CONCURRING OPINION BY ACOBA, J.

I concur but note the following.

The statute's mandate 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 at the time of the commencement of the first trial[,]" Hawai'i Revised Statutes (HRS) § 701-109(2) (1993),[1] relates to prosecutorial charging. This court has said:

> The relevant "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." [State v.] Servantes, 72 Haw. [35,] 38-39, 804 P.2d [1347,] 1349 [(1991)] (quoting [State v.] Carroll, 63 Haw. [345,] 351, 627 P.2d [776,] 780 [(1981)].

State v. Keliiheleua, 105 Hawai'i 174, 181, 95 P.3d 605, 612 (2004).

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[1] HRS § 701-109 entitled "Method of prosecution when conduct establishes an element of more than one offense," states in pertinent part as follows:

> (2) Except as provided in subsection (3) of this section, 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.
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> (3) 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.

Obviously, application of the test will differ, depending upon the varying circumstances of the cases.[2] Thus,

[2] Respectfully, in this regard, the dissent is incorrect in its comparison of the instant case to Keliiheleua. In Keliiheleua, the defendant was involved in an automobile accident on November 18, 2000, for which he was charged with the offense of negligent injury. 105 Hawai'i at 176-77, 95 P.3d at 607-08. The defendant, who did not have an insurance policy at the time of the accident, obtained an insurance policy later that same day of the accident. Id. at 176, 95 P.3d at 607. Upon obtaining the policy "he falsely represented the date and time of the accident as occurring subsequent to the initiation of the policy," for which he was subsequently charged with insurance fraud and attempted theft in the second degree. Id. at 176-77, 95 P.3d at 607-08.

As related infra, the crux of the issue is whether "a complete account of one charge cannot be related without referring to details of the other charge" based on the close relationship "in time, place, and circumstances." Id. at 181, 95 P.3d at 612 (internal quotation marks and citations omitted). First, as the dissent notes as to the time factor, "'although the motor vehicle accident and fraudulent insurance claim occurred on the same day, they did not occur at the same time.'" Dissent at 2 (quoting Keliiheleua, 105 Hawai'i at 181, 95 P.3d at 612). However, in the instant case, the time factor was satisfied despite the fact that events pertaining to the drug buy case took place five to forty-nine days before the events relating to the search warrant case because the drug buys were the basis for the procurement of the search warrant that resulted in the other drug-related crimes charged in the search warrant case.

Second, the dissent contends that "[t]he evidence tending to prove a prima facie case against [Petitioner/Defendant-Appellant Anthony Kalani Akau (Akau)] in both criminal cases occurred . . . at different places (835 Keeaumoku Street for the possession case, and, for the drug buy case, the area fronting 825 Keeaumoku Street and a men's restroom of a commercial establishment)[.]" Dissent at 12-13. Although the activities relating to the drug buy case and the search warrant case did not all take place at the exact same physical location, as the majority notes, all of the activities took place within "approximately .25 miles or about three blocks" of each other. Majority opinion at 26. Such a limited distance is hardly equivalent to the contrasting "entire City and County of Honolulu" in Keliiheleua where the record did not indicate "the places where [the d]efendant committed the offenses[.]" Keliiheleua, 105 Hawai'i at 181, 95 P.3d at 612.

Third, the dissent argues that the discovery of the offenses in this case occurred under different circumstances, "namely, the offense in the drug buy case was alleged to have been committed as a result of the three undercover transactions, and the offenses in the possession case were alleged to have been committed as a result of the search of Akau's person," and, thus, "any evidence tending to prove Akau's culpability in the possession case would not constitute a substantial portion of the proof in the drug buy case." Dissent at 13 (citation omitted). However, as noted above, the issuance of the search warrant necessary for the search of Akau and leading to the charges of promoting a dangerous drug and unlawful use of drug paraphernalia, was "[b]ased on the [three] undercover [drug buy] transactions[.]" Furthermore, here, "the facts and issues involved in the charges (namely the statutory requirements of the alleged offenses)," Keliiheleua, 105 Hawai'i at 182, 95 P.3d at 613, are similar. The offenses of promoting a dangerous drug in the third degree under HRS § 712-1243 and unlawful use of drug paraphernalia under HRS § 329-43.5(a) arising from the search warrant case and the offense of promoting a dangerous drug in the second degree under HRS § 712-1242(1)(c) in

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although probable cause may be a factor in the single episode evaluation of a specific case, see majority opinion at 26-27 (stating that "a common thread runs throughout these cases -- that is, . . . 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[]" (emphases added)), I do not believe it is a requirement of the single episode test, or that the order in which the charges are brought is necessarily determinative in applying the test.

There is no probable cause requirement in HRS § 701-109, or that is alluded to in the commentary. Thus the absence of a "probable cause" link between the first charge brought and the second charge initiated, is not determinative of the statute's application. Probable cause was not a factor in State v. Boyd, 533 P.2d 795 (Or. 1975), from which this court obtained the same episode test, Carroll, 63 Haw. at 349, 627 P.2d at 779, or in subsequent Oregon cases applying that test. See, e.g., State v. Smith, 770 P.2d 950, 952 (Or. App. 1989) (two

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the drug buy case, contain similar statutory requirements -- all involving the possession or distribution of drugs or the possession of drug paraphernalia.

Finally, in Keliiheleua the evidence necessary to prove the negligent injury offense was different from the evidence needed to prove the fraud offense. There would be little overlap in the proof adduced for the negligent injury and fraud cases as the two cases would necessitate the production of entirely different witnesses, documents, and testimony. Thus, the purpose of HRS § 701-109(2) to join trials such that defendants will not "have to face the expense and uncertainties of two trials based on essentially the same episode," commentary on HRS § 701-109, and to spare the State the time and expense associated with production of repetitive evidence, would not be served in Keliiheleua where there would be little to no overlap in the evidence required for the different charges.

offenses arise from the same criminal episode if "the charges . . . arise out of the same act or transaction if they are so closely linked in time, place, and circumstance that a complete account of one charge cannot be related without relating details of the other charge" (citation and internal quotation mark omitted)); State v. Grant, 675 P.2d 1120, 1122 (Or. App. 1984) ("In deciding whether multiple charges should be joined, the prosecutor and the trial judge may start . . . with the initial guideline that if a complete account of one charge necessarily includes details of the other charge, the charges must be joined to avoid a later double jeopardy defense to further prosecution." (Citation and internal quotation marks omitted.)); State v. Parrish, 607 P.2d 778, 781 (Or. App. 1980) (two offenses arise out of the same criminal episode if the charges are so factually interrelated that a complete account of one charge cannot be related without relating details of the other).

Moreover, the order in which the cases are filed in court is not fundamentally decisive of the single episode issue. In this case had the "buy" case been brought first and the "search warrant" case second, a complete account of the search warrant case could not be related without relating details of the buy case, thus rendering the search warrant case subject to dismissal as well. Inasmuch as the search warrant case could never be tried, whether brought first or second, without reference to the buy case, both cases must be tried together

because of the substantive overlap in evidence from the buy case into the search warrant case. This comports with the purpose of HRS § 701-109(2) and (3) "that defendants should not normally have to face the expense and uncertainties of two trials based on essentially the same episode." Commentary on HRS § 701-109.

Although HRS § 701-109(2) focuses on the knowledge of "the appropriate prosecuting officer at the time of the commencement of the first trial," (emphasis added), it may be impractical at that point in time to add a new charge to the trial without engendering substantial court delay and potential prejudice to the defendant. The offenses pertaining to the drug buy case occurred between October 8, 2002 and November 21, 2002. The offenses pertaining to the search warrant case occurred on November 26, 2002. Thus, in this case, it appears that all the offenses in question were known to the prosecutor at the time the first charge was made via complaint on December 5, 2002. The same episode test was, by definition, applicable to the instant cases at the time of the first charge. Prudentially for the prosecution, then, the crucial question is whether, in considering the evidence known at the time of the first charging decision, a complete account of one charge cannot be related without referring to details of the other charge such that evidence to be presented in one case would substantively overlap evidence in the other case. See supra note 2. Finally, if post-charge circumstances indicate that the offenses should not be

tried together, then that contingency is met by rendering the cases "subject to the court's power, in [HRS § 701-109] subsection (3), to order severance, if 'justice so requires[,]'" Commentary on HRS § 701-109, as raised by motion of the prosecution or of the defense.