IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI,
Plaintiff-Appellee,

vs.

CHRISTOPHER DEEDY,
Defendant-Appellant.

SCAP-15-0000440

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CAAP-15-0000440; CR. NO. 11-1-1647)

DECEMBER 14, 2017

DISSENTING OPINION BY NAKAYAMA, J.

Defendant-Appellant Christopher Deedy (Deedy) was charged with one count of murder in the second degree and one count of carrying or using a firearm in the commission of a separate felony after fatally shooting Kollin Elderts at a fast food restaurant in November 2011. To this date, Plaintiff-

Appellee State of Hawaiʻi (the State) has already been afforded two full opportunities in its quest to convict Deedy of murder. The result was an acquittal of the charged offense. The response of the State is to change the charge and attempt to convict him of manslaughter, despite averring to the trial court in two separate trials that the evidence does not support a manslaughter conviction. Moreover, the prosecution admits the evidence will be the same at the third trial. This is patently unfair, and I cannot abide by the Majority's decision permitting the State to try Deedy for a third time under these circumstances. Because of this, I respectfully dissent.

At the first trial, which lasted for twenty-three days, the jury was instructed solely on the charged offenses per the parties' request, and was unable to return a verdict. The Circuit Court of the First Circuit (circuit court) found manifest necessity to declare a mistrial.

The second trial, held a year later, spanned sixteen days. The State's evidence at the second trial was essentially the same as the evidence that it had presented at the first trial. Over the State's objection, the jury was instructed on not only the charged offenses, but also numerous lesser included offenses, including reckless manslaughter. Ultimately, the jury acquitted Deedy on the charge of murder in the second degree, but was unable to reach a verdict on the included offenses.

After successfully defending his case at two full jury trials, Deedy filed several motions to dismiss the charges against him, including a motion to dismiss pursuant to State v. Moriwake, 65 Haw. 47, 647 P.2d 705 (1982). The circuit court denied all of Deedy's dismissal motions. On appeal, the Majority affirms the circuit court's decision, and thereby bequeaths upon the State a third opportunity to convict Deedy of an offense, but this time for an offense that was never charged.

Respectfully, I disagree with the Majority insofar as I believe that the State should not be permitted to retry Deedy's case for two reasons. First, based upon the equitable doctrine of judicial estoppel, the State is precluded from retrying Deedy's case. Second, while a trial court's application of the factors delineated in Moriwake is reviewed for an abuse of discretion, the circuit court misinterpreted and misapplied most of the Moriwake factors to the facts in the present case. In doing so, the circuit court "disregarded rules or principles of law . . . to the substantial detriment of a party litigant." State v. Rapozo, 123 Hawaiʻi 329, 336, 235 P.3d 325, 332 (2010) (quoting State v. Oughterson, 99 Hawaiʻi 244, 253, 54 P.3d 415, 424 (2002)). Consequently, in my view, the circuit court abused its discretion in denying Deedy's motion to dismiss under State v. Moriwake.

Accordingly, I dissent.

I. DISCUSSION

A. The State is estopped from retrying Deedy on the offense of reckless manslaughter.

The doctrine of judicial estoppel, also referred to as equitable estoppel, is "grounded in the equitable principle that one should not be permitted to take a position inconsistent with a previous position if the result is to harm another." Univ. of Haw. Prof'l Assembly ex. rel. Daeufer v. Univ. of Haw., 66 Haw. 214, 221, 659 P.2d 720, 725 (1983) (hereinafter "University"). Put differently, judicial estoppel establishes that

> [a] party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by his action.

Roxas v. Marcos, 89 Hawaiʻi 91, 124, 969 P.2d 1209, 1242 (1998) (brackets in original) (quoting Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 218, 664 P.2d 745, 751 (1983)). In more colloquial terms: "This doctrine prevents parties from 'playing "fast and loose" with the court or blowing "hot and cold" during the course of litigation.'" Id. (quoting Rosa, 4 Haw. App. at 219, 664 P.2d at 751).

At different stages in this case, the State has adopted conflicting positions as to whether there was a rational basis in the evidence to support a conviction for reckless manslaughter.

During the settling of jury instructions in the first trial, the circuit court observed that both parties had "asked that a manslaughter instruction not be given," and ruled that there was no evidence to support a reckless manslaughter instruction. The State apparently agreed with the circuit court's ruling, as it did not object or otherwise express any disagreement. Taken together, the State's request that a reckless manslaughter instruction not be given and its acquiescence to the circuit court's ruling reflect that at the first trial, the State's position was that there was no rational basis in the evidence to support a conviction of reckless manslaughter. See State v. Flores, 131 Hawaiʻi 43, 51, 314 P.3d 120, 128 (2013) ("[J]ury instructions on lesser-included offenses must be given where there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense.").

At the second trial, Deedy again asked that a reckless manslaughter instruction not be given because, inter alia:

> [T]here will be no rational basis in the evidence to give a reckless manslaughter jury instruction, just as there was no basis in the evidence at the first trial to do so. The evidence regarding Mr. Deedy's state of mind will not differ at the second trial in any material way from the evidence that the parties adduced at the first trial on that topic. That evidence uniformly supports only one conclusion with regard to whether Mr. Deedy's state of mind was intentional and knowing on the one hand, or reckless on the other . . . .

In its memorandum in response to Deedy's request, the State asserted:

> In the first trial, neither the State nor the defense requested the lesser-included Manslaughter instruction, and there was no objection from either side to this Court's decision not to provide that alternative instruction. This Court made its original decision based on the evidence presented in the first trial, and based on the appropriate standard at the time. The State maintains its same position, that should the evidence in this retrial mirror the evidence in the first, then there is no rational basis for giving the instruction on the lesser-included offense of Manslaughter.

(Emphasis added.) Additionally, during the settling of jury instructions, the State reiterated: "With regards to rational basis, just as in last year, we maintain that same position that there's not a rational basis in the evidence to support the giving of the manslaughter instruction." (Emphasis added.)

In other words, the State unambiguously argued during the first and second trials that there was no rational basis in the evidence to support a conviction of reckless manslaughter. Yet, in defense of its opportunity to try the case a third time, the State completely flipped its position, and argued that there is a rational basis in the evidence to support a conviction of reckless manslaughter. At the hearing on Deedy's motions to dismiss, the State acknowledged that for the most part, similar evidence was presented at the first and second trials, and that the evidence in the third trial would closely resemble that which was presented in the first two trials, albeit with a different

emphasis. However, the State then asserted:

> Now, obviously the jurors think that there was reckless conduct involved here, and if you look at the circumstances of the whole event, it's easy to see where that recklessness comes in, and therefore, the presentation of evidence, whether it will be the same or different, will definitely have a different emphasis.
>
> The State's position was, as the Court knows and as the Defense has emphasized, that this was intentional conduct. There was no way we wanted to elicit any evidence to show that it was reckless conduct. However, the Court is well aware of the state of the evidence and is aware that there are a myriad [of] things that happened during that whole transaction at McDonald's that could support a Reckless charge.

(Emphases added.)

The foregoing illustrates that the State's assertion that Deedy may be retried on the offense of reckless manslaughter rests on a position that the State has "take[n] . . . in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by [the State], at least where [it] had, or was chargeable with, full knowledge of the facts[.]" Roxas, 89 Hawaiʻi at 124, 969 P.2d at 1242 (quoting Rosa, 4 Haw. App. at 218, 664 P.2d at 751). Should the State's argument be accepted, "the result [would be] to harm another," as Deedy would be required to endure the insurmountable physical and emotional expense of having to defend his case for a third time at trial. University, 66 Haw. at 221, 659 P.2d at 725.

"Estoppel by any name is based primarily on considerations of justice and fair play." Id. at 222, 659 P.2d

at 726. Both of these values would be offended if the State is afforded a third opportunity to try Deedy for an offense that the State unequivocally asserted was without a rational basis in the evidence not once, but twice before. Therefore, in my view, the State is estopped from now contending that there is a rational basis in the evidence to support a conviction for reckless manslaughter. It follows that the State is also estopped from retrying Deedy for a third time.

Based on these reasons alone, I would hold that the State should not be permitted to try Deedy for a third time. However, as will be discussed in section I.B, infra, I also believe that Deedy should not be retried for a third time because most of the factors contemplated in State v. Moriwake weigh against retrial.

B. Because the circuit court misinterpreted and misapplied several of the Moriwake factors to the facts of the present case, the circuit court abused its discretion in denying Deedy's Moriwake motion to dismiss.

In Moriwake, this court held that a trial court may "dismiss[] an indictment with prejudice following the declaration of one or more mistrials because of genuinely deadlocked juries, even though the defendant's constitutional rights are not yet implicated." 65 Haw. at 55, 647 P.2d at 712. When ascertaining whether to dismiss an indictment in such circumstances, the trial court's task, at its core, is to "balanc[e] the interest of the

state against fundamental fairness to a defendant with the added ingredient of the orderly functioning of the court system." Id. at 56, 647 P.2d at 712 (quoting State v. Braunsdorf, 297 N.W.2d 808, 817 (Wis. 1980) (Day, J., dissenting)). In engaging in this balance:

> The factors which the trial court should consider . . . include the following: (1) the severity of the offense charged; (2) the number of prior mistrials and the circumstances of the jury deliberation therein, so far as is known; (3) the character of prior trials in terms of length, complexity and similarity of evidence presented; (4) the likelihood of any substantial difference in a subsequent trial, if allowed; (5) the trial court's own evaluation of relative case strength; and (6) the professional conduct and diligence of respective counsel, particularly that of the prosecuting attorney.

Id. at 56-57, 647 P.2d at 712-13.

I agree with the Majority that the circuit court did not abuse its discretion in ruling that the first factor, the severity of the offense charged, weighs in favor of retrial. Majority at 34-35. However, "[n]othing in Moriwake indicates that all factors must be given equal weight or that certain factors must be given more weight than others." State v. Hinton, 120 Hawaiʻi 265, 280, 204 P.3d 484, 499 (2009). Therefore, although I concur that the circuit court did not abuse its discretion in ruling that one of the Moriwake factors favors retrial, I believe that all of the other factors, when correctly analyzed in the context of our precedent and the key principles

upon which Moriwake itself was based, weigh in favor of dismissal.

1. Number of mistrials and circumstances of the jury deliberations therein

With respect to the second Moriwake factor, the circuit court observed that: (1) there were two mistrials; (2) the jury at the first trial was only instructed on the charged offense, whereas the jury at the second trial was instructed on the charged offense, as well as numerous lesser included offenses, including reckless manslaughter; (3) at both trials, the jury was required to consider the defenses of self-defense and defense of others; (4) the jury communications in the first trial pertained to self-defense, whereas the jury communications in the second trial concerned "recklessness" and the timing of its applicability; and (5) "[t]he final jury splits reportedly were 8 to 4 for acquittal and 7 to 5 for acquittal" in the first and second trials, respectively. Overall, the circuit court ruled that this factor is neutral because "[i]t is difficult to discern from communications precisely how jury deliberations proceeded," and because of the "legal and factual complexity of this case and the fact that a retrial will focus solely upon a reckless state of mind."

According to the Majority, the circuit court did not abuse its discretion in ruling that this factor is neutral for

two reasons. First, the Majority, like the circuit court, highlights that the jury was required to consider the included offenses of manslaughter and assault in the second trial only. Majority at 36-37. To the Majority, because Deedy is being tried for reckless manslaughter for only the second time, albeit in the third trial, the circuit court did not abuse its discretion in ruling that this factor does not necessarily favor dismissal. See Majority at 36-37.

With due respect, I disagree. In my view, the fact that the jury was only required to consider reckless manslaughter as a lesser included offense in the second trial is irrelevant to the role that this factor plays in "balancing the interest of the state against fundamental fairness to a defendant." Moriwake, 65 Haw. at 56, 647 P.2d at 712 (quoting Braunsdorf, 297 N.W.2d at 817 (Day, J., dissenting)). The purpose in requiring courts to contemplate the number of prior mistrials is to ensure that courts consider how many chances the State has had to pursue a conviction, and has failed to achieve said outcome. Where the State has been given more chances to convict a defendant and has consistently been unable to do so, as indicated by a greater number of mistrials, this factor should weigh heavily in favor of dismissal.

Moreover, from my perspective, which offenses were

submitted to the jury for consideration at each prior trial relates to the strategies and tactical considerations that the parties utilized within the State's previous opportunities to obtain a conviction. Whether the same offenses were submitted to the jury in the prior mistrials has no bearing on the number of chances that the State has been afforded to obtain a guilty verdict. Therefore, I believe that the circuit court did not properly consider the number of prior mistrials in its analysis of the second Moriwake factor, insofar as the circuit court focused on the immaterial fact that the jury was only instructed on reckless manslaughter in the second trial.

Second, the Majority posits that the circuit court did not abuse its discretion in ruling that this factor is neutral because the circuit court apparently inferred that "the jury communications from the second jury evince a degree of confusion about the recklessness state of mind and its application." Majority at 37. Based upon the circuit court's concern for the jury's confusion, as well as its consideration of "the legal and factual complexity of the case and that a retrial will focus solely upon a reckless state of mind," the Majority holds that the circuit court did not abuse its discretion in "weighing this factor as 'neutral' in its Moriwake analysis." Majority at 38-39.

The Majority's holding on this point effectively establishes that where jury communications during a prior mistrial suggest that the jury might have been confused about the law or its application, the second Moriwake factor may weigh in favor of retrial. See Majority at 38-39. Such a holding, however, will unfairly provide the State with extraneous and undeserved opportunities to retry its cases after failing to secure a conviction on its initial attempts.[1]

The State, as the party with the burden of proof in criminal cases, bears the responsibility of presenting its

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[1] The Majority suggests that my analysis on the second Moriwake factor, which concerns why jury confusion regarding the law or its application to the facts should not push the second Moriwake factor in favor of retrial, is inconsistent with Hinton. Majority at 38 n.12. According to the Majority, in Hinton, we "approved consideration of jury communications evincing confusion under Moriwake's second factor." Majority at 38 n.12.

Respectfully, I believe that the Majority reads our decision in Hinton too broadly. In Hinton, the trial court ruled that the second Moriwake factor weighed in favor of retrial because the jury was "evenly split" throughout deliberations, and because "[t]he jury did seem to have problems following the evidence." 120 Hawaiʻi at 271, 204 P.3d at 490. The Intermediate Court of Appeals (ICA) affirmed the trial court's ruling and held that "there is a basis for concluding that another jury could reach a verdict even if the evidence is essentially the same" due, in part, to the fact "that the jury appeared confused by the testimony even though the trial was not particularly complex." Id. at 276, 204 P.3d at 495 (emphasis added). On certiorari, we agreed with the trial court and the ICA that the second Moriwake factor weighed in favor of retrial because although the case against Hinton was not particularly complicated, the jury seemed confused about the testimony presented at trial. Id. at 278-79, 204 P.3d at 497-978.

Therefore, in Hinton, we did not hold that jury confusion concerning the relevant law or its application to the facts may tip the second Moriwake factor in favor of retrial. Rather, in Hinton, we held that based on the facts in that case--where the jury had difficulty following the evidence and testimony being presented at trial despite the fact that the case was not complex--the second Moriwake factor weighed in favor of retrial because under those circumstances, a different jury could have plausibly arrived at a different outcome even if it were presented with the same evidence as the first jury. 120 Hawaiʻi at 278-79, 204 P.3d at 497-98. Consequently, I do not believe that my analysis in section I.B.1 conflicts with Hinton.

evidence and legal theories clearly, and in a manner which the jury will comprehend. See State v. Cuevas, 53 Haw. 110, 113, 488 P.2d 322, 324 (1971) ("Under our legal system, the burden is always upon the prosecution to establish every element of crime by proof beyond a reasonable doubt, never upon the accused to disprove the existence of any necessary element."). Should the State fail to obtain a conviction due to its unclear presentation of the facts or the means by which the relevant law applies to the facts, or other strategic decisions, the State should bear the consequences of its own actions. The Majority's holding, however, may allow the State to avoid some of the repercussions of its own choices. Under the Majority's interpretation of the second Moriwake factor, whenever jury communications indicate confusion, the State may be afforded another opportunity to retry the case after learning precisely where its presentation and strategic decisions may have fallen short in the previous trial.[2]

[2] I agree with the Majority that the State is not responsible for correctly instructing the jury on the law to which the facts must be applied. Majority at 39 n.13; see State v. Adviento, 132 Hawaiʻi 123, 137, 319 P.3d 1131, 1145 (2014) ("[I]t is the trial judge's duty to insure that the jury instructions cogently explain the law applicable to the facts of the case and that the jury has proper guidance in its consideration of the issues before it." (bracket in original) (quoting State v. Locquiao, 100 Hawaiʻi 195, 205, 58 P.3d 1242, 1252 (2002)). However, the fact remains that the State, not the trial court, is the party that bears the burden of proof in criminal prosecutions. See Cuevas, 53 Haw. at 113, 488 P.2d at 324. Accordingly, even if the trial court correctly instructs the jury on the applicable law, the State is still required to present its evidence and its theory of the case in a manner that is clear and comprehensible to the jury. Consequently, if the State's presentation confuses the jury with respect to its theory of how the (continued...)

The injustice that results from such an interpretation of the second Moriwake factor is evident in this case. Here, in both prior mistrials, the State argued that a reckless manslaughter instruction should not be given. Though the circuit court instructed the jury on reckless manslaughter over the State's objection at the second trial, the State deliberately and strategically chose not to focus on whether Deedy could be convicted of reckless manslaughter. Rather, the State concentrated its efforts on arguing that Deedy was guilty of murder in the second degree. Indeed, the State conceded that it had adopted such a strategy when, during the hearing on Deedy's motions to dismiss, the State stated that at the second trial, "[t]he State's position was, as the Court knows and as the Defense has emphasized, that this was intentional conduct. There was no way we wanted to elicit any evidence to show that it was reckless conduct." (Emphasis added.)

Yet, the Majority now holds that because the jury was apparently confused about the recklessness state of mind and its application, the second Moriwake factor could weigh in favor of retrial. As a result, the State is given an opportunity to

[2](...continued)
law applies to facts established by the evidence adduced at trial to support a verdict in the State's favor, the State must accept the consequences of its own actions and decisions.

abandon its previous trial strategy, which did not focus on the recklessness state of mind and its applicability to the facts, and take a second bite at the apple. Put differently, the Majority's interpretation of the second Moriwake factor places a thumb on the scale in favor of the State in the context of an analytical framework that strives to objectively balance the State's "strong interest in punishing criminal conduct" with the interest of "ensuring fairness to defendants in judicial proceedings." Moriwake, 65 Haw. at 56, 647 P.2d at 712 (quoting Braunsdorf, 297 N.W.2d at 817 (Day, J., dissenting)). This interpretation cannot stand. In my view, the circuit court "disregarded [the] . . . principles of law," Rapozo, 123 Hawaiʻi at 336, 235 P.3d at 332 (quoting Oughterson, 99 Hawaiʻi at 253, 54 P.3d at 424), inasmuch as it considered the jury's confusion regarding recklessness in its analysis of the second Moriwake factor.

The Majority vastly misconstrues the foregoing discussion as "fault[ing] the State's trial strategy of focusing its efforts upon obtaining a murder conviction rather than a manslaughter conviction." Majority at 43 n.17. Any reading of my dissent makes clear that my analysis of the second Moriwake factor does not, in any way, fault or otherwise criticize the State's decision to charge Deedy with the offense of murder in

the second degree (and the related firearms offense), or the State's decision to, in the first two trials, tailor its trial strategy towards securing a conviction on the charged offense. On the contrary, I believe that the State was well within its right to charge Deedy as it saw fit, and to try its case in the manner of its choosing and preference. The decisions that the State made in the course of charging and trying Deedy in the first two trials are not the source of my concern.

Rather, what gives me pause is that under the Majority's interpretation of the second Moriwake factor, the State may be allowed to completely change its approach to trying a criminal defendant on the offenses that it originally chose not to charge him or her with, after its previous decisions did not result in a unanimous guilty verdict, due possibly in part to the jury's confusion regarding the State's theory of the case. I do not believe that the jury's confusion regarding the State's theory of the case, as reflected in their deliberations, should be a potential basis for giving the State a free do-over, in which the State may change its mind and adopt a brand new trial strategy after it was unsuccessful in its previous attempts to secure a unanimous verdict against the defendant.[3]

[3] In footnote 17, the Majority states that "the State's trial strategy did not preclude the jury from consideration of reckless manslaughter at the (continued...)

A proper application of the second Moriwake factor indicates that rather than being neutral, this factor weighs against retrial. In this case, there were two mistrials. The jury deliberated for five and a half days in the first trial. In the second trial, the jury deliberated for six and a half days. The jury in the first trial could not reach a verdict on the original charge, whereas the jury in the second trial acquitted Deedy of the original charge but could not reach a verdict on the included offenses and defenses. The jurors were split in favor of the defendant in both trials; the jurors were eight to four for acquittal in the first trial and seven to five for acquittal in the second trial.

Taken together, the foregoing facts illustrate that the State has already had two opportunities to pursue a guilty verdict in Deedy's case, and that the juries in both trials engaged in thoughtful deliberations. Therefore, to the extent that "serious consideration [ought to] be given to dismissing an indictment with prejudice after a second hung jury mistrial," Moriwake, 65 Haw. at 57, 647 P.2d at 713, and that retrying the case before a different jury is unlikely to result in a different

[3](...continued)
second trial." Majority at 43 n.17. I am not certain as to the purpose behind the Majority's statement, as I have not stated, nor do I believe, that the jury was precluded from considering the offense of reckless manslaughter at the second trial.

outcome, the second Moriwake factor weighs in favor of dismissal.

2. Character of prior trials in terms of length, complexity, and similarity of evidence presented

Addressing the third Moriwake factor, the circuit court considered that the first trial spanned twenty-three days, and that the second trial lasted for sixteen days. The circuit court also compared the evidence, legal theories, and witness testimony between the two trials:

> While many of the same witnesses and the same surveillance tape were presented at both trials, the second trial's evidence appeared to place greater emphasis upon the Defendant's alleged state of intoxication and the State's theory that the deceased already had sustained a gunshot wound before he and the Defendant fell to the restaurant floor. The Defendant's testimony remained essentially similar as to his conduct and his state of mind; one may argue that Defendant's statements could be construed to support the elements of murder in the second degree. However, Defendant argued that his actions were justified. In both trials, the State argued for conviction as charged.

(Emphases added.) Furthermore, the circuit court observed that both trials were legally and factually complicated, and that although "the State had one opportunity to argue for an included manslaughter conviction . . . it would have been difficult and contradictory to pursue and argue manslaughter where it believed it could prove murder beyond a reasonable doubt." Based on these facts, the circuit court concluded that the third Moriwake factor weighs in favor of retrial.

The Majority holds that the circuit court did not abuse

its discretion in ruling that the third Moriwake factor weighs in favor of retrial because: (1) "the length of previous trials, considered in and of itself, is not a strong indicator of whether the third Moriwake factor favors or disfavors a retrial"; (2) the circuit court "duly considered" the differences between the legal theories, evidence, and witness testimony presented at both trials; and (3) the circuit court determined that the previous trials were factually and legally complex. Majority at 39-44.

I do not believe that the circuit court applied the third Moriwake factor correctly. Specifically, I do not think the circuit court "duly considered" the differences between the legal theories, evidence, and witness testimony presented at both of the previous trials. See Majority at 43. According to the circuit court, and the Majority appears to agree, the evidence presented at both trials was sufficiently dissimilar to tip this "ingredient" in the third Moriwake factor in favor of retrial because the State placed "greater emphasis" upon Deedy's state of intoxication and the State's theory that the victim had already been shot before he and Deedy fell to the ground. Majority at 42-43.

However, the "similarity of the evidence" component of the third Moriwake factor does not relate to whether the same evidence was emphasized in different ways between the previous

trials. The analysis in this part of the third Moriwake factor centers upon the similarity of the evidence, legal theories, and witness testimony between the prior trials, not upon the similarity of the means by which the parties highlighted or emphasized the evidence to support their respective positions. See State v. Deguair, 136 Hawaiʻi 71, 88, 358 P.3d 43, 60 (2015) ("A comparison between the evidence presented, witnesses testifying, and legal theories argued in each trial are relevant to the third Moriwake factor." (emphasis added)). Accordingly, inasmuch as the circuit court incorrectly equated differing emphases upon the evidence with dissimilarities in the evidence itself, the circuit court "disregarded [the] . . . principles of law," Rapozo, 123 Hawaiʻi at 336, 235 P.3d at 332 (quoting Oughterson, 99 Hawaiʻi at 253, 54 P.3d at 424), and misconstrued this component of the third Moriwake factor. On this basis alone, I would hold that the circuit court abused its discretion in ruling that the third Moriwake factor favors retrial.[4]

[4] The Majority states that my position on this point "misapprehends the circuit court's analysis" because the circuit court's "allusion to differing emphases in the two trials referred to differences in the legal theories that the State presented, which our precedents require a court to account for when analyzing the third Moriwake factor." Majority at 42-43 n.16.

With due respect, I disagree with the Majority's characterization of the circuit court's discussion on the third Moriwake factor. The text of the circuit court's written order denying Deedy's motion to dismiss pursuant to Moriwake illustrates that the circuit court, in analyzing the third Moriwake factor, acknowledged that the State utilized the same legal theories between the first and second trials, inasmuch the State argued, on both occasions, that Deedy should be convicted as charged. The circuit court did not, as the (continued...)

Moreover, when correctly applied, the third Moriwake factor weighs in favor of dismissal. The evidence presented at the first trial was substantially identical to the evidence presented at the second trial. The circuit court noted that "many of the same witnesses and the same surveillance tape were presented at both trials," and that Deedy's "testimony remained essentially similar as to his conduct and his state of mind."

Additionally, the parties primarily relied upon the same legal theories in both trials. In particular, the circuit court observed that in both trials, "the State argued for conviction as charged," whereas Deedy relied upon a theory of self-defense. That the State had an opportunity to argue for a manslaughter conviction at the second trial, but chose to forego it and instead fixate its efforts on pursuing a murder conviction, is of no relevance to this analysis. As Deedy succinctly stated in his opening brief: "The State's strategic

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[4](...continued)
Majority contends, find that the State emphasized or relied upon different legal theories between the first two trials. By contrast, the circuit court clearly considered that between the first and second trials, the State presented the same evidence but emphasized different facts. In particular, the circuit court observed that in the second trial, the State "place[d] greater emphasis" on Deedy's state of intoxication, and the State's factual theory that the deceased sustained a gunshot wound before he and Deedy had fallen to the ground.

Accordingly, the circuit court's analysis of the third Moriwake factor did not refer to the "differences in the legal theories that the State presented." See Majority at 43 n.16. Rather, the text in the circuit court's order supports that when evalating the third Moriwake factor, the circuit court improperly conflated placing differing emphases on the same evidence with the presentation of different evidence.

predilections . . . are not the focus of Moriwake's third factor."[5]

Because the evidence presented, the witnesses who testified, and the legal theories advanced at both of Deedy's previous trials were vastly similar, this part of the third Moriwake factor significantly tips it in favor of dismissal.

Furthermore, the remaining two components of the third Moriwake factor support dismissal. Both of Deedy's previous trials were legally and factually complex. And, both trials were quite long--the first trial lasted for twenty-three days, and the second trial lasted for sixteen days. Considering "the length of the previous trials . . . in the context of the complexity of the case," Majority at 40, these facts support dismissal because they illustrate that the State has been afforded two extensive

[5] Analogous to my remark on the matter in section I.B.1, my comment upon the State's strategic decisions in my analysis of the third Moriwake factor does not, in any way, "fault[] the State's trial strategy of focusing its efforts upon obtaining a murder conviction rather than a manslaughter conviction." Majority at 43 n.17. Rather, I believe that the circuit court abused its discretion to the extent that, in its evaluation of the third Moriwake factor, the circuit court improperly considered that the State only "had one opportunity to argue for an included manslaughter conviction" between the two trials because "[a]ccording to the State, it would have been difficult and contradictory to pursue and argue manslaughter where it believed it could prove murder beyond a reasonable doubt." In my view, the fact that the State believed that "it would have been difficult and contradictory to pursue and argue manslaughter where it believed it could prove murder beyond a reasonable doubt," and therefore did not argue for a manslaughter conviction at the second trial, is completely irrelevant to the length of the prior mistrials, the complexity of the case, and/or the similarity of the evidence between the previous trials. Accordingly, I would hold that the circuit court abused its discretion by considering a wholly irrelevant fact in its analysis of the third Moriwake factor.

opportunities to present the same evidence and arguments in support of its position regarding the complex factual and legal issues before a jury, and receive a decision based thereupon.

The Majority suggests that if it were to conclude that the length of the prior trials and the complexity of the case weigh in favor of dismissal in the present case, this court would establish precedent whereby there it is more likely that cases involving higher stakes--those involving more serious charges, or a greater number of charged offenses, or multiple defendants--will be dismissed. Majority at 41-42. However, the Majority's extrapolation of the consequences that could result from my analysis concerning the third Moriwake factor rests upon a flawed factual assumption: that cases involving more serious charges, or those involving numerous defendants or multiple charges, necessarily result in longer and/or more complicated trials. I do not believe that criminal cases can be characterized in such a linear fashion. The length and complexity of criminal trials ultimately depend on a vast number of factors, which will inevitably vary from case-to-case depending on each case's unique facts and circumstances. Accordingly, from my perspective, the Majority's justification for its holding on this point is unpersuasive.

To conclude, I would hold that the circuit court abused

its discretion in ruling that the third Moriwake factor weighs in favor of retrial. The circuit court fundamentally misapplied this factor when it determined that placing differing emphases on the same evidence is tantamount to presenting different evidence. And, properly applied, the third Moriwake factor weighs in favor of dismissal. Here, the State has had two protracted opportunities to present the same evidence, legal theories, and witness testimony to support it position on the complicated issues before the jury in each trial, and receive a decision based thereon.

3. Likelihood of any substantial difference in a subsequent trial, if allowed

The circuit court ruled that the fourth Moriwake factor weighs in favor of retrial because "the prosecution will focus exclusively upon a reckless state of mind," such that the "evidentiary emphasis and argument during [the] third trial will differ from what they were when the focus was the charged offense" in the first two trials.

On appeal, Deedy argues that this factor weighs in favor of dismissal because the State intends to rely upon the same evidence that it had presented at the first two trials. The Majority rejects this argument, stating:

> Deedy places inordinate emphasis on his claim that the evidence at a third trial will not be substantially different from that introduced at the first and second

> trials. While "[t]his court has indicated that whether the evidence submitted in a subsequent trial would be substantially different from prior trials is relevant" in evaluating the fourth Moriwake factor, this court has never held that it is dispositive as to whether this factor favors retrial. Deguair, 136 Hawaiʻi 89, 358 P.3d at 61.
>
> The primary focus of this factor is the likelihood of any substantial difference in a subsequent trial, which includes not only the evidence presented, but also the theory of guilt, the applicable defenses, and the likelihood of a verdict as opposed to a hung jury. See, e.g., id. (noting that not only was evidence to be offered at a third trial substantially the same as the second trial, it was also not likely that there would be a substantial difference in the result of a third trial).

Majority at 45-46 (brackets in original) (emphases added).

Indeed, our case law has not established that the similarity of the evidence presented between the subsequent trial and the previous trials is dispositive of whether this Moriwake factor weighs in favor of dismissal or retrial. Nonetheless, the cases upon which the Majority relies illustrate that this court has previously given heavy consideration to "whether the evidence submitted in a subsequent trial would be substantially different from prior trials," and if so, whether such evidence would likely make a difference on retrial. Deguair, 136 Hawaiʻi at 89, 358 P.3d at 61 (holding that the circuit court did not abuse its discretion in ruling that the fourth Moriwake factor weighed in favor of dismissal because the new evidence that the State sought to offer at the third trial "would not make a difference" such that "the evidence in the third trial would be substantially the

same as the second trial"); Hinton, 120 Hawaiʻi at 279, 204 P.3d at 498 (affirming the ICA's determination that the circuit court did not abuse its discretion in concluding that the fourth Moriwake factor weighed against retrial because "the evidence submitted in a subsequent trial, if allowed, 'would be substantially similar . . . [and] would not differ all that much'"). Neither Dequair nor Hinton support, as the Majority posits, that courts ought to consider "the theory of guilt, the applicable defenses, and the likelihood of a verdict as opposed to a hung jury" when analyzing the fourth Moriwake factor. See Dequair, 136 Hawaiʻi at 89, 358 P.3d at 61, Hinton, 120 Hawaiʻi at 279, 204 P.3d at 498; Majority at 46.

Therefore, I do not believe that Deedy inordinately emphasized the fact that the evidence at the third trial will be the same as the evidence that was presented in the first two trials. Consonant with Moriwake and its progeny, Deedy correctly contended that the fourth Moriwake factor weighs in favor of dismissal because the State has not indicated that it will present evidence materially different from that which it had utilized at the first two trials. Though the State intends to cast the evidence in a different light in the third trial, its plan to shift its trial strategy has no bearing upon the fact to which this court has previously given substantial weight in

analyzing the fourth Moriwake factor: that "the evidence in the third trial would be substantially the same as the second trial." Dequair, 136 Hawaiʻi at 89, 358 P.3d at 61.

In sum, the circuit court's analysis of the fourth Moriwake factor focused solely upon "the differing emphasis of the prosecution's case, as well as the manner in which the evidence will be characterized" in the third trial. Majority at 46. The circuit court, however, did not address, in any way whatsoever, whether the evidence presented at the third trial would be similar to that which was presented at the first two trials. This is a consideration that this court has previously accorded significant weight in examining the fourth Moriwake factor. Accordingly, the circuit court "disregarded [the] . . . principles of law" by applying the fourth Moriwake factor in a manner that is inconsistent with this court's case law. Rapozo, 123 Hawaiʻi at 336, 235 P.3d at 332 (quoting Oughterson, 99 Hawaiʻi at 253, 54 P.3d at 424). As such, the circuit court abused its discretion in determining that the fourth Moriwake factor weighs in favor of retrial.

4. Trial court's evaluation of relative case strength

The circuit court ruled that the fifth Moriwake factor weighs in favor of retrial because "[t]here was sufficient evidence to convict the Defendant, and there was sufficient

evidence to acquit the Defendant, depending upon who and what a jury elected to believe." The Majority holds that the circuit court did not abuse its discretion in arriving at the aforementioned conclusion because "[t]here is no indication in the record to refute the circuit court's determination that the evidence was sufficiently strong to support a conviction on retrial." Majority at 48.

I do not dispute that arguably, the evidence in the present case could have supported either Deedy's conviction or acquittal. However, from my perspective, the circuit court overlooked a key consideration that is probative of the strength of the State's case, and supports that the fifth Moriwake factor weighs in favor of dismissal.

Notwithstanding the fact that the evidence could have supported either Deedy's conviction or acquittal, the salient fact remains that the State must obtain a unanimous guilty verdict to convict Deedy of any offense stemming out of the incident that took place at the fast food restaurant in 2011. State v. Arceo, 84 Hawaiʻi 1, 30, 928 P.2d 843, 872 (1996) ("[T]he right of an accused to a unanimous verdict in a criminal prosecution, tried before a jury in a court of this state, is guaranteed by article I, sections 5 and 14 of the Hawaiʻi Constitution."). The State had two fair chances to obtain a

unanimous guilty verdict. The State failed both times. The jury could not reach a verdict on the charged offense at the first trial. At the second trial, the jury acquitted Deedy on the charge of murder, and could not reach a verdict on the included offenses. That the State presented the same evidence to a jury twice before, and was unsuccessful in both efforts to obtain a unanimous guilty verdict, suggests that the State's case was clearly not strong enough to support a conviction on retrial, inasmuch as Deedy was acquitted of the charged offense at the second trial.

Accordingly, I believe that the circuit court neglected a conspicuous and pertinent fact that bore upon the relative strength of the State's case when it analyzed the fifth Moriwake factor. In doing so, the circuit court abused its discretion in ruling that this factor weighs in favor of retrial.

5. Professional conduct and diligence of respective counsel, particularly that of the prosecuting attorney

The circuit court determined that the sixth Moriwake factor "favors retrial" to the extent that "[c]ounsel acted with diligence and did the best job they could do, as they defined it." In affirming the circuit court's ruling, the Majority posits: "The quality of counsel's professional conduct and the level of their diligence could weigh either in favor or against

retrial depending on the circumstances and specific facts of the case, including the result of the evaluation of other relevant Moriwake factors." Majority at 50. To the Majority, because the circuit court did not abuse its discretion in concluding that there was a substantial likelihood that the third trial would have a different outcome, the circuit court did not abuse its discretion in ruling that the sixth Moriwake factor weighs in favor of retrial. Majority at 50-51.

I do not agree with the Majority's holding on this point for two reasons. First, I do not believe that "[t]he quality of counsel's professional conduct and the level of their diligence could weigh either in favor or against retrial depending on the circumstances and specific facts of the case." Majority at 50. Rather, the sixth Moriwake factor simply requires courts to consider whether a different outcome would have been reached had the attorneys been more skilled or diligent. Consonant with this view, this court has consistently held that the sixth Moriwake factor weighs in favor of dismissal where counsel have performed competently and diligently. See Hinton, 120 Hawaiʻi at 280, 204 P.3d at 499 (affirming that the circuit court correctly ruled that the sixth Moriwake factor weighed against retrial "inasmuch as the attorneys for both parties 'did a good job'"); Deguair, 136 Hawaiʻi at 90, 358 P.3d

at 62 (declining to disturb the circuit court's ruling that the sixth Moriwake factor weighed "strongly against a retrial" because the prosecutor's performance was of unparalleled excellence, diligence, and professionalism). The Majority's holding on this point over-complicates the straight-forward inquiry that lies at the heart of the sixth Moriwake factor.

Second, I disagree with the Majority's holding concerning the sixth Moriwake factor to the extent that, as discussed in section I.B.3, supra, I believe that the result in the third trial is not substantially likely to be materially different from the outcome in the previous two trials.

The sixth Moriwake factor weighs against retrial. Here, both the prosecutor and defense counsel were and are profoundly well-regarded in the legal community. At the hearing on Deedy's motions to dismiss, the circuit court observed that "[c]ounsel acted with diligence and did the best job they could as they defined it." The circuit court reiterated its sentiments regarding counsels' professional conduct and diligence in its order denying Deedy's Moriwake motion to dismiss. As counsel for both parties are well-respected attorneys who have twice litigated their cases with a high degree of diligence, professionalism, and competence, it is unlikely that the quality of their performance would give rise to a different result in a

subsequent trial. Consequently, this factor weighs in favor of dismissal. See Hinton, 120 Hawaiʻi at 280, 204 P.3d at 499; Dequair, 136 Hawaiʻi at 90, 358 P.3d at 62.

In short, we have previously held that where the parties' attorneys have competently and diligently presented their cases in a professional manner, this factor should weigh in favor of dismissal. Faced with precisely those facts in this case, the circuit court abused its discretion in its analysis of the sixth Moriwake factor by disregarding the foregoing precedent and concluding, without explanation, that this factor weighs in favor of retrial.

To conclude, I concur with the Majority that the circuit court did not abuse its discretion in ruling that the first Moriwake factor weighs in favor of retrial. I disagree with the Majority to the extent that from my perspective, the circuit court misinterpreted and misapplied the remaining Moriwake factors to the facts in this case. Properly analyzed, these factors weigh in favor of dismissal. Accordingly, the circuit court abused its discretion in denying Deedy's motion to dismiss brought under Moriwake.

II. CONCLUSION

For the reasons stated above, I would hold that the State is judicially estopped from retrying Deedy's case, and that

the circuit court abused its discretion in denying his motion to dismiss brought pursuant to State v. Moriwake. Therefore, I respectfully dissent.

/s/ Paula A. Nakayama