* * * **FOR PUBLICATION** * * *
in West's Hawai'i Reports and the Pacific Reporter

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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STATE OF HAWAI'I, Respondent/Plaintiff-Appellee,

vs.

ANTHONY KALANI AKAU, Petitioner/Defendant-Appellant.

NO. 26989

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CR. NO. 03-1-2289)

MAY 30, 2008

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

OPINION OF THE COURT BY MOON, C.J.

On February 8, 2008, this court accepted a timely application for a writ of certiorari, filed by petitioner/defendant-appellant Anthony Kalani Akau on January 7, 2008, requesting this court review the Intermediate Court of Appeals' (ICA) October 11, 2007 judgment on appeal, entered pursuant to its September 21, 2007 summary disposition order (SDO). Therein, the ICA affirmed the Circuit Court of the First Circuit's[1] October 15, 2004 judgment, convicting Akau of, and sentencing him

[1] The Honorable Michael A. Town presided over the underlying proceedings.

for, -- pursuant to his conditional guilty plea -- three counts of promoting a dangerous drug in the second degree, in violation of Hawai'i Revised Statutes (HRS) § 712-1242 (1993 & Supp. 2003).[2] Oral argument was held on March 6, 2008.

Briefly stated, on three separate occasions in October and November 2002, Akau unwittingly sold crystal methamphetamine to undercover police officers. The drug buys led to the execution of a search warrant of Akau's person and personal effects, which, in turn, led to charges of promoting a dangerous drug in the third degree, in violation of HRS § 712-1243 (1993), and unlawful use of drug paraphernalia, in violation of HRS § 329-43.5 (1993) [hereinafter, the search warrant case or possession case]. Approximately ten months later (and after Akau pled no contest and was sentenced as a first-time drug offender in the search warrant case), Akau was indicted on three counts of promoting a dangerous drug in the second degree based upon the three undercover drug buys [hereinafter, the drug buy case or distribution case]. After unsuccessfully moving to dismiss the drug buy case based upon the compulsory joinder statutes, HRS §§ 701-111(1)(b) (1993) (barring a subsequent prosecution for "[a]ny offense for which the defendant should have been tried on the first prosecution") and 701-109(2) (1993) (requiring joinder

[2] HRS § 712-1242(1)(c) (1993) provides: "A person commits the offense of promoting a dangerous drug in the second degree if the person knowingly . . . [d]istributes any dangerous drug in any amount."

of criminal offenses "based on the same conduct or arising from the same episode"), Akau entered a conditional guilty plea, pursuant to Hawai'i Rules of Penal Procedure (HRPP) Rule 11(a)(2) (2007),[3] and was sentenced.

On application, Akau apparently argues that the ICA erred in affirming, inter alia, the circuit court's denial of his motion to dismiss. Specifically, Akau asserts -- as he did before the ICA -- that the circuit court should have dismissed the drug buy case for failure on the part of respondent/plaintiff-appellee State of Hawai'i (the prosecution) to bring all the charges in one action, as required under HRS §§ 701-111(1)(b) and 701-109(2), because the possession and paraphernalia offenses and the distribution offenses "[arose] from the same episode."

As discussed more fully infra, we hold that the ICA erred in affirming the circuit court's denial of Akau's motion to dismiss. Accordingly, we reverse the ICA's October 11, 2007 judgment on appeal and the circuit court's October 15, 2004 judgment of conviction in the drug buy case.

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[3] HRPP Rule 11(a)(2) states:

> With the approval of the court and the consent of the [prosecution], a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to seek review of the adverse determination of any specific pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

I. BACKGROUND

A. Factual and Procedural Background Leading Up to the Drug Buy Case

The following undisputed findings of facts (FOFs) are taken from the circuit court's order denying Akau's motion to dismiss the drug buy case:

> 1. On October 8, 2002, fronting 825 Keeaumoku Street, an undercover Honolulu Police Department (hereinafter "HPD") police officer purchased 0.121 grams of crystal methamphetamine from [Akau] for twenty dollars.
>
> 2. On October 22, 2002, fronting 825 Keeaumoku Street, a second undercover police officer purchased 0.094 grams of crystal methamphetamine from [Akau] for twenty dollars.
>
> . . . .
>
> 4. On November 21, 2002, inside the men's restroom of Daiei located at 801 Kaheka Street, the second undercover police officer purchased 0.158 grams of crystal methamphetamine from [Akau for twenty dollars].
>
> 5. Based on the [three] undercover transactions, a search warrant was obtained and executed on [Akau] and his personal effects on November 26, 2002. [Akau] was never arrested for the [three] underlying drug transactions.[4]
>
> 6. Upon execution of the search warrant fronting 835 Keeaumoku Street, 0.351 grams of crystal methamphetamine were found in [Akau's] possession, which resulted in [Akau's] arrest for [p]romoting a [d]angerous [d]rug in the [t]hird [d]egree, in violation of [HRS § 712-1243], and [u]nlawful [u]se of [d]rug [p]araphernalia, in violation of HRS [§] 329-43.5(a)[.]
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> 7. On December 5, 2002 [Akau] was charged via complaint with [p]romoting a [d]angerous [d]rug in the [t]hird [d]egree and [u]nlawful [u]se of [d]rug [p]araphernalia[] in [the search warrant case], based upon the illegal narcotic and drug paraphernalia recovered during the execution of the search warrant.
>
> 8. On February 6, 2003, [Akau] pled [n]o [c]ontest as charged in [the search warrant case].

[4] As indicated by the prosecution, Akau "was in fact arrested after he was indicted on three of the distribution offenses as noted in FOF No. 10."

> 9. On April 14, 2003, [Akau] was sentenced [as a first-time drug offender] to[,] inter alia, a term of five (5) years of probation (with one (1) year of incarceration), pursuant to HRS [§] 706-622.5 [(Supp. 2003)] in [the search warrant case].
>
> 10. On October 21, 2003, [Akau] was indicted in the instant matter for three counts of [p]romoting a [d]angerous [d]rug in the [s]econd [d]egree, in violation of HRS [§] 712-1242(1)(c) . . . , based on the October 8, 22, and November 21, 2002, undercover drug transactions.

B. Motion to Dismiss the Drug Buy Case

On March 22, 2004, Akau filed a motion to dismiss the drug buy case, pursuant to HRS §§ 701-111(1)(b) and 701-109(2). HRS § 701-111 provides in relevant part that:

> **When prosecution is barred by former prosecution for a different offense.** Although a prosecution is for a violation of a different statutory provision or is based on different facts, it is barred by a former prosecution under any of the following circumstances:
>
> (1) The former prosecution resulted in an acquittal which has not subsequently been set aside or in a conviction as defined in section 701-110(3) [(1993)[5]] and the subsequent prosecution is for:
>
> . . . .
>
> (b) Any offense for which the defendant should have been tried on the first prosecution under section **701-109** unless the court ordered a separate trial of the offense[.]

(Some emphases in original and some added.) In turn, HRS § 701-109, also known as "the compulsory joinder of offenses requirement," State v. Aiu, 59 Haw. 92, 95, 576 P.2d 1044, 1047 (1978), provides in relevant part that:

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[5] HRS § 701-110(3) provides in relevant part: "There is a conviction if the prosecution resulted in . . . a verdict of guilty which has not been set aside and which is capable of supporting a judgment, or a plea of guilty or nolo contendere accepted by the court."

In the search warrant case, Akau entered a no contest plea which was accepted by the circuit court resulting in the circuit court's judgment of conviction and sentence; accordingly, under HRS § 701-110(3), the search warrant case resulted in a conviction for the purposes of HRS § 701-111(1).

> (2) Except as provided in subsection (3) of this section [(authorizing the court to order separate trials), quoted infra note 10,] a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.

(Emphases added.) Based on these two statutes, Akau argued that the undercover drug buys were "part and parcel of a search warrant and as such, both the purchase [of the drugs] and the issuance of a search warrant can and should be deemed 'the same episode.'" The prosecution opposed Akau's motion. A hearing was held on May 13, 2004 at which time Akau called Lawrence Grean, the head of the Screening Intake Division at the Prosecuting Attorney's Office, to testify regarding the circumstances under which undercover buys or sales of narcotics that lead to a search warrant are prosecuted or are not prosecuted. Specifically, the following testimony was elicited:

> Q: [By Akau's Counsel] . . . Now, in those cases where the undercover or the confidential informant sales/buys has resulted in search warrants, is it the practice of your office, Mr. Grean, to then prosecute the actual buys and/or sales in spite of the fact that the search warrant case has been prosecuted? Do you understand what I'm driving at?
> A: [By Grean] I -- I think so. The answer to that is it depends.
> Q: All right. And will you please elucidate all of us as to why it depends?
> A: Well, if you have undercover police officers -- let's take that scenario --
> Q: Thank you.
> A: -- and they make three or four buys from a suspect, and then as a result of those buys the search warrant is prepared and executed, --
> Q: Yes?
> A: -- it's quite possible that the undercover buys cannot go forward because the police officer, the undercover officer, is still working undercover and cannot surface at that time.
> Q: And then?

> A: So the prosecutor's office would go ahead with the search warrant case. And at a later date, when it's -- when the undercover officer is going to be available and surface, then we would go ahead with those cases.
> . . . .
> Q: Now, with respect to the buys/sales involving an undercover officer, you mentioned a circumstance under which sometimes those cases would be postponed, to wit, that the officer is still serving in an undercover capacity and therefore your office has to wait until -- until that -- that person's undercover status has been lifted. Is that true?
> A: Right.
> . . . .
> Q: . . . Off the top of your mind, you cannot recollect a case where an undercover officer has done the buy and the sale and which then leads of course to a search warrant on a suspect; right? The suspect is --
> A: The answer is yes.
> Q: Right. And the suspect is prosecuted on the search warrant case but then is not prosecuted for the buys and sales, even though there was an undercover officer involved in the undercover buys and sales.
> . . . .
> A: Well, it -- if the undercover officer has let's say made four buys and he can't surface at the -- at the time of the buys, and he does surface later on, then there wouldn't be -- unless there's some other reason I -- I don't -- I'm not aware of, he -- he -- the suspect would then be prosecuted for those four buys.
> . . . .
> Q: . . . Now, can you say as a matter of fact that in all circumstances when there is an undercover officer involved with the sales and the buys that -- that, even though you've made a search warrant case on the suspect, that you always prosecute those buys and sales?
> A: Well, I would think so, yes.

Additionally, the circuit court questioned Grean as follows:

> Q: [By the circuit court] Mr. Grean, in your mind, correct me if I'm not hearing you right, it's a matter of prosecutorial discretion if there's some buys and then later a search warrant and the undercover officer is able to surface, for lack of a better word, and they're prosecuting, it's prosecutorial discretion whether to charge separate charges?
> A: Absolutely.

Akau also called HPD Officer Shellie Silva, who executed the search warrant on Akau, as a witness. Officer Silva testified, in relevant part, as follows:

> Q: [By Akau's counsel] Is there any reason why, Officer, you decided to get three or four purchases?
> A: [By Officer Silva] In order to get the search warrant, um, you need the purchases done, and the more purchases you have, the more days you have to execute the warrant from the last purchase.
> Q: Okay. Now, earlier this afternoon I asked you about that, and is it fair to say that, for instance, if you only made one undercover purchase, more likely than not the search warrant would be good for like one day?
> A: Yes.
> Q: Whereas, if you made three or four purchases, undercover purchases, then the search warrant would be good for perhaps ten days; is that correct?
> A: Maximum ten days, yes.[6]
> . . . .
> Q: And then finally, Officer Silva, the -- to your knowledge, the search warrant that you executed on November 26[], 2002, did in fact result in a criminal case being brought against [Akau]?
> A: Yes.
> Q: The undercover officers that were used in this case for -- with [Akau], do you recall for what length of time, if any, after the search warrant was executed on November 26[], 2002, that they stayed in an undercover capacity, if you will?
> A: One of the undercover officers is still in an undercover capacity, and the second undercover officer I would say, um, maybe approximately six months. I don't know exactly 'cause there's other divisions and other teams that would use them. So for my case, I would say approximately six months for one, and one is still currently working with us.
> Q: In the police reports that were prepared regarding the purchases and sales in this matter with [Akau], their names are disclosed; is that correct?
> A: Um, in the criminal cases that --
> Q: Yeah, in the police reports.
> A: Yes, because I would believe they had to do a -- a report on the actual transactions so their name would be signed at the bottom of the report.
> Q: Yeah. So it wouldn't be blacked out or something like that; right?
> A: No.

(Emphases added.) Ultimately, on June 18, 2004, the circuit court issued its order denying Akau's motion to dismiss. Therein, the circuit court concluded that:

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[6] HRPP Rule 41(c) (2007) dictates that a search warrant must be executed "within a specified period of time not to exceed 10 days." (Emphasis added.) However, it is unclear from the record what factors the issuing judge examines in determining how long a search warrant will be valid for -- i.e., one day or ten days.

> 3. [Akau's] assertion that the distribution charges in the instant matter and his possession of an illegal narcotic and drug paraphernalia in [the search warrant case], were "based on the same conduct or arising from the same episode" is unsupported by the evidence presented to the court. HRS [§] 701-109(2).
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> . . . .
>
> 6. [Akau's] act of distributing crystal methamphetamine [(in the drug buy case)] and his act of possessing an illegal narcotic and drug paraphernalia [(in the search warrant case)] do not constitute the "same conduct."
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> 7. The evidence demonstrated that [Akau's] distribution of crystal methamphetamine were discrete acts committed and completed on the specific dates charged in the indictment.
>
> 8. Similarly, the evidence demonstrated that [Akau's] possession of the illegal narcotic and related drug paraphernalia were also discrete acts committed and completed on the specific date charged in the complaint and unrelated to the date of the distribution charges in the instant matter.
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> 9. There is no basis to conclude the distribution offenses in the instant matter and the possession and drug paraphernalia offense charged in [the search warrant cases], arose "from the same episode." HRS [§] 701-109(2). Accord[] State v. Carroll, 63 Haw. 345, 627 P.2d 776 (1981).
>
> 10. Accordingly, [Akau] has failed to substantiate his contention that the instant prosecution is barred by operation of "HRS [§§] 701-111(1)(b) and 701-109(2)."

(Emphases and some brackets in original.)[7]

C. Motion for Sentencing as a First-Time Drug Offender in the Drug Buy Case

On April 30, 2004, Akau filed a motion for sentencing as a first-time drug offender, pursuant to HRS § 706-622.5. HRS § 706-622.5 (Supp. 2003) sets forth a sentencing scheme that

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[7] The circuit court made the following additional FOFs in denying Akau's motion to dismiss:

> 11. [HPD] Officer Shellie Silva testified that the distribution [offenses in the drug buy] case[] were not referred immediately to the [p]rosecutor's [o]ffice as to not compromise the identity of the undercover officers who were still involved in ongoing investigations unrelated to the instant matter.
>
> 12. There was no evidence that the prosecution delayed in bringing the indictment in the instant matter in order to gain a tactical advantage over [Akau] or to unfairly cause or expose him to stiffer penalties or punishment.

directs the sentencing court, in certain circumstances, to sentence first-time drug offenders to probation and drug treatment rather than imprisonment. At the May 20, 2004 hearing on the motion, Akau essentially argued that it was unfair to sentence him as a first-time drug offender in the search warrant case when the offenses in that action occurred subsequent in time to the offenses for which he was indicted in the drug buy case. He claimed that he did not receive the benefits of the first-time drug offender statute because the search warrant case and the drug buy case were brought separately, as opposed to all offenses being joined in a single prosecution. The prosecution admitted that the situation "[did] look unfair to the defendant," but argued that Akau would not have been eligible for sentencing as a first-time drug offender for the drug buy case even if those charges had been joined with those in the search warrant case because HRS § 706-622.5,[8] by its express terms, is limited only

[8] HRS § 706-622.5 states in relevant part:

> **Sentencing for first-time drug offenders; expungement.** (1) Notwithstanding any penalty or sentencing provision under part IV of chapter 712, a person convicted for the first time for any offense under part IV of chapter 712 involving possession or use, **not including to distribute or manufacture . . . of any dangerous drug, detrimental drug**, harmful drug, intoxicating compound, marijuana, or marijuana concentrate, as defined in section 712-1240, or involving possession or use of drug paraphernalia under section 329-43.5, who is nonviolent, as determined by the court after reviewing the:
>
> (a) Criminal history of the defendant;
>
> (b) Factual circumstances of the offense for which the defendant is being sentenced; and
>
> (c) Other information deemed relevant by the court;
>
> shall be sentenced in accordance with subsection (2); provided that the person does not have a conviction for any
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> (continued...)

to possession offenses, not distribution offenses. The circuit court denied Akau's motion for sentencing as a first-time offender on June 18, 2004. The circuit court agreed with the prosecution and concluded, inter alia, that "HRS [§] 706-622.5 does not apply in drug distribution cases."

D. Akau's Conditional Plea and Sentence

Prior to the circuit court's issuance of the orders denying Akau's motions to dismiss and for sentencing as a first-time drug offender, Akau entered a conditional guilty plea, pursuant to HRPP Rule 11(a)(2), quoted supra note 3, to the charges in the drug buy case. At the hearing on Akau's change of plea, the circuit court stated:

> THE COURT: I'm well aware of this case. This was a search warrant case initially. And then the government chose to use the undercover officers to do the -- was it [confidential informants] or [undercover officers]?
>
> [AKAU'S COUNSEL]: [Undercover officers.]
>
> THE COURT: The undercover officers to get sales cases. And there's a squabble, which I totally understand, whether the law allows it. I tried real hard to either settle this case or to figure out a way to cut [Akau] some slack. I'm making a transcript now for the [a]ppellate [c]ourt. I couldn't do it, because I have an oath to follow the law. I can't just, based on the length of my foot or what I had for breakfast, take care of [Akau]. But I think I made a thorough record. So maybe the [a]ppellate [c]ourts might see it differently.

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[8](...continued)
violent felony for five years immediately preceding the date of the commission of the offense for which the defendant is being sentenced.

(2) A person eligible under subsection (1) shall be sentenced to probation to undergo and complete a drug treatment program.

(Some emphases in original and some added.)

On October 15, 2004, the circuit court accepted Akau's conditional plea, entered its judgment of guilty conviction, and sentenced Akau to a ten-year term of imprisonment with a mandatory minimum of six months, pursuant to HRS § 712-1242(3) (Supp. 2003).[9] On December 8, 2004, Akau filed his notice of appeal.

E. Appeal Before the ICA

On appeal, Akau argued, as he does in his application, that the circuit court erred in (1) denying his motion to dismiss inasmuch as the search warrant case and the distribution case should be considered part of the "same episode" and (2) denying his motion to be sentenced as a first-time drug offender. The ICA issued its SDO on September 21, 2007, discussed more fully infra, rejecting Akau's arguments and affirming the circuit court's October 15, 2004 judgment. The ICA filed its judgment on appeal on October 11, 2007. Akau timely filed his application for a writ of certiorari on January 7,

[9] The 2003 version of HRS § 712-1242(3) stated:

> Notwithstanding any law to the contrary, except for first-time offenders sentenced under section 706-622.5, if the commission of the offense of promoting a dangerous drug in the second degree under this section involves the possession or distribution of methamphetamine, or any of its salts, isomers, and salts of isomers, the person convicted shall be sentenced to an indeterminate term of imprisonment of ten years with a mandatory minimum term of imprisonment, the length of which shall be not less than six months and not greater than five years, at the discretion of the sentencing court.

(Emphases added.)

2008. Thereafter, this court accepted Akau's application on February 8, 2008 and heard oral argument on March 6, 2008.

II. STANDARDS OF REVIEW

A. Motion to Dismiss an Indictment

"A [circuit] court's ruling on a motion to dismiss an indictment is reviewed for an abuse of discretion." State v. Mendonca, 68 Hawai'i 280, 283, 711 P.2d 731, 734 (1985) (citations omitted).

B. Statutory Interpretation

We review the circuit court's interpretation of a statute de novo. State v. Pacheco, 96 Hawai'i 83, 94, 26 P.3d 572, 583 (2001).

III. DISCUSSION

As previously stated, Akau essentially contends that the ICA erred in affirming the circuit court's denial of his motions to dismiss and for sentencing as a first-time drug offender. We first address Akau's argument with respect to his motion to dismiss.

A. Motion to Dismiss

On application, Akau argues -- as he did before the ICA -- that the search warrant case and the drug buy case should have been tried together as mandated by HRS §§ 701-111(1)(b) and 701-109(2) because both cases "[arose] from the same episode." As previously quoted, HRS § 701-111 provides in relevant part:

> **When prosecution is barred by former prosecution for a different offense.** Although a prosecution is for a violation of a different statutory provision or is based on different facts, it is barred by a former prosecution under any of the following circumstances:
>
> (1) The former prosecution resulted in an acquittal which has not subsequently been set aside or in a conviction as defined in section 701-110(3)[, quoted supra note 5,] and the subsequent prosecution is for:
>
> . . . .
>
> (b) Any offense for which the defendant should have been tried on the first prosecution under section 701-109 unless the court ordered a separate trial of the offense[.]

(Bold emphasis in original and underscored emphases added.) In turn, HRS § 701-109 provides in relevant part:

> (2) Except as provided in subsection (3) of this section,[10] a defendant shall not be subject to separate trials for multiple offenses based on the **same conduct or arising from the same episode**, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.

(Emphases added.) Inasmuch as "it is axiomatic that the 'same criminal episode' element of the compulsory joinder rule is not a self-defining concept[,]" People v. Miranda, 754 P.2d 377, 380 (Colo. 1988), we first examine this jurisdiction's interpretation of the above statutes and, specifically, the definition of the

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[10] HRS § 701-109(3) states:

> When a defendant is charged with two or more offenses based on the same conduct or arising from the same episode, the court, on application of the prosecuting attorney or of the defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires.

Accordingly, based on HRS § 701-109(3), it appears that, prior to the entry of Akau's plea of no contest in the search warrant case, the prosecution could have sought permission from the circuit court to bring the cases separately. However, neither the circuit court, the ICA, nor the parties address the effect of HRS § 701-109(3) on this case.

"same episode" before delving into the correctness of the ICA's conclusions.

1. Hawai'i Case Law

a. the *Carroll* case

In State v. Carroll, 63 Haw. 345, 627 P.2d 776 (1981), the defendant was arrested for allegedly starting a fire at a school. Id. at 346, 627 P.2d at 777. The arresting police officer conducted a routine search of the defendant and found a cannister in the defendant's possession. Id. Believing that the canister contained nasal spray, the officer returned it to the defendant. Id. The defendant was then transported to the police station and booked for attempted criminal property damages in the second degree. Id. During a custodial search, a second officer recovered the cannister and identified it as mace. Id. The defendant was subsequently charged with possession of an obnoxious substance. Id. The defendant was first tried and acquitted of the misdemeanor charge of possession of an obnoxious substance -- the mace. Id. at 346-47, 627 P.2d at 777-78. The defendant was subsequently brought to trial on the attempted criminal property damage charge. Id. at 347, 627 P.2d at 778. The defendant moved to dismiss the indictment, arguing that (1) the two offenses were part of a single "episode within the context of HRS § 701-109(2)" and, (2) inasmuch as the offenses were part of the same episode and not prosecuted in the same proceeding, the second case was prohibited by

HRS § 701-111(1)(b). Id. (internal quotation markes omitted). The trial court granted the defendant's motion to dismiss the indictment, and the prosecution appealed. Id. On appeal, this court observed that:

> [HRS] § 701-109(2) . . . reflects a policy that a defendant should not have to face the expense and uncertainties of multiple trials based on essentially the same conduct or episode. It is designed to prevent the [prosecution] from harassing a defendant with successive prosecutions where the [prosecution] is dissatisfied with the punishment previously ordered or where the [prosecution] has previously failed to convict the defendant.

Id. at 351, 627 P.2d at 780 (citations omitted). This court held that the preconditions for the application of HRS § 701-109(2) had been satisfied inasmuch as (1) it was "uncontested that the appropriate prosecuting officer was aware of the . . . [a]ttempted [c]riminal [p]roperty [d]amage charge at the time that the possessory charge was prosecuted" and (2) "both charges [were] clearly within the jurisdiction of a single court." Id. at 349, 627 P.2d at 779 (footnote and citations omitted). Additionally, this court declared that, "[i]n view of the dual considerations of fairness to the defendant and society's interest in efficient law enforcement," the "test for determining the singleness of a criminal episode should be based on whether the alleged conduct was so closely related in time, place and circumstances that a complete account of one charge cannot be related without referring to details of the other charge." Id. at 351, 627 P.2d at 780. Applying the test to the facts

presented, this court held that the two cases did not arise from the "same episode" because:

> [the] defendant was charged with the commission of offenses which occurred at different times and places and under different circumstances. Our rationale is based primarily on the fact that the arresting officer failed to recognize the illegal nature of the cannister at the time of the search for weapons. As a result, defendant's possession of the [m]ace continued after his initial arrest, until the subsequent discovery and identification at the police station.

Id. at 352, 627 P.2d at 781. This court further reasoned that:

> While it is true that the possessory offense can be traced to the time of the first arrest, we cannot say that the possessory charge should be deemed effective as of the time of that arrest. The point in time at which the [m]ace was identified is important because prior to the identification, the facts and circumstances within the first arresting officer's knowledge did not afford probable cause to believe that an offense other than [a]ttempted [c]riminal [p]roperty [d]amage in the [s]econd degree had been committed.

Id. (emphasis added) (citations omitted). Accordingly, the Carroll court reversed the trial court's order granting the defendant's motion to dismiss. Id. at 353, 627 P.2d at 781.

b. the *Servantes* case

This court, in State v. Servantes, 72 Haw. 35, 804 P.2d 1347 (1991), had an opportunity to apply the test announced by the Carroll court. In Servantes, a police officer observed a passenger in the defendant's car smoking a marijuana cigarette. Id. at 36, 804 P.2d at 1348. After ordering the passenger out of the car, the police officers discovered a bag of marijuana in plain view on the driver's side of the car next to the defendant's foot. Id. The bag was seized, and the defendant and the passenger were arrested for promoting a detrimental drug in

the third degree, a misdemeanor. Id. at 36-37, 804 P.2d at 1348. The defendant's car was towed to the police station; four days later, after obtaining a search warrant, the police discovered and seized cocaine and drug paraphernalia from the vehicle. Id. at 37, 804 P.2d at 1348. The defendant was arrested and charged with promoting a dangerous drug in the third degree and possession with intent to use drug paraphernalia, both class C felonies. Id. The defendant entered a nolo contendere plea to the misdemeanor charge and was sentenced. Id. Subsequently, the defendant moved to dismiss the felony indictment on the grounds that HRS §§ 701-111(1)(b) and 701-109(2) barred the prosecution from proceeding on the felony charges. Id. The circuit court denied the defendant's motion to dismiss, finding that "the marijuana offense occurred at a different time, place and circumstances from the felony offenses." Id. This court, in reversing the trial court's ruling, stated that:

> In Carroll, we reasoned that defendant's possession of the [m]ace continued until the discovery and identification at the police station. Prior to identifying the [m]ace, the facts and circumstances known to the first officer did not afford probable cause to believe that an offense other than attempted criminal property damage had been committed.
>
> Here, [the defendant] lost possession of both the marijuana and cocaine when he was arrested and his car seized. **Most importantly, police had probable cause at the time of [the defendant's] arrest on the marijuana offense to suspect [the defendant] of possession of additional illegal drugs**.
>
> Furthermore, we cannot ignore that [the defendant's] motion, filed previous to trial, to suppress the evidence seized from his car is obviously part of the trial proceedings. In the course of the suppression hearing, the [prosecution] would have to refer to a factual account of the misdemeanor offense in order to support probable cause for the search. A fortiori, the felony charge cannot be tried without mention of the misdemeanor offenses.

Id. at 39, 804 P.2d at 1349 (emphases added). Accordingly, this court held that "the [prosecution] was barred under [HRS] § 701-109(2) from prosecuting [the defendant] for the felony offense[of possession of cocaine] by his conviction on the misdemeanor marijuana possession charge." Id.

c. the *Keliiheleua* case

In State v. Keliiheleua, 105 Hawai'i 174, 95 P.3d 605 (2004), this court again applied the Carroll test to determine whether two criminal offenses, prosecuted separately, were barred pursuant to HRS §§ 701-111(1)(b) and 701-109(2). In Keliiheleua, the defendant's van "drifted across three lanes of freeway and rear-ended a parked car." Id. at 176, 95 P.3d at 607. A passenger in the defendant's van and the driver of the parked car were both injured. Id. At the time of the accident, the defendant did not have insurance; however, he "obtained an insurance policy later that same day." Id. "After obtaining the policy, he falsely represented the date and time of the accident as occurring subsequent to the initiation of the policy." Id. During the police investigation of the accident, the Insurance Fraud Division of the State of Hawai'i Department of Commerce and Consumer Affairs (DCCA) began a separate investigation of the defendant's purported insurance fraud. Id. The DCCA investigator testified he had no knowledge regarding the "pending criminal investigation for the negligent injury case." Id. As a result of the DCCA investigation, the defendant was charged with

insurance fraud and attempted theft in the second degree. Id. at 177, 95 P.3d at 608. On December 6, 2001, the defendant pled no contest to the charges of insurance fraud and attempted theft in the second degree and moved for a deferred acceptance of his plea, which was granted. Id. Thereafter, on July 17, 2002, as a result of the HPD's investigation, the prosecutor's office formally initiated prosecution against the defendant as a result of the accident itself. Id. On September 19, 2002, a grand jury indicted the defendant on the charge of negligent injury in the first degree. Id. The defendant then moved to dismiss the negligent injury indictment, arguing that the case was barred pursuant to HRS §§ 701-111(1)(b) and 701-109(2). Id. at 178, 95 P.3d at 609. The circuit court denied the defendant's motion. Id. Thereafter, the defendant entered a conditional plea of no contest and subsequently appealed. Id. On appeal to this court, the defendant argued, inter alia, that the negligent injury case should have been dismissed pursuant to HRS §§ 701-111(1)(b) and 701-109(2). Id. This court reasoned that: (1) "although the motor vehicle accident and fraudulent insurance claim occurred on the same day, they did not occur at the same time"; (2) "although the record does not so indicate, the places where [the d]efendant committed the offenses were presumably different"; and (3) the circumstances were not similar because "the facts and issues involved in the charges (namely, the statutory requirements of the alleged offenses) are dissimilar." Id. at 181-82, 95 P.3d at

612-13 (footnote omitted). Accordingly, this court held that, "[because the criminal offenses in question are not closely re]lated in time, place and circumstances, they did not arise from the same 'episode,' [and, c]onsequently[,] HRS §[] 701-109(2) does not apply to this case." Id. at 182, 95 P.3d at 613 (footnote omitted). In so holding, this court distinguished the facts in the case at bar from Servantes, which was relied upon by the defendant, stating that:

> Here, there was no reason to suspect that subsequent to causing the motor vehicle accident, [the d]efendant would obtain an insurance policy and then file a fraudulent insurance claim. Furthermore, unlike the offenses involved in Servantes, the negligent injury charge can be tried without mention of the fraud case.

Id. (emphasis added).[11]

2. Application of the Compulsory Joinder Statute in this Case

On direct appeal before the ICA, the prosecution argued that the circuit court correctly determined "that there was no basis upon which to conclude that the distribution offenses in the [drug buy case] and the search warrant . . . case arose 'from the same episode.'" Specifically, the prosecution asserted:

[11] We also note here our agreement with the interpretation of Keliiheleua set forth in the concurring opinion. See Concurring Opinion by Acoba, J. (Concurring Op.) at 2-3 n.2.

> Here, the circuit court was correct [that] the distribution offenses and the search warrant case did not arise from the same episode or conduct.[12] The drug buys were conducted at times separate and apart from the execution of the search warrant. There were entirely different witnesses involved in each offense. The offenses were discovered under different circumstances and were not related in time, place and circumstances. The fact that the buys were used as a basis to support the search warrant did not require the offenses be charged together.

Id. at 13.

In affirming Akau's conviction, the ICA agreed with the prosecution and rejected Akau's arguments that all of the charged offenses were required to be joined in a single prosecution. Specifically, the ICA explained that:

> Akau's case is similar to [Servantes] because the [prosecution's drug buy case] against Akau provided the [prosecution] with probable cause to search his person and personal effects. The [prosecution's] search warrant, in turn, gave rise to the [search warrant case]. However, Akau's case is distinguishable from Servantes because the search warrant for Akau was based on three separate buys/sales for crystal methamphetamine from/to him conducted on three separate buys/sales of crystal methamphetamine from/to him conducted on three separate dates (October 8 and 22 and November 21, 2002) -- all made before the police department executed its search warrant on Akau and his personal effects on November 26, 2002. The dates and circumstances involved in the [drug buy case] and [the search warrant case] were more disparate than were the dates

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[12] In so asserting, the prosecution relied on this court's decision in State v. Lessary, 75 Haw. 446, 462, 865 P.2d 150, 156 (1994), for the proposition that "'[p]rosecutions are for the same conduct if any act of the defendant is alleged to constitute all or part of the conduct elements of the offenses charged in the respective prosecutions." However, the prosecution's reliance on Lessary is misplaced. In Lessary, this court held that the "same conduct" test applies under the double jeopardy clause of the Hawai'i constitution. 75 Haw. at 458-59, 865 P.2d at 156. This court specifically indicated that it was not applying the "same episode" test articulated in Carroll and that the defendant was "confusing the 'same conduct' test with the 'same episode' test." Id. at 461, 865 P.2d at 157. Here, the prosecution appears to confuse this court's double jeopardy jurisprudence with its compulsory joinder jurisprudence. Moreover, a number of jurisdictions, in looking at the interplay between double jeopardy protections and their compulsory joinder statutes, have held that, when applicable, "the compulsory joinder rule . . . offer[s] greater protection to the accused than does the double jeopardy clause." Commonwealth v. Bellezza, 603 A.2d 1031, 1036 (Pa. Super. Ct. 1992); see also People v. Miranda, 754 P.2d 377, 380 (Colo. 1988).

> and circumstances in the two cases involved in Servantes. Hence, we do not agree that the [search warrant case] and [the drug buy case] were part of the "same episode" and, as such, should have been consolidated into one trial.
>
> Akau's case is more like [Keliiheleua] in that the criminal offenses were not closely related in time, place, or circumstances.
>
> The Supreme Court of Hawai'i explained in [Carroll] that HRS § 701-109(2) was designed to prevent the State from harassing a defendant with successive prosecutions where the State had failed to convict the defendant or was dissatisfied with the punishment previously ordered. However, the State's conviction of Akau in the [search warrant case] was successful, as Akau was convicted of [p]romoting a [d]angerous [d]rug in the [t]hird [d]egree and [u]nlawful [u]se of [d]rug [p]araphernialia and sentenced to a term of five years of probation and one year of incarceration. There is no evidence in the record on appeal that the [prosecution] attempted to harass Akau by prosecuting the [search warrant case] separately from the [drug buy case].

ICA SDO at 3-4.

Akau, however, contends that the ICA "committed grave error in being too mechanical and rigid in its approach to the facts of this case and interpretation of case law." Specifically, Akau argues that

> [t]his is evidenced in the [ICA's] own language found on page [three] of the [SDO] . . . second full paragraph[,] wherein the [ICA] at first state[d] that the present case is similar to State v. Servantes, 72 Haw. 35, 804 P.2d 1347 (1991) and then in the same breath distinguishes Akau from Servantes by invoking the ". . . so closely related in time, place and circumstances . . ." language from Carroll to point out the obvious that the three buys/sales occurred on different dates[] -- ignoring the commonality of purpose of each buy/sale.
>
> Even though this case might constitute an anomalous situation (referred to [in] the [o]pening [b]rief as the "Akau anomaly"), this court, nevertheless, should be concerned with the administration of justice, [c]f., State v. Wong, 97 Hawai'i 512, 40 P.3d 914 (2002)[.]

(Ellipses in original.) **Id.**

As previously stated, criminal offenses that are "based on the same conduct or aris[e] from the same episode" must be joined in a single prosecution "if such offenses are known to the

appropriate prosecuting officer at the time of commencement of the first trial and are within the jurisdiction of a single court." HRS § 701-109(2). If the prosecution fails to bring such cases together, the subsequent charges are barred. HRS § 701-111(1)(b). Here, the evidence demonstrates (1) that at the time Akau entered his plea of no contest in the search warrant case the appropriate prosecuting officer was aware of the existence of the three undercover drug buys inasmuch as they served as the bases for the search warrant that ultimately led to the charges levied against Akau in the search warrant case and (2) that both cases were within the jurisdiction of a single court -- the Circuit Court of the First Circuit. Additionally, the parties do not dispute, and we agree, that the search warrant case and the drug buy case were not based on the same conduct. Accordingly, the relevant inquiry before us narrows to whether both cases "[arose] from the same episode."

In Carroll, this court announced that the "test for determining the singleness of a criminal episode should be based on whether the alleged conduct was so closely related in time, place and circumstances that a complete account of one charge cannot be related without referring to details of the other charge." 63 Haw. at 351, 627 P.2d at 780 (emphasis added). The "time" and "place" factors of the Carroll test are easily determined and straightforward to apply. However, as discussed

more fully infra, the "circumstances" factor of the test is more difficult to define and apply.

With respect to the "time" factor, the evidence in the instant case indicates that the undercover drug buys occurred on three separate occasions -- October 8, 22, and November 21, 2002. The search warrant was executed on November 26, 2002 -- five days after the last drug buy. Thus, the facts unequivocally establish that the drug buy offenses and the search warrant offenses did not occur on the same day or at exactly the same time. However, in Servantes, this court determined that the lapse of several days between the discovery of the first criminal offense and the second offense was not fatal to the defendant's argument that the two criminal offenses "[arose] from the same episode." Servantes, 72 Haw. at 37, 804 P.2d at 1348. In our view, the span of five days between the last undercover drug buy and the execution of the search warrant, or even the forty-nine days between the first drug buy and the execution of the search warrant, is not so disparate as to render the drug buy offenses and the search warrant offenses separate episodes. Thus, because the drug buy offenses and the search warrant offenses were closely related in time, we believe the time factor has been met.

With respect to the "place" factor, we expressed concern in Keliiheleua, that "defining 'place' as broadly as the entire City and County of Honolulu would unduly hamper the administration and application of HRS § 701-109(2)." 105 Hawai'i

at 181, 95 P.3d at 612. However, such concern is not present in the case at bar inasmuch as the evidence established that the place where two of the three drug buys occurred and the place where the search warrant was executed were the same or similar -- i.e., in an area fronting 825 and 835 Keeaumoku Street. The third drug buy occurred inside the men's restroom of the Daiei store on Kaheka Street. We take judicial notice that the distance between the Daiei store and the place where the search warrant was executed is approximately .25 miles or about three blocks. See State v. Puaoi, 78 Hawai'i 185, 191, 891 P.2d 272, 278 (1995) (holding that "geographical facts, such as whether a particular address is within a certain city and county of the state, is a proper matter subject to judicial notice" (internal quotation marks and citations omitted)). Thus, inasmuch as (1) the place where the first two drug buys occurred and where the search warrant was executed was the same or similar and (2) the third drug buy occurred within close proximity of the place where the search warrant was executed, we likewise believe the "place" factor has also been met.

With respect to the "circumstances" factor of the Carroll test, a close reading of our relevant case law reveals that a common thread runs throughout these cases -- that is, an examination of whether the facts and circumstances of the first discovered offense provided sufficient probable cause to suspect that the defendant had committed or would commit the second

discovered offense. For example, in Carroll, this court determined that the two charged offenses -- attempted criminal property damage in the second degree and possession of an obnoxious substance (mace) -- were not part of the "same episode" because,

> prior to the identification [of the mace], the facts and circumstances within the first arresting officer's knowledge **did not afford probable cause to believe** that an offense other than [a]ttempted [c]riminal [p]roperty [d]amage in the [s]econd [d]egree had been committed.

63 Haw. at 352, 627 P.2d at 781 (emphases added). Likewise, in utilizing a probable cause analysis, this court in Servantes determined that the defendant's marijuana possession offenses and cocaine possession offenses "[arose] from the same episode," reasoning that, "[m]ost importantly, [the] police had probable cause at the time of [the defendant's] arrest on the marijuana offense to suspect [the defendant] of possession of additional illegal drugs[, i.e., cocaine]." 72 Haw. at 39, 804 P.2d at 1349. Finally, in Keliiheleua, this court held that the negligent injury charge and the charges in the fraud case did not arise from the "same episode" because, inter alia, "there was no reason to suspect that[,] subsequent to causing the motor vehicle accident, [the d]efendant would obtain an insurance policy and then file a fraudulent insurance claim." 105 Hawai'i at 182, 95 P.3d at 613. Based on the foregoing, we believe that the relevant case law in this jurisdiction establishes that, when examining the "circumstances" of offenses alleged to be part of

the "same episode," this court has focused primarily on whether the facts and circumstances of the first discovered offense provided sufficient probable cause to suspect that the defendant had committed or would commit the second discovered criminal offense.

In this case, the undisputed facts and the reasonable inferences therefrom establish that: (1) Akau sold drugs to undercover police officers on three separate occasions, each of which was sufficient to charge him with promoting a dangerous drug in the second degree; (2) the three drug buys, however, also provided sufficient probable cause to suspect that Akau would commit additional drug offenses; (3) rather than refer the drug buy evidence to the prosecutors, the police opted to obtain a search warrant based upon the drug buys; (4) the three previous drug buys provided sufficient probable cause for the search warrant; (5) the execution of the search warrant ultimately led to the possession and paraphernalia charges; and (6) the prosecutors were clearly aware of the distribution offenses at the time they made the decision to charge Akau in the search warrant case. Additionally, we observe that the circumstances involved in the three undercover drug buys were also similar to the circumstances involved in the execution of the search warrant inasmuch as all the offenses were drug related, i.e., they involved the sale and/or possession of crystal methamphetamine or crystal methamphetamine paraphernalia. Because the circumstances

of the drug buy case and the search warrant case are closely related, we believe the "circumstances" factor has been met.

Accordingly, we hold that the charged offenses in the search warrant case and the drug buy case arose from the "same episode" inasmuch as Akau's conduct was "so closely related in time, place and circumstances that a complete account of one charge [could not have been] related without referring to the details of the other charge." Carroll, 63 Haw. at 351, 627 P.2d at 780. The dissent, however, disagrees, contending that "the offenses allegedly committed in the drug buy case and the possession case [were] not so 'closely related in time, place, and circumstances,' that a '**substantial factual nexus' exists between the two cases**, [People v.] Miranda, 754 P.2d [377,] 381 [(Colo. 1988) (en banc)], whereby 'a complete account of one charge cannot be related without referring to details of the other charge[.]"[13] Dissenting Op. at 10-11 (bold emphasis added) (underscored emphases provided by dissent) (citations to Carroll omitted). The dissent's belief that a "substantial factual nexus" must be present misconstrues the Carroll test.

[13] In Miranda, the Colorado Supreme Court applied the test for determining when two cases arose from the same episode in its own jurisdiction. See Miranda, 754 P.2d at 380-81 (collecting cases and concluding that "[f]or purposes of compulsory joinder, the requirement that offenses arise out of 'the same criminal episode,' must be interpreted to include the condition that the offenses be connected in such a manner that prosecution of the offenses involved substantially interrelated proof"). We, however, are bound by our own precedent, as discussed supra. Accordingly, the dissent's disregard of the case law in this jurisdiction in favor of the test enunciated in an out-of-state case to support its position is unavailing.

First, under the compulsory joinder statutes, multiple offenses that are closely related in time, place, and circumstances must be known to the prosecuting officer. See HRS § 701-109(2) (stating in part that "a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same episode, if such offenses are known to the appropriate prosecuting officer"). And, second, such knowledge must be known "at the time of **the commencement** of the first trial[.]" Id. (emphasis added). In other words, because a defendant shall not be subjected to multiple trials, prosecutors -- at the time they review evidence submitted by the police that involve multiple offenses committed by the defendant, or at least by the time of trial (if those offenses were charged in separate cases) -- must necessarily consider whether the offenses involve the same conduct or whether the alleged conduct constitutes a single episode.

Third, in deciding the singleness of a criminal episode, the prosecutor must, as indicated by our case law, consider "whether the alleged conduct was so closely related in time, place and circumstances that a complete account of one charge cannot be related without referring to details of the other charge." 63 Haw. at 351, 627 P.2d at 780. In making charging decisions, prosecutors "shall not institute or cause to be instituted criminal charges when . . . it is obvious that the

charges are not supported by probable cause." Hawai'i Rules of Professional Conduct, Rule 3.8(a) (2004) (emphases added).

In the instant case, the prosecutor, in making a determination of the specific charges to be brought against Akau, would necessarily have been required to review the police affidavit in support of the search warrant -- that included a factual accounting of the undercover drug buys, i.e., whether there was probable cause to sustain criminal charges. In conducting such review and evaluating probable cause, it is apparent that a complete account of the search warrant offenses could not be made without reference to the details of the undercover drug buys. Consequently, we also hold that all of the offenses brought against Akau should have been joined in a single prosecution.[14]

Finally, our holding today is consistent with and promotes the policies underlying Hawaii's compulsory joinder statutes, HRS §§ 701-111(1)(b) and 701-109(2), i.e., "fairness to the defendant" and "society's interest in efficient law

[14] We recognize that, even though multiple offenses are known to the prosecutor during the charging-decision stage, the compulsory joinder statutes do not mandate that the prosecutor charge all of the offenses in a single complaint or indictment. Indeed, the prosecutor may charge the offenses in separate complaints or indictments; however, HRS § 701-109(2) appears to contemplate that, when the offenses arise from a single episode and are in the jurisdiction of a single court, the prosecuting officer must, at least by "the time of the commencement of the first trial," HRS § 701-109(2), decide to seek either joinder of all offenses (as required by HRS § 701-109(2)) or separate trials (as permitted under HRS § 701-109(3)). Otherwise, once the first trial commences, the prosecution runs the risk of having the subsequent-charged-offenses dismissed or guilty verdicts on those charges overturned.

enforcement." Carroll, 63 Haw. at 351, 627 P.2d at 780. As stated by this court in Carroll:

> Compulsory joinder of offenses which share a proximity in time, place and circumstances would not only protect the defendant from successive prosecutions based on the same conduct or episode, but it would also save the defendant and the [prosecution] time and money[.]

Id. Likewise, the commentary to HRS § 701-109(2) states that "[t]hese rules reflect a policy that defendants should not have to face the expense and uncertainties of two trials based on essentially the same episode." Commentary to HRS § 701-109. As more aptly stated by the Pennsylvania Supreme Court, where two criminal cases "arise from the same episode" but are not joined, the criminal defendant is forced to "run the gauntlet repeated times and confront the awesome resources of the state." Commonwealth v. Nolan, 855 A.2d 834, 839 (Pa. 2004) (quoting Commonwealth v. Hude, 458 A.2d 177, 180 (Pa. 1983)) (internal quotation marks omitted).

Here, Akau was potentially facing "the expense and uncertainties of two [criminal prosecutions] based on essentially the same episode." Commentary to HRS § 701-109. At the time Akau entered his no contest plea and was sentenced in the search warrant case -- in February and April 2003, respectively -- he was unaware that law enforcement officials, who had knowledge of the drug buy offenses, would be indicting him in the drug buy case. Having such awareness would presumably have had some impact on Akau's trial strategy, including his decision to plead

no contest to the charges in the search warrant case. Moreover, we observed in Carroll that HRS § 701-109(2) was "designed to prevent the [prosecution] from harassing a defendant with successive prosecutions where the [prosecution] is dissatisfied with the punishment previously ordered or where the [prosecution] has previously failed to convict the defendant." Carroll, 63 Haw. at 351, 627 P.2d at 780 (citation omitted). Inasmuch as law enforcement officials had knowledge of the drug buy offenses at the time the search warrant offenses were charged, but, nevertheless, choose to bring two separate cases at different times, Akau was subjected to harassment with successive prosecutions.

Additionally, "society's interest in efficient law enforcement," Carroll, 63 Haw. at 351, 627 P.2d at 780, lies in "judicial administration and economy," Hude, 458 A.2d at 180. As such, we believe that, under the circumstances of the case at bar, this policy consideration also weighs in favor of compulsory joinder because the prosecution could have charged all of the offenses together in a single prosecution, which would have saved the judiciary the expenses associated with having to deal with the two cases separately, including the potential of holding two trials. To hold otherwise would "unduly encourage pursuit and surveillance for lengthy periods of time and multiple prosecutions from the eventual arrest," Morgan v. State, 469 S.E.2d 340, 343 (Ga. Ct. App. 1996), a result surely not

supported by either the plain language or purpose of HRS §§ 701-111(1)(b) and 701-109(2). Although the prosecution claims that it could not bring all the charges in a single prosecution because one of the undercover officers involved in the drug buys had not yet "surfaced," the prosecution's claim is weakened by Officer Silva's testimony that, even after Akau was indicted in the drug buy case, one of the undercover officers involved in the drug buys had not yet surfaced. In other words, it appears that the "surfacing" of undercover officers does not necessarily affect the prosecution's ability to bring charges based on undercover drug buys. As such, the policies expressed by HRS §§ 701-111(1)(b) and 701-109(2) further compel this court to conclude that the offenses contained in the search warrant case and the offenses contained in the drug buy case should have been joined in a single prosecution.

Based on the foregoing discussion, we hold that the circuit court erred in denying Akau's motion to dismiss based upon the prosecution's failure to join the search warrant offenses and the drug buy offenses in a single prosecution. As such, we also hold that the ICA erred in affirming the circuit court's erroneous denial.

B. Akau's Remaining Contention

Akau additionally argues that the ICA erred in affirming the circuit court's denial of his motion to be sentenced as a first-time drug offender pursuant to HRS

§ 706-622.5. However, in light of our holding, as discussed above, we need not examine Akau's remaining contention on application.

IV. CONCLUSION

Based on the foregoing, we hold that, inasmuch as the offenses associated with the search warrant case and the drug buy case should have been joined in a single prosecution, pursuant to HRS § 701-109(2), the prosecution of the drug buy case was barred by HRS § 701-111(1)(b). Accordingly, we reverse the ICA's October 11, 2007 judgment on appeal and the circuit court's October 15, 2004 judgment of conviction in the drug buy case.

Christopher R. Evans, for petitioner/defendant-appellant, on the application

Loren J. Thomas, Deputy Prosecuting Attorney, for respondent/plaintiff-appellee