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CRIMINAL DEFENSE
IN FEDERAL AND STATE COURTS
TRIAL - APPEAL - POST-CONVICTION RELIEF

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July 4, 2009

Mr. James Herring
1 Sunfish Court
Carolina Shores, NC 28467

Re: Proposed Fee Agreement - 3.850/3.800 Motion for Pedro Alonso

Dear Mr. Herring:

This is to confirm the terms of my proposed representation of Mr. Pedro Alonso, in a motion under Rule 3.850/3.800, Florida Rules of Criminal Procedure, to vacate and set aside his admission of violation of probation, and the judgment and sentence orally imposed in Circuit Court, Dade County, Florida on September 7, 2007 and recorded by the clerk on September 20, 2007 in case number F-96-027002-B.

Under Florida law there is a two year deadline for filing such motions. The time limit starts to run from the date the judgment and sentence became final. A Florida judgment and sentence is not final for 3.850/3.800 purposes until the clerk has recorded the judgment and the time for filing a notice of appeal has expired without the filing of a notice of appeal. Florida allows thirty calendar days to file a notice of appeal. Thirty days from September 20, 2007 would have been Saturday, October 20, 2007. When a deadline falls on a Saturday or Sunday, the deadline rolls over to the next court business day, which in this case would then have been Monday, October 22, 2007. The two year time period began to run from that date, so the deadline would be October 22, 2009. The motion must actually be filed in the clerk's office in Dade County by that date.

I would not wait until the deadline to file the motion but would anticipate filing it within 30 days of being retained to start work on the case.

Having reviewed the court file and VOP hearing/sentencing transcript, it is my tentative view that the admission of violation of probation plea agreement and sentence was based on the use of an incorrect sentencing guideline scoresheet (and that scoresheet was incorrectly scored as well). The agreement and sentencing was based on a current Criminal Punishment Code scoresheet, but this was wrong. Instead, Mr. Alonso was entitled to be sentenced under the guidelines applicable at the time of his offense, and that means, not the VOP itself, but the underlying original offense, which 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 decision, at least as to cases that fell within a so-called Heggs window period. Mr. Alonso's case fell within the Heggs window period. For such cases the defendant was entitled to be sentenced under the 1994 guidelines. The 1994 guidelines would have assigned 91 points for the original trafficking offense (a level 9 offense at the time). Mr. Alonso had no prior record. (This was incorrectly scored in the guideline scoresheet that was used in his case; they apparently scored his new federal crime as a prior record. Prior offenses are offense committed prior to the original offense, not intervening offenses and not the offense triggering the violation.) Then he would have gotten either 6 or 12 points for the violation of probation. It could be argued that it should only be six points, because the prior violation resulted in simple reinstatement. Then you subtract 28 points from this, and the range is limited to 75% above or below this total. If he only got 6 points for the violation, then the range would have been 51.75 to 86.25 months. He did not face sentencing up to fifteen years, at least absent a departure sentence. The transcript of the violation of probation has his attorney 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 resentencing at the correct bottom, or we can argue, to move to withdraw the admission of violation entirely and start over with the negotiation. Likewise, in theory, were he to only want to be resentenced to the correct bottom, the state has the option to pull out of the deal, but I would not anticipate that the state would push to do that. If he opts out of the deal he of course exposes himself to the theoretical risk that the court would simply then impose the same sentence as before or perhaps even a more severe sentence. I do not think either is likely, but that depends on the judge.

My fee for preparing, filing and litigating the 3.850/3.800 motion (I contemplate a single, joint motion under both rules) would be a flat fee of \$7,500, provided, however, if the court required me to attend in person any evidentiary hearing or other hearing in Dade County, there would be an additional fee of \$2,500 per such hearing. I do not anticipate that the court would require me to attend any hearing in Dade County in person, but instead would allow me to appear telephonically. If, however, the court were to set the motion for an evidentiary hearing, meaning witnesses would be called and examined, then the court would require me to attend that hearing in person. Given the nature of the issue involved and the record that exists, I do not think the court will set the motion for an evidentiary hearing.

My representation would NOT include any resentencing hearing or any negotiation of a reduced sentence or any further matters at the Circuit Court in Dade County other than the litigation of the 3.850/3.800 motion itself. If I am successful in convincing the judge to set aside the current judgment and sentence, then Mr. Alonso would need to either retain new counsel in Dade County to do these things or we would have to agree on a fee for me to do so. That being said and understood, I will informally attempt during the course of my work to see if I can work out a better disposition of the case that is acceptable to Mr. Alonso, but if I am not able to do so by the time the motion is decided, then my role and representation will be ended at that point whether I have worked out a better disposition or not.

Also, should the Circuit Court deny our motion, my representation would NOT include, for this fee, any appeal. If the motion were to be denied, and Mr. Alonso wanted to retain me for an appeal of the denial of the motion, then we would have to agree on an additional fee for the appeal.

The \$7,500 fee also does NOT include visiting with Mr. Alonso in person in prison. Any consultation with Mr. Alonso will be by telephone only. I am willing to arrange a face to face consultation with Mr. Alonso, but I would have to charge a flat daily rate of \$2,500 to travel to Madison to meet with him.

In addition I will bill you for actual out of pocket costs incurred in connection with the 3.850/3.800 motion. I do not anticipate there being any out of pocket costs other than perhaps Fed Ex invoices, but if there were an evidentiary hearing then we might have to subpoena witnesses, and you would have to pay the witness fees and my travel costs to attend the hearing.

My representation will commence once I have received payment in full of the \$7,500 attorney's fee. My fee must be paid from legitimate sources and may not be paid from the proceeds of criminal activity or from any property which is subject to any government claim of lien or forfeiture.

You may pay by check, credit card or direct deposit/wire transfer to my business account at Wachovia Bank, account number 9985065187, routing number 063000021. If you wish to pay by credit card, just call my secretary, Mrs. Susan Davis, and give her the credit card information by telephone.

Obviously I cannot guarantee or promise that we will win this motion, but I am very experienced in this type work and can guarantee you that I will give it my best effort. The legal analysis set forth above is not my formal legal opinion but simply a tentative conclusion having reviewed the record, but without having done any formal research as would be required to give you a binding opinion. But having looked at the court file and sentencing transcript I am reasonably confident of the views set forth above, and based on that then at a minimum we should be able to reduce Mr. Alonso's sentence to the bottom of the correct guidelines, which I think would have been 51.75 months.

Sincerely,

William Mallory Kent