

**IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA**

CASE NUMBER F96-27002B

PEDRO ALONSO

v.

STATE OF FLORIDA
_____ /

**DEFENDANT PEDRO ALONSO'S MOTION PURSUANT TO
RULES 3.800 AND 3.850, FLORIDA RULES OF CRIMINAL
PROCEDURE, TO VACATE ADMISSION OF VIOLATION OF
PROBATION OR IN THE ALTERNATIVE FOR
RESENTENCING**

COMES NOW, PEDRO ALONSO, by and through the undersigned counsel,
WILLIAM MALLORY KENT, pursuant to Rules 3.800 and 3.850, Florida Rules of
Criminal Procedure, and respectfully requests this honorable Court to vacate his
admission of violation of probation and vacate the judgment and sentence entered
pursuant thereto, or in the alternative, for resentencing, and in support thereof would
state under oath, as follows:

- 1. Name and location of the court that entered the judgment of
conviction under attack.**

Circuit Court in and for Dade County, Florida, Eleventh Judicial Circuit of
Florida, Richard E. Gerstein Justice Bldg., 1351 NW 12th Street, 9th Floor, Miami,

Florida 33125.

2. Date of judgment and conviction.

Judgment and sentence was rendered by the clerk of the court on September 20, 2007. The judgment became final upon expiration of the thirty day time period during which Alonso could have filed a notice of appeal. The thirtieth day would have been Saturday, October 20, 2007, therefore the judgment became final upon the first business day following, which was Monday, October 22, 2007.

3. Length of sentence.

Five point zero five years imprisonment.

4. Nature of offense(s) involved (all counts).

Violation of probation.

5. What was your plea?

Alonso admitted the violation of probation based on a negotiated sentence of what was represented to be the bottom of the guidelines.

6. Kind of trial:

There was no right to trial, because it was a violation of probation proceeding.

7. Did you testify at the trial or at any pretrial hearing?

No.

8. Did you appeal from the judgment of conviction?

No.

9. If you did appeal, answer the following:

(a) Name of court:

Not applicable.

(b) Result:

Not applicable.

(c) Date of result:

Not applicable.

(d) Citation (if known):

Not applicable.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, etc., with respect to this judgment in this court?

No.

11. If your answer to number 10 was "yes," give the following information (applies only to proceedings in this court):

Not applicable.

12. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, motions, etc., with respect to this judgment in any other court?

No.

13. If your answer to number 12 was "yes," give the following information:

Not applicable.

14. State concisely every ground on which you claim that the judgment or sentence is unlawful. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and the facts supporting them.

Grounds

Alonso entered into a negotiated admission of violation of probation which called for a sentence at what the parties and Court mistakenly thought was the most lenient sentence provided under the applicable guidelines. However, in fact, the admission of violation of probation plea agreement and sentence was based on the use of an incorrect sentencing guideline scoresheet.

The negotiated admission of probation agreement and sentence was based on a current *Criminal Punishment Code* scoresheet.¹ This was incorrect. The case was not subject to the Criminal Punishment Code. Instead, Alonso was entitled to be sentenced under the pre-Criminal Punishment Code guidelines applicable at the time of his offense, and that means, not the date of the violation of probation conduct, but

¹ The Criminal Punishment Code, Florida Statutes, § 921.002, *et seq*, was effective October 1, 1998.

the date of the underlying criminal offense for which Alonso was on probation. That date was 1996.

In 1996 the applicable guidelines were the 1995 guidelines, but as it happens, the Florida Supreme Court declared the 1995 guidelines unconstitutional in the *Heggs*² decision, at least as to cases that fell within a so-called *Heggs* window period.³ Alonso's case fell within the *Heggs* window period. For such cases defendants were entitled to be sentenced under the 1994 guidelines. The 1994 guidelines would have assigned ninety-one (91) points for the underlying trafficking offense (a level nine (9) offense at the time).

Alonso had no "prior record" so he should have received no points for prior record. However, the scoresheet used to negotiate his admission of violation of probation scored Alonso for the new federal offense, as if it were a prior record. Prior offenses are offenses committed prior to the underlying offense, not intervening offenses and not the offense triggering a violation of probation. *See* Rule 3.702(d)(8), Florida Rules of Criminal Procedure, and Florida Statutes, § 921.0011(5)(1995) .

The violation of probation should have been scored as six (6) points. Rule 3.702(d)(10) and Florida Statutes, § 921.0011(6)(1995).

² *Heggs v. State*, 759 So.2d 620 (Fla. 2000).

³ The window period was October 1, 1995 through May 24, 1997. *Trapp v. State*, 760 So.2d 924, 928 (Fla. 2000).

Because this subtotal exceeds forty (4), 28 points are subtracted pursuant to Rule 3.702(d)(16).

The sentencing range is a number not less than 75% nor more than 125% of the resulting number. Rule 3.702(d)(16). In Alonso's case that would have been a range of 51.75 months to 86.25 months. This is the range from which the violation of probation should have been negotiated and sentenced, subject to a downward departure for his substantial assistance to federal authorities. *See* Rule 35, Federal Rules of Criminal Procedure and United States Sentencing Guideline, § 5K1.1.

Under the Criminal Punishment Code, Alonso would have faced fifteen years imprisonment in the Court's absolute discretion, not so under the correct guideline scoresheet. Indeed Rule 3.702(d)(20) expressly *prohibits* upward departures based on violation of probation:

(20) Sentences imposed after revocation of probation or community control must be in accordance with the guidelines. Cumulative incarceration imposed after revocation of probation or community control is subject to limitations imposed by the guidelines. A violation of probation or community control may not be the basis for a departure sentence.

Alonso simply did not face fifteen years imprisonment and yet this threat was the basis of the negotiated admission of violation of probation and informed this

Court in determining whether to accept the negotiated violation of probation agreement and impose sentence.

Had Alonso been properly advised of the correct sentencing alternatives (which were less onerous than the parties understood them to be) he would not have accepted a negotiated plea to a sentence of five point zero five years, but would have insisted on his counsel negotiating a more lenient disposition or would have admitted the violation without agreeing to a sentence of five point zero five years and instead argued for a sentence less severe based on his special circumstances, which included substantial assistance which had been rendered for the benefit of federal law enforcement authorities and would have asked for federal authorities to support his sentencing request before this Court. Counsel's performance fell below the standard of reasonable competence and prejudiced Alonso. A reasonably competent criminal defense attorney would have understood the correct sentencing alternatives and would not have mistakenly advised Alonso and the Court that he was subject to a guideline sentence. Counsel's failure deprived Alonso of effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, § 16 of the Florida Constitution and Alonso' decision to accept the negotiated admission of violation of probation was not knowingly and intelligently made.

Supporting Facts

Attached hereto as Exhibit A and by this reference made a part hereof is a true, correct and complete copy of the transcript of the admission of violation of probation proceeding. Also attached hereto as Exhibit B and by this reference made a part hereof is the Criminal Punishment Code scoresheet used at Alonso's violation of probation proceeding.

Alonso was advised by his counsel that he faced a potential sentence of fifteen years imprisonment under the Criminal Punishment Code for his alleged violation of probation. Likewise, Alonso's counsel advised him that the minimum sentence under the Criminal Punishment Code for his violation of probation was five point zero five years imprisonment. Based on this advice, which Alonso now knows to have been incorrect, Alonso authorized his attorney to negotiate an admission of violation of probation agreement with the State and to seek approval from the Court for a negotiated sentence of five point zero five years imprisonment, which Alonso mistakenly thought was the best possible sentence.

Alonso now understands that the Court was in fact authorized to impose a sentence of approximately nine months less imprisonment than that agreed to and imposed by this Court.⁴

⁴ Alonso further believes that had his counsel sought the assistance of federal authorities to support a request for further mitigation and downward departure, such

The transcript of the violation of probation shows his counsel expressly stating that he has entered into a deal to be sentenced at the bottom of the guidelines. Because the bottom of the guidelines was less than that calculated and applied in his case (by about 9 months), then he is entitled to either withdraw his admission of violation of probation and seek to renegotiate the disposition, or alternative to be resentenced at the correct bottom of the guideline range, subject to a downward departure for his substantial assistance to authorities.

15. If any of the grounds listed in 14 A, B, C, D, E, or F were not previously presented on your direct appeal, state briefly what grounds were not so presented and give your reasons they were not so presented:

None of the above grounds were cognizable on direct appeal absent an appropriate objection or record for appeal. If the State or this Court disagrees, then Alonso further asserts as an additional ground hereunder that his counsel advised him that there was no basis for an appeal, and Alonso's decision to not appeal was made in reliance upon this advice of counsel. Counsel's advice in this respect, were the State to argue or this Court be inclined to find the claims presented herein to be procedurally barred due to the failure to appeal, would have been deficient and would have prejudiced Alonso and constitutes an additional ground for relief hereunder and

assistance would have been forthcoming and would have been persuasive in convincing this Court to impose a sentence *below* the minimum guideline range.

as such would constitute cause and prejudice so as to excuse the procedural bar due to counsel's ineffective assistance in counseling Alonso to not appeal.

16. Do you have any petition, application, appeal, motion, etc., now pending in any court, either state or federal, as to the judgment under attack?

No.

17. If your answer to number 16 was "yes," give the following information:

Not applicable.

18. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein.

(a) At preliminary hearing:

Not applicable; not raising any claim related to preliminary hearing.

(b) At arraignment and plea on violation of probation:

Not applicable; not raising any claim related to preliminary hearing.

(c) At the violation of probation proceeding:

Orlando Rodriguez, Florida Bar Number 887501, 1571 N.W. 13th Court, Miami, Florida 33125-1605, telephone number 305-325-8119.

(d) At sentencing:

Orlando Rodriguez.

(e) On appeal:

Not applicable.

(f) In any postconviction proceeding:

William Mallory Kent, 1932 Perry Place, Jacksonville, Florida 32207, (904)
398-8000, email: kent@williamkent.com.

(g) On appeal from any adverse ruling in a postconviction proceeding:

Not applicable.

[TEXT CONTINUES ON NEXT PAGE]

CONCLUSION

Accordingly, PEDRO ALONSO respectfully requests this Honorable Court vacate his admission of violation of probation and the judgment and sentence entered pursuant thereto, or in the alternative, set this matter for resentencing.

Respectfully submitted,

THE LAW OFFICE OF
WILLIAM MALLORY KENT

William Mallory Kent
Florida Bar No. 0260738
1932 Perry Place
Jacksonville, Florida 32207-3443
(904) 398-8000 Office phone
(904) 662-4419 Cell phone
(904) 348-3124 Fax
kent@williamkent.com

OATH OF PETITIONER

Under penalties of perjury, I declare that I have read the foregoing motion and that the facts stated in it are true.

PEDRO ALONSO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Office of the State Attorney, attention Luis Perez-Medina, 1350 N.W. 12th Avenue, Miami, Florida 33136-2102, by United States Postal Service, first class postage prepaid, this ___th day of October, 2009, and the original has been filed with the clerk of the Court by depositing the same with Federal Express for delivery no later than October ____, 2009.

William Mallory Kent