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IN THE SUPREME COURT OF FLORIDA

DORCY GAYMON,

Petitioner,

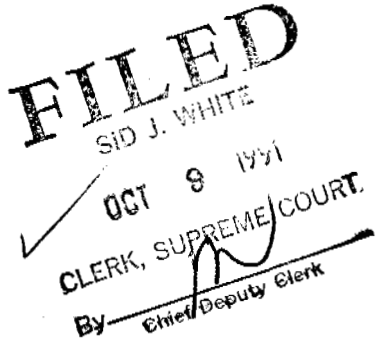
v.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO.: 78,547



BRIEF OF RESPONDENT ON THE MERITS

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IN THE SUPREME COURT OF FLORIDA

DORCY GAYMON,

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v. CASE NO.: 78,547

STATE OF FLORIDA,

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_____/

BRIEF OF RESPONDENT ON THE MERITS

PRELIMINARY STATEMENT

Petitioner, Dorcy Gaymon, defendant/appellant below, will be referred to herein as "Petitioner". Respondent, the State of Florida, will be referred to herein as either "Respondent" or "the State." References to the record on appeal will be by the symbol "R" followed by the appropriate page number in parentheses. References to the transcript of proceedings will be by the symbol "T" followed by the appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

Respondent is in agreement with Petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

Because a criminal defendant must be convicted of a third degree felony for a third conviction of petit theft pursuant to §812.014(2)(d), Florida Statutes, and as that subsection contemplates the sentencing of one so convicted as a habitual offender pursuant to 8775.084, Florida Statutes, there can be no question that the legislature intended such a result.

This result in Petitioner's case is not a double punishment for one offense in violation of the double jeopardy clause, as Petitioner's felony enhancement was based on the instant offense, but the habitual offender sentence was based on his prior felony history, the instant offense being only incidental to that sentence.

ARGUMENT

ISSUE

WHETHER THE DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS WERE VIOLATED BY THE TRIAL COURT'S RECLASSIFYING APPELLANT'S OFFENSE AS FELONY PETIT THEFT AND THEN USING THAT FELONY CLASSIFICATION TO ENHANCE APPELLANT'S SENTENCE PURSUANT TO THE HABITUAL VIOLENT FELONY OFFENDER STATUTE.

In the case sub judice, Petitioner was found guilty of petit theft (R 22). This was Petitioner's third conviction for petit theft (R 29). Section 812.014(2)(d), Florida Statutes, states in pertinent part that "(u)pon a third or subsequent conviction for petit theft, the offender shall[1] be guilty of a felony of the third degree, punishable as provided in 88775.082, 775.083, and 775.084." (emphasis supplied).

Pursuant to the statutory mandate, Petitioner's petit theft conviction was classified as a third degree felony, The trial court then determined that Petitioner met the criteria for sentencing as a habitual violent felony offender and imposed a five year minimum mandatory sentence (T 283, 284).

In an opinion issued on August 9, 1991, and reported at 16 F.L.W. D2131 (attached hereto), the First District Court of

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[1] *See* D'Alessandro v. Shearer, 360 So.2d 774 (Fla. 1978); Tascano v. State, 393 So.2d 540 (Fla. 1981) ("shall" is mandatory language).

Appeal determined that the sentencing procedure employed in this case did not violate double jeopardy, stating that

> We must disagree with appellant's premise that the provisions utilized herein are dependent on each other and are alternative methods of enhancement. The supreme court in State v. Harris, 356 So.2d 315 (Fla. 1978), ruled that the felony petit theft statute creates a substantive offense "and is thus distinguishable from section **775.084,** the habitual criminal offender statute." Id. at **316.** In that light, the rule is that "[d]ouble jeopardy seeks only to prevent courts either from allowing multiple prosecutions or from imposing multiple punishments for a single, legislatively defined offense." State v. Heqstrom, 401 So.2d at **1345.** Here, the legislature defined the offense of felony petit theft in section 812.014(2)(d). It then specifically made the offense subject to punishment "as provided in **88775.082, 775.083,** and **775.084.**" (Emphasis added.) Thus, provided the procedural safeguards are complied with under section **775.084** in sentencing the defendant as an habitual violent felony offender, we see nothing in the respective statutes indicating that the legislature did not intend the sentence imposed herein.

Id. at D2132. The appellate court, however, certified the following as a question of great public importance:

> WHETHER THE DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS WERE VIOLATED BY THE TRIAL COURT'S RECLASSIFYING APPELLANT'S OFFENSE AS FELONY PETIT THEFT AND THEN USING THAT FELONY CLASSIFICATION TO ENHANCE APPELLANT'S SENTENCE PURSUANT TO THE HABITUAL VIOLENT FELONY OFFENDER STATUTE.

Petitioner contends that his sentence constitutes a violation of the double jeopardy clauses of the United States and Florida constitutions as he was twice punished for one crime.

The State disagrees and urges this Honorable Court to answer the certified question in the negative.

In addressing the enhanced penalty provisions of the former larceny statute, this Court stated in State v. Harris, 356 So.2d 315, 316 (Fla. 1978) that

> Section 812.021(3) provides in pertinent part, that upon the third or subsequent conviction for petit larceny, the offender shall be guilty of a felony in the third degree (rather than a misdemeanor in the second degree). This statute creates a substantive offense and is thus distinguishable from Section 775.084, the habitual criminal offender statute. While both sections provide for the enhanced punishment of a repeat offender, under Section 775.084 the prior offense serving as the basis for the increased sentence need not be related to the present offense (as long as it is "qualified" under Subsection (3)) and enhanced punishment is sought in a separate proceeding following conviction or adjudication of guilt.

In Eutsey v. State, 383 So.2d 219, 223 (Fla. 1980), this Court discussed the purpose of the habitual offender statute:

> The purpose of the habitual offender act is to allow enhanced penalties for those defendant who meet objective guidelines indicating recidivism. The enhanced punishment, however, is only an incident to the last offense. The act does not create a new substantive offense. It merely prescribes a longer sentence for the subsequent offenses which triggers the operations of the act. The determination of whether one may be sentenced as an habitual offender is independent of the determination of guilty of the underlying substantive offense, and new findings of fact separate

> and distinct from the crime charged are required. Reynolds v. Cochran, 138 So.2d 500 (Fla. 1962).

See also Washington v. Mayo, 91 So.2d 621 (Fla. 1956) (habitual offender sentencing involves neither double jeopardy nor double punishment for the same offense).

A third conviction for petit theft under the mandatory provision of §812.014, Florida Statutes, thus becomes a third degree felony, which is a new substantive offense to which a certain penalty attaches. The habitual offender statute "merely prescribes a longer sentence for the subsequent offenses which triggers the operation of the act."

The double jeopardy clauses of the United States and Florida constitutions prohibit multiple punishments for the same offense. State v. Hegstrom, 401 So.2d 1343 (Fla. 1981); Whalen v. United States, 445 U.S. 684 (1980). However, the fifth amendment presents no substantive limitation on the legislature's power to prescribe multiple punishments. Whalen, supra; Albernaz v. United States, 450 U.S. 333 (1981).

In the situation at bar, the legislature determined that a defendant must be punished for a third petit theft conviction by classifying the third conviction as a third degree felony, The legislature also determined that a defendant could be accorded habitual offender status based on his previous felony history. Indeed, §812.014(2)(d), Florida Statutes, specifically refers to

the habitual offender statute as a sentencing option. Here, Petitioner was convicted of a third degree felony, which carries a maximum penalty of five years incarceration (§775.082(3)(d), Florida Statutes), and he was sentenced as a habitual violent felony offender to five years in prison. The only difference is that, as a habitual offender, Petitioner must serve the full five years pursuant to the minimum mandatory provisians of 8775.084, Florida Statutes.

As this Court recognized in Williams v. State, 517 So.2d 681 (Fla. 1988), reclassification and minimum mandatory provisions operate independently of one another and are not alternative methods of enhancement. This is so because the provisions serve different purposes and address separate evils. State v. Smith, 470 So.2d 764 (Fla. 5th DCA 1985), approved, 485 So.2d 1284 (Fla. 1986); Haywood v. State, 466 So.2d 424 (Fla. 4th DCA 1985), approved, 482 So.2d 1377 (Fla. 1986); Perez v. State, 431 So.2d 274 (Fla. 5th DCA 1983), approved, 449 So.2d 818 (Fla. 1984).

In Missouri v. Hunter, 459 U.S. 359, 74 L.Ed.2d 535, 103 S.Ct. 673 (1983), the United States Supreme Court held that where a state legislature authorizes cumulative punishment under two statutes, regardless of whether based on the same conduct, a court's task of statutory construction is at *an* end and the prosecutor may seek and the trial court impose cumulative punishments under such statutes in a single trial. The double jeopardy clause only prevents the sentencing court from imposing punishment greater than that authorized by the legislature.

In State v. Whitehead, 472 So.2d 730 (Fla. 1985), this Court held that the determination of punishment for crimes is a legislative matter. In discussing whether pursuant to §775.087(1), Florida Statutes, a defendant's sentence may be enhanced and a minimum mandatory sentence imposed, this Court stated that "(a)bsent an indication from the legislature that these subsections are an either/or proposition, both subsections will be followed." Id. at 732.

Similarly, in this case, by specifically stating that a defendant convicted pursuant to the enhancement provision of the theft statute can be sentenced pursuant to the habitual offender statute, the legislature has clearly indicated its intention. Double jeopardy concerns are not implicated by Petitioner's sentence, as he was convicted of an enhanced degree of crime based on the instant offense, and then given a minimum mandatory habitual offender sentence based on his prior criminal history, the instant offense being only incidental to that sentence. Petitioner was thus not twice punished for one crime.

United States v. Gomberg, 715 F.2d 843 (3rd Cir. 1983), cited by Petitioner, does not apply to the instant case as Gomberg concerned multiple sentences for a continuing criminal enterprise under the Comprehensive Drug Abuse Prevention and Control Act, and for conspiracy under the same act. Here, the sentence enhancement is based on prior discreet criminal offenses, not from acts in the same information, and pursuant to separate statutes.

CONCLUSION

Based on the above arguments and citations of legal authority, Respondent prays that this Honorable Court affirm the judgment rendered in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to James T. Miller, Assistant Public Defender, 407 Duval County Courthouse, Jacksonville, Florida 32202, this 9th day of October, 1991.

Bradley R Bischoff

BRADLEY R. BISCHOFF
Assistant Attorney General

testimony of what she would have done had she read the entire Drano label, or had she known that the product could explode if combined with water. In concluding that it was proper to exclude such speculative testimony, the court stated:

> A statement by a witness as to what action he would have taken if something had occurred which did not occur—particularly in those instances where such testimony is offered for the purpose of supporting a claim for relief or damages—or what course of action a person would have pursued under certain circumstances which the witness says did not exist will *ordinarily* be rejected as inadmissible and as proving nothing.

Id. at 465 (emphasis added).

Even if products-liability case law is applicable to medical malpractice cases,[2] and I am not necessarily persuaded that this is so, the facts at bar do not present an "ordinary" case for exclusion, in that appellee was permitted to introduce evidence that Singletary *missed* an appointment, thus opening the door for Singletary to prove that this was not typical behavior for her. Moreover, unlike the mother's testimony in *Drackett* which was clearly speculative and subjective, the excluded evidence at bar regarding Singletary's subsequent pregnancy was *factual* and should have been admitted.

Although I would not find the final error regarding the *Allen* charge to be reversible per se, I believe that its combination with the other errors at trial warrants reversal. The jury retired to begin deliberations at 5:15 p.m. At approximately 8:45 p.m., the jury reported it was deadlocked, and the court decided to send the jury out to dinner, after the foreman had voluntarily reported, "We are down about five to one and we don't seem to be able to get it all together." The jury again announced a deadlock at 10:35 p.m., at which time the court gave the "*Allen* charge."[3] At 11:00 p.m., the jury returned a verdict for the defendant.

I believe that the trial court erred in announcing the *Allen* charge so soon both after deliberations had begun, and after the court had been informed of the numerical division among the jury. Although I did not find any Florida cases directly on point, I think that the rule stated in *Iverson v. Pacific American Fisheries*, 73 Wash. 2d 973, 442 P.2d 243 (Wash. 1968), is highly persuasive. In that case, the trial judge was informed that the jurors were nine to three in favor of the defendant, and the jurors knew that the judge had been so informed. When the judge gave the deadlocked charge, the jurors, within ten minutes thereafter, returned a verdict. On appeal, the court concluded that this nominal lapse of time, combined with the jurors' knowledge that the trial judge was aware of their numerical split, was conclusive evidence that the minority jurors had been pressured to change positions. *Id.* at __, 442 P.2d at 244.

In the case at bar, I consider it quite likely that the one juror holding out may have felt that the *Allen* charge was directed solely at him or her, and therefore succumbed to the pressure to reach a verdict in the very short time—twenty minutes—after the charge was given. *Cf. Lewis v. State*, 369 So.2d 667, 669 (Fla. 2d DCA 1979) ("It is impermissible for a trial court to instruct in such a manner which tends to embarrass a single juror in holding to his honest convictions.").

After eight days of trial had elapsed in the case at bar, and with the jury being confronted with complicated issues of medical malpractice, I fail to see any cause for the trial court to speed deliberations, which had, at best, only entered their fifth hour. Moreover, it is notable that the instruction was given at 10:35 p.m., at a time when the jurors surely were weary and needing rest. An *Allen* charge at that late hour could easily have misled the jury into believing they would be expected to deliberate until unanimity was reached, regardless of the hour. This is an unacceptable, although subtle, form of coercion that, when added to the more serious errors previously discussed, leads me to the firm conclusion that a new trial must be ordered.

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[1]This principle has been applied in civil cases as well as criminal. Johnson v. Florida Farm Bureau Cas. Ins. Co., 542 So. 2d 367 (Fla. 4th DCA 1988), *review dismissed*, 549 So. 2d 1013 and 551 So.2d 461 (Fla. 1989); City of Miami v. Cornett, 463 So.2d 399 (Fla. 3d DCA), *appeal dismissed*, 469 So.2d 748 (Fla. 1985). *Accord*, Edmonson v. Leesville Concrete Co., __ U.S. __, 111 S. Ct. 2077, 114 L.Ed. 2d 660 (1991).

[2]Perhaps a more pertinent question, assuming the applicability of products-liability law to medical malpractice cases, is whether the *Drackett* rule has continuing efficacy, in that subsequent to its decision the Florida Supreme Court adopted both the doctrine of strict liability in tort, *see* West v. Caterpillar Tractor Co. 336 So.2d 80 (Fla. 1976), and the doctrine of comparative negligence, *see* Hoffman v. Jones, 280 So.2d 431 (Fla. 1973). As to the former, comment j to Section 402A, Restatement (Second) of Torts (1965), provides: "In order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the container, as to its use." The comment continues, similar to the instruction given by the trial court in *Harlow v. Chin*, that if such warning is given, "the seller may reasonably assume that it will be read and heeded." *See also* Giddens v. Denman Rubber Mfg. Co., 440 So.2d 1320 (Fla. 5th DCA 1983) (summary judgment in favor of manufacturer of tire rim reversed on the ground that the failure of the manufacturer to provide the plaintiff with an adequate warning created a jury question as to whether such failure could be considered a proximate cause of the plaintiff's injuries).

As to the applicability of *Drackett* after the adoption of comparative negligence, in Harless v. Boyle-Midway Division, American Home Products, 594 F.2d 1051, 1058 n.10 (5th Cir. 1979), although refusing to rule specifically on the question of whether *Drackett* precludes evidence regarding what a plaintiff might have done if he or she had read an inadequate warning on a label, the Fifth Circuit nevertheless in dictum questioned whether *Drackett* should not be reconsidered in light of *Hoffman v. Jones*. Given the adoption of both strict liability and comparative negligence, I seriously doubt the current applicability of *Drackett* to products-liability cases, and question even more strongly its applicability to other classes of cases.

[3]The charge is provided in Standard Jury Instruction 7.3 as follows:

> Members of the jury, it is your duty to agree on [a verdict] [verdicts] if you can do so without violating conscientiously held convictions that are based on the evidence. No juror, from mere pride of opinion hastily formed or expressed, should refuse to agree. Yet, no juror, simply for the purpose of terminating the case, should acquiesce in a conclusion that is contrary to his own conscientiously held view of the evidence. You should listen to each other's views, talk over your differences of opinion in a spirit of fairness and candor and, if possible, resolve your differences and come to a common conclusion, so that [a verdict] [verdicts] may be reached and this case may be disposed of.

* * *

Criminal law—Sentencing—Double jeopardy—Trial court's reclassifying defendant's offense as felony petit theft and then using that felony classification to enhance defendant's sentence pursuant to the habitual violent felony offender statute did not constitute double jeopardy violation—Question certified

DORCY GAYMAN, Appellant, v. STATE OF FLORIDA, Appellee. 1st District. Case No. 90-3635. Opinion filed August 9, 1991. An Appeal from the Circuit Court for Duval County. John D. Southwood, Judge. Louis O. Frost, Jr., Public Defender; James T. Miller, Assistant Public Defender, Jacksonville, for appellant. Robert A. Butterworth, Attorney General; Bradley R. Bischoff, Assistant Attorney General, Tallahassee, for appellee.

(WIGGINTON, J.) The issue as presented to us is whether the trial court punished appellant twice for the same offense by first reclassifying the offense as felony petit theft and then using that felony classification to punish appellant again as an habitual violent felony offender, contrary to the double jeopardy clauses of the United States and Florida Constitutions. We hold that there was no double jeopardy violation and therefore affirm.

Appellant was charged by information with armed robbery. The state thereafter filed a notice of intent to classify appellant as an habitual violent felony offender pursuant to section 775.084, Florida Statutes (1989). The case proceeded to trial and the jury found appellant guilty of petit theft.

The case was then passed on for sentencing, just prior to which the state filed a notice of intent to seek felony petit theft sentencing or, in the alternative, a first-degree misdemeanor penalty. The state next filed an amended notice of intent to classify appellant as an habitual violent felony offender, seeking an enhanced sentence commensurate with a conviction for felony petit theft. At the hearing, the court first adjudicated appellant guilty of the offense of felony petit theft based upon two prior convictions for petit theft. It then found appellant to be an habitual violent felony offender based on the instant conviction for

felony petit theft and a prior conviction of aggravated battery. Consequently, appellant was sentenced to five years as a result of the felony petit theft, with a five-year minimum mandatory provision pursuant to the habitual violent felony offender statute.

On appeal, appellant argues that he was punished twice for a single, discrete offense in violation of the double jeopardy clause prohibiting multiple punishments for the same offense. *See, generally, State v. Hegstrom*, 401 So.2d 1343 (Fla. 1981). He maintains that the first punishment was the reclassification of his conviction for petit theft to felony petit theft pursuant to section 812.014(2)(d), Florida Statutes. He notes that this reclassification increased his punishment from a maximum of 60 days for a second-degree misdemeanor to a maximum of five years as a third-degree felony. He then argues that the double jeopardy violation is caused by the "second enhancement" involving the elevation of the felony petit theft sentence to an habitual violent felony offender sentence thereby increasing the maximum sentence to a potential ten years instead of five, with a minimum mandatory of five years pursuant to section 775.084(4)(b)3. Appellant urges that although a defendant's recidivism may be used to increase the punishment applicable in the instant case, it may not be used twice to increase the penalty for an offense. He posits that the distinction between reclassification of an offense (as with felony petit theft) and enhancement of a penalty for an offense (as with an HVFO sentence) is not significant in this case where appellant's punishment was "undoubtedly increased twice."

Moreover, appellant argues that the legislature did not intend this result, relying on the analysis employed in case law involving the issue of double enhancement by the reclassification of an offense coupled with the imposition of a minimum, mandatory sentence for use of a firearm. *See, e.g., Williams v. State*, 517 So.2d 681 (Fla. 1988) wherein the supreme court found it *permissible* to enhance an offense for the use of a firearm and then impose a minimum mandatory sentence for the use of the same firearm. In distinguishing *Williams* from the instant case, appellant argues that the minimum mandatory sentence imposed in *Williams* was not another sentence enhancement, as it did not increase the maximum penalty for the offense and could be imposed even if the underlying offense was not reclassified. He points out that it was also noted in that decision that the reclassification and mandatory minimum provisions operated independently of each other and were not alternative methods of enhancement. To the contrary, he urges that the reclassification/enhancement methods utilized herein are dependent on each other and are alternative methods of enhancement.

We must disagree with appellant's premise that the provisions utilized herein are dependent on each other and are alternative methods of enhancement. The supreme court in *State v. Harris*, 356 So.2d 315 (Fla. 1978), ruled that the felony petit theft statute creates a *substantive offense* "and is thus distinguishable from section 775.084, the habitual criminal offender statute." *Id.* at 316. In that light, the rule is that "[d]ouble jeopardy seeks only to prevent courts either from allowing multiple prosecutions or from imposing multiple punishments for a single, legislatively defined offense." *State v. Hegstrom*, 401 So.2d at 1345. Here, the legislature defined the offense of felony petit theft in section 812.014(2)(d). It then specifically made the offense subject to punishment "as provided in ss. 775.082, 775.083, and *775.084*." (Emphasis added.) Thus, provided the procedural safeguards are complied with under section 775.084 in sentencing the defendant as an habitual violent felony offender, we see nothing in the respective statutes indicating that the legislature did not intend the sentence imposed herein.

Consequently, the present sentence is not dissimilar to the sentence analyzed in *Williams v. State* and does not run afoul of the double jeopardy provisions as discussed in *State v. Hegstrom*. As noted by the state, where possible full effect must be given to all statutory provisions, and related statutory provisions should be construed in harmony with one another. *Villery v. Florida Parole & Probation Commission*, 396 So.2d 1107 (Fla. 1981). Further, as pointed out in *State v. Whitehead*, 472 So.2d 730 (Fla. 1985), punishment of crimes is a legislative matter, and absent an indication from the legislature that subsections are an "either/or proposition," both will be followed. *Id.* at 732. Since appellant can point to no expression of legislative will that indicates petit theft enhancement and habitual violent offender sentencing are an "either/or proposition," effect must be given to both.

However, because we perceive this issue to present a question of great public importance, we certify the following question to the supreme court:

> WHETHER THE DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS WERE VIOLATED BY THE TRIAL COURT'S RECLASSIFYING APPELLANT'S OFFENSE AS FELONY PETIT THEFT AND THEN USING THAT FELONY CLASSIFICATION TO ENHANCE APPELLANT'S SENTENCE PURSUANT TO THE HABITUAL VIOLENT FELONY OFFENDER STATUTE.

AFFIRMED. (ERVIN, J., and CAWTHON, S.J., CONCUR.)

* * *

Criminal law—Jury instructions—Self defense in the home—Trial court erred in giving confusing and irrelevant modified instruction calling attention to victim's right to defend himself at home rather than defendant's right to use self defense where question of whether victim acted in self defense was not at issue—Standard instruction on use of force in home given prior to modified instruction irrelevant where altercation did not take place in defendant's home

ALEXANDER MASON, JR., Appellant, vs. STATE OF FLORIDA, Appellee. 1st District. Case No. 90-1071. Opinion filed August 12, 1991. An Appeal from the Circuit Court for Escambia County. William H. Anderson, Judge. Nancy Daniels, Public Defender; Glen P. Gifford, Assistant Public Defender, Tallahassee, for Appellant. Robert A. Butterworth, Attorney General; Gypsy Bailey, Assistant Attorney General, Tallahassee, for Appellee.

(SHIVERS, Judge.) Appellant, Alexander Mason, appeals his battery conviction, arguing that the trial court erred in giving the jury a confusing and irrelevant instruction. We find that reversible error did occur.

The appellant was originally charged with the aggravated battery of both Jay Catches and Duke Cook, and proceeded to jury trial. The trial testimony indicated that Catches was standing in his yard when he heard two neighbors, appellant and Cook, arguing in Cook's girlfriend's yard across the street. Appellant and Cook eventually moved to Catches' yard and involved him in the argument. At some point, appellant threatened to cut Catches, and Catches kicked the appellant. Appellant then stabbed Catches and hit Cook with a metal pipe. The defense maintained that Catches saw appellant and Cook arguing in Cook's yard, crossed the street because he also had a "bone to pick" with appellant, struck appellant first, and that only then did appellant cut Catches in self-defense.

At the charge conference, the State requested that the jury be given the instruction on self-defense in the home, modified as follows:

> If a person is attacked in his own home or on his own premises, he has no duty to retreat and has the lawful right to stand his ground and meet force with force even to the extent of using force likely to cause death or great bodily harm if it was necessary to prevent death or great bodily harm to himself or another of a forcible felony.

Over defense counsel's objection, the court found the modified instruction to be appropriate, stating that the instruction "deals perhaps largely with the alleged victim's right to act in self-defense, but I think it's pertinent to the facts of the case and ought to be given." After closing argument, however, the court gave the jury the following instruction: