DISSENTING OPINION BY NAKAYAMA, J.

I respectfully dissent. In my view, the facts of the distribution offenses in the drug buy case and the facts of the possession case do not arise from the same episode.

The plain language of Hawai'i Revised Statutes (HRS) § 701-109(2) (1993) clearly requires 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 commencement of the first trial and are within the jurisdiction of a single court.

(Emphases added.) I agree with the majority's framework for analysis, insofar as the plain language of HRS § 701-109(2) mandates analysis of the following: (1) the condition of prosecutorial knowledge "at the time of commencement of the first trial" and whether the offenses "are within the jurisdiction of a single court[,]" see majority opinion at 24; (2) whether the separate prosecutions are based on the "same conduct," see majority opinion at 24; and (3) whether they arise from the "same episode," see majority opinion at 24-29. As stated by the majority, the time, place, and circumstances test enunciated by this court in State v. Carroll, 63 Haw. 345, 351, 627 P.2d 776, 780 (1981) provides the framework through which we resolve the issue of whether separate prosecutions arise from the "same episode."

However, the majority's analysis of the "time" factor is inconsistent with this court's unanimous decision in State v. Keliiheleua, 105 Hawai'i 174, 181, 95 P.3d 605, 612 (2004). Compare Majority opinion at 25 (holding that "the time factor has been met" even though the facts leading up to the drug buy case

occurred between five and forty-nine days prior to the facts of the possession case), with Keliiheleua, 105 Hawai'i at 181, 95 P.3d at 612 (holding that the "time" factor was not satisfied because "although the motor vehicle accident and fraudulent insurance claim occurred on the same day, they did not occur at the same time"). Moreover, while this court in Carroll, 63 Haw. at 352, 627 P.2d at 781 stated that "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 [d]egree had been committed," I do not believe that a finding of probable cause was intended by this court to swallow whole the "circumstances" factor of the Carroll test, see majority opinion at 26-29. Compare Keliiheleua, 105 Hawai'i at 182, 95 P.3d at 613 ("[T]he circumstances of the cases were not similar[,]" inasmuch as "the facts and issues involved in the charges (namely, the statutory requirements of the alleged offenses) are dissimilar.").

Instead, "whether several criminal acts arise from the 'same criminal episode' for purpose of the compulsory joinder rule depends in the final analysis upon a close examination of the underlying facts on which the several offenses are based." People v. Miranda, 754 P.2d 377, 380 (Colo. 1988) (citations omitted). "[O]ffenses based on acts or a series of acts 'arising from the same criminal episode' include 'offenses arising either from the same conduct of the defendant or offenses connected in such a manner that prosecution of the offenses will involve substantially interrelated proof.'" Id. (citation omitted).

Accordingly, "[i]f proof of one of the crimes charged is not relevant to proof of the other, then the two crimes do not involve interrelated proof and as a matter of law are not part of the 'same criminal episode' . . . ." Id. at 381 (citation omitted). As the reasoning goes:

> Basing the application of the compulsory joinder statute on a determination of the interrelationship between the proofs of the several offenses properly focuses the trial court's inquiry on the degree to which the defendant is harassed and judicial resources wasted by successive prosecutions. . . . Where the proof or defense of one charge necessarily involves the proof or defense of another charge, sequential prosecutions of the two charges burden both the defendant and the state with repetitive presentation of evidence. However, where the proofs of the charges are not interrelated, the prejudice to the defendant caused by separate prosecutions is minimal. For 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 involve substantially interrelated proof. Crimes that are committed simultaneously or in close sequence, crimes that occur in the same or closely related place, and acts that form part of the schematic whole, generally involve interrelated proof.

Id. at 380-81; see State v. Boyd, 533 P.2d 795, 800 (Or. 1975) ("Unless the prosecutor is absolutely certain that presenting the facts underlying each charge will not necessitate reference to the facts underlying another, the prosecutor should move for joinder of the charges for trial.").

In Keliiheleua, 105 Hawai'i at 181-82 & n.9, 95 P.3d at 612-13 & n.9, this court engaged in an analysis of the time, place, and circumstances test, and noted similarly to Miranda that "[e]xamples of crimes arising from the same criminal episode include 'the simultaneous robbery of seven individuals, the killing of several people with successive shots from a gun, the successive burning of three pieces of property, or such

contemporaneous and related crimes as burglary and larceny, or kidnaping and robbery.'" (Some quotation marks omitted.) Indeed, in Keliiheleua, we held that the criminal offenses were not closely related in time, place and circumstances because (1) "the facts and issues involved in the charges (namely, the statutory requirements of the alleged offenses) [were] dissimilar[,]" (2) "the motor vehicle accident and fraudulent insurance claim occurred on the same day, [but] did not occur at the same time[,]" and (3) "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 181-82, 95 P.3d at 612-13. Although the majority in this case frames its analysis similarly to that of Keliiheleua, see majority opinion at 24-29, the majority, respectfully, fails to make a crucial distinction.

As it relates to the instant case, a distinction must be made between multiple prosecutions that share common characteristics on the one hand, and, on the other hand, multiple prosecutions that are so interrelated that proof of a single prosecution would constitute a substantial portion of the proof of other prosecutions. See Miranda, 754 P.2d at 381 ("While the charges in both prosecutions have some common characteristics-the nature of the offenses, the persons involved in the incidents, the circumstances surrounding the distribution of the cocaine-we cannot say with fair assurance that the charges in each prosecution are so interrelated that proof of the charges alleged in one prosecution would constitute a substantial portion of the

proof in the other."). Where this interrelationship exists, both crimes share a "substantial factual nexus" with each other, and, "as a matter of law," must be considered part of the same criminal episode. Id.

It is this emphasis on the interrelatedness of proof between separate prosecutions that I believe was intended by this court to compel joinder when we held, in Carroll, 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 (emphases added). This court derived the time, place, and circumstances test from the Supreme Court of Oregon, see Carroll, 63 Haw. at 349, 627 P.2d at 779, which stated as follows: "We construe this test of interrelated events as necessitating joinder only where the facts of [e]ach charge can be explained adequately only by drawing upon the facts of the other charge. Stated differently, the charge must be cross-related." Boyd, 533 P.2d at 799 (footnote omitted) (emphasis added).

This court's jurisprudence reveals a similarity with the foregoing framework. In State v. Servantes, 72 Haw. 35, 36, 804 P.2d 1347, 1348 (1991), the arresting police officers "discovered in plain view a clear plastic bag of marijuana on the driver's side of the car next to [the defendant's] foot." Subsequently, the bag was seized and the defendant was placed under arrest for committing the offense of promoting a

detrimental drug in the third degree. Id. Apparently, the defendant's car was towed to the police station on the same day and secured. Id. It was not until four days later, on January 23, 1989, that the police obtained a search warrant for the car and seized, inter alia, cocaine from the car. Id. In connection with what was seized on January 23, 1989, the defendant was charged with promoting a dangerous drug in the third degree and possession with intent to use drug paraphernalia. Id. This court held that HRS § 701-109(2) applied in Servantes because both sets of charges arose from the same episode. Id. at 38-39, 804 P.2d at 1349. My interpretation of this court's holding, however, is that pursuant to the time, place, and circumstances test, see id., the evidence to support both prosecutions was obtained at the same time (the car was towed to the police station and secured at the same time the defendant was arrested and charged in connection with the plain view search of the same car), at the same place (the defendant's car), and seized under similar circumstances (the facts surrounding the plain view search of the car, and the facts related to the search of the same car conducted pursuant to a search warrant). See id. at 36-39, 804 P.2d at 1348-49. Therefore, Servantes presents the situation where there exists a "substantial factual nexus" between both sets of charges, see Miranda, 754 P.2d at 381, such that "the facts of [e]ach charge can be explained adequately only by drawing upon the facts of the other charge[,]" Boyd, 533 P.2d at 799. Compare Carroll, 63 Haw. at 351, 627 P.2d at 780 ("[T]he 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."), and Miranda, 754 P.2d at 381 ("If proof of one of the crimes charged is not relevant to proof of the other, then the two crimes do not involve interrelated proof and as a matter of law are not part of the 'same criminal episode' . . . ."). Contrasting the facts of Servantes to Carroll, in Carroll, the defendant was arrested on October 19, 1978, for starting a fire at a school. 63 Haw. at 346, 627 P.2d at 777. In connection with what purportedly occurred at the school on that day, the defendant was charged with the offense of attempted criminal property damage in the second degree. Id. at 347, 627 P.2d at 778. After being brought to the police station and booked for the above offense, a police officer confiscated a cannister from the defendant's person, which was identified as mace. Id. at 346, 627 P.2d at 777. As a result of this identification, the defendant was charged with possession of an obnoxious substance. Id. Ultimately, this court held that the offenses occurred at different times and places, and "were discovered under different circumstances . . . ." Id. at 352, 627 P.2d at 781. Although this court's "rationale [was] based primarily on the fact that the arresting officer failed to recognize the illegal nature of the cannister at the time of the" initial search, id., it can be inferred from the facts that both offenses did not "share a substantial factual nexus" -- the offenses occurred at different times on the same day, compare

Keliiheleua, 105 Hawai'i at 181, 95 P.3d at 612 (holding that the "time" factor was not satisfied because "although the motor vehicle accident and fraudulent insurance claim occurred on the same day, they did not occur at the same time"), in different places (at a school and at the police station), and under different circumstances (the facts surrounding the defendant's purported intent to commit a criminal act on the one hand, and the facts of the search of the defendant's person by the police, on the other hand). See Miranda, 754 P.2d at 381. Accordingly, the facts surrounding the possession case were unnecessary and likely irrelevant to explain adequately the facts of the attempted criminal property damage case. See Boyd, 533 P.2d at 799 ("We construe this test of interrelated events as necessitating joinder only where the facts of [e]ach charge can be explained adequately only by drawing upon the facts of the other charge."); see also Miranda, 754 P.2d at 381 ("If proof of one of the crimes charged is not relevant to proof of the other, then the two crimes do not involve interrelated proof and as a matter of law are not part of the 'same criminal episode' . . . .").

Likewise, in Keliiheleua, the defendant was involved in an automobile accident on November 18, 2000, and injured several people. 105 Hawai'i at 176, 95 P.3d at 607. In connection with this accident, the defendant was charged with committing the offense of negligent injury. Id. Meanwhile, in July or August of 2001, an investigation ensued which resulted in charges against the defendant for committing the offenses of insurance

fraud and attempted theft in the first degree. Id. at 176-77, 95 P.3d at 176-77. As stated above, this court ultimately held that "the criminal offenses in question are not closely related in time, place and circumstances[]" because: (1) "the facts and issues involved in the charges (namely, the statutory requirements of the alleged offenses) [were] dissimilar[,]" (2) "the motor vehicle accident and fraudulent insurance claim occurred on the same day, [but] did not occur at the same time[,]" and (3) "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 181-82, 95 P.3d at 612-13. As such, the criminal offenses "did not arise from the same 'episode[,]'" and HRS § 701-109(2) did not apply to that case. Id. at 182, 95 P.3d at 613.

In the instant case, the search warrant was executed on November 26, 2002, at 835 Keeaumoku Street, whereupon 0.351 grams of crystal methamphetamine were found on Akau's possession. In connection with the drugs that were recovered on that specific date and place, Akau was charged with promoting a dangerous drug in the third degree, in violation of HRS § 712-1243 (1993),[1] and unlawful use of drug paraphernalia, in violation of HRS § 329-43.5(a) (1993).[2]

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[1] HRS § 712-1243 mandates that: "(1) A person commits the offense of promoting a dangerous drug in the third degree if the person knowingly possesses any dangerous drug in any amount. (2) Promoting a dangerous drug in the third degree is a class C felony."

[2] HRS § 329-43.5(a) mandates that

It is unlawful for any person to use, or to possess with (continued...)

On October 21, 2003, Akau was indicted for three counts of promoting a dangerous drug in the second degree, in violation of HRS § 712-1242(1)(c) (1993 & Supp. 2003).[3] The indictment was based on the undercover drug transactions that took place on October 8, 22, and November 21, 2002. The October 8, 2002 undercover transaction took place in an area fronting 825 Keeaumoku Street, where an undercover police officer purchased 0.121 grams of crystal methamphetamine from Akau for twenty dollars. The October 22, 2002 undercover transaction took place in the same area by a different police officer who purchased 0.094 grams of crystal methamphetamine from Akau for twenty dollars. Finally, the November 21, 2002 undercover transaction took place inside a men's restroom of Daiei at 801 Kaheka Street, where the undercover police officer involved in the October 22 transaction bought 0.158 grams of crystal methamphetamine from Akau for twenty dollars.

Contrary to the majority's conclusion, the offenses allegedly committed in the drug buy case and the possession case

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> intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of this chapter. Any person who violates this section is guilty of a class C felony and upon conviction may be imprisoned pursuant to section 706-660 and, if appropriate as provided in section 706-660 and, if appropriate as provided in section 706-641, fined pursuant to section 706-640.

[3] HRS § 712-1242(1)(c) mandates that "[a] person commits the offense of promoting a dangerous drug in the second degree if the person knowingly: . . . (c) Distributes any dangerous drug in any amount, except for methamphetamine."

are not "so closely related in time, place, and circumstances," Carroll, 63 Haw. at 351, 627 P.2d at 780, that a "substantial factual nexus" exists between the two cases, Miranda, 754 P.2d at 381,[4] whereby "a complete account of one charge cannot be related

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[4] Respectfully, the majority misconstrues the concept of a "substantial factual nexus." Contrary to the majority's interpretation, the concept of a "substantial factual nexus" and the reasoning behind it merely serves to guide and clarify application of the "circumstances" factor of the Carroll test itself, similar in purpose to the majority's reliance on a finding of probable cause. See Majority opinion at 26-30 & n.13. However, the majority overlooks that Keliiheleua neither required nor applied a probable cause analysis to satisfy the "circumstances" factor, or any other factor, of the Carroll test. See Keliiheleua, 105 Hawai'i at 181-82, 95 P.3d at 612-13.

To reiterate the reasons for my dissent: (1) the majority's analysis of the "time" factor is clearly inconsistent with Keliiheleua, and (2) I do not believe that a finding of probable cause was intended by this court to swallow whole the "circumstances" factor of the Carroll test. Instead, the more germane consideration is whether "the facts and issues involved in the charges will be similar." Keliiheleua, 105 Hawai'i at 182, 95 P.3d at 613 (quoting Carroll, 63 Haw. at 350, 627 P.2d at 780) (emphasis added and quotation marks omitted); accord Miranda, 754 P.2d at 380 ("[W]hether several criminal acts arise from the 'same criminal episode' for purpose of the compulsory joinder rule depends in the final analysis upon a close examination of the underlying facts on which the several offenses are based." (Emphasis added.)). Stated another way, the appropriate inquiry is whether there exists a "substantial factual nexus" between both sets of charges, see Miranda, 754 P.2d at 381, such that "the facts of [e]ach charge can be explained adequately only by drawing upon the facts of the other charge[,]" Boyd, 533 P.2d at 799. Compare Carroll, 63 Haw. at 351, 627 P.2d at 780 ("[T]he 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."), and Miranda, 754 P.2d at 381 ("If proof of one of the crimes charged is not relevant to proof of the other, then the two crimes do not involve interrelated proof and as a matter of law are not part of the 'same criminal episode' . . . .").

As stated infra, although not binding upon this court, it is important that we recognize that the Carroll test was derived from Oregon case law. See Carroll, 63 Haw. at 349, 627 P.2d at 779. Because the majority concedes that "the 'circumstances' factor of the [Carroll] test is more difficult to define and apply[]" given our current jurisprudence, majority opinion at 25, Oregon case law is very persuasive in its explanation of the factors of this test. See Boyd, 533 P.2d at 799 ("We construe this test of interrelated events as necessitating joinder only where the facts of [e]ach charge can be explained adequately only by drawing upon the facts of the other charge."); State v. Fitzgerald, 516 P.2d 1280, 1284 (Or. 1973) ("The unauthorized use of the vehicle took place at least 15 miles away and 16 1/2 hours after the escape was completed so that the two transactions were clearly

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without referring to details of the other charge[,]" Carroll, 63 Haw. at 351, 627 P.2d at 780 (emphases added). Specifically, the facts surrounding the search of Akau's person on November 26, 2002, at 835 Keeaumoku Street, is not relevant to proving Akau's culpability beyond a reasonable doubt for the offense allegedly committed under HRS § 712-1242(1)(c). See HRS § 702-205 (1993) ("The elements of an offense are such (1) conduct, (2) attendant circumstances, and (3) results of conduct, as: (a) Are specified by the definition of the offense, and (b) negative a defense . . . ."); Miranda, 754 P.2d at 381 ("If proof of one of the crimes charged is not relevant to proof of the other, then the two crimes do not involve interrelated proof and as a matter of law are not part of the 'same criminal episode' . . . ."); Hawai'i Rules of Evidence ("HRE") Rule 401 (1993) ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). The evidence tending to prove a prima facie case against Akau in both criminal cases occurred at different times (November 26, 2002, and October 8, 22, and November 21, 2002), compare Keliiheleua, 105 Hawai'i at 181, 95 P.3d at 612 (holding that the "time" factor was not satisfied because "although the motor vehicle accident and fraudulent insurance claim occurred on

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not closely linked in time, place and circumstance. The evidence of the unauthorized use of the vehicle did not tend in any way to prove the escape." (Emphasis added.)). At least one other state has applied the time, place, and circumstances test in a very similar, if not the same, manner as Oregon. See generally Miranda, 754 P.2d 377. Accordingly, I also find Miranda's explanation of the test very persuasive in this case.

the same day, they did not occur at the same time"), 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), and "the offenses . . . were discovered under different circumstances," Carroll, 63 Haw. at 352, 627 P.2d at 781; 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 by police officers on November 26, 2002, at 835 Keeaumoku Street. As such, 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. See Miranda, 754 P.2d at 381. Because the two cases do not share a "substantial factual nexus" with each other, see id., the cases are not "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." See Carroll, 63 Haw. at 351, 627 P.2d at 780; see also Miranda, 754 P.2d at 381; Boyd, 533 P.2d at 799; Fitzgerald, 516 P.2d at 1284.

Accordingly, and in light of the foregoing analysis, I would hold that HRS § 701-109(2) does not apply to this case because the drug buy case does not arise from the "same episode" as the possession case. As such, I would affirm the ICA's October 11, 2007 judgment, which affirms the first circuit court's October 15, 2004 judgment.

Pamela A. Nakayama