DISSENTING OPINION OF RECKTENWALD, C.J.

I respectfully dissent, because I believe that the circuit court exceeded its discretion in dismissing the indictments against defendants Jason B. Rumbawa (Rumbawa), Rosalino B. Ramos (Ramos), and Anthony Brown (Brown) (collectively Defendants).

First, while it is true that the circuit court's ruling should be reviewed for abuse of discretion, that discretion is limited in light of the "magnitude of the respective interests of society and criminal defendants which are implicated in this area of the law." State v. Moriwake, 65 Haw. 47, 56, 647 P.2d 705, 712 (1982); see State v. Lincoln, 72 Haw. 480, 491, 825 P.2d 64, 70 (1992) ("a trial court's inherent power to dismiss an indictment is not a broad power and trial courts must recognize and weigh the State's interest in prosecuting crime against fundamental fairness to the defendant"). Indeed, some courts have observed that dismissal of an indictment in these circumstances raises separation of powers concerns which require that the power to dismiss be used sparingly:

> [B]ecause of separation-of-powers considerations and the public's interest in the prosecution of those charged with criminal offenses, the trial court's discretion to dismiss cases in the interest of justice is necessarily limited. Generally, trial courts may dismiss prosecutions in furtherance of justice against the wishes of the prosecutor only in rare and unusual cases when compelling circumstances require such a result to assure fundamental fairness in the administration of justice.

State v. Sauve, 666 A.2d 1164, 1167 (Vt. 1995) (citations omitted); State v. Gonzales, 49 P.3d 681, 686 (N.M. Ct. App. 2002) ("As long as the court's discretion in dismissing successive prosecutions is limited and exercised with great caution, there is no separation of powers violation. . . . [w]e . . . limit the discretion of trial courts so that they may dismiss criminal prosecutions only in the most extreme of cases").

Second, the circuit court limited its consideration to the six factors that were specifically identified in Moriwake. Moriwake, however, makes clear that the six factors identified

there are non-exclusive, and that the trial court should consider other factors as appropriate. Moriwake, 65 Haw. at 56-57, 647 P.2d at 712-13. This omission is significant because the circuit court failed to consider issues relevant to the unique circumstances of this case. Most notably, the State argued that the circuit court should consider the risk to the community posed by these defendants, who were alleged to have been involved in gang activity and to have visited two other neighborhoods looking for a drug house to rob before settling on the neighborhood where the murder occurred. Risk to the community was among the 12 factors identified for consideration by the Iowa Court of Appeals in State v. Lundeen, 297 N.W.2d 232, 236 (Iowa App. 1980) (court should consider the "effect on the protection to society in case the defendant should actually be guilty"), which was cited with approval by the Hawai'i Supreme Court in Moriwake, 65 Haw. at 56-57, 647 P.2d at 712-13.

Third, the circuit court's ruling here with regard to Rumbawa and Ramos did not give sufficient weight to the seriousness of the crimes with which they were charged, as well as the fact that 18 out of 24 jurors in the prior two trials voted to convict. Both Ramos and Rumbawa were charged with second degree murder, which, based on the legislature's authorized punishment of life with the possibility of parole, Hawaii Revised Statutes (HRS) § 707-701.5 (1993) and 706-656 (1993), is one of the most serious offenses in the Hawai'i Penal Code.

The Moriwake opinion provides guidance on how a trial court should assess the seriousness of the offense in such a case. The defendant there was charged with manslaughter for recklessly causing the death of Ruby Scanlan by beating her with his hands and feet. Moriwake, 65 Haw. at 49, 647 P.2d at 708. Moriwake "defended against the manslaughter charge on the ground that his state of mind with regard to Scanlan's death did not constitute recklessness due to extreme intoxication at the time." Id. After two trials both resulted in hung juries, the circuit

court dismissed, but noted:

> Of course, if this were a situation entailing, say, murder for hire or a criminal situation, then it would be an element against dismissal. But, as the trial has indicated, this entailed certain, shall we say, mitigating circumstances that were not indicative of criminal propensity as in the case, say, of murder or a criminal situation.

Id. at 50-51, 647 P.2d at 708-09 (emphasis added) (footnote omitted).

As the circuit court recognized in Moriwake, the interest of the State in obtaining a final adjudication of guilt is particularly strong when a defendant is charged with murder.[1] The Supreme Court did not criticize or otherwise reject that observation.

The circuit court also gave too little weight to the votes of the juries in this case. The first jury voted 11-1 for conviction, while the second jury voted 7-5 for conviction. It is instructive to compare the decision of the circuit court with those of courts in other murder cases in which defendants have sought to dismiss the indictment against them after two or more mistrials. A survey of those cases indicates that trial courts have either refused to dismiss indictments in circumstances similar to those here, or have been reversed when they have done so. Moreover, it appears that dismissal of a murder indictment is an extreme measure that has been reserved for situations involving more than two trials and when a majority of jurors have voted for acquittal.

This case is similar in many ways to People v. Kirby, 460 N.Y.S.2d 572 (N.Y. App. Div. 1983). The two defendants there were charged with murdering a cab driver. Id. One defendant was tried three times, with the jury splitting 10-2 for conviction in the first trial, 6-6 in the second trial, and 10-2 for conviction

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[1] This strong public policy is reflected in the fact that a prosecution for murder can be commenced at any time, while prosecutions for other criminal offenses are subject to limitation periods ranging from one to ten years. Hawaii Revised Statutes § 701-108 (Supp. 2006).

in the third trial; the other defendant was tried twice, with the first jury voting 6-6 and the second jury voting 10-2 for conviction. Id. at 573. A judge who was not involved in the trials then dismissed the indictment, after talking to the judges who tried the cases and concluding that a unanimous verdict was unlikely. The New York Supreme Court, Appellate Division reversed, finding that the trial court had not adequately explained its reasons for dismissing the case and noting that "[w]hile the court below was correct in its general observation that '[r]equiring defendants to face additional juries with the continuing prospect of no verdict offends traditional notions of fair play and substantial justice,' we are unconvinced that that is the situation here." Id. at 574; see also State v. Gonzales, 49 P.3d 681, 686 (N.M. Ct. App. 2002) (reversing the trial court's dismissal of murder indictment after two juries divided 6-6, and remanding to allow the trial court to consider factors identified in appellate court's opinion).

There are other instances in which trial courts have refused to dismiss murder indictments after two or more mistrials, and those refusals to dismiss have been affirmed by appellate courts. See, e.g., Sullivan v. State, 874 S.W.2d 699 (Tex. Ct. App. 1994) (holding that it is was not a double jeopardy violation to retry defendant in a murder case after two juries voted 9-3 for conviction). In some of these cases, a substantial majority of the jurors voted in favor of acquittal. See Sivels v. State, 741 N.E.2d 1197, 1202 (Ind. 2001) (finding it was not an abuse of discretion to allow retrial of defendant after two prior trials had ended with jurors voting 7-5 for acquittal and 9-3 for acquittal); Ex parte Anderson, 457 So. 2d 446 (Ala. 1984) (holding that it was not a due process violation to try defendant a fourth time after prior juries voted 10-2, 9-3 and 8-4 for acquittal, where trial judge believed that the state's evidence proved the defendant's guilt).

In State v. Witt, 572 S.W.2d 913 (Tenn. 1978), a trial court's dismissal of a murder indictment after three mistrials

was upheld on appeal. The opinion does not indicate the split of votes in the first two trials, although the third jury voted 8-4 for acquittal, and jurors from each of the three trials testified at a hearing that they did not believe any jury could reach a unanimous verdict assuming the evidence remained the same. Id. at 914; see also United States v. Ingram, 412 F. Supp. 384 (D.C. 1976) (affirming dismissal in robbery prosecution when two juries had voted 10-2 and 11-1 for acquittal).

Each of these cases must be considered in light of its own facts, and in light of the different legal principles that were being applied by the respective courts. Nevertheless, these cases suggest that it was an abuse of discretion for the circuit court here to dismiss a murder prosecution after the jury voted 11-1 and 7-5 in favor of conviction.[2] It is one thing to dismiss a prosecution when a substantial majority of the jurors have repeatedly voted to acquit, as was the case in Ingram. The split of votes in such a case indicates that further prosecution is futile and overreaching. It is quite another thing to dismiss a murder prosecution when 18 out of 24 jurors have voted to convict the defendant, with one panel voting 11-1 for conviction. The votes in such circumstances indicate there is a substantial likelihood that another prosecution could result in a conviction. When considered in light of the strong state interest in obtaining an adjudication of guilt or innocence in murder cases, dismissal in such circumstances exceeds the narrow discretion given to the circuit court by Moriwake.

Finally, although Ramos and Rumbawa were both accused

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[2] I also note that the circuit court failed to resolve allegations raised by the State that a juror in the second trial may have been motivated by racial considerations in refusing to convict defendants of Filipino ancestry. While the court alluded to those allegations during oral argument, it did not state in either its oral or written ruling whether it was considering them or rejecting them. This omission is significant since the split among the jurors in the first trial (11-1 for conviction) is one that would be expected to weigh heavily in favor of allowing a third retrial; however, the circuit court instead relied on the fact that the 7-5 vote in the second trial indicated that the State's case was getting weaker. If that 7-5 vote reflected the consideration of race rather than the evidence on the part of at least one juror, then presumably that trend would be less significant.

of second degree murder as well as other offenses, Brown was only charged with first degree robbery, which carries a 20 year prison term. HRS § 708-840 (1998); HRS § 706-659 (1994). While the charge against Brown is less serious than those against Ramos and Rumbawa, the existence of strong corroborating evidence linking Brown to the crime argues against dismissal of the indictment against him. The police recovered a t-shirt from the street near the victim's house; Brown's DNA could not be excluded from the sample on the shirt. Given this evidence linking Brown to the crime scene, I would hold that the court exceeded its discretion by dismissing the charge against him as well.

For all these reasons, I would reverse the ruling of the circuit court, and reinstate the indictments against the Defendants.

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