

No. 20-7961

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

ANTONIO OLMEDA — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA RESPONDENT(S)

FILED
APR 28 2021

OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ANTONIO OLMEDA
(Your Name)

P.O. BOX 500
(Address)

ELMIRA, NEW YORK 14902
(City, State, Zip Code)

607 734-3901
(Phone Number)

QUESTION(S) PRESENTED

- Whether a Judgment and Conviction on two counts, under U.S.S.G. § 2K2.1.(a), for unlawful "receipt" of a firearm and "Possession" of that firearm is multiplicitous, and not intended by congress to punish the same offense under two seperate statutes.
- Whether U.S.S.G. § 2K2.1.(b)(4)(B), and (b)(6)(B), enhancements, are a sentencing factor or an element of another offense, that must be submitted to a Jury and proved beyond reasonable doubt.
- Pursuant to U.S.S.G. § 5G1.3(c), cmt. 3, can a sentence subject to an anticipated state term of imprisonment, be imposed to run consecutively to a federal sentence.
- Whether the District Court upon Remand and Mandate, under 18 U.S.C. § 3742(a), is subject to resentence a defendant in a manner and consistant with such instructions as may have been given by the Court of Appeals.

see. eg., [Violations of the Fifth, Sixth and Eighth amendments]
[of the United States Constitution]

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- United States v Olmeda, No. 13-Cr-626, U.S. District Court for the Southern District of New York. Judgment entered Oct., 15, 2015.
- United States v Olmeda, No. 15-3449cr, U.S. Court of Appeals for the Second Circuit. Judgment entered June, 22, 2018.
- United States v Olmeda, No. 13-Cr-626(RMB), U.S. District Court for the Southern District of New York. Judgment entered July, 10, 2019.
- United States v Olmeda, No. 19-2137cr, U.S. Court of Appeals for the Second Circuit. Judgment entered Dec., 14, 2020.

TABLE OF CONTENTS

| | |
|--|-------|
| OPINIONS BELOW..... | 1 |
| JURISDICTION..... | 2 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 3-4 |
| STATEMENT OF THE CASE | 5-6 |
| REASONS FOR GRANTING THE WRIT | 7-14 |
| CONCLUSION..... | 15-16 |

INDEX TO APPENDICES

| | |
|---|------|
| APPENDIX A . . . United States Court of Appeals(2d Cir: 2020) . | 1A |
| APPENDIX B . . . United States District Court(S.D.N.Y: 2019) . | 8A |
| APPENDIX C . . . United States Court of Appeals(2d Cir: 2018) . | 17A |
| APPENDIX D . . . United States District Court(S.D.N.Y: 2015) . | 26A |
| APPENDIX E . . . Indictment, U.S. District Court(S.D.N.Y: 2013) . | 34A |
| APPENDIX F . . . Sentencing, U.S. District Court(S.D.N.Y: 2015) . | 39A |
| APPENDIX G . . . 18 U.S.C., 26 U.S.C., 18 U.S.S.G., 28 U.S.S.C. . | 127A |

TABLE OF AUTHORITIES CITED

| CASES | PAGE NUMBER |
|---|-----------------|
| Alleyne v United States, 570 U.S. 99, (2013) | . . . 11 |
| Alleyne v United States, 133 S. Ct. 2151(2013) | . . . 8, 11 |
| Apprendi v New Jersey, 530 U.S. 466(2000) | . . . 11 |
| Ball v United States, 470 U.S. 856(1985) | . . . 10, 13 |
| Bell v United States, 349 U.S. 81(1955) | . . . 13 |
| Blakely v Washington, 542 U.S. 296(2004) | . . . 11 |
| Blockburger v United States, 284 U.S. 299(1932) | . . . 10, 13 |
| Cooter & Gell v Hartmax Corp., 496 U.S. 384, 110 S. Ct. 2447 . | . 8, 15 |
| Dillard v Roe, 244 F.3d 758(9th Cir. 2001) | . . . 8 |
| Gall v United States, 552 U.S. 38, (2007) | . . . 7 |
| Jones v United States, 526 U.S. 277(1999) | . . . 8 |
| Morey v Comm. Wealth, 108 Mass. 433(1871) | . . . 10 |
| Rita v United States, 551 U.S. 338(2007) | . . . 8 |
| Salley v United States, 786 F.2d 546(1986) | . . . 9 |
| Setser v United States, 566 U.S. 231, 132 S. Ct. 1463(2012) . | . . 6, 9, 12 |
| Staples v United States, 511 U.S. 600(1994) | . . . 8 |
| Townsend v Burke, 334 U.S. 736(1948) | . . . 8, 13 |
| Tapia v United States, 564 U.S. 319, 131 S. Ct. 2382(2011) . | . . 12 |
| Zeros v Verizon New York Inc., 252 F.3d 163(2001) | . . . 8 |
| United States v Apprendi, 120 S. Ct. 2348(2000) | . . . 8 |
| United States v Abiodun, 536 F.3d 162(2008) | . . . 12 |
| United States v Ansaldi, 372 F.3d 118(2004) | . . . 10, 13 |
| United States v Booker-FanFan, 543 U.S. 220(2005) | . . . 8, 11 |
| United States v Cairo, 922 F.2d 1008(2008) | . . . 10 |
| United States v Clayton, 927 F.2d 491(9th Cir. 1991) | . . . 9, 10 |
| United States v Cavera, 550 F.3d 180(2008) | . . . 7, 8 |
| United States v Crosby, 397 F.3d 103(2005) | . . . 8, 11, 15 |
| United States v Dixon, 509 U.S. 688(1993), 113 S. Ct. 2849 . | . . . 10, 13 |
| United States v Cordoba-Murgas, 233 F.3d 704(2000) | . . . 8 |
| United States v Dantzler, 771 F.3d 137(2014) | . . . 7, 8 |
| United States v Donoso, 512 F.3d 144(2008) | . . . 9, 12 |
| United States v Digeronimo, 598 F.2d 746(1979) | . . . 13 |
| United States v Doe, 79 F.3d 1309(1996) | . . . 14 |
| United States v Evans, U.S. Dist., (2013 WL 55486610) | . . . 8 |
| United States v Eastman, 758 F.3d 1315(9th Cir. 1985) | . . . 10 |
| United States v Finely, 245 F.3d 199(2001) | . . . 10 |

| | |
|--|----------|
| United States v Gonzalez, 420 F.3d 111(2005) | 8 |
| United States v Gigante, 94 F.3d 53(1996) | 7 |
| United States v Green, 618 F.3d 120(2010) | 14 |
| United States v Handakas, 286 F.3d 92(2002) | 10 |
| United States v Handakas, 329 F.2d 115(2003) | 10 |
| United States v Hart, 324 F.3d 740(D.C. Cir. 2003) | 8 |
| United States v Holmes, 44 F.3d 1150(1995) | 13 |
| United States v Lauersen, 343 F.3d 604(2003) | 12 |
| United States v Lente, 647 F.3d 1021(10th Cir. 2011) | 7 |
| United States v Martin, 732 F.2d 591(1984) | 10 |
| United States v Mason, 611 F.2d 49(1979) | 10, 13 |
| United States v Olmeda, 894 F.3d 53(2018) | 6, 9, 11 |
| United States v Pugliese, 805 F.2d 1117(1986) | 13 |
| United States v Richardson, 521 F.3d 149(2008) | 14 |
| United States v Rigas, 583 F.3d 108(2009) | 7 |
| United States v Roe, 244 F.3d 758(9th Cir. 2001) | 8 |
| United States v Wallace, 447 F.3d 184(2006) | 10 |
| Brown v Ohio, 432 U.S. 161 (1977) | 10 |

STATUTES AND RULES

| | |
|--|-------------|
| 18 U.S.C. § 922(G)(1) | 6, 13, 14 |
| 28 U.S.S.C. § 994(a) | 6, 7, 8, 11 |
| 18 U.S.C. § 3553(a) | Passin |
| 18 U.S.C. § 3553(a)(5), (6), | 8, 14 |
| 18 U.S.C. § 3553(b) | 6, 11, 12 |
| 18 U.S.C. § 3582(a) | 12 |
| 26 U.S.C. § 5845(a)(2), (b), | 6, 13 |
| 26 U.S.C. § 5861(d) | 6, 13 |
| 18 U.S.S.G. 1B1.1 | 11 |
| 18 U.S.S.G. 1B1.3, (a), | 6, 9, 11 |
| 18 U.S.S.G. 2k2.1.(a) | 6 |
| 18 U.S.S.G. 2K2.1.(b)(4)(B) | 10 |
| 18 U.S.S.G. 2K2.1.(b)(6)(B) | 9, 11 |
| 18 U.S.S.G. 3D1.2 | 13 |
| 18 U.S.S.G. 5D1.3(a), (d), | 14 |
| 18 U.S.S.G. 5G1.3(c) | 6, 9, 11, |
| 18 U.S.S.G. 5G1.3(c), cmt. 3. | 12 |

PAGE NUMBER

| | |
|---|----|
| 18 U.S.S.G. 5G1.3(c), cmt. 3. | 11 |
| 18 U.S.S.G. App. C, Amend 787.(2014). | 12 |
| 18 U.S.S.G. 6A1.3.(a), | 13 |
| 18 U.S.C. § 3584(a) | 9 |

OTHER

| | |
|-----------------------------------|----|
| Fed. R. Crim. P. § 32(i). | 14 |
| Fed. F. Crim. P. § 32(f). | 14 |
| Fed. R. Crim. P. § 32(g). | 14 |
| Fed. R. Ev. § 701. | 14 |

LAWS

| | |
|---|--------|
| Fifth Amend., United States Constitution. | Passin |
| Sixth Amend., United States Constitution. | 6,8,11 |
| Eighth Amend., United States Constitution | 12, 15 |

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**: United States v Olmeda, 19-2137(2d Cir.2020)

The opinion of the United States court of appeals appears at Appendix D to the petition and is

reported at U.S. v Olmeda, 894 F.3d 89(2d 2018); or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished. U.S. v Olmeda, 738 Fed. Appx. 710(2018)

The opinion of the United States district court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

[] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[] reported at _____; or,
[] has been designated for publication but is not yet reported; or,
[] is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was December, 14th, 2020,

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and -district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be -informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VIII

Excessive bail shall not be required, nor -excessive fines imposed, nor cruel and -unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

title 18, United States Code 922(G)(1), Receipt, Possession of Firearm

it shall be unlawful for any person, who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year.

title 26, United States Code 5861(d), The Possession or Receipt of a firearm, which are not registered to such persons in the National Firearms Registration and Transfer Record.

title 26, United States Code 5845(a)(2), "Firearm" a weapon made from a shotgun, if such weapon as modified has an overall of less than 26 inches, or a barrel or barrels of less than 18 inches in length.

title 26, United States Code 5845(b), "Machinegun" a weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.

STATEMENT OF THE CASE

1. On December, 19th, 2011, Olmeda was apprehended subsequent to warrantless Search and Seizure in New York County, New York., by local law enforcement of NYPD, which was not incident to lawful arrests.
2. Olmeda was arraigned on December, 20, 2011, before a Queens County criminal court, New York., and has been in the custody of New York State Department of corrections since the above incident to date, and serving a term of imprisonment.
3. Initially Olmeda was indicted, on December, 23, 2011, before the Supreme Court of New York on Ind. No. 2003/2011. He currently has a pending appeal in New York State Appellate Division, for the Second Judicial Department, A. D. No. 2017-10031.
4. The record on appeal before the Court of Appeals for the Second Circuit Doc. No. 15-3449cr, reflects that Olmeda was later charged and indicted by a Grand Jury on August, 14th, 2013, on Ind. No. 13-Cr-626(RMB), in the District Court for the Southern District of New York, (App. E) .
5. During Olmeda's New York PreTrial detention, on October, 28th, 2013, while in state custody he was subsequently placed in the custody of U.S. Marshal's Service, and delivered to U.S. District Court for the Southern District of New York, for an initial appearance and arraigned on the above indictment before Hon. R. Berman.
6. Olmeda requested before Judge Berman a stay of the proceedings in the Governments case, to permit him time to allow the state to adjudicate the pending case. To avoid any conflict or constitutional violations of [NYPL] § 30.30, Speedy Trial or Due Process Rights under the Fifth and Sixth Amend., of the U.S. Constitution. to also have access to State court and his attorney on the state Indictment No. 2003/2011. Cognizant of that fact, Judge Berman denied the

motion which unduly prejudicial to the defendant and the interest of justice.

7. Subsequently Olmeda submitted application to the District Court, due to conflicts of interests to proceed without aid of counsel, on June, 16, 2014,. The district court Granted Olmeda's right to proceed Pro se, and self-represent himself in this case.

8. On October, 23, 2014, Olmeda entered a Guilty Plea to the instant indictment, which charged possession of a firearm(s) by a prohibited person, under 18 U.S.C. § 922(G)(1), § 5845(a)(2),(b) and § 5861(d)(App.D).

9. The initial sentencing on May, 21, 2015, and October, 15, 2015, Judge Berman informed the parties that his determination as to the applicable Guideline was to be 78 to 97 Months. However, due to the courts application of Four enhancements under U.S.S.G. § 2K2.1, (App.E) its Judicial fact-findings and the U.S. Probation Offices [PSR]. The resulting substancial increases in the offense level from 26, to a total offense level exceeding 33, was applied. Since, the cumulative offense level cannot exceed a total of 29, under 2K2.1(b), an incorrect application of the U.S. Sentencing Guideline was applied. The court failed to consider other mitigating factors set forth in 18 U.S.C. § 3553(a), and (b), which was inconsistant with pertinent Sentencing Commission Policy, 28 U.S.S.C. 994(a).

10. The U.S. Court of Appeals No. 19-2137cr(App.A), and the U.S. District Courts review, under the abuse-of-discretion standard at resentencing affirmed Olmeda's 151 Month term of imprisonment, to also be served consecutive to the New York State sentence. Ruling in opposition to its previous opinion, see. United States v Olmeda, 894 F.3d 89, 92(2d Cir. 2018)(App.C), Mandate to apply the adopted amendments of the U.S. Sentencing Commission, 2014 Sentencing Guidelines and Methodology as set forth in the application notes accompanying, U.S.S.G. § 5G1.3(c) and 1B1.3, in Setser v United States, 566 U.S. 231, 236-237. Which significantly increased Olmeda's Guideline range by more than fifty percent.

REASONS FOR GRANTING THE PETITION

The Petitioner Antonio Olmeda Pro se, seeks a Writ of Certiorari before this court. He presents a number of Questions before this court, where the circuits are split on the issues. Where,

The Judgment of the Second Circuit for the Southern District of New York either chose to ignore, or ruled against its sister circuits in conflict with this courts opinion on an important federal Question.

The record of the Second Circuits appellate review never answered the appellate subjectmatter issues raised by the Petitioner in his appeal, Pursuant to 18 U.S.C. § 3742(a). In order to permit Olmeda meaningful appellate review, and to more fully consider the U.S. Sentencing Guidelines(U.S.S.G.), title 18 U.S.C. 3553(a), and U.S. Sentencing Commission Policy,28 U.S.S.C. § 994(a).
(App. G,(1-3),(6-7) ,(8-11).

1. The Court of Appeals, under the Abuse-of-Discretion Standard of review, where errors that substancial rights or that implicate potentially fundamental constitutional interests issues are violated, the Supreme court may exercise its discretion to correct the errors. If it effects the fairness, integrity or public reputation of the Judicial Proceedings, *Gall v. United States* 552 U.S. 38, 46,51., *United States v Cavera*, 550 F.3d 180, 190., *United States v Gigante*, 94 F.3d 53, 56., *United States v Lente*, 647 F.3d 1021, 1030,1033.. Dammages the Administration of Justice or otherwise is unsupportable as a matter of law, *United States v Rigas*, 583 F.3d 108, 123., *United States v Dantzler*, 771 F.3d 137, 148.

2. Olmeda argues the unreasonableness of his sentence imposed by Judge Berman, by limiting its considerations of the § 3553(a) applicable Guideline ranges(USSG), based solely on Judicial facts found by the court, Alleyne v United States, 133 S. Ct. 2151, 2163-2164., United States v Aprendi, 120 S. Ct. 2348, 2362-2363, Jones v United States, 526 U.S. 227, 232, 252., 119 S. Ct. 1215., United State v Gonzalez, 420 F.3d 111, 129-130., United States v Dantzler, 771 F.3d 137, 143., Cordoba-Murgas, 233 F.3d 704, 709., Dillard v Roe, 244 F.3d 758, 772(9th Cir. 2001). Resulting in significant enhancements in sentence, facts not found by a Jury or admitted by a defendant, in violation of the Fifth and Sixth Amendments of the U.S. Constitution, Rita v United States, 551 U.S. 38, 51., Cavera, 550 F.3d 180, 193., United States v Hart, 324 F.3d 740, 751., Staples v United States, 511 U.S. 600, 605,619,

3. The abuse-of-discretion standard of review, considers whether the District Court violated 18 U.S.C. 3553(a), U.S. Federal Sentencing Guidelines and U.S. Sentencing Commission Policy, 28 U.S.S.C. 994(a), if it fails to inquire or relies upon clearly erroneous findings of fact in an invalid pre-sentence report at sentencing, Townsend v Burke, 334 U.S. 736, 741., Cooter & Gell v Hartmarx Corp., 496 U.S. 384, 401., 110 S. Ct. 2447., (App. G,(1). Zeros v Verizon New York Inc., 252 F.3d 163, 168-169., it includes a review to determine if the remaining factors identified in 3553(a)(5),(6), considered in imposing a sentence "sufficient, but not greater than necessary", as required by the Supreme Court's decision in "Booker-FanFan, 543 U.S. 220, 261." United States v Crosby, 397 F.3d 103, 113., United States v Evans, U.S. Dist.,

2013 WL 5548610., and its need to avoid unwarranted sentencing disparity among defendants with similar records, or conduct. (App. G,(9)f,(10)p., Rehaif v United States, 139 S. Ct. 2191, 2195.

4. The defendant 151 Month sentence imposed to run consecutive to the state sentence was procedurally unreasonable. The defendant had a pending state charge for relevant conduct at the time of his federal sentencing, under § 5G1.3(c) and 1B1.3.. A state term of imprisonment [was] anticipated to result from the New York charges, and formed the basis for the 2K2.1(b) (6), Four level enhancement that increased the Guideline range by over Fifty Percent, United States v Olmeda, 894 F.3d 89, 92.. The court in its opinion, may still deem Olmeda's state term an "anticipated" sentence. Subsequently Olmeda has since appealed his conviction in New York State A.D. Second Dept., No. 2017-10013, which is currently pending., (App. G,(26),(18-22)(14)

5. Upon Olmeda's resentencing on July, 10th, 2019, before Judge R. Berman, who declined to Order that his federal sentence [S]hall run concurrently with an "anticipated" state sentence that had not yet been imposed, Setser v United States, 566 U.S. 231, 236. Not notwithstanding the fact that, at the time of Olmeda's October, 15th, 2015, initial sentencing, under 18 U.S.C. 3584(a), the District Court could not have imposed a consecutive sentence, United States v Donoso, 521 F.3d 144, 149., Sally v United States, 786 F.2d 1315, 1317-1318(9th Cir. 1985)., United States v Clayton, 927 F.2d 491, 492-493(9th Cir. 1991)., it would infringe upon

"the right of the state to exercise its own sentencing prerogative" since the sovereign with primary Jurisdiction, in "such a sentence precluded the state from fulfilling its own interest by running the state sentence concurrently with the federal term" Clayton, at 493(9th Cir. 1991)., Eastman, at 1317., Davis, 140 S. Ct. 1060-61.

6. The fifth Amendment of the U.S. Constitution double jeopardy clause, prohibits successive prosecutions as well as cumulative punishments, United States v Dixon, 509 U.S. 688, 696., 113 S. Ct. 2849., Brown v Ohio, 432 U.S. 161, 166, 168-169.. the courts have held, that a conviction for both possession and receipt, Ball v United States, 470 U.S. 856, 862., United States v Martin, 732 F.2d 591, 592-593., Ansaldi, 372 F.3d 118, 124., would be improper. Congress did not intend that there be two punishments for a single act, and courts cannot ignore the collateral consequence, Ball, 470 U.S. at 865., Blockburger v United States, 284 U.S. 299, 304., United States v Mason, 611 F.2d 49, 51., or the same offense under two different statutes. Where ambiguity or doubt exists about congressional intent regarding the unit of prosecution, we apply the rule of lenity, United States v Wallace, 447 F.3d 184, 188., United States v Finely, 245 F.3d 199, 207-208. Which dictates that "if congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses", Finely, 245 F.3d at 207., United States v Cairo, 922 F.2d 1008, 1014., United States v Handakas, 286 F.3d 92, 97., (App. G,(13),(28-29)).

The Petitioners arguments presented here for review are,
One, whether the courts application of the United States Sentencing Guidelines, title 18 United States Code, section 3553(a), and its

Provisions. It increases the offense level for [a] firearm with an altered or obliterated serial number, an offense not listed or charged in any counts of the instant indictment No: 13-Cr-626(RMB), increasing the offense level by Four points under U.S.S.G. § 2K2.1 (b)(4)(B), violate the Fifth and Sixth Amendment of the United States Constitution. Where the above is not a sentencing factor but an element of another offense, *Alleyne v United States*, 570 U.S. 99, 103., 133 S. Ct. 2151, 2155, 2158(2013)., and *Apprendi v New Jersey*, 530 U.S. 466, 490-492., 120 S. Ct. 2348, 2362-2364(2000). Holding that "other than the fact of a prior conviction, any fact that increases the penalty for a crime", is an "element". Increasing the minimum sentence or beyond the prescribed maximum must be submitted to a Jury, and proved beyond a reasonable doubt, *Apprendi* at 483-484., *Booker Fan-Fan*, 543 U.S. 220., *U.S. v Crosby*, 397 F.3d 103, 112., within the meaning of U.S.S.G. § 1B1.1., and § 3553(b)., (App. G,(1),(13),(23-24)).

Two, Whether the courts further application of U.S.S.G. § 2K2.1 (b)(6)(B), enhancement of Olmeda's Base offense level by an additional Four levels for the alleged possession of [a] firearm in connection with another felony offense is erroneous. Where New York State Charge under U.S.S.G. § 1B1.3(a), relevant conduct enhancements significantly increased Olmeda's Guideline range by more than Fifty percent, *United States v Olmeda*, 894 F.3d 89, 92,(2d Cir. 2018)., (App. G,(13), (21),9a,b.,

Three, assuming arguendo that U.S.S.G. § 5G1.3(c) was applicable here, particularly whether it applies to pending state charges. Did the Circuit Court abuse its discretion under U.S.S.G. § 5G1.3 Section (c), cmt. 3., § 1B1.3., and United States Sentencing Commission Policy, 28 U.S.S.C. § 994(a). Failing to apply the adopted Amendments Guideline and Methodology as set forth in the application notes accompanying subsection (c). In the wake of

Setser v United States, 566 U.S. 231., 132 S. Ct. 1463(2012)., affirming Olmeda's District Court federal sentence, shall run consecutive with the anticipated New York States sentence that had not yet been adjudicated, Setser at 236-237., United States v Donoso, 521 F.3d 144, 149(2d Cir. 2008). The Commission adopted Section 5G1.3 further, see. U.S.S.G. App. C, Amend. 787(2014), at 85., to address pending state charges. Since, the defendant was initially sentenced in federal court before he had ever been convicted in the state court. In violation of the fifth, Sixth, and Eighth Amendment of the United States Constitution.(App. G, (8),(26).

Four, Whether the courts sentencing procedure under the Abuse of Discretion standard, failed to follow title 18, U.S.C. § 3553(a) and its provisions, by imposing a 151 Month term of imprisonment. That was principally based on, or at least in part, for prison rehabilitation or medical care improper and substantively unreasonable, Tapia v United States, 564 U.S. 319, 321., 131 S. Ct. 2382, 2391-2392., Since the courts have long held that, [a] Judge may not impose or lengthen a prison sentence to enable a defendant to complete a program, or otherwise to promote rehabilitation, Id. at 321. Recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation, title 18, § 3582(a), Tapia at 2389., (App. G, (4)(5).

7. The District Court erred, in its application of all the above upward adjustments to the sentencing range, of the six count instant indictment. Which are substantially overlapping enhancements, based on closely related conduct having a cumulative effect "to a degree" not adequately considered under U.S.C. 3553(b)(1), United States v Lauersen, 343 F.3d 604., Abiodun, 536 F.3d 162.,

§ 3D1.2 at cmt. App. n. 5.(c), and 1B1.3 at cmt. n. 10(a)(1),(2), noting that "the Guideline prohibits aggregation from multiple counts, in order to prevent unwarranted "double counting" of the offense conduct from each count of conviction" (App. G,(25).

8. Olmeda argues that the Judgment and Sentence entered on all Six Counts of the instant indictment was Multiplicitous, under 18 U.S.C. § 922(G)(1), §§ 5845(b), (a)(2), and § 5861(d), and violates the Double Jeopardy clause of the Fifth Amendment of U.S. Constitution, *Ball v United States*, 470 U.S. 856, 861-862, 864-865, *United States v Ansaldi*, 372 F.3d 118, 124. When a Six Count indictment is multiplicitous, after conviction the proper remedy would be for the court to have entered Judgment on One Count alone, with respect's to Counts 2, 5, and 6, being multiplicitous of Counts 3, and 4, of the instant indictment. Which are not separate incidents or offenses, *Bell v United States*, 349 U.S. 81, 83-84., *Blockburger v United States*, 284 U.S. 299, 304., *United States v Mason*, 611 f.2d 49, 51., and not intended by congress to punish the same offense under two different statutes, *Ball* at 862, the court should have dismissed one, of each of the underlying counts of convictions, as a matter of law, *United States v Digeronimo*, 598 F.2d 746, 749-751., *United States v Holmes*, 44 F.3d 1150, 1156-57., *United States v Dixon*, 509 U.S. 688, 696, App. G,28.

9. The courts review was an abuse of discretion, when it relied upon an erroneous Pre Sentence Report and Addendum, that lacked the "sufficient indicia of reliability to support its probable accuracy" under U.S.S.G. 6A1.3(a), in order that the court not sentence him, prior to insuring that the U.S. Probation Office

properly responded and corrected any remaining disputed portions, United States v Pugliese, 805 F.2d 1117, 1124., Townsend v Burke, 334 U.S. 736, 741., United States v Robin, 545 F.2d 775, 778., that were unsupported by the case record, or envolved in the instant offense, United States v Doe, 79 F.3d 1309, 1319., United States v Richardson, 521 F.3d 149, 158., United States v Green, 618 F.3d 120, 122-123., Fed. R. Crim. P. § 32(i),(f).

10. The courts erred, in imposing the additional conditions of a three year term of supervised release, (App. B , at n. 1., 2., and 5.), as a recommendation by the U.S. Probation office's [PSR], of July, 1st, 2018, and a Government addendum appended on July, 10th, 2019, at resentencing. The U.S.S.G. § 5D1.3(d), "additional or special conditions" imposed were unwarranted, since the courts reasoning was unsupported by the record in the instant offense. In other than the present case matter before this court, there is no precedent in the Second Circuit where the above special conditions have been imposed involving, the criminal conduct for possession of Firearms under 18 U.S.C. § 922(G)(1)., (App. G,(1), (4-5).

The Petitioner argues, that under 18 U.S.C. 3553(a)(4),(5), and (6), "any greater supervision or deprivation of liberty than necessary for purposes set forth, would be inconsistent with pertinent policy issued by the sentencing commission, 28 U.S.C. § 994(a), and § 5D1.3(a)(b)(2).

CONCLUSION

a) Olmeda contends that, the United States Court of Appeals for the Second Circuit abused its discretion, by affirming the U.S. District Courts 151 Month Sentence and Three year term of Supervised Release, to be served consecutive to the New York State Sentence. That would be Both Procedurally and Substantively unreasonable, which has substantially effected the Petitioners United States Constitutional rights under the Fifth, Sixth and Eighth Amendments.

b) That a District Judge would be deemed to have abused its discretion, not only because the decision on its merits exceeded the bounds of allowable discretion, but because the Judge committed an error of law in the course of exercising discretion Crosby, 397 F.3d 103, 114., United States v Fernandez, 443 F.3d 19, 21, 26-27., and therefore guided by "erroneous legal conclusions", Cooter & Gell v Hartmax Corp., 496 U.S. 384, 405,, or has made a clearly erroneous findings of facts, Cooter & Gell at 410,, Cavera, 550 F.3d 180, 223.

c) Similarly, a sentence would be unreasonable regardless of length, if legal errors, properly to be considered on appeal, led to its imposition, Crosby, 397 F.3d at 114., or because of the unlawfulness of the method of selection. Pursuant to § 3742(f), "if the United States Supreme Court determines that, the sentence was imposed in violation of law. The court shall reverse and remand the case for further sentencing proceedings before a different Judge, with such instructions as the court considers appropriate". (App. G,(6-7).

because his sentence of 151 Months imposed, to be served consecutive to the New York State term of imprisonment by the District Court was unsupported as a matter of law, nor based on the sentencing procedures set out in the U.S.S.G., 18 U.S.C. § 3553(a),(b), and 28 U.S.S.C. 994(a), that rendered it substantially unreasonable, under § 3742(g).

The Petition for a Writ of Certiorari should be Granted.

dated: April , 29th , 2021,

Respectfully Submitted,



Antonio Olmeda Pro se,

Elmira Corr. Facility
P.O. Box 500
Elmira, New York 14902

cc.

U.S. Solicitor General/ DOJ.
950 Pennsylvania Ave N.W.
Washington, D.C. 20530