DISSENTING OPINION BY FUJISE, J.

We review the trial court's denial of a pre-sentence motion to withdraw a plea for an abuse of discretion. State v. Gomes, 79 Hawai'i 32, 36, 897 P.2d 959, 963 (1995). An abuse occurs when the court "has clearly exceeded the bounds of reason or has disregarded rules or principles of law or practice to the substantial detriment of a party litigant." State v. Merino, 81 Hawai'i 198, 211, 915 P.2d 672, 685 (1996) (citation and internal quotation marks omitted). A pre-sentence motion to withdraw a plea may be granted if the defendant can show a "fair and just reason," either that the plea was not entered knowingly, intelligently or voluntarily, or that changed circumstances or newly discovered evidence, warrants the withdrawal. Gomes, 79 Hawai'i at 37, 897 P.2d at 964. Because I disagree that the denial of Defendant-Appellant Eric Dotterer's (Dotterer) motion to withdraw his plea, based on the post-plea disclosure of the results of a blood draw taken when Dotterer was arrested for Driving Under the Influence of an Intoxicant[1] was an abuse of discretion, I respectfully dissent.

Dotterer argues that the blood test result, delivered to him in discovery months after his plea and revealing that his blood-alcohol content (BAC) was .07 and thus under the legal limit, qualified as newly discovered evidence for the purposes of withdrawing his plea. However, that blood test could not have been conducted without Dotterer's knowledge, and Dotterer does

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[1] Hawaii Revised Statutes (HRS) § 291E-61(a) (Supp. 2016) provides, in pertinent part,

> (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:
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> (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;
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> . . . .
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> (4) With .08 or more grams of alcohol per one hundred milliliters or cubic centimeters of blood.

not contest that the blood was drawn on the date of his arrest.[2] Therefore, Dotterer knew that a test documenting his BAC existed, although he did not know what the test result was, at the time of his plea. It is the test result, not the fact of the test, that became available after Dotterer's plea. "Newly available" evidence is not the same as "newly discovered" evidence and does not qualify as a fair and just reason to withdraw a plea. United States v. Showalter, 569 F.3d 1150, 1155 (9th Cir. 2009) citing United States v. Lockett, 919 F.2d 585, 591-92 (9th Cir. 1990) (witness who refused to testify at trial later agrees to testify for the defense).

Moreover, in my opinion, it is highly questionable that this evidence "was relevant evidence in [Dotterer's] favor that could have at least plausibly motivated a reasonable person in [his] position not to have pled guilty had he known about the evidence prior to pleading." United States v. Garcia, 401 F.3d 1008, 1011-12 (9th Cir. 2005). While the test result showed Dotterer's BAC was .07 and therefore under the level required for a conviction for OVUII pursuant to HRS 291E-61(a)(4), it does not call into question whether he was driving under the influence under HRS 291E-61(a)(1) with which he was also charged. In fact, it would have established not only that he had alcohol in his system at the time of the offense, but that it was just shy of the statutory presumption, and therefore supportive of the conclusion he was intoxicated at the time. See, HRS § 291E-3(b)(1) and (2) (Supp. 2016).[3]

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[2] Indeed, to be considered competent evidence of intoxication, the testing must be completed within three hours of the violation. HRS §291E-3(a) (Supp. 2016).

[3] HRS § 291E-3(b)(1) and (2) provides,

> (b) In any criminal prosecution for a violation of section 291E-61 or 291E-61.5, the amount of alcohol found in the defendant's blood or breath within three hours after the time of the alleged violation as shown by chemical analysis or other approved analytical techniques of the defendant's blood or breath shall be competent evidence concerning whether the defendant was under the influence of an intoxicant at the time of the alleged violation and shall give rise to the following presumptions:

(continued...)

For these reasons, I conclude that the District Court did not abuse its discretion in denying Dotterer's motion to withdraw his plea and would affirm.

[3](...continued)

(1) If there were .05 or less grams of alcohol per one hundred milliliters or cubic centimeters of defendant's blood or .05 or less grams of alcohol per two hundred ten liters of defendant's breath, it shall be presumed that the defendant was not under the influence of alcohol at the time of the alleged violation; and

(2) If there were in excess of .05 grams of alcohol per one hundred milliliters or cubic centimeters of defendant's blood or .05 grams of alcohol per two hundred ten liters of defendant's breath, but less than .08 grams of alcohol per one hundred milliliters or cubic centimeters of defendant's blood or .08 grams of alcohol per two hundred ten liters of defendant's breath, that fact may be considered with other competent evidence in determining whether the defendant was under the influence of alcohol at the time of the alleged violation, but shall not of itself give rise to any presumption.