DISSENTING OPINION BY NAKAYAMA, J.,
WITH WHOM, DUFFY, J., JOINS

I respectfully dissent. In my view, the plurality uses the appellate record to retry the facts of the case and has thereby commandeered the fact-finding function traditionally reserved for the jury, replacing the jury's verdict with a verdict of its own. To wit, the plurality holds, as a matter of law, that evidence of the corporal punishment delivered by Mother upon Daughter was insufficient to sustain the jury's verdict convicting Mother of the offense of Abuse of Family or Household Members. Inasmuch as (1) I do not believe the cases cited by the plurality are controlling, (2) the record, viewed in the light most favorable to the prosecution, contains substantial evidence to support the jury verdict, and (3) the trial court's response to the jury communication was not improper, I would hold that the Intermediate Court of Appeals ("ICA") did not gravely err by affirming Mother's conviction.

I. DISCUSSION

A. This Jurisdiction's Child Abuse Jurisprudence Does Not Require a Finding of Insufficient Evidence as a Matter of Law.

The plurality relies heavily on six cases drawn from this jurisdiction's child abuse jurisprudence: (1) State v. Deleon, 72 Haw. 241, 813 P.2d 1382 (1991); (2) State v. Crouser, 81 Hawai'i 5, 911 P.2d 725 (1996); (3) State v. Stocker, 90 Hawai'i 85, 976 P.2d 399 (1999); (4) State v. Kaimimoku, 9 Haw. App. 345, 841 P.2d 1076 (1992); (5) State v. Tanielu, 82 Hawai'i 373, 922 P.2d 986 (App. 1996); and (6) State v. Miller, 105 Hawai'i 394, 98 P.3d 265 (App. 2004). For the following reasons, I believe that these cases do not mandate the conclusion that

Mother's conduct in the present case did not, as a matter of law, constitute the offense of Abuse of Family or Household Members.

I first address Crouser, Miller, and Tanielu, to the extent that they share the same defect in application to the present case.

In Crouser, the female victim ("Minor") was fourteen years of age. 81 Hawai'i at 8, 911 P.2d at 728. Minor was required by her mother ("Mother") and Mother's boyfriend, Delbert L. Crouser ("Crouser"), to bring home a daily progress report from school. Id. On May 19, 1993, Minor forgot to pick up the report from her counselor and, consequently, filled out the report herself, changing several grades and her attendance record. Id. Crouser discovered Minor's attempt at deception and unleashed a fury of punishment that lasted for approximately a half-hour. Id. Specifically, Crouser struck Minor across both sides of her face, knocking her to the ground. Id. As Minor tried to stand, Crouser threw her onto the bed, yanked her pants and underwear down around her knees, and proceeded to "whack[]" her bottom. Id. Crouser thereafter left the room to retrieve a plastic baseball bat. Id. When he returned, he repeatedly struck Minor "on the buttocks, arm, thighs, and torso until the bat broke." Id. For approximately one hour following the beating, Minor experienced dizziness and had difficulty sitting. Id. On the day following the incident, Minor could not sit in the hard student chairs, and was permitted to either sit in the padded teacher's chair or stand. Id. Minor experienced lingering pain in her buttocks for another two weeks. Id.

Because Minor reported difficulty sitting, Minor was sent to the school health aide, Shirley Yamaguchi ("Yamaguchi"). Id. Yamaguchi observed that Minor "waddled stiffly[,]" was "very emotional" and "unable to sit at the desk, where she customarily talked with students." Id. Yamaguchi called the school counselor, and they both observed that Minor's buttocks were "bruised and colored a deep reddish-purple." Id. at 9, 911 P.2d at 729 (emphasis removed). They also observed "bruising to Minor's arm, thigh, and torso[.]" Id. Yamaguchi testified that Minor's injuries were the worst she had ever seen in a discipline case. Id.

Following a bench trial, Crouser was convicted of committing the offense of Abuse of Family and Household Members. Id. at 7, 911 P.2d at 727. On appeal, Crouser argued that the trial court clearly erred by rejecting the parental discipline defense. Id. at 10, 911 P.2d at 730. We noted that the trial court determined, inter alia, that "the force used was not reasonably related to the purpose of safeguarding the welfare of the minor and it was designed to cause or known to create a risk of causing substantial bodily injury or mental distress." Id. (emphasis in original). We thereafter affirmed the trial court, holding that neither conclusion was clearly erroneous. Id. at 15, 911 P.2d at 735.

In Miller, Michael Damien Miller ("Miller") was convicted of Abuse of Family or Household Members for physically abusing his eleven-year-old nephew ("CW"). 105 Hawai'i at 395-96, 98 P.3d at 266-67. On October 16, 2001, Miller picked CW up

from school. Id. at 396, 98 P.3d at 267. Miller tickled CW as they drove home and did not comply with CW's requests for him to stop. Id. When CW grabbed Miller's arm to make him stop, Miller hit him. Id. Additionally, when CW asked Miller to turn down the radio because of a headache, Miller responded by turning the volume up. Id. Miller's conduct angered CW, and when they stopped at a gas station CW exited the vehicle and walked away. Id. When CW turned around to look back, Miller and the car were gone. Id. However, Miller returned shortly thereafter, pushed CW to the ground, and yelled at him to get back in the car. Id. CW sat on the ground, cross-legged, and refused to move. Id. Miller made several attempts to pick CW up by the ear and by the hair, but each time CW fell back to the ground. Id. Miller proceeded to kick CW and delivered several blows with a closed fist to CW's head, back, and ribs. Id. The punishment finally ceased when a witness intervened and ultimately got into a fist-fight with Miller. Id. CW sustained several injuries as a result of the beating, including (1) a bump on the head, (2) scratches on his face and ears, and (3) lingering pain in his back and ribs. Id.

The family court concluded that the parental discipline defense did not apply "where the defendant's own conduct provoked or caused the misconduct on the part of the victim which gave rise to the use of force." Id. at 398, 98 P.3d at 269. The family court reasoned further that, even if the parental discipline defense was available, the prosecution disproved it beyond a reasonable doubt insofar as (1) "the use of force

employed by defendant was not reasonably related to the purpose of safeguarding or promoting the welfare of the minor[,]" id., and (2) "[n]or was the force used not designed to cause or create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress or neurological damage[,]" id. (emphasis in original). The ICA affirmed the family court's judgment on the grounds that the record contained sufficient evidence to negate Miller's defense and the family court's decision in that regard was not clearly erroneous. Id. at 402, 98 P.3d at 273.

In Tanielu, Iese Tanielu ("Tanielu") was convicted of Abuse of Family or Household Members for physically disciplining his fourteen-year-old daughter ("Daughter") for her continued relationship with her eighteen-year-old boyfriend ("Boyfriend"). Tanielu and his wife ("Wife") disapproved of Boyfriend, whom Wife described as "verbally and physically 'very abusive[.]'" 82 Hawai'i at 376, 922 P.2d at 989 (brackets in original). Daughter eventually agreed to postpone her relationship with Boyfriend until after she completed highschool. Id. However, unbeknownst to her parents, she continued the relationship in secret. Id. Wife later uncovered the truth and Daughter admitted that she had been skipping classes to see Boyfriend and spent time with Boyfriend in his bedroom. Id. Wife scheduled a pelvic examination to determine whether Daughter was pregnant, but on the scheduled day of the examination Daughter ran away from home to live with Boyfriend. Id. Wife and her brother thereafter retrieved Daughter from Boyfriend's home. Id. Tanielu and Wife

then confronted Daughter about her relationship with Boyfriend. Id. at 377, 922 P.2d at 990. Daughter was unresponsive, and Tanielu and Wife proceeded to deliver an onslaught of blows, including slapping and punching Daughter in the face, kicking Daughter in the shin and face, stomping on Daughter's face, and pulling Daughter's ears. Id. Daughter sustained multiple contusions and lacerations on her face and neck, and several bruises on her legs, as a result of the beating. Id.

At trial, the family court rejected Tanielu's parental discipline defense, concluding, inter alia, that (1) the prosecution adduced evidence that Tanielu actually caused substantial bodily injury (i.e., lacerations and penetrations of the skin), id. at 378, 922 P.2d at 991, and (2) the "viciousness" of the attack was not reasonably related to promoting Daughter's welfare, id. at 380, 922 P.2d at 993. On appeal, the ICA first concluded that the family court erred by not finding that the lacerations that Daughter suffered or could have suffered were "major."[1] Id. Thus, the family court failed to apply the correct legal requirement. Id. Nevertheless, the ICA agreed with the family court that "the 'viciousness of the attack' [Tanielu] was involved in severed any relationship between the use of force and the welfare of Daughter which might be considered 'reasonable.'" Id. at 381, 922 P.2d at 994. Accordingly, the ICA affirmed the family court's judgment of conviction. Id.

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[1] It should be noted that the ICA did not offer its own opinion as to whether the injuries sustained by Daughter coincided with the legal definition of "substantial bodily injury."

Crouser, Miller, and Tanielu provide examples of conduct that fall within, but do not exhaustively define, the upper echelon of the spectrum of corporal punishment that a trier of fact may properly find constitutes abuse (i.e., corporal punishment that exceeds the scope of the parental discipline defense). To the extent that these cases do not establish the minimum degree of punishment that will constitute abuse, they provide little assistance in determining whether the corporal punishment delivered by Mother is insufficient to constitute abuse as a matter of law.

The plurality also may not rely on Deleon or Kaimimoku for support inasmuch as those cases were decided under a substantially different statutory version of the parental discipline defense.

In Deleon, Artemio A. Deleon ("Deleon") was convicted of the offense of Abuse of Family or Household Members. 72 Haw. at 241, 813 P.2d at 1382. On May 24, 1990, the day of the incident in question, Deleon arrived home and heard his fourteen-year-old daughter ("Daughter") and her friends in the house. Id. at 242, 813 P.2d at 1383. Deleon had repeatedly informed his Daughter that he did not want her friends at the house because he believed that they were a bad influence on her. Id. Deleon warned Daughter that he would spank her with a belt if she violated the rule. Id. Entering the house, Deleon heard one of Daughter's friends crying. Id. He asked Daughter what happened but got no satisfactory answer. Id. He then told Daughter's friends to go home, but they refused. Id. At that point, Deleon

struck Daughter directly above the knees between six and ten times with a 36-inch long belt. Id. Daughter testified that she felt a little pain and that the pain lasted for one and a half hours. Id. She had bruises for approximately one week. Id. Deleon also cut Daughter's waist-long hair so that it was level with her neck. Id.

At trial, Deleon relied upon the parental discipline defense. Id. at 243, 813 P.2d at 1383. The parental discipline defense in effect at that time read as follows:

> The use of force upon or toward the person of another is justifiable under the following circumstances:
>
> (1) The actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor, or a person acting at the request of such parent, guardian, or other responsible person, and:
>
> (a) The force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and
>
> (b) The force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress, or gross degradation.

Id. (citing HRS § 703-309 (1985)) (emphasis added). The trial judge found that the parental justification defense was unavailable because Deleon caused "extreme pain." Id. at 244, 813 P.2d at 1383. This court disagreed and reversed Deleon's conviction. Applying the maxim noscitur a sociis, a canon of statutory interpretation, we concluded that

> the pain inflicted upon [Daughter] by her father in the course of the incident in question, does not come, in degree, anywhere near death, serious bodily injury, disfigurement, exreme mental distress or gross degradation. It therefore was not, as a matter of law, serious pain. [Deleon's] conduct in the incident in question therefore was justified under HRS § 703-309(1)(a) and (b), and consequently was not a violation of HRS § 709-906.

Id. at 244, 813 P.2d at 1384 (some emphasis added and some in

original).

In Kaimimoku, Henry A.K. Kaimimoku ("Kaimimoku") was convicted of Abuse of Family or Household Members for striking his seventeen-year-old daughter ("Daughter"). 9 Haw. App. at 346, 841 P.2d at 1077. On February 13, 1991, Kaimimoku was at home with his grandson ("Grandson"). Id. When Kaimimoku's wife ("Wife") returned home with Daughter, Kaimimoku began yelling at Wife because she was gone for a long period of time and he had difficulty caring for Grandson. Id. Daughter intervened, and, standing face-to-face with Kaimimoku, used profanity and yelled at him to leave Wife alone. Id. This triggered an expletive-laden "communicat[ion]" between Kaimimoku and Daughter. Id. Wife tried to separate Kaimimoku and Daughter, and Daughter subsequently ran outside. Id. at 347, 841 P.2d at 1077. Kaimimoku followed Daughter and commenced with the corporal punishment that engendered his criminal prosecution. Id. Specifically, Kaimimoku slapped and "whacked" Daughter in the face and punched her in the shoulders multiple times with a closed fist. Id. As they were walking back to the house, Daughter again used profanity towards Kaimimoku and he again slapped and "whacked" Daughter. Id. As a result, Daughter experienced pain to the back and chest areas and sustained bruises and a scratch on her shoulder. Id. at 347-48, 841 P.2d at 1078.

At trial, the family court rejected Kaimimoku's parental discipline defense. Id. at 348, 841 P.2d at 1078. The family court found that (1) Kaimimoku's conduct was not

disciplinary in nature, (2) even if disciplinary, Kaimimoku did not use reasonable force, and (3) the force used was not designed to promote the welfare of Daughter or to prevent or punish misconduct. Id. The ICA reversed the family court's judgment of conviction. Id. at 352, 841 P.2d at 1080. The ICA perceived substantial evidence in the record that the force used by Kaimimoku was for the purpose of punishing Daughter for yelling profanities, disobedience, and disrespect. Id. The ICA stated that "[t]here [was] no evidence on the record that [Kaimimoku] struck Daughter for any purpose other than for punishment." Id. The ICA next considered whether the record contained substantial evidence that the force used by Kaimimoku was "not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress, or gross degradation." Id. (citing HRS § 703-309(1)(b) (1985)) (emphasis added). The ICA reasoned that the punishment delivered by Kaimimoku in the present case was no worse than the belt-lashing in Deleon and that the evidence was therefore insufficient to establish that the force used exceeded the limits imposed by HRS § 703-309(1)(b). Id. Accordingly, the ICA concluded that the prosecution failed to disprove Kaimimoku's parental discipline defense beyond a reasonable doubt. Id.

In Deleon and Kaimimoku, the punishment was deemed insufficient as a matter of law to rise to the level of creating a risk of "death, serious bodily injury, disfigurement, extreme pain or mental distress, or gross degradation." HRS § 703-309(1)(b) (1985). However, that standard is no longer

applicable. In 1992, the legislature substantially amended HRS § 703-309(1). See generally 1992 Haw. Sess. Laws Act 210, § 1 at 554-56. The statutory section now reads as follows:

> **§703-309 Use of force by persons with special responsibility for care, discipline, or safety of others.** The use of force upon or toward the person of another is justifiable under the following circumstances:
>
> (1) The actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor, or a person acting at the request of the parent, guardian, or other responsible person, and:
>
> (a) The force is employed with due regard for the age and size of the minor and is reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor's misconduct; and
>
> (b) The force used is not designed to cause or known to create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage.

HRS § 703-309(1) (1993). Legislative committee reports indicate that the legislature intentionally imposed greater limits on the degree of punitive actions that may be taken against a child. See Conf. Comm. Rep. No. 103, in 1992 House Journal, at 843 ("The purpose of this bill is to reduce the permitted level of force that a person responsible for the care of a minor, or an incompetent person, may use."); Stand. Comm. Rep. No. 828-92, in 1992 House Journal, at 1206 ("The purpose of this bill . . . is to . . . prohibit persons with special responsibility for care, discipline, or safety of others to use force in excess of what is reasonable and moderate under the circumstances."). Thus, while the corporal punishments in Deleon and Kaimimoku were obviously not designed to cause or create a known risk of causing "death, serious bodily injury, disfigurement, extreme pain or mental distress, or gross degradation," HRS § 703-309(1)(b) (1985),

neither this court in Deleon, nor the ICA in Kaimimoku, commented as to whether such punishments complied with the greater limitations imposed on parental discipline by HRS § 703-309(1)(b) (1993).

I recognize, however, that the legislature has indicated that the amendments were not intended to alter the result in Deleon. Specifically, the legislature stated that "the changes are not intended to create a standard under which the results in Deleon would have been different. The force used by the father in Deleon, as described in the decision, did not exceed the permissible force under the new language." Stand. Comm. Rep. No. 2493, in 1992 Senate Journal, at 1121. Admittedly, the case at bar bears some factual resemblance to Deleon to the extent that the minors in both cases suffered bruises lasting approximately one week. The distinction, however, lies in the modus operandi. I perceive a considerable difference between striking a child with a belt and striking a child with various hard, blunt implements. In my view, the latter method presents a greater potential for substantial bodily injury -- i.e., major avulsions, lacerations, penetrations of the skin, and bone fractures. See discussion infra. This fact, coupled with Mother's superior size and strength and her admitted loss of control sufficiently distinguishes the present case from Deleon.

Finally, I turn to the plurality's reliance on Stocker. In Stocker, Kent D. Stocker ("Stocker") was convicted of the offense of Harassment, in violation of HRS § 711-1106(1)(a)

(Supp. 1998).[2] 90 Hawai'i at 87, 976 P.2d at 401. On June 20, 1997, Stocker visited his ex-wife's parent's home in Pearl City to give his eleven-year-old son ("Son") a birthday card. Id. at 87-88, 976 P.2d at 401-02. Although his ex-wife obtained "full custody" of Son and their other child ("Daughter"), Stocker was permitted certain visitation rights. Id. at 87, 976 P.2d at 401. Upon arrival, Stocker did not attempt to enter the residence, but conversed with Son and Daughter from the doorway. Id. at 88, 976 P.2d at 402. According to Son's trial testimony, Stocker then flung birthday cards and a money envelope into Son's chest. Id. It is unclear whether Stocker also punched Son in the chest, and, if so, whether the punch was out of aggression or playfulness. Id. Stocker asked Son to go home with him, but Son declined and left to watch television while Stocker spoke with Daughter. Id. Stocker later called Son back to the door, but Son refused to comply. Id. Son testified that Stocker then yelled at him and slapped him in the face with an open hand. Id. The slap did not leave a bruise or mark on Son's face. Id.

The family court concluded that the prosecution disproved Stocker's parental discipline defense beyond a reasonable doubt because the slap in the face was not "reasonably proportional" to Son's repeated refusal to go back to the door to talk to Stocker. Id. at 89, 976 P.2d at 403 (emphasis removed). On appeal, we reversed the family court's judgement of

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[2] HRS § 711-1106(1)(a) (Supp. 1998) provides that "[a] person commits the offense of harassment if, with intent to harass, annoy, or alarm any other person, that person . . . [s]trikes, shoves, kicks, or otherwise touches another person in an offensive manner or subjects the other person to offensive physical contact . . . ."

conviction. Id. at 96, 976 P.2d at 410. We opined, in relevant part, that

> even viewing the evidence in the light most favorable to the prosecution, the inference is inescapable, the use of force being legally justifiable--by legislative mandate--in the context of parental discipline, that the slap did not constitute an unreasonable, excessive, or disproportionate use of force. . . . Although there was no apparent danger to [Son] at the time, we cannot agree with the family court's assessment, that, as a matter of law, a single, mild slap to the face is not "reasonably proportional" to a child's refusal to come when repeatedly directed to do so.

Id.

Stocker is not controlling because it involves conduct obviously on the lower end of the spectrum of corporal punishment that will not, as a matter of law, constitute abuse. Indeed, precluding one mild, open-handed slap to the face in response to repeated and deliberate disregard of a parent's command to come forward would, in effect, outlaw virtually any use of force in disciplining a child.

In sum, Mother's conduct falls somewhere on the spectrum of corporal punishment between an open-handed slap and six to ten lashes with a belt, as in Stocker and Deleon, and the wanton beatings displayed in Crouser, Miller, and Tanielu. By holding as it does today, the plurality has narrowed the gap and thereby restricted the realm reserved for the trier of fact. Indeed, henceforth, where a parent losses control over a child's repeated and prolonged deception about failing to attend tutoring sessions which contributed to poor performance in school, that parent is permitted, as a matter of law, to respond in the fashion Mother did here.

B. Sufficiency of the Evidence

In my view, the proper question is whether the prosecution adduced sufficient evidence to disprove Mother's parental discipline defense. As mentioned, the parental discipline defense authorized Mother to use force against Daughter if:

> (a) The force [wa]s employed with due regard for the age and size of [Daughter] and [wa]s reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor's misconduct; and
> (b) The force used [wa]s not designed to cause or known to create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage.

HRS § 703-309(1) (1993). "Because the requirements of HRS § 703-309(1) are set out in the conjunctive, rather than the disjunctive, the prosecution needed only to disprove one element beyond a reasonable doubt to defeat the justification defense." Crouser, 81 Hawai'i at 11, 911 P.2d at 731.

Here, the record indicates that Daughter was performing poorly in school. On the day of the incident in question, Daughter deliberately failed to bring home her report card despite Mother's repeated reminders. Mother subsequently had Daughter write her grades down on a piece of paper, and Daughter revealed that she had received four "C's," one "D," and an "Incomplete." Mother then surmised that Daughter's grades resulted from her failure to attend tutoring. Daughter confirmed that she had been skipping tutoring sessions and hanging out with her friends at Windward City Shopping Center instead. Throughout the conversation Mother grew increasingly incensed over

Daughter's poor performance and deception, and (1) struck Daughter with a plastic backpack approximately sixteen inches by twelve inches in size, (2) struck Daughter approximately five times on her left forearm with a plastic hanger, (3) struck Daughter on the top of her left hand with the hard, flat side of a hair brush, and (4) struck Daughter on the knuckles with the plastic handle of a rusted, metal tool. Daughter testified that Mother was taller, heavier, and stronger. Mother admitted that she lost control, and that she was forcefully swinging the various implements.

Viewed in the light most favorable to the prosecution, see State v. Agard, 113 Hawai'i 321, 324, 151 P.3d 802, 805 (2007) (stating that "[t]he test on appeal in reviewing the legal sufficiency of the evidence is whether, when viewing the evidence in the light most favorable to the prosecution, substantial evidence exists to support the conclusion of the trier of fact[]") (citations omitted) (first alteration in original), the record establishes that Mother, a parent of superior size and strength, lost control and forcefully struck Daughter, among other things, with the blunt handle of a rusted metal tool. Such a blow carries with it an attendant risk of causing "substantial bodily injury" -- i.e., a "major avulsion, laceration, or penetration of the skin," or a "bone fracture[.]" See HRS § 703-309(1)(b) (excluding from the scope of the parental discipline defense the use of force "designed to cause or known to create a risk of causing substantial bodily injury . . ."); HRS § 707-700 (1993) (defining "substantial bodily injury" to include "major

avulsion[s], laceration[s], or penetration[s] of the skin[,]" or "bone fracture[s]"). The fact that Daughter did not actually suffer such an injury is fortunate, but not determinative.

Because I would hold that there is sufficient evidence in the record to sustain the jury's verdict, I next address Mother's second point of error.

C. The Allen-Like Instruction

Mother's second point of error contends that the family court's response to the jury's communication that it was deadlocked constituted an improper Allen instruction. However, I believe that Mother's argument is without merit to the extent that the trial court's response was in substantial accord with the response expressly recommended by this court in State v. Fajardo, 67 Haw. 593, 699 P.2d 20 (1985).

In Fajardo, a verbal altercation between Eliseo Fuentes Fajardo ("Fajardo") and Robert John Tavares ("Tavares") led to a fight at the end of which Fajardo stabbed Tavares to death with a knife. Id. at 593, 699 P.2d at 21. Fajardo was charged with murder. Id. At trial, Fajardo claimed the stabbing was in self-defense. Id. at 594, 699 P.2d at 21. During its deliberation, the jury informed the trial court that it was deadlocked. Id. The trial court responded as follows:

> Ladies and gentlemen, I am going to at this time give you another instruction. I am going to ask that you continue your deliberations in an effort to agree upon a verdict, and I have additional comments I would like you to consider as you do so.
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> If you cannot reach a verdict, this case must be tried again. Any future jury must be selected in a same manner and from the same source from which you were chosen. There is no reason to believe that this case could ever be submitted to twelve men and women more conscientious, more impartial, or more competent to decide it.

> During your deliberations, you, as jurors, have a duty to consult with one another and to deliberate with the view to reaching an agreement if you can do so without violating your individual judgment. Although each juror must decide the case for himself, this should be done only after consideration of the evidence with his fellow jurors.
>
> In the course of your deliberations, a juror should not hesitate to re-examine his own views and change his opinion if convinced it is erroneous. Each juror who finds himself to be in the minority should reconsider his views in the light of the opinion of the jurors in the majority. Conversely, each juror finding himself in the majority should give equal consideration to the views of the minority.
>
> No juror should surrender his belief as to the weight or effect of the evidence for the mere purpose of returning a verdict.
>
> Applying these additional comments together with all the instructions which I have previously given you, I wil [sic] now ask that you retire once again and continue your deliberations and exercise your very best effort to reach a verdict.

Id. at 594-95, 699 P.2d at 21-22 (citing Transcript, December 27, 1983, at 4-5) (emphases in original). The jury subsequently returned a unanimous verdict finding Fajardo guilty of the lesser-included offense of manslaughter. Id. at 595, 699 P.2d at 22.

On appeal, this court reversed Fajardo's conviction reasoning that (1) the potential for retrial was not a proper matter for the jury to consider during its deliberations, and (2) the admonition that jurors in the minority should reconsider their views in light of opinions of the jurors in the plurality was "highly problematical." Id. at 600, 699 P.2d at 24-25. We expressly hypothesized that "[h]ad the trial court simply repeated an instruction given earlier to the jury on how to go about its deliberations, . . . no prejudicial effect would have befallen [Fajardo]." Id. at 601, 699 P.2d at 25. In a footnote we provided a specific example of an instruction, reference to

which would have been proper:

> A verdict must represent the 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 yourduty [sic] to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your h onest [sic] conviction as to the weight or effect of evidence for the mere purpose of returning a verdict.

Id. at 601 n.2, 699 P.2d at 25 n.2 (citing Transcript, December 21, 1983, at 12).

The response recommended by the Fajardo court closely resembles the response in the case at bar. When the jury informed the trial court that it was deadlocked, the trial court instructed the jury as follows: "Continue with your deliberations. See page 16 of the jury instructions." Page 16 of the jury instructions reads as follows:

> A verdict must represent the 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 the weight or effect of evidence for the mere purpose of returning a verdict.

The instruction in the present case was virtually identical to the instruction recommended in Fajardo. Although the trial court in the present case additionally responded, "Continue with your deliberations[,]" that statement merely expressly states what is obviously implied by a bare recitation of a jury deliberation

instruction.

I would therefore hold that the trial court's response did not amount to an impermissible Allen-like instruction.

II. CONCLUSION

In sum, I share in the plurality's discomfort with condemning Mother for her actions in the present case. Most assuredly, even the most pious of parents are susceptible to the unique aggravation caused by the disrespect, disobedience, or deception of their offspring, capable of triggering an uncharacteristic parental reaction. Nevertheless, I respectfully disagree with the plurality's decision to supplant the jury's verdict in the present case and hold that the facts presented cannot, as a matter of law, constitute a case of abuse. In addition, I do not believe that the trial court's response to the jury's communication that it was deadlocked was improper insofar as it mirrored the response recommended by this court in Fajardo.

For the foregoing reasons, I would affirm the ICA's August 29, 2006 judgment, which affirms the first circuit court's August 5, 2005 judgment of conviction.

Paula A. Nakayama

Kamaa E. Dubbs, Sr.