IN THE SUPREME COURT OF FLORIDA

JOHN ANDREW KNIGHT,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

CASE NO. 85,654

District Court of Appeal,
Fifth District, No. 94-1003

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY
AND THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court, Eighteenth Judicial Circuit, in and for Seminole County, Florida. In the Brief the Respondent will be referred to as "the State" and the Petitioner will be referred to as he appears before this Honorable Court.

In the brief the following symbols will be used:

"R" - Record on appeal

"T" - Transcript of trial proceedings

"SR" - Supplemental record on appeal (Transcripts of re-arraignment and sentencing proceedings)

STATEMENT OF THE CASE

Petitioner was charged by an amended information filed in the Circuit Court of Seminole County, Florida, with aggravated assault with a firearm and shooting at or into a building. (R 33) He was tried by a jury on February 15 and 16, 1994, and found guilty as charged. (R 73-74; T 302) On March 30, 1994, he was sentenced to a mandatory minimum term of three years in prison for aggravated assault with a firearm and ordered to serve one year on probation for shooting at or into a building. (R 96-102; SR 24)

On April 7, 1995, the Fifth District Court of Appeal affirmed Petitioner's convictions and sentences. Knight v. State, 21 Fla. L. Weekly D862 (Fla. 5th DCA April 7, 1995), and certified the following question to this Honorable Court as being one of great public importance:

> DOES THE DECISION IN [STATE v WELLER], 590 So. 2d 923 (Fla. 1991)[,] WHICH REQUIRES THE TRIAL JUDGE TO INSTRUCT THE JURY [ON] MINIMUM MANDATORY SENTENCES APPLY WHERE A MINIMUM MANDATORY SENTENCE OF THREE CALENDAR YEARS MUST BE IMPOSED PURSUANT TO SECTION 775.087(2)(A), FLORIDA STATUTES (1991)?

Petitioner's notice to invoke this Honorable Court's discretionary jurisdiction was filed on April 21, 1995.

STATEMENT OF THE FACTS

In the early evening of September 6, 1993, Soloman Hardy was backing his car into the fenced yard of his house on West 16th Street in Sanford, Florida. (T 21, 41, 42, 132, 148) Petitioner stopped behind a truck that had parked in the street while Mr. Hardy maneuvered his vehicle, and then Petitioner pulled around the truck, and his and Mr. Hardy's cars almost collided. (T 43, 113, 115, 149) Petitioner and Mr. Hardy engaged in a heated verbal exchange and then in a physical altercation in the street. (T 43-46, 115, 129, 133, 134, 150, 151) Petitioner testified that Mr. Hardy had thrown the first punch, and Mr. Hardy admitted that he hit Petitioner in the mouth while Petitioner was on the ground. (T 46, 116, 117, 152, 155)

During the fight, an 80- or 120-pound Rottweiler described by witnesses as "vicious" was running in Mr. Hardy's yard, barking and trying to get out. (T 47, 103, 104, 113, 114, 142, 143) Some of the "bunch" of "loud" observers of the fight urged Mr. Hardy to sic the dog on Petitioner; there were others telling him not to do it. (T 48, 49, 119, 134, 138, 153, 154)

Charles Armstrong, who was visiting his mother-in-law who lived next door to the Hardy residence, saw Mr. Hardy knock Petitioner to the ground and stepped in to separate the men. (T 48, 49, 116, 133, 134, 138, 152) He said Mr. Hardy had not returned to his yard when Petitioner reached his car. (T 118, 135, 136, 139, 140)

Mr. Hardy said that as he was approaching his front door,

someone said, "He's got a gun," and he heard a shot and a bullet hit an aluminum blind inside the house. (T 52, 53, 119, 123) He said he heard two or three more shots as he ran around the house. (T 55) When he returned to the porch, Mr. Hardy said, Petitioner fired another shot in his direction. (T 56) He also testified that Petitioner fired a shot through his passenger window as he drove off. (T 57, 58)

Mr. Hardy said he found broken windows, holes near the top of walls in his and his daughter's rooms, and in a two-by-six beam in his car port canopy. (T 58-61, 63, 88, 111) Over Petitioner's objection, the State introduced a spent bullet which Mr. Hardy said he found on the ground under his car port and which he said he could identify by some paint from a house shingle and the design of where he believed it had pressed into the wood under the car port. (T 91-94, 97, 99, 108, 109, 119) He testified that he also recovered bullets from over his daughter's closet and from behind a couch. (T 101, 119)

Mr. Hardy said that Petitioner never said anything of a threatening nature. (T 120, 155)

Petitioner, a school teacher, was en route home that Labor Day from hitting golf balls. (T 148, 149) He testified that after the argument and fight with Mr. Hardy, he was afraid because he was from outside the neighborhood they were in, and some members of the crowd were exhorting his assailant to sic the Rottweiler on him. (T 154) He testified that he got a gun from under his car seat and fired into the air, to let the crowd know

that he was able to protect himself. (T 153-156, 159) Most of what Mr. Hardy believed to be bullet holes were high on the walls of the house, ten or eleven feet off the ground. (T 111, 119) Bullets appeared to have gone through several walls, each hole successively higher. (T 122)

Petitioner testified that he had no intention to hit the Hardy house or any person, and he never aimed the gun at the dog. (T 158, 159)

SUMMARY OF ARGUMENT

This Honorable Court's decision in State v. Weller, 590 So. 2d 923 (Fla. 1991), applies to this case in which the trial court refused to advise the jury that their special finding, that Petitioner used a firearm in the commission of an aggravated assault, would mandate a mandatory minimum sentence of three calendar years in prison. Rule 3.390(a), which provides that a trial judge shall not instruct a jury on penalties which may be imposed, does not prohibit a trial judge from instructing a jury on penalties which must be imposed. For the same reasons that a jury trying a charge of conspiracy to traffic in cocaine must be told that their factual findings will affect the sentence, the jury at Petitioner's trial should have been told, at his request, that their special verdict would mandate a minimum sentence.

The trial court abused its discretion by refusing to instruct Petitioner's jury on the three-year mandatory minimum penalty in his case, because the requirement that the trial court impose the mandatory minimum penalty was dependent on the jury's special finding.

ARGUMENT

THE DECISION IN STATE v. WELLER, 590 So. 2d 923 (Fla. 1991), APPLIES IN THIS CASE AND REQUIRES THAT THE TRIAL COURT INSTRUCT THE JURY ON MANDATORY MINIMUM PENALTIES WHICH ARE DEPENDENT UPON THE JURY'S FACTUAL FINDINGS.

Rule 3.390(a) states:

> **(a) Subject of instructions.** The presiding judge shall charge the jury only on the law of the case at the conclusion of argument of counsel. Except in capital cases, the judge shall not instruct the jury on the sentence that may be imposed for the offense for which the accused is on trial.

Section 918.10(1), however, provides:

> (1) At the conclusion of argument of counsel, the court shall charge the jury. The charge shall be only on the law of the case and must include the penalty for the offense for which the accused is being charged.

Petitioner's counsel requested that his jury be instructed on the penalties for aggravated assault and shooting at or into a building, the crimes for which he was on trial. (T 186) He argued in particular that the jury must be informed of the penalties where their special finding would determine the sentence, i. e., a three-year mandatory minimum prison term if they found that a firearm was involved in the aggravated assault. (T 187-188) The trial judge denied the request because "You don't give penalties on cases in Florida anymore." (T 186)

Section 775.087(2)(a) makes it mandatory that anyone who is

convicted of aggravated assault and had in his possession a firearm be sentenced to a minimum term of three calendar years. It was apparently believed by everyone involved in this case, including the prosecutor and the trial judge, that a three-year mandatory minimum prison term was inappropriate and even unfair for a man who had been a school teacher for 25 years and whose reputation in the community of Sanford prompted some to gather signatures on a petition to present to the trial court and others to attend his sentencing. (SR 11-14, 18) The prosecutor said:

> MR. STONE [Prosecutor]: I want to point out to the Court and also to members that are in the courtroom right now in the audience, I'm not happy by this. This is very difficult for me, and I see Mr. Knight and I think, based upon the petitions that were submitted to you and based upon what I know of him, that he isn't really truly a criminal, but he did commit a criminal act on that day. . . .
>
> . . . So it's difficult for me to ask the Court to impose a legal sentence in this case.

(SR 13-14) The trial court appeared equally reluctant to impose the mandatory minimum term:

> THE COURT: Let me tell you, this is a brief response to that, it doesn't take a rocket scientist to figure out the love and respect this man has in his community. And you wouldn't be here, and I understand that. And let me preface my sentencing colloquy based upon the fact that I'm not particularly enamored with the sentence I must impose this morning. I have no choice.
>
> If I could, I would put this man on probation. I can't put him on straight probation, however, nor can this Court

> withhold adjudication of guilt. That would be a nice weapon in my little arsenal if I could do that. The law says I must adjudicate him guilty and I must sentence him to no less than three years in the state prison. Those are uncompromised principles and I was sworn as a judge to follow the law. And I think Mr. Frederick as his attorney, an outstanding attorney, that you understand that to be a fact and understand the position of the law. That's the law.

(SR 22-23)

The Fifth District Court of Appeal held in this case that Rule 3.390(a) of the Rules of Criminal Procedure abrogates Section 918.10(1) and affirmed the trial court's refusal to instruct Petitioner's jury that a minimum penalty would be mandated by their verdict that he used a firearm. Knight v. State, 21 Fla. L. Weekly D862 (Fla. 5th DCA April 7, 1995). The District Court's decision also relied on this Honorable Court's ruling in McKendry v. State, 641 So. 2d 45 (Fla. 1994), which upheld the mandatory nature of the five-year prison penalty for possession of short-barreled shotgun. See also State v. Coban, 520 So. 2d 40 (Fla. 1988) (The plenary power of the legislature to prescribe punishment for criminal offenses cannot be abrogated by the courts in the guise of fashioning an equitable sentence outside the statutory provision).

Petitioner recognizes that the language of Section 918.10(1), that instructions on criminal penalties "must" be included in the jury charge, has been interpreted to be "directive" rather than mandatory, Johnson v. State, 308 So. 2d 38 (Fla. 1974), despite the fact that "[i]n common usage, the

word 'must' has a more preemptory or mandatory significance than does the word 'shall[.]'" Murray v. State, 378 So. 2d 111 (Fla. 5th DCA 1980) (Orfinger, J., concurring specially), quashed, 403 So. 2d 417 (Fla. 1981). Even if the word "must" in Section 918.10(1) only means "may," however, Petitioner maintains that this provision authorizes trial judges to exercise their discretion to "[inform] the jury of one of the most telling indicators of a crime's perceived severity" in appropriate cases. The Florida Bar Re: Amendment to Rules--Criminal Procedure, 462 So. 2d 386, 392 (Fla. 1984) (Boyd, C. J., concurring in part, dissenting in part). Rule 3.390(a) usurps this Legislative grant.

Petitioner further recognizes that the Legislature has no constitutional authority to enact any law relating to court practice and procedure but may only, by a two-thirds vote of the House and Senate, repeal rules promulgated by the Supreme Court. Art. V s. 2(a), Fla. Const. It is worth noting, however, that since Rule 3.390(a) was promulgated in 1984, its antithesis, Section 918.10(1), has been "re-adopted" by the Legislature in every ensuing biennial adoption act. See ss. 11.2421, Fla. Stat. (1993); 11.2421, Fla. Stat. (1991); 11.2421, Fla. Stat. (1989); 11.2421, Fla. Stat. (1987); 11.2421, Fla. Stat. (1985); and ss. 918.10(1), Fla. Stat. (1991); 918.10(1), Fla. Stat. (1989); 918.10(1), Fla. Stat. (1987); 918.10(1), Fla. Stat. (1985); 918.10(1), Fla. Stat. (1983).

Rule 3.390(a) does not, in any event, prohibit the jury

instruction requested by Petitioner at his trial; rather, the ruling in State v. Weller, 590 So. 2d 923 (Fla. 1991), requires it. In the District Court's opinion, Judge Thompson emphasized the language of Rule 3.390(a) in this way:

> The presiding judge shall charge the jury only on the law of the case at the conclusion of argument of counsel. Except in capital cases, the judge shall not instruct the jury on the sentence that may be imposed for the offense for which the accused is on trial.

Knight v. State. (Emphasis in original.) More pertinent to the situation in Weller and in this case, however, is the Rule's directive that:

> . . . [T]he judge shall not instruct the jury on the sentence that may be imposed for the offense for which the accused is on trial.

(Emphasis supplied.) Rule 3.390(a) is simply inapplicable in this case and cases like it and Weller, where there are penalties which must be imposed, depending on the jury's findings.

Aggravated assault is a third-degree felony. s. 784.021(2), Fla. Stat. (1993). If during the commission of an aggravated assault the defendant also had a firearm in his possession, he may be found guilty of a third-degree felony but he also shall be sentenced to a mandatory minimum term of three years in prison. s. 775.087(2)(a), Fla. Stat. (1993). Without the jury's special finding that a firearm was possessed, the three-year mandatory minimum provision deplored by the prosecutor and the trial judge at Petitioner's sentencing would not apply. See, e. g., State v.

Tripp, 642 So. 2d 728 (Fla. 1994).

In State v. Weller, 590 So. 2d 923 (Fla. 1991), this Honorable Court found that it was error for the trial court not to instruct the jury on all three of the drug trafficking offenses that involve 28 grams or more of cocaine, even though each offense, defined by the amount of cocaine involved, is a first-degree felony. s. 893.135(1)(b), Fla. Stat. (1989). This Court might have found that the categories within the trafficking statute were not "lesser" offenses included within the greater offense for which Weller was on trial, except:

> [W]e are constrained to find error here, because the three offenses in question carry different minimum penalties, despite their shared status as first-degree felonies. As noted earlier, Florida law provides for a greater mandatory minimum sentence and a greater fine, determined by the quantity of the substance involved in the offense. . . .

Id., 590 So. 2d at 927. (Emphasis in original.) The Supreme Court went on to say:

> Thus, before the trial court can impose sentence on a defendant when enhancements of this type are authorized, the trial court must inform the jury that the minimum mandatory punishment for the offense is greater depending upon the quantity of the substance involved. The jury then must determine from the evidence adduced at trial the quantity of contraband involved in the commission of the offense, in effect advising the court as to the appropriate minimum penalty.

Id., 590 So. 2d at 927. (Emphasis supplied.)

The rationale of Weller was echoed by defense counsel's argument in support of instructing the jury on the penalty in this case:

> MR. FREDERICK [Defense counsel]: . . . It's my position that even if under normal circumstances [the penalties] would not be given under the theory that the Court decides the penalties for the offense[,] that where the Statute is of such nature that the penalty is automatic if the jury makes a finding of guilt that the jury is entitled to have that information.

(T 187-188) (Emphasis supplied.)

McKendry v. State, 641 So. 2d 45 (Fla. 1994), relied upon in its opinion by the Fifth District Court of Appeal, is inapposite to the issue in this case and in State v. Weller. McKendry presented the question of whether a sentencing judge could impose a sentence other than the mandatory minimum five years in prison prescribed for possessing a short-barreled shotgun and this Honorable Court answered that it cannot. The validity of McKendry's conviction was not involved in that decision, as is Petitioner's in this case. Petitioner has not attacked the validity of the sentence prescribed for aggravated assault with a firearm but the validity of his conviction, obtained at a trial at which his request for a valid jury instruction was denied.

The trial court not only denied Petitioner's request for a jury instruction to which he was entitled but, after admonishing them that they "**must** follow the law as it is set out in these instructions," made the following statement to Petitioner's jurors:

> THE COURT: . . . Your duty is to determine if the defendant is guilty or not guilty in accord with the law. It is the judge's job to determine what a proper sentence would be if the defendant is guilty.

(T 294) (Emphasis supplied.)

When it pertains to the definition or elements of a crime or compromises an accused's affirmative defense, a misleading jury instruction constitutes fundamental reversible error. Rojas v. State, 522 So. 2d 914 (Fla. 1989); Pugh v. State, 624 So. 2d 277 (Fla. 2d DCA 1993); Carter v. State, 469 So. 2d 194 (Fla. 2d DCA 1985). The jury instruction quoted above is not only misleading but a misstatement of law and fact. In this case, it is nonsensical.

Under the authority granted by Section 918.10(1) and the language of Rule 3.390(a), it was within the trial court's discretion to instruct the jury at Petitioner's trial on the penalties for the offenses with which he was charged. Under the reasoning of State v. Weller, 590 So. 2d 923 (Fla. 1991), and because of the consequences that would attach upon a jury's special finding, he was **required** to advise the jury of the mandatory minimum penalty for possessing a firearm in the commission of an aggravated assault. The certified question should be answered in the affirmative, the District Court's affirmance should be reversed, and this cause should be remanded to the trial court for a new trial. Art. I s. 9, Fla. Const.; Amend. XIV, U. S. Const.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court reverse the District Court's decision affirming his convictions for aggravated assault and shooting at or into a building and remand this cause to the trial court for a new trial. In the alternative, Petitioner respectfully requests that this Honorable Court order that his conviction for aggravated assault be reversed and this cause remanded to the trial court for a new trial.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 175150
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904-252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. John A. Knight, 1817 Harding Avenue, Sanford, Florida 32771, this second day of June, 1995.

ATTORNEY

IN THE SUPREME COURT OF FLORIDA

JOHN ANDREW KNIGHT,

Petitioner,

versus

STATE OF FLORIDA,

Respondent.

CASE NO. 85,654

District Court of Appeal,
Fifth District, No. 94-1003

PETITIONER'S BRIEF ON THE MERITS

A P P E N D I X

of probation requiring payment of $84.00 to First Step of Volusia County. *See Tibero v. State,* 646 So. 2d 213 (Fla. 5th DCA 1994).

AFFIRMED in part; REMANDED to Strike Condition of Probation. (COBB, SHARP, W., and THOMPSON, JJ., concur.)

[1]§ 812.13(1) and (2)(c), Fla. Stat. (1993).

* * *

Criminal law—Sentencing—Correct remedy for relief from illegal consecutive habitual offender sentences is by rule 3.850 motion

JOHN D. GENTRY, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 95-640. Opinion filed April 7, 1995. 3.800 Appeal from the Circuit Court for Volusia County, R. Michael Hutcheson, Judge. Counsel: John D. Gentry, Madison, pro se. No Appearance for Appellee.

(PER CURIAM.) The summary denial of Gentry's 3.800(a) motion to correct an illegal sentence is affirmed without prejudice. Gentry alleges illegal consecutive habitual offender sentences under *Hale v. State*, 630 So. 2d 521 (Fla. 1993), *cert. denied*, __ U.S. __, 115 S. Ct. 278, 130 L. Ed. 2d 195 (1994). The correct remedy to seek relief is a properly filed Rule 3.850 motion. *Bunch v. State*, 647 So. 2d 1080 (Fla. 5th DCA 1995); *Callaway v. State*, 642 So. 2d 636 (Fla. 2d DCA 1994) (question certified), *review granted*, (Fla. Feb. 15, 1995); *Massey v. State*, 648 So. 2d 785 (Fla. 5th DCA 1994).

AFFIRMED. (COBB, PETERSON and THOMPSON, JJ., concur.)

* * *

Criminal law—Appeals—Jurisdiction

ALLEN G. HUTCHENS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 95-392. Opinion filed April 7, 1995. 3.800 Appeal from the Circuit Court for Osceola County, Jose R. Rodriquez, Judge. Counsel: Allen G. Hutchens, Avon Park, pro se. No Appearance for Appellee.

(PER CURIAM.) We dismiss this appeal for lack of jurisdiction. *See Griffis v. State*, 593 So. 2d 308, 308-09 (Fla. 1st DCA 1992).

DISMISSED. (COBB, GOSHORN and PETERSON, JJ., concur.)

* * *

Criminal law—Firearms—Jury instructions—No error to deny defendant's request that jury be instructed that if they determined that defendant used firearm in commission of crimes, judge was required to impose minimum mandatory sentence of three years in Department of Corrections—Defendant's prior lack of anti-social behavior was not basis for instructing jury upon penalties in the case—Question certified whether *Weller v. State*, 590 So.2d 923 (Fla. 1991), which requires trial judge to instruct jury of minimum mandatory sentences, applies to cases where minimum mandatory sentence of three calendar years must be imposed pursuant to section 775.087(2)(A), Florida Statutes (1991)

JOHN ANDREW KNIGHT, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 94-1003. Opinion filed April 7, 1995. Appeal from the Circuit Court for Seminole County, Newman D. Brock, Judge. Counsel: James B. Gibson, Public Defender and Brynn Newton, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee and Anthony J. Golden, Assistant Attorney General, Daytona Beach, for Appellee.

(THOMPSON, J.) John Andrew Knight appeals his conviction for the crimes of aggravated assault[1] with a firearm and shooting at or into a building.[2] More precisely, Knight appeals the denial of his request that the trial judge instruct the jury on the penalties for the crimes for which he was convicted. He wanted the jury to be instructed that if they determined that he used a firearm in the commission of the crimes, the trial judge was required to impose the minimum mandatory sentence of three years in the Department of Corrections.[3] The trial judge denied the request. We affirm.

Knight was involved in a traffic dispute in front of the victim's home that escalated into a fistfight. After the fistfight, and while the victim was walking to his carport, Knight fired several rounds from his firearm. The bullets struck the victim's home and the area near the victim in the carport. The victim recovered several spent bullets from inside his home and from his carport. Knight does not dispute these facts. He argues, however, that the jury should have been instructed on the penalties where their special finding would determine the sentence. Knight relies upon *State v. Weller*, 590 So. 2d 923 (Fla. 1991) to support his argument. We think *Weller* is inapplicable to cases where the jury has to determine if a firearm was used. *Weller* should be confined to cases involving instructions on lesser included drug offenses where the jury has to determine the weight of the drugs involved.

Weller was charged with multiple drug trafficking and conspiracy offenses. The issue in *Weller* was the number of lesser included offenses the court was required to instruct the jury upon and the minimum mandatory penalties as to each offense. The supreme court held that the trial judge was required to instruct the jury on all three of the drug trafficking offenses that involved 28 grams or more of cocaine, even though each offense, defined by the amount of cocaine involved, was a first-degree felony. *See* § 893.135(1)(b), Fla. Stat. (1989). The court held that although the three offenses were all first-degree felonies, they had different minimum mandatory sentences and different fines. The court opined:

> Thus, before the trial court can impose sentence on a defendant when enhancements of this type are authorized, the trial court must inform the jury that the minimum mandatory punishment for the offense is greater depending upon the quantity of the substance involved. The jury then must determine from the evidence adduced at the trial the quantity of contraband involved in the commission of the offense, in effect advising the court as to the appropriate minimum penalty.

Weller, 590 So. 2d at 927. Knight attempted to raise a similar argument at trial and on appeal. Knight argues that the finding by the jury that a firearm was used in the commission of the offenses was tantamount to an advisory finding to the trial judge that the minimum sentence to be imposed was three years, therefore, the jury should have been instructed as to the penalties in the case as the court required in *Weller*. We disagree.

Florida Rules of Criminal Procedure 3.390(a) mandates that the trial judge *not* instruct the jury on the penalties in the case. Rule 3.390(a) provides:

> The presiding judge shall charge the jury only on the law of the case at the conclusion of argument of counsel. Except in capital cases, the judge *shall not* instruct the jury on the sentence that may be imposed for the offense for which the accused is on trial. (emphasis supplied).

Fla. R. Crim. P. 3.390(a). This rule abrogates the legislature's grant of discretion to the trial judge given in section 918.10(1), Florida Statutes (1991) which provides that the trial judge shall instruct the jury "on the law of the case and must include the penalty for the offense for which the accused is being charged."

In *Kocsis v. State,* 467 So. 2d 384 (Fla. 5th DCA), *review denied*, 475 So. 2d 695 (Fla. 1985), this court held that the language in Rule 3.390(a) "shall not instruct the jury on the sentence that may be imposed..." was mandatory and a trial judge could not instruct the jury on the penalties. The Florida Supreme Court, when confronted with the request that a jury in a capital murder case be instructed on the maximum penalties to be imposed for three other offenses, addressed the application of rule 3.390(a) and reached the same conclusion. The court wrote:

> This rule has been construed to mean that the jury need only be instructed as to the possible penalty when it is faced with the choice of recommending either the death penalty or life imprisonment. *As to offenses in which the jury plays no role in sentencing, the jury will not be advised of the possible penalties.* (emphasis added).

Nixon v. State, 572 So. 2d 1336, 1345 (Fla. 1990) (citing *Coleman v. State*, 484 So. 2d 624, 628 (Fla. 1st DCA 1986)), *cert. denied*, 502 U.S. 854, 112 S. Ct. 164, 116 L. Ed. 2d 128 (1991); *see also Disinger v. State*, 526 So. 2d 213 (Fla. 5th DCA 1988). Moreover, we are unable to find any case since the amendment of Florida Rules of Criminal Procedure 3.390(a) in January of 1985 which holds that the trial judge may instruct the jury as to the penalty to be imposed in a case involving a firearm.

Knight argues that he has been a school teacher for 25 years, has an outstanding reputation in the community and has no blemish upon his record. He argues that the trial judge and the prosecutor were upset that the minimum mandatory three year penalty had to be imposed. He implies that his prior lack of anti-social behavior should have been a basis for instructing the jury upon the penalties in the case. This argument has been rejected by the supreme court. Recently, in a similar firearm case, the Florida Supreme Court upheld the imposition of a minimum mandatory five year sentence for an appellant with no prior record of anti-social behavior who was sentenced for possession of a short-barreled shotgun.[4] *McKendry v. State*, 641 So. 2d 45 (Fla. 1994). The supreme court would not allow the trial judge to suspend the sentence. In a special concurring opinion, Justice Overton noted the inflexibility of the statute and the harshness of the sentence, but suggested that the remedy for such sentencing horror stories was with the legislature and not the courts. *Id.* at 48. The same reasoning applies here. The legislature has determined that a mandatory three year sentence should be imposed in firearm cases. Only the legislature has the power to change the statute. The trial judge appropriately followed the mandate of Florida Rules of Criminal Procedure 3.390(a).

Because of the confusion or conflict raised by the decision in *Weller*, we certify the following question as one of great public importance:

> DOES THE DECISION IN *WELLER V. STATE*, 590 So. 2d 923 (FLA. 1991) WHICH REQUIRES THE TRIAL JUDGE TO INSTRUCT THE JURY OF MINIMUM MANDATORY SENTENCES APPLY TO CASES WHERE A MINIMUM MANDATORY SENTENCE OF THREE CALENDAR YEARS MUST BE IMPOSED PURSUANT TO SECTION 775.087(2)(A), FLORIDA STATUTES (1991)?

AFFIRMED. (COBB AND GOSHORN, JJ., concur.)

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[1] § 784.021(1), Fla. Stat. (1991).
[2] § 790.19, Fla. Stat. (1991).
[3] § 775.087(2)(a), Florida Statutes (1991) reads in pertinent part:
Any person who is convicted of:
1. Any. . . aggravated assault . . .
and who had in his [or her] possession a "firearm,"... shall be sentenced to a minimum term of imprisonment of 3 calendar years.
[4] § 790.221(1), Fla. Stat. (1989).

* * *

Attorney's fees—Attorney's action to recover fees for representation of client in criminal proceedings—Error to enter summary judgment in favor of defendants on contract issues raised in complaint where there were unresolved factual and legal issues—No error in denial of defendants' motion for attorney's fees under section 57.105(2) in attorney's action on mortgage and promissory note that resulted in summary judgment for defendants—Judgment in favor of attorney on basis of quantum meruit reversed in view of reversal of summary judgment in favor of defendants on contract issues

KENNETH R. DAVIS and WILLIAM CARROLL DAVIS, Appellants/Cross-Appellees, v. RICHARD D. WELDON, Appellee/Cross-Appellant. 2nd District. Case No. 94-00244. Opinion filed April 5, 1995. Appeal from the Circuit Court for Sarasota County; James W. Whatley, Judge. Counsel: Alan R. Dakan of Snyder, Groner & Schieb, Venice, for Appellants/Cross-Appellees. Richard D. Weldon of Richard Weldon, P.A., Safety Harbor, for Appellee/Cross-Appellant.

(CAMPBELL, Acting Chief Judge.) This appeal is from an action in which appellee/cross-appellant, Richard D. Weldon (Weldon), sought attorney's fees for his representation of appellant/cross-appellee, William Carroll Davis (William), in certain criminal proceedings in which William was a defendant. Appellant/cross-appellee, Kenneth R. Davis (Kenneth), is William's brother. Kenneth had mortgaged his real property as security for a promissory note that William had made to Weldon for Weldon's upcoming legal services. The Davises appeal the final judgment which awarded Weldon attorney's fees based on a quantum meruit theory (Count VIII of Weldon's third amended complaint). They also appeal the trial court's denial of their request for attorney's fees under section 57.105(2), Florida Statutes (1989), in Weldon's action on the mortgage and promissory note that resulted in a summary judgment for the Davises (Counts II and III of Weldon's third amended complaint). Weldon, in turn, cross-appeals the summary judgment for the Davises as to Counts I through VII of Weldon's third amended complaint. On appeal, we affirm the denial of the Davises' request for attorney's fees under the mortgage and promissory note and section 57.105(2). Finding that material issues of fact and law still exist, we reverse the summary judgments in favor of the Davises on the contract issues raised in Counts I, II, III, V and VII of Weldon's third amended complaint.

Because we reverse the summary judgments for the Davises on the contract issues, we must also reverse the judgment for Weldon on the basis of quantum meruit (Count VIII). On remand, the court will have before it Counts I, II, III, V, VII and VIII. The parties are entitled to jury trial where appropriate.

The record before us shows that on September 14, 1989, William entered into a written contract with the law firm of Martino, Price & Weldon, P.A., in which the firm agreed to represent William on certain criminal charges that had been lodged against him. That contract provided for a flat fee of $15,000, and provided that "[t]he attorney's obligation under this agreement terminated upon disposition by dismissal, *or plea*, or trial." (Emphasis added.)

Weldon, a member of the law firm of Martino, Price & Weldon, P.A., represented William from September 14, 1989 through June 1990, and William paid the firm $8,000 for that representation under the contract. On July 1, 1990, the federal government filed a superseding indictment. Weldon, in the meantime, had become a solo practitioner.

On October 3, 1990, Weldon and William entered into a new representation agreement. That agreement provided that it "supercedes [sic] all prior written and oral agreements" and that the consideration for the services to be rendered was "$30,000, payable within thirty days after termination of case by trial verdict or dismissal." Unlike the September 14, 1989 agreement in which disposition by plea was specifically provided for, the October 3, 1990 agreement contained no such provision. William subsequently executed a promissory note in accord with the October 3, 1990 agreement, and Kenneth executed a mortgage to secure that promissory note. The promissory note provides that it is payable "within 60 days after termination by trial verdict, dismissal, or mistrial of a federal criminal defense case . . . ." The note likewise does not specifically reference a plea termination of the case. The criminal case against William, in which he was actively represented by Weldon, was terminated by a plea agreement on June 5, 1991.

In addition, the record contains eight invoices from Weldon to William during a six-month period beginning November 30, 1990, and ending July 5, 1991. Each invoice reflects charges for "attorney fee from Agreement 10-3-90 $30,000.00," together with certain accrued costs. The record also contains a handwritten letter from William to Weldon, written while William was in prison, dated August 16, 1991. That letter states, among other things: "At this point I'm not speaking with my Brother as we are at odds over his loaning me any money at all, let alone the full $30,000.00." Later, the letter states: