DISSENT BY RECKTENWALD, J.,
IN WHICH NAKAYAMA, J., JOINS

I respectfully dissent.

Respondent/Defendant-Appellant Christian K. Johnson was charged in a four-count complaint with operating a vehicle under the influence of an intoxicant (OVUII) in violation of HRS § 291E-61(a) (Count One),[1] operating a vehicle without no-fault insurance in violation of HRS § 431:10C-104(b) (Count Two), failure to verify insurance in violation of HRS § 431:10C-107(b) (Count Three), and failure to surrender registration certificate and plate upon termination of insurance in violation of HRS § 431:10C-114 (Count Four). He was convicted of Counts One and Two, which were charged as follows in the complaint:

> COUNT ONE:
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> That on or about the 11th day of October, 2006, in the Division of Wailuku, County of Maui, State of Hawaii, CHRISTIAN K. JOHNSON did operate or assume actual physical control of a vehicle while under the influence of an intoxicant meaning that he was under the influence of alcohol in an amount sufficient to impair his normal mental faculties or ability to care for himself and guard against casualty, thereby committing the offense of [OVUII] in violation of Section 291E-61(a) of the [HRS].
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> COUNT TWO:
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> That on or about the 11th day of October, 2006, in the Division of Wailuku, County of Maui, State of Hawaii, CHRISTIAN K. JOHNSON did intentionally,

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[1] HRS § 291E-61(a) (Supp. 2006) provided, in relevant part, that "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; . . . ." "Operate" is defined as "to drive or assume actual physical control of a vehicle upon a public way, street, road, or highway . . . ." HRS § 291E-1 (Supp. 2006).

> knowingly, or recklessly own a motor vehicle, to wit, a vehicle bearing State of Hawaii license plate number MMY-374, operated or used upon any public street, road, or highway of this State without said motor vehicle being insured under a no-fault policy which provided the coverage required by Chapter 431 of the [HRS], or without maintaining said no-fault policy at all times for said motor vehicle's entire registration period, thereby committing the offense of No No-Fault Insurance in violation of Section 431:10C-104(b) of the [HRS].

(Emphasis added).

Johnson appealed his convictions to the Intermediate Court of Appeals (ICA), which affirmed his conviction for Count Two, but vacated his conviction for Count One (OVUII). Although Johnson never objected to the sufficiency of the complaint at the trial level or on appeal to the ICA, the ICA sua sponte concluded that in light of this court's recent opinion in State v. Wheeler, 121 Hawai‘i 383, 393, 219 P.3d 1170, 1180 (2009), Count One was insufficient because it did not allege the essential element that Johnson operated his vehicle "upon a public way, street, road or highway." The State of Hawai‘i thereafter filed an application for a writ of certiorari with this court. For the reasons set forth below, I would accept the application and conclude that although Count One did not adequately allege that essential element, when viewing the complaint as a whole, Count One can reasonably be construed to charge the offense of OVUII.

This court has held that when a defendant does not object to the sufficiency of the charging document at the trial level, the Motta/Wells liberal construction standard is

applicable to review its sufficiency. State v. Sprattling, 99 Hawai‘i 312, 318, 55 P.3d 276, 282 (2002). Under this standard, "convictions based upon a defective charge will be deemed valid unless the defendant proves that either the complaint cannot be reasonably interpreted to charge a crime or he or she was prejudiced by the omission." Id. This court has further recognized that "[o]ne way in which an otherwise deficient count can be reasonably construed to charge a crime is by examination of the charge as a whole." State v. Elliot, 77 Hawai‘i 309, 312, 884 P.2d 372, 375 (1994) (citing State v. Schroeder, 76 Hawai‘i 517, 530, 880 P.2d 192, 205 (1994) (construing two counts together in a case where the defendant was charged with robbery and kidnapping in separate counts, and holding that although the kidnapping count did not allege that the defendant used a handgun, since the robbery count did, that aggravating fact was sufficiently alleged with respect to the kidnapping count), abrogated on other grounds by State v. Jess, 117 Hawai‘i 381, 184 P.3d 133 (2008)).

Applying these principles here, although Count One (OVUII) did not allege the attendant circumstance that the proscribed conduct took place "upon a public way, street, road, or highway", Count Two indicated that Johnson "operated or used [a motor vehicle] upon any public street, road, or highway of this State . . . ." Under the liberal construction standard,

when the two counts are read together, the complaint can be "reasonably interpreted to charge [the] crime" of OVUII.[2] Sprattling, 99 Hawai'i at 318, 55 P.3d at 282. Both Counts One and Two refer to conduct which occurred on October 11, 2006, in Wailuku, Maui, and both refer to violations involving the operation of a vehicle. When construing the complaint liberally, it can be inferred that both counts refer to the same incident. Accordingly, I believe the complaint against Johnson sufficiently alleged the offense of OVUII.

[2] While this particular argument was not raised by the State in its application, we have an obligation to sua sponte determine whether we have jurisdiction. See, e.g., Ditto v. McCurdy, 103 Hawai'i 153, 157, 80 P.3d 974, 978 (2003) (holding that "it is well settled that an appellate court is under an obligation to ensure that it has jurisdiction to hear and determine each case and to dismiss an appeal on its own motion where it concludes it lacks jurisdiction") (citation omitted); Tamashiro v. Dep't of Human Serv., 112 Hawai'i 388, 398, 146 P.3d 103, 113 (2006) ("The lack of jurisdiction over the subject matter cannot be waived by the parties. If the parties do not raise the issue, a court sua sponte will . . . .") (citation omitted). Thus, assuming arguendo that the sufficiency of a charging document is a jurisdictional issue, see State v. Cummings, 101 Hawai'i 139, 143, 63 P.3d 1109, 1113 (2003), we have an obligation to consider all potentially applicable theories of jurisdiction and make our own independent judgment.