CONCURRING OPINION BY ACOBA, J.

As to the two issues that were presented on appeal, first, I concur in the result because I believe that the evidence was insufficient to rebut the parental justification defense under Hawai'i Revised Statutes (HRS) § 703-309(1) (1993) of Petitioner/Defendant-Appellant/Cross-Appellee Ijeva Matavale (Mother) beyond a reasonable doubt. Second, I believe the instruction given by the family court of the first circuit (the court) to the "deadlocked" jury was incorrect and, also, that that instruction must be addressed in light of our supervisory jurisdiction under HRS § 602-4 (1993) and in light of the dissent's view of that instruction.

I.

With respect to Mother's parental justification defense, the decisions of this court cannot be read to prohibit the use of physical force in disciplining children altogether. The use of parental force is permissible under the penal law, for under appropriate circumstances, "a parent might justifiably believe that the use of physical force was the only proper alternative left to the parent to fulfill his or her obligation under HRS § 577-7 (1993) to control his or her child's conduct." State v. Tanielu, 82 Hawai'i 373, 381, 922 P.2d 986, 994 (1996) (footnote omitted). HRS § 577-7(a) provides in relevant part that "[p]arents shall have control over the conduct and education of their minor children . . . . All parents . . . shall provide,

to the best of their abilities, for the discipline, support, and education of their children." It appears the legislature has indicated that "[p]revention and punishment of a child's misconduct are both included in HRS § 703-309 as examples of when a parent's use of force may be 'reasonably related to the purpose of safeguarding or promoting the welfare of the minor.'" Tanielu, 82 Hawai'i at 381, 922 P.2d at 994.

Thus, "[a]lthough the use of physical force as a child-rearing method may engender debate, it is an option parents are free to employ within the bounds of the statute." Id. Consequently, "HRS § 703-309 permits the use of physical force to punish a minor child for his or her misconduct and to deter that minor from future misconduct." Id. Under the facts adduced here, and consonant with precedent in this jurisdiction, Mother's "use of physical force to punish or deter . . . is not subject to criminal liability [because] it [was] reasonably related to the welfare of the minor and within the scope of allowable physical force under the statute." Id.

II.

A.

Preliminarily, as to the "deadlock" instruction issue, the circumstances call for exercise of our supervisory jurisdiction as to which the mootness doctrine would not apply.[1]

[1] Inasmuch as we may exercise supervisory jurisdiction as to the "deadlock" instruction, and the viability of the court's instruction is argued by the dissent, that issue is not moot as the plurality contends. Additionally, the following may be noted. In Wong v. Bd. of Regents, Univ. of (continued...)

In this case we filed an "Order Accepting Application for Writ of Certiorari" expressly informing the parties that the sole issue on oral argument was the matter of the deadlock instruction.

> Mother's application for a writ of certiorari . . . is . . . accepted and will be scheduled for oral argument on the following sole issue: "whether the Family Court committed reversible error when it instructed the jury to continue deliberations and directed the jury to a previously-promulgated instruction after the jury had indicated that it was deadlocked."

(Emphasis in original.) That order further stated that "the parties may, within 30 days from the date of this order, file a supplemental brief addressing the sole issue to be discussed in oral argument." (Emphasis added.) Mother did file a supplemental brief. Oral argument, accordingly, was overwhelmingly devoted to the appropriateness of the foregoing instruction. Hence, the point raised as to the deadlocked instruction was of primary importance to this court and was extensively briefed and argued.

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[1](...continued)
Hawaii, 62 Haw. 391, 616 P.2d 201 (1980), the appellant was seeking injunctive and declaratory relief to enjoin the University of Hawai'i from imposing disciplinary action against the appellant. Id. at 392, 616 P.2d at 202. After the appeal was filed, however, "appellant and the University entered into another stipulation [and the] University agreed to terminate its disciplinary proceedings against appellant and to keep his school record free from any mention of the proceedings or charges. By then appellant had graduated from the University and had never sought admission for graduate work there." Id. at 394, 616 P.2d at 203. This court held that the doctrine of mootness was applicable to the case on appeal because the controversy on appeal no longer affected the legal relations of the parties. Id. at 396, 616 P.2d at 205. By contrast, in the instant case, the legal controversy between the parties remained intact on appeal, leaving it to this court to decide the issues.

Additionally, while Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 734 P.2d 161 (1987), stated the proposition cited by the plurality, in that case this court declined to apply the very proposition cited, recognizing that in certain exceptional situations such as when the question on appeal affects the public interest, mootness is not an obstacle to the consideration of the appeal. Id. at 87-88, 734 P.2d at 165-66.

Despite the precedent established in State v. Fajardo, 67 Haw. 593, 699 P.2d 20 (1985), and State v. Villeza, 72 Haw. 327, 817 P.2d 1054 (1991), the question of an appropriate instruction to a deadlocked jury has again arisen in this case. Under HRS § 602-4, this court is granted "general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by law." See State v. Kealaiki, 95 Hawai'i 309, 317, 22 P.3d 588, 596 (2001) (recognizing that "[w]e could assert supervisory jurisdiction under HRS § 602-4 over the trial courts 'to prevent and correct errors and abuses therein where no other remedy is expressly provided for by law'" (quoting State v. Ui, 66 Haw. 366, 367, 663 P.2d 630, 631 (1983)); State v. Moniz, 69 Haw. 370, 742 P.2d 373 (1987); In re Carvelo, 44 Haw. 31, 352 P.2d 616 (1959). In my view this case necessitates the employment of supervisory jurisdiction.

B.

In connection with the deadlock instruction, the jury had informed the court, "We are in a deadlocked decision. What next?" Apparently without showing the court's written instruction to counsel,[2] in answer to the question, "What next?"

[2] It appears the court did not follow the procedure regarding communications from the jury set forth in Hawai'i Rules of Penal Procedure (HRPP) Rule 30. HRPP Rule 30(e) states in pertinent part, as follows:

> If, during deliberation on its verdict, the jury shall request further instructions, the court may further instruct the jury in accordance with instructions prepared by the court and reduced to writing, first submitting the same to counsel.

(continued...)

the court replied, "Continue with your deliberations. See p. 16 of the instructions."[3] By informing the jury to continue and in referring to the deliberation instruction, the court directed the jury to resume deliberating despite the jury's statement that it was deadlocked.

Because this was in response to their query, "What next?" the jurors would have been reasonably led to believe that they "could be deliberating indefinitely unless [they] unanimously reached a verdict[.]" Villeza, 72 Haw. at 336, 817 P.2d at 1059. The instruction thus "pressur[ed] . . . the jury to reach a verdict based on compromise and expediency." Id. at 334, 817 P.2d at 1058. Such an instruction was seemingly aimed at avoiding a hung jury. However, a hung jury is a safeguard of our judicial system.

> A mistrial from a hung jury is a safeguard built into the American system of jurisprudence. "In our system this is a desirable result. Despite the fact that each trial which ends in a hung jury may appear to be an exercise in futility and may create understandable judicial frustration, it should be remembered that a hung jury is only undesirable

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[2](...continued)
(Emphasis added.)

[3] The reference to "p. 16" was a command to re-read the instruction on jury deliberation. The instruction states:

> A verdict must represent considered judgment of each juror, and in order to return a verdict, it is necessary that each juror agree thereto. In other words, your verdict must be unanimous.
>
> Each of you must decide the case for yourself, but it is your duty to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violating your individual judgment. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest belief as to weight or effect of evidence for mere purpose of returning a verdict.

> where the hanging jurors simply refuse to join in conscientious collective deliberation in an honest effort to reach a verdict. There simply is no evidence that any significant number of American jurors approach their task in such a manner. What evidence there is all points the other way."

Fajardo, 67 Haw. at 600, 699 P.2d at 24 (quoting Note, Due Process, Judicial Economy and the Hung Jury: A Reexamination of the Allen Charge, 53 Va. L. Rev. 123, 146 (1967) (emphasis added) (footnote omitted)). The instruction accordingly was prejudicial.

C.

Rather than the court's chosen response, Respondent/Plaintiff-Appellee/Cross-Appellant State of Hawai'i (Respondent) properly suggested that the jury be asked, "Would more time assist you in reaching a unanimous verdict?" At the August 4, 2005 hearing, Respondent argued that the court's instruction was legally incorrect:

> [RESPONDENT]: The State's position is the more proper response in your response to a juror communication indicating that they are in a deadlock is "Would more time assist you in, uh, reaching a unanimous verdict?" State cites, uh, the case of State v. Fajardo which was -- which --
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> THE COURT: Why don't you give us a cite on that as well?
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> [RESPONDENT]: Citation for that case is 67 Haw[.] 593. This case basically said that the Allen Instruction would no longer be allowed and this is the Allen Instruction, the so-called "dynamite instruction" said to blast a verdict out of a jury. State, uh, submits that the, um "Continue with your deliberations" after a communication of "We are at a deadlock," it comes very close to, if not as exactly, what the court in, uh, Fajardo was saying he's no longer -- uh, will no longer -- will no longer be tolerated. State submits that the more proper response to that -- to that communication is what the State suggested.

(Emphases added.) Respondent was correct and rightly objected to the charge.

I note, however, that on appeal, Respondent appears to argue a position opposite from that maintained at the trial below. Relying on Fajardo, Respondent contends on appeal that the reference to "p. 16" of the instructions cured any error in this case.

> [T]he trial court's response to jury communication number one simply directed the jury to the trial court's general instruction - on "page 16 of the instructions" - given earlier on how to go about its deliberations. When read and considered as a whole, it is clear that the jury was properly instructed as to their duty to deliberate-that it should only reach agreement if it can do so without violating individual judgment, that it should not surrender an honest belief as to the weight or effect of evidence for the mere purpose of returning a verdict, and that therefore it may not be able to reach agreement. Consequently no prejudicial effect had befallen defendant.

(Emphasis added.) But that argument has been made before and rejected. This court has said that the same instruction as found on page 16 of the instant case does not remedy an instruction of the sort given by the court.

> The State highlights the phrase in the first paragraph of instruction no. 14, which states "if you can do so without violence to individual judgment," as a caveat in following the court's response to jury communication no. 4. However, "an erroneous instruction, clearly prejudicial cannot be cured by another instruction which correctly states the law, but does not call the attention of the jury to the erroneous instruction." State v. Napeahi, 57 Haw. 365, 377, 556 P.2d 569, 577 (1976) (citation omitted). The phrase, "if you can do so without violence to individual judgment" related to "returning a verdict" and has nothing to do with the issue of being deadlocked. Instruction no. 14 simply defined how the jury should reach a verdict.

Villeza, 72 Haw. at 337, 817 P.2d at 1059 (emphasis added) (brackets omitted). In this case the erroneous response given by the court to continue deliberations cannot save the response because the instruction on page 16 "does not call the attention of the jury to the erroneous instruction." Id. In sum, under

Villeza and Fajardo, the court reversibly erred in instructing the jury to continue to deliberate in the face of the jury's advisement to the court that it was deadlocked, rather than in instructing the jury as Respondent had requested.