than $200 or imprisoned not more than twenty days, or both, for a second conviction within one year of a first conviction; and fined not more than $500 or imprisoned not more than six months, or both, for a third conviction within one year of a first conviction.

(Emphasis added.) HRS § 291C-14 (1993), entitled "Duty to give information and render aid," states in pertinent part as follows:

> (a) The driver of any vehicle involved in an accident resulting in . . . damage to any vehicle or other property which is driven or attended by any person shall give the driver's name, address, and the registration number of the vehicle the driver is driving, and shall upon request and if available exhibit the driver's license or permit to drive . . . to the driver or occupant of or person attending any vehicle or other property damaged in the accident and shall give such information and upon request exhibit such license or permit to any police officer at the scene of the accident or who is investigating the accident[.]

(Emphasis added.)

witnesses.

> At the close of [Respondent's] case, defense counsel moved for a judgment of acquittal as to the OVUII charge, arguing there was insufficient evidence[.] The court denied the motion, concluding there was "overwhelming evidence of intoxication in terms of stumbling, falling, sliding against rail, walls, not being able to stand up. . . . Terrible driving . . . playing bumper cars apparently in the parking lot, and then not even knowing that it took place when the person was sober standing next to her car clearly did. . . ." As to defense counsel's argument that [Respondent] failed to prove that the driving occurred on a public road or parking lot, the court acknowledged, "It's a good point . . . I assumed this to be a public parking lot, and that assumption is not fair to make."
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> . . . [F]ollowing a motion to reconsider, the [court] concluded [that] . . . "[Petitioner] left the scene; walked up to his apartment and very quickly came back down with a beer, got in his car and drove off onto a public road and highway, and therefore, I have no problem in determining that [Petitioner] did operate a vehicle in a public road or highway."
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> . . . .
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> The [court] also convicted [Petitioner] of the [l]eaving the scene charge, rejecting defense counsel's argument that . . . based on Ms. Avelero's testimony . . . [Petitioner] did not know that he had been in an accident[.] At the hearing on the motion to reconsider, the court stated . . . that Ms. Avelero's testimony that [Petitioner] appeared "as if he didn't even know that he had done this, does not mean that he didn't know."

(Emphases added.)

II.

On September 15, 2006, the ICA affirmed in its SDO without explication but cited "Hawai'i Rules of Evidence [(HRE)] Rule 701; State v. Toyomura, 80 Hawai'i 8, 25, 904 P.2d 893, 910 (2005); State v. Mitchell, 94 Hawai'i 388, 15 P.3d 314 (App. 2000); State v. Souza, 72 Haw. 246, 249, 813 P.2d 1384, 1386 (1991); HRS § 702-230 (1993); and Commentary on HRS § 702-230." SDO at 2-3.

III.

In his application, Petitioner poses the following two questions:

> Whether the ICA gravely erred in summarily affirming the judgments of conviction where there was insufficient evidence to prove that [Petitioner] committed OVUII by a) operating a motor vehicle under the influence of alcohol, as specifically charged, or b) on a "public" street or parking lot as defined under HRS § 291E-61(A)(1), or 2) [l]eaving the scene of an accident, where [Petitioner] did not act with the requisite state of mind regarding the occurrence of an accident.

(Emphasis added.)

IV.

The test on appeal for the denial of a motion for judgment of acquittal is identical to that for sufficient evidence to support the conviction, see State v. Okumura, 78 Hawai'i 383, 403 n.15, 894 P.2d 80, 100 n.15 (1995), that is, "[s]ubstantial evidence as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." State v. Aplaca, 96 Hawai'i 17, 21, 25 P.3d 792, 796 (2001) (citations omitted) (emphasis added). "'Substantial evidence' as to every material element of the offense charged is credible evidence, which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998) (quoting State v. Eastman, 81 Hawai'i 131, 135, 913 P.2d 57, 61 (1996)).

V.

As to a) of the first question, Petitioner argues that "[w]hile there was ample evidence that [Petitioner's] normal faculties were impaired, the evidence was insufficient to prove

that the impairment was due to an intoxicant, much less . . . alcohol."

As to b) of the first question, Petitioner argues that "[Respondent] presented no evidence that the parking lot of the apartment building was 'open for use by the public or to which the public was invited' . . . [and t]he [court] concluded as much." The [court] convicted [Petitioner] based on the inference that [he] drove onto a public highway off the parking lot" but according to Petitioner, "[t]here was not substantial evidence adduced to support the court's inference." (Footnote omitted.) Petitioner indicates the court said, "When she says he drove off and then came back with his wife and child ten minutes late[r] and the wife was driving, I think the inference is overwhelming that that's onto a public road or highway and I think I can make that inference."

VI.

HRS § 291E-61(a)(1) is relevant to both a) and b) of Petitioner's first question. To convict Petitioner for OVUII, Respondent was required to prove "'every element of the crime charged beyond a reasonable doubt.'" State v. Puaoi, 78 Hawai'i 185, 191, 891 P.2d 272, 278 (1995) (quoting State v. Lima, 64 Haw. 470, 474, 643 P.2d 536, 539 (1982) (other citations omitted)); see also HRS § 701-114 (1993). Therefore, Respondent must have proven that Petitioner (1) "operate[d] or assum[ed] actual physical control of a vehicle[,]" (2) "[w]hile under the influence of alcohol in an amount sufficient to impair [his]

normal mental faculties or ability to care for the person and guard against casualty[.]"[3] HRS § 291E-61(a)(1).

VII.

Arguably, there is substantial evidence that Petitioner was "under the influence of alcohol in amount sufficient to impair [his] normal mental faculties or ability to care for the person and guard against casualty[,]" HRS § 291E-61(a)(1), although there was no evidence of the odor of alcohol, or bloodshot or glassy eyes.

As indicated before, Ms. Avelero testified to having observed Petitioner attempt to park, then back up and collide with her car, and then go forward, and then back up again, and eventually crash into a different vehicle. Ms. Avelero related that Petitioner was unable to stand upon exiting his vehicle. In clarification she stated that, "his whole body was banging into the car" and that it was "[l]ike he was falling over." Ms. Avelero further stated that she was standing about ten feet away from Petitioner and that Petitioner "appeared intoxicated" and "seemed to be drunk" to her.

Ms. Avelero's testimony was proper opinion testimony by a lay witness. HRE Rule 701 entitled, "Opinion testimony by lay witnesses" provides:

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[3] "Alcohol" is defined as "the product of distillation of any fermented liquid, regardless of whether rectified, whatever may be the origin thereof, and includes ethyl alcohol, lower aliphatic alcohol, and phenol as well as synthetic ethyl alcohol, but not denaturated or other alcohol that is considered not potable under the customs law of the United States." HRS § 291E-1.

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness, and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

(Emphasis added.) "[A] lay witness may express an opinion regarding another person's sobriety, provided the witness has had an opportunity to observe the other person." Toyomura, 80 Hawai'i at 25, 904 P.2d at 910 (internal quotation marks and citation omitted) (brackets in original). Ms. Avelero had the opportunity to observe Petitioner, and therefore "may express an opinion regarding [his] sobriety." Id. Her opinion is "helpful to a . . . determination of a fact in issue," HRE Rule 701, namely Petitioner's impairment.

VIII.

Ms. Avelero also testified that following the collisions, she observed Petitioner go upstairs to his apartment, only to return about five minutes later, drinking from an open beer can. Ms. Avelero then observed Petitioner get into his car with the can of beer and drive away around 10:25 p.m. Ms. Avelero did not testify to Petitioner's condition during this segment of the events although the court appears to have placed emphasis on finding Petitioner was OVUII on this part of the facts.[4]

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[4] As said before, Ms. Avelero testified that following the collision and her observance of Petitioner, Petitioner "got back into his car and drove away" around 10:20 p.m. Ms. Avelero also testified that "about ten minutes later, [Petitioner] drove back in with his wife, [but that Petitioner's wife] was driving."

The record is unclear as to whether something other than alcohol may have contributed to Petitioner's impairment. However, nothing in HRS § 291E-61(a)(1) "requires that alcohol be the sole or exclusive cause of a defendant's impairment. Rather, what is required is proof beyond a reasonable doubt that liquor contributed to the diminishment of the defendant's capacity to drive safely." State v. Vliet, 91 Hawai'i 288, 293, 983 P.2d 189, 194 (1999); see also Mitchell, 94 Hawai'i at 399-400, 15 P.3d at 325-26. This court has stated that "[r]easonable inferences drawn from circumstantial evidence may be used to prove a criminal case beyond a reasonable doubt." State v. O'Daniel, 62 Haw. 518, 529-30, 616 P.2d 1383, 1391 (1980).

Based on that part of the facts preceding Petitioner leaving the parking lot to go to his apartment, considering the evidence in "a light most favorable to the State," id., there is substantial evidence, including Ms. Avelero's opinion of drunkenness, "which is of sufficient quality and probative value, to enable a person of reasonable caution to support [the] conclusion[,]" Richie, 88 Hawai'i at 33, 960 P.2d at 1240, that Petitioner's "normal mental faculties or ability to care for the person" were impaired by alcohol. HRS § 291E-61(a)(1); Richie, 88 Hawai'i at 33, 960 P.2d at 1241.

IX.

However, as pertinent to b) of Petitioner's first question, the offense of OVUII also requires that a "person

operate[] or assume[] actual physical control of a vehicle[.]"[5] HRS § 291E-61(a). "Operate," as relevant here, was defined as "to drive or assume actual physical control of a vehicle upon a public way, street, road, or highway[.]" HRS § 291E-1 (emphasis added). Thus, by implication, the definition of "public way, street, road, or highway" would appear to exclude those ways that are private. Id.

Similarly, in State v. Figel, 80 Hawai'i 47, 48, 904 P.2d 932, 933 (1995), this court considered whether "the legislature intended that the term 'way' in HRS § 291-1 [(Supp. 1992)[6]] to apply to a private parking lot for the purposes of HRS § 291-4.5(a) [(Supp. 1992)[7]]." The Figel court observed that "it

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[5] It should be noted that a conviction for OVUII under HRS § 291E-61(a) is warranted if a person "operates" or "assumes actual physical control" of a vehicle in violation of the express terms of the statute. Here, the court determined that Petitioner "did operate a vehicle on a public road or highway." (Emphasis added.) Respondent did not argue that Petitioner "assume[d] actual physical control of a vehicle" in violation of HRS § 291E-61(a) and neither the parties, the court, or the ICA address this aspect of the statute.

[6] HRS § 291-1 provided that "[p]ublic street, road, or highway" includes:

> the entire width, including beam and shoulder, of every road, alley, street, way, lane, trail, highway, bikeway, bridge, when any part thereof is open for use by the public, including any bicycle lane, bicycle path, bikeway, controlled access highway, laned roadway, roadway, or street, as defined in section 291C-1, and any public highway, as defined in section 264-1.

[7] HRS § 291-4.5(a) provided in pertinent part that:

> No person whose driver's license has been revoked, suspended, or otherwise restricted pursuant to part XIV of chapter 286 or section 291-4 shall operate a motor vehicle either upon the highways of this State while the person's license remains suspended or revoked or in violation of the restrictions placed on the person's license.

(Emphasis added.)

[was] unclear whether the term 'highways' in HRS § 291-4.5 incorporate[d] the amended definition of 'public street, road, or highway' as set forth in HRS § 291-1." Id. at 49, 904 P.2d at 934. Nonetheless, the Figel court said that, if "the legislature had intended to prohibit a person from operating a vehicle anywhere, even on private property, with a license suspended for [driving under the influence of intoxicating liquor (DUI)], the statute could have simply stated that 'it is unlawful to operate a vehicle while license suspended for DUI.'" Id. at 49, 904 P.2d at 935 (emphasis in original). Thus, it concluded that "[b]ecause the legislature included [the limiting term "highway" in its proscription, it could] only conclude that the operation of a vehicle other than on a 'highway' by a person whose license has been suspended for [OVUII] is not illegal under the statute." Id. at 50, 904 P.2d at 935.

The Figel court also noted that "[a]lthough it appears anomalous to criminalize the operation of a vehicle without a license, or while [OVUII], without regard to the term 'highway,' -- while prohibiting driving with a license suspended for [OVUII] only when it occurs on a 'highway,' [it was] nevertheless constrained to give effect to the limiting term 'highway' as set forth in HRS § 291-4.5, which is a penal statute." Id. (citing State v. Gaylord, 78 Hawai'i 127, 138, 890 P.2d 1167, 1178 (1995) ("penal statutes are to be strictly construed")) (other citations omitted). Likewise, in this case, effect must be given to the limiting language that a violation of HRS § 291E-61(a)(1) must

occur "upon a public way, street, road, or highway" based upon the definitions thereof. HRS § 291E-1 (emphasis added).[8] Therefore, in order to convict Petitioner for OVUII, Respondent was required to prove beyond a reasonable doubt, HRS § 701-114(1)(a), that Petitioner "dr[o]ve or assume[d] actual physical control of a vehicle upon a public way, street, road, or highway" that was public. HRS § 291E-1.

X.

As indicated previously, the court initially assumed that the parking lot was a public one. However, following the motion to reconsider, the court drew the "overwhelming" inference that Petitioner "did operate a vehicle on a public road or highway" based on Ms. Avelero's observation of Petitioner driving off and then returning with his wife ten minutes later. (Emphasis added.) However, this inference is not supported by the record. There is no evidence as to exits from the parking lot. There was no evidence as to what route Petitioner took when

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[8] In State v. Watson, 71 Haw. 258, 259, 787 P.2d 691, 692 (1990), this court held that "nothing in HRS § 291-4(a)(1)[, the former OVUII statute,] requires that the operation of a vehicle while under the influence of intoxicating liquor be done on a public highway" and that "the strong public policy against the operation of a vehicle while under the influence of intoxicating liquor is sufficient to extend the prohibition of the statute to any vehicle, which is exactly what the statute provides." However, since Watson, the legislature has repealed HRS § 291-4 and enacted HRS chapter 291E. 2000 Haw. Sess. L. Act 189, §§ 23, 30-33 at 407-30; 432. As noted previously, HRS § 291E-1 specifically defines "operate," as relevant here, to mean "drive or assume actual physical control of a vehicle upon a public way, street, road, or highway[.]" (Emphasis added.) Unlike Watson, where the former OVUII statute did not require that the "operation of a vehicle while under the influence of intoxicating liquor be done on a public highway[,]" 71 Haw. at 259, 787 P.2d at 692, HRS § 291E-61(a)(1) specifically requires that the operation of a vehicle while under the influence of an intoxicant be done on a "public way, street, road, or highway[.]" HRS § 291E-1. Moreover, Watson does not cite any authority except for the former OVUII statute, and contains little analysis or reasoning. Thus, Watson is distinguishable.

he left in his car. There was no evidence of where Petitioner's wife was located. There was no evidence indicating at what point Petitioner's wife assumed control of the car. There is no evidence of what route was taken on the way back to the parking lot. In view of the lack of evidence, no rational inference can be drawn that Petitioner even drove on Iolani Avenue. Even if such an inference were possible, there is no evidence that Iolani Avenue satisfies the definition of a "public road" or a "public highway," a requirement indicated by Figel. HRS § 291E-1; HRS § 264-1.

XI.

Judicial notice as to the ownership of Iolani Avenue cannot be taken, assuming, arguendo, ownership would be relevant despite the lack of evidence as to whether Petitioner drove on the avenue. Initially it should be noted that Respondent did not request judicial notice at trial, and, thus, judicial notice cannot be taken on appeal. See State v. Rodrigues, 67 Haw. 496, 498, 692 P.2d 1156, 1158 (1985) ("[T]he record reveals that the State had never presented the issue of exigent circumstances, nor the issue of a 'good faith' exception to the exclusionary rule to the trial court. It is a generally accepted rule that issues not raised at the trial level will not be considered on appeal" and, thus, "the issues of exigency and a 'good faith' exception [are deemed] to have been waived." (Citations omitted.)). Respondent did not proffer any evidence as to the ownership of Iolani Avenue. In addition, the court did not take judicial notice with

respect to whether the State of Hawai'i or the City and County of Honolulu, or any other party, owned the roadway which is known as Iolani Avenue.

Second, under the circumstances, even if not deemed waived, judicial notice by this court is not sustainable. As stated in HRE Rule 201(b) (1993), entitled "Judicial notice of adjudicative facts," "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial [or reviewing] court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." See Commentary on HRE Rule 201. Thus, (1) under HRE Rule 201(b)(1), the fact must be generally known within the jurisdiction of the court, and (2) under HRE Rule 201(b)(2), there must be the capability to accurately and readily determine the information by a source that cannot reasonably be questioned.

Three logical criteria can be drawn from HRE Rule 201(b)(2). First, in order for a one to take judicial notice of a fact, the source used must be accurate. Second, the source must be capable of "ready determination." Third, assuming that the source is considered to be accurate and readily determinable, it must also reach a level of "accuracy [that] cannot reasonably be questioned."

As to the ownership of Iolani Avenue, it is unclear as to what an accurate source would be. With respect to the second

criterion, as it applies to the ownership of Iolani Avenue, such information does not appear to be readily determinable. Unless an accurate source is readily ascertained, one cannot evaluate whether the accuracy of the source "cannot be reasonably questioned." Hence, judicial notice cannot be based on HRE Rule 201(b)(2).

Judicial notice cannot be based on HRE Rule 201(b)(1) either. Previously, "Hawaii courts have held that a fact is a proper subject for judicial notice if it is common knowledge or easily verifiable," however, as of now, "a judge cannot take judicial notice of facts based solely upon his own personal knowledge unless the facts are also known to the community in general." Commentary on HRE Rule 201 (citations omitted). In regard to this case, it is evident that information regarding the ownership of Iolani Avenue is not common knowledge. Additionally, as previously stated, there is no identifiable source from which to readily and accurately obtain the information regarding this issue. It appears the only other way remaining to reach the conclusion regarding the ownership of Iolani Avenue is through a judge's own knowledge. That source is not properly subject to judicial notice. See Commentary on HRE Rule 201.

In sum, with respect to Iolani Avenue, it is unclear as to what source one would need to utilize in order to determine the ownership of Iolani Avenue and what source would be considered accurate. If there is such a source, it does not

appear to be readily available to this court. Therefore, it cannot be maintained that information as to ownership is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." HRE 201(b)(2). Further, the ownership of Iolani Avenue does not appear to be common knowledge in the community in general. HRE Rule 201(b)(1). Since neither HRE Rule 201(b)(1) nor 201(b)(2) can be satisfied, judicial notice is not available on appeal with respect to the ownership of Iolani Avenue.

XII.

Also, it should be noted that there was no evidence that the parking lot was encompassed by the definition of "[p]ublic way, street, road, or highway" insofar as "any part thereof is open for use by the public or to which the public is invited for entertainment or business purposes." HRS § 291E-1. As noted before, in response to Petitioner's argument that Respondent did not introduce any evidence that the parking lot was "public," the court said, "It's a good point . . . <u>frankly I think [Petitioner] is right that I somewhat assumed this to be a public parking lot</u> . . . . If a private lot is solely for private purposes, that is not a public road or highway." (Emphasis added.) No evidence was introduced to show that the parking lot was "open for use by the public" or that "the public [was] invited for entertainment or business purposes[.]" HRS § 291E-1. Thus, there was no evidence "of sufficient quality and probative value," <u>Richie</u>, 88 Hawai'i at 33, 960 P.2d at 1240,

from which a person exercising reasonable caution could determine that Petitioner operated a vehicle in a parking lot that was a public one, HRS § 291E-61(a)(1); HRS § 291E-1.

XIII.

Thus, even considering the evidence in "a light most favorable to the State," O'Daniel, 62 Haw. at 529-30, 616 P.2d at 1391, there is no substantial evidence, "which is of sufficient quality and probative value, to enable a person of reasonable caution to support [the] conclusion[,]" Richie, 88 Hawai'i at 33, 960 P.2d at 1240, that Petitioner "operate[d] a vehicle on a public road or highway." Accordingly, the ICA appears to have committed a grave error of law and rendered a disposition inconsistent with case law in affirming the judgment of the court with respect to Petitioner's OVUII conviction.

XIV.

As to the second question, Petitioner argues that "[a]lthough there is no requisite state of mind within the statutory definition of [l]eaving the scene, [Respondent] is . . . required to prove that [Petitioner] intentionally, knowingly, or recklessly left the scene of an accident resulting in damage to property without providing certain information." (Citing HRS § 702-204; HRS § 291C-13.).

HRS §§ 291C-13 and -14 do not establish a state of mind requirement as an element of the offense. "When the state of mind required to establish an element of an offense is not specified by the law, that element is established if, with

respect thereto, a person acts intentionally, knowingly, or recklessly." HRS § 702-204 (1993). To convict Petitioner of HRS § 291C-13, the prosecution was required to prove "every element of the crime charged beyond a reasonable doubt[,]" Puaoi, 78 Hawai'i at 191, 891 P.2d at 278 (internal quotation marks and citation omitted), as well as the fact that the Petitioner acted intentionally, knowingly, or recklessly, HRS § 701-114.

XV.

Petitioner asserts that "[h]e was unaware that he had been involved in an 'accident' resulting in damage because the contact between the two cars was so slight." However, the evidence indicates that Ms. Avelero felt Petitioner's vehicle strike her vehicle causing it to move forward. Her vehicle sustained a scratch on the back passenger side. Subsequently, she observed Petitioner pull forward and strike another vehicle. Ms. Avelero exited her vehicle and stood ten feet away from Petitioner while waiting to exchange information. After exiting his vehicle, Petitioner stared at Ms. Avelero. Ms. Avelero was apparently near Petitioner, and as close as ten feet and observed Petitioner's conduct. She testified that Petitioner stared at her after the "bump."

Based on Ms. Avelero's testimony, Petitioner should have been aware of the risk that his conduct would have caused damage to other vehicles. However, he made no inquiry or attempt to provide the information mandated under HRS §§ 291C-13 and -14. The court apparently believed the testimony of Ms. Avelero. See

In re Doe, 107 Hawai'i 12, 19, 108 P.3d 966, 973 (2005) (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 State v. Lubong, 77 Hawai'i 429, 432, 886 P.2d 766, 769 (App. 1994) (citation omitted)).

Thus, the testimony given by Ms. Avelero can be considered credible evidence "which is of sufficient quality and probative value, to enable a person of reasonable caution to support [the] conclusion." Richie, 88 Hawai'i at 33, 960 P.2d at 1240. Although Petitioner did stop his vehicle and remained at the scene of the accident for a short period of time, he failed to "remain at the scene of the accident until [he] fulfilled the requirements of [HRS §] 291C-14[.]" HRS § 291C-13. In sum, there is substantial evidence that Petitioner acted recklessly in causing the damage to Ms. Avelero's vehicle and in failing to comply with his duty to remain and give information as required by HRS § 291C-13.

XVI.

In light of the foregoing, Petitioner's conviction of OVUII, HRS § 291E-61(a)(1), should be vacated. Petitioner's conviction of leaving the scene, HRS § 291C-13, should be affirmed. On the grounds stated above I believe the case warrants further review and, therefore, I would accept certiorari.