

APPENDIX A

APPENDIX A

19-2137
United States of America v. Olmeda

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

**At a stated term of the United States Court of Appeals for the Second Circuit,
held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of
New York, on the 14th day of December, two thousand twenty.**

PRESENT:

**GUIDO CALABRESI,
ROBERT A. KATZMANN,
RICHARD J. SULLIVAN,
*Circuit Judges.***

United States of America,

Appellee,

v.

19-2137

Antonio Olmeda,

Defendant-Appellant.

For Defendant-Appellant:

Antonio Olmeda, *pro se*, Elmira, NY.

For Appellee:

Michael D. Maimin, Thomas McKay,
Assistant United States Attorneys, *for*
Audrey Strauss, Acting United States
Attorney for the Southern District of New
York, New York, NY.

Appeal from a judgment of the United States District Court for the Southern District of New York (Berman, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED IN PART** and **VACATED IN PART.**

Defendant-appellant Antonio Olmeda, proceeding *pro se*, appeals from a sentence imposed following his conviction for being a felon in possession of firearms and for possessing unregistered firearms. We had previously affirmed most aspects of Mr. Olmeda's sentence but remanded so that the district court could more fully consider the impact of Sentencing Guideline § 5G1.3 in light of Mr. Olmeda's subsequently imposed state court sentence. *See United States v. Olmeda*, 894 F.3d 89 (2d Cir. 2018) (per curiam); *United States v. Olmeda*, 738 F. App'x 710 (2d Cir. 2018) (summary order). On remand, the district considered § 5G1.3, but reimposed its original sentence — 151 months' incarceration — to run consecutive to Mr. Olmeda's incarceration in state prison for conduct related to the instant offense. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review a sentence for reasonableness under a "deferential abuse-of-discretion standard." *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc).¹ Procedural review must "ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [18 U.S.C.] § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." *Gall v. United States*,

¹ Unless otherwise indicated, in quoting cases, we omit all internal citations, quotation marks, footnotes, and alterations.

552 U.S. 38, 51 (2007). A sentence is substantively unreasonable “only in exceptional cases where the trial court’s decision cannot be located within the range of permissible decisions, that is, when sentences are so shockingly high, shockingly low, or otherwise unsupportable as a matter of law that allowing them to stand would damage the administration of justice.” *United States v. Aldeen*, 792 F.3d 247, 255 (2d Cir. 2015). We review the district court’s interpretation of the Guidelines *de novo*, and its findings of fact for clear error. *United States v. Salim*, 549 F.3d 67, 72 (2d Cir. 2008).

I. Guidelines Calculation

Mr. Olmeda challenges various aspects of the district court’s Guidelines calculation. However, we have already rejected these challenges during Mr. Olmeda’s prior appeal, and the district court did not change its Guidelines calculation on remand. Under the law-of-the-case doctrine, this Court will generally “adhere to its own decision at an earlier stage of the litigation,” and will depart from this rule only for “compelling reasons,” such as “an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” *United States v. Plugh*, 648 F.3d 118, 123–24 (2d Cir. 2011). We see no basis to reconsider our prior decision here. Mr. Olmeda’s new argument that the enhancements were improper because they are “substantially overlapping,” Appellant’s Br. at 9, is without merit since it relies on the rule for grouping counts under the Guidelines—which does not have any bearing on Guidelines enhancements, *see* U.S.S.G. § 3D1.2.

II. Consecutive Sentence

The district court did not abuse its discretion in imposing Mr. Olmeda’s federal sentence consecutive to his state sentence. First, the district court explicitly considered the Guidelines’ recommendation in U.S.S.G. § 5G1.3 that a federal sentence be imposed concurrently to an

undischarged state sentence for an offense that is relevant conduct to the federal offense, and it reasonably concluded that the factors listed in 18 U.S.C. § 3553(a) instead favored a consecutive sentence. The district court reasonably emphasized public safety concerns, given Mr. Olmeda's history of unlawfully possessing and using weapons, and the circumstances of his offense. The resentencing was consistent with this Court's mandate on remand, which required only that the district court *consider* the Guidelines regarding concurrence. *See Olmeda*, 894 F.3d at 94 & n.3; *see also United States v. Coppola*, 671 F.3d 220, 253 n.30 (2d Cir. 2012) ("To the extent the Guidelines are advisory, the district court would have the discretion not to follow § 5G1.3(b) even where applicable.").

Second, contrary to Mr. Olmeda's argument, the district court did not extend the length of his term of incarceration to promote his rehabilitation. The district court's lengthy discussion of the § 3553(a) factors makes clear that the sentence was imposed due to the seriousness of the offense, the need for deterrence, and the need to protect the public. The mere mentioning of the need for mental health treatment does not indicate that the district court lengthened the term of incarceration for rehabilitative aims. *See United States v. Gilliard*, 671 F.3d 255, 260 (2d Cir. 2012).

Third, there is no indication of vindictiveness by the district court in response to Mr. Olmeda's prior exercise of his legal right to appeal. A presumption of vindictiveness arises when a court imposes a harsher sentence on remand after a successful appeal. *United States v. Singletary*, 458 F.3d 72, 74 (2d Cir. 2006). But no such presumption attaches here. The district court did not increase the federal sentence itself on remand, reimposing the same carceral term for the same reasons. Moreover, the district court clarified that during the original sentencing, it "intended to impose, and did impose, a sentence that was not concurrent to the state sentence." Suppl. App'x

70. In light of the district court's explanation on remand that it was imposing the same sentence that it had initially intended — once again denying Mr. Olmeda's request for a concurrent sentence — we cannot say that the district court imposed a harsher sentence such that a presumption of vindictiveness applies. Without the benefit of the presumption, the burden is on Mr. Olmeda to prove actual vindictiveness, *see United States v. Weingarten*, 713 F.3d 704, 715 (2d Cir. 2013), and he has not done so.

Finally, as we previously held, Mr. Olmeda's within-Guidelines term of 151 months' incarceration is substantively reasonable given the seriousness of Mr. Olmeda's offense. *Olmeda* 738 F. App'x at 715; *see also United States v. Perez-Frias*, 636 F.3d 39, 43 (2d Cir. 2011) (per curiam) (a within-Guidelines sentence is substantively reasonable "in the overwhelming majority of cases"). On the facts of this case — including those concerning Mr. Olmeda's dangerousness that were not addressed in the state case — we cannot say that the decision to impose the sentence consecutively to the undischarged state term results in a total sentence that "cannot be located within the range of permissible decisions." *Cavera*, 550 F.3d at 191.

III. Conditions of Supervised Release

"The district court has broad authority pursuant to 18 U.S.C. § 3583(d) to impose any condition of supervised release that it considers to be appropriate . . ." *United States v. Dupes*, 513 F.3d 338, 343 (2d Cir. 2008). Conditions of supervised release must be "reasonably related" to the statutory sentencing factors listed in 18 U.S.C. § 3553(a)(1) and (a)(2), must involve "no greater deprivation of liberty than is reasonably necessary to implement the statutory purposes of sentencing," and must be "consistent with pertinent Sentencing Commission policy statements." *Id.* We review special conditions of supervised release "for plain error where, as here, the defendant had advance notice of the challenged condition and failed to object during sentencing."

United States v. Bleau, 930 F.3d 35, 39 (2d Cir. 2019).

Mr. Olmeda’s argument that the district court imposed conditions of supervised release based on false information in the presentence report (“PSR”) is not supported by the record. Mr. Olmeda’s only factual challenge to the PSR before the district court concerned the identity of his high school and junior high school, and there is no basis to conclude that this information had any effect on the sentence. Mr. Olmeda does not identify on appeal any other information in the PSR that was not accurate.

We do agree with Mr. Olmeda that — as the government concedes — the condition imposing substance abuse treatment only “if the probation officer determine[s] that it is necessary” impermissibly delegates judicial authority to the probation officer. Suppl. App’x 116. Although the district court may delegate authority over the details of supervised release to a probation officer, it may not delegate “authority which would make a defendant’s liberty itself contingent on a probation officer’s exercise of discretion.” *United States v. Matta*, 777 F.3d 116, 122 (2d Cir. 2015). Thus, the substance-abuse-treatment condition is stricken.²

By contrast, the condition that Mr. Olmeda participate in mental health treatment does not raise delegation concerns because it is not contingent on a determination by the probation officer. And, as we held on Mr. Olmeda’s prior appeal, this condition is reasonably related to his history and characteristics. *Olmeda*, 738 F. App’x at 715–16.

Finally, in light of Mr. Olmeda’s conduct, including his possession of fake police identification cards, we find no error in the imposition of the condition prohibiting him from possessing “any clothing, badges, identification, or paraphernalia that indicates or appears to

² The government consents to striking this condition rather than remanding to the district court.

indicate that the wearer, user, or possessor is a member of law enforcement." App'x 35.

IV. Remaining Issues

To the extent that Mr. Olmeda challenges his conviction or the state proceedings, they are outside the scope of this appeal, which is limited to the resentencing. And to the extent that Mr. Olmeda argues that he received ineffective assistance of counsel during resentencing, we decline to consider that issue because, as in most cases, a motion brought under 28 U.S.C. § 2255 is preferable to direct appeal for deciding claims of ineffective assistance. *Massaro v. United States*, 538 U.S. 500, 504 (2003); *see also United States v. Doe*, 365 F.3d 150, 154 (2d Cir. 2004).

We have considered all of Mr. Olmeda's remaining arguments and find them to be without merit. Accordingly, the judgment of the district court is **VACATED IN PART** and **AFFIRMED IN PART**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

Catherine O'Hagan Wolfe


APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA

v.

Antonio Olmeda

JUDGMENT IN A CRIMINAL CASE

Case Number: 13 cr 626

USM Number: 23097-056

Neil Checkman

Defendant's Attorney

THE DEFENDANT:

 pleaded guilty to count(s) one through six pleaded nolo contendere to count(s) _____ which was accepted by the court. was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 922(g)(1).	felon in possession of a firearm	12/19/2011	
18 USC 924(a)(2)			one

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

 The defendant has been found not guilty on count(s) _____ Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

7/10/2019
Date of Imposition of Judgment

Signature of Judge

Richard M. Berman, U.S.D.J., S.D.N.Y.
Name and Title of Judge7/11/2019
Date

DEFENDANT: Antonio Olmeda
CASE NUMBER: 13 cr 626Judgment—Page 2 of 8

ADDITIONAL COUNTS OF CONVICTION

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 USC 922(g)(1),	felon in possession of a firearm	12/19/2011	two
18 USC 924(a)(2)			
26 USC 5845(b), 5861(d), & 5871	receipt of firearms not registered to the defendant in the national firearms registration and transfer record	12/19/2011	three
18 USC 922(g)(1),	felon in possession of a firearm	2011	four
18 USC 925(a)(2)			
26 USC 5845(b), 5861(d), & 5871	receipt of firearms not registered to the defendant in the national firearms registration and transfer record	2011	five
26 USC 5845(a)(2), 5861(d), & 5871	receipt of firearms not registered to the defendant in the national firearms registration and transfer record	2011	six

DEFENDANT: Antonio Olmeda
CASE NUMBER: 13 cr 626

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

151 months as follows: 120 months on counts one through five to run concurrently to one another followed by 31 months on count six to run consecutively. The 151 month term of imprisonment shall also run consecutively to the defendant's state term of imprisonment.

- The court makes the following recommendations to the Bureau of Prisons:

It is recommended that the defendant receive medical treatment while incarcerated.

- The defendant is remanded to the custody of the United States Marshal.

- The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____

as notified by the United States Marshal.

- The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____

at _____ to _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

DEPUTY UNITED STATES MARSHAL

DEFENDANT: Antonio Olmeda

CASE NUMBER: 13 cr 626

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

3 years

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (check if applicable)
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (check if applicable)
5. You must cooperate in the collection of DNA as directed by the probation officer. (check if applicable)
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. (check if applicable)
7. You must participate in an approved program for domestic violence. (check if applicable)

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Antonio Olmeda
CASE NUMBER: 13 cr 626

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines, based on your criminal record, personal history or characteristics, that you pose a risk to another person (including an organization), the probation officer, with the prior approval of the Court, may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature

Date

DEFENDANT: Antonio Olmeda
CASE NUMBER: 13 cr 626

ADDITIONAL SUPERVISED RELEASE TERMS

- 1-Throughout the term of supervised release, defendant shall participate in weekly therapeutic individual counseling by a licensed therapist. The defendant may be required to contribute to the costs of services rendered (copayment) in an amount to be determined by the probation officer, based on ability to pay or availability of third party payment;
- 2- If deemed necessary, defendant shall participate in a program approved by the U.S. Probation Office for substance abuse which program shall include testing to determine whether the defendant has reverted to the use of drugs or alcohol. The defendant may be required to contribute to the costs of services rendered (copayment) in an amount to be determined by the probation officer, based on ability to pay or availability of third party payment;
- 3- Defendant shall be supervised in his district of residence;
- 4- The defendant shall submit his person, residence, vehicle, place of business or any other premises under his control to a search by any United States Probation Officer, and if needed, with the assistance of any law enforcement. The search is to be conducted when there is reasonable suspicion concerning violation of a condition of supervision or unlawful conduct by the person being supervised. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition. Any search shall be conducted at a reasonable time and in a reasonable manner;
- 5- Defendant may not possess any clothing, badges, identification, or paraphernalia that indicates or appears to indicate that the wearer, user, or possessor is a member of law enforcement;
- 6- Defendant shall report to probation within 48 hours of release from custody;
- 7- The terms of supervised release may not be modified without prior approval of the Court.

DEFENDANT: Antonio Olmeda

CASE NUMBER: 13 cr 626

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

TOTALS	Assessment	JVTA Assessment*	Fine	Restitution
	\$ 600.00	\$ 0.00	\$ 0.00	\$ 0.00

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

- Restitution amount ordered pursuant to plea agreement \$ _____
 - The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
 - The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine restitution.
 - the interest requirement for the fine restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22. ** Findings for the fiscal year 2016.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Antonio Olmeda
CASE NUMBER: 13 cr 626Judgment - Page 8 of 8

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A Lump sum payment of \$ 600.00 due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or
- B Payment to begin immediately (may be combined with C, D, or F below); or
- C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- The defendant shall pay the cost of prosecution.
- The defendant shall pay the following court cost(s):
- The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

APPENDIX C

APPENDIX C

15-3449
United States v. Olmeda

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 22nd day of June, two thousand eighteen.

PRESENT:

ROBERT A. KATZMANN,
Chief Judge,
PIERRE N. LEVAL,
Circuit Judge,
ANDREW L. CARTER,*
District Judge.

UNITED STATES OF AMERICA,

Appellee,

v.

15-3449

ANTONIO OLMEDA,

Defendant-Appellant.

* Judge Andrew L. Carter, of the United States District Court for the Southern District of New York, sitting by designation.

For Appellee:

Shane T. Stansbury, Sarah K. Eddy,
Assistant United States Attorneys, for
Geoffrey Berman, United States Attorney
for the Southern District of New York, New
York, NY.

For Defendant-Appellant:

Antonio Olmeda, *pro se*, Dannemora, NY.

1

Appeal from a judgment of the United States District Court for the Southern District of New York (Berman, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the case is **REMANDED** with instructions to vacate the sentence and resentence in a manner consistent with the accompanying opinion.

Defendant-Appellant Antonio Olmeda appeals from a judgment of the Southern District of New York (Berman, J.), entered October 15, 2015, sentencing him to 151 months' imprisonment. Olmeda was arrested in possession of two firearms, live ammunition, and shell casings. Later searches of his home and storage locker revealed a cache of more than 20 firearms, including semiautomatic weapons and a sawed-off shot gun. Olmeda elected to proceed *pro se* and pleaded guilty to a six-count indictment, which alleged three counts of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and three counts of possession of unregistered firearms, in violation of 26 U.S.C. §§ 5845, 5861(d). Olmeda proceeds *pro se* on appeal. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal. Each of the arguments discussed herein are without merit; however, for the reasons stated in an opinion issued simultaneously with this summary order, we REMAND with instructions to vacate the sentence and resentence in a manner consistent with the opinion.

I. Double Jeopardy

Olmeda argues that his convictions under both 26 U.S.C. §§ 5845, 5861(d) and 18 U.S.C. § 922(g)(1) violate the Double Jeopardy Clause. We review a double jeopardy challenge *de novo*. See *United States v. Basciano*, 599 F.3d 184, 196 (2d Cir. 2010). Courts apply the *Blockburger* test to double jeopardy claims, and determine whether “each [charged] offense contains an element not contained in the other [offenses].” *United States v. Dixon*, 509 U.S. 688, 696 (1993) (reaffirming the *Blockburger* test). We have previously considered a claim that a conviction of both 26 U.S.C. § 5861(d) and 18 U.S.C. § 922(g)(1) violates the Double Jeopardy Clause, and rejected it, holding that:

There is no question that the offenses of possession of unregistered weapon, in violation of 26 U.S.C. § 5861(d), and possession of a weapon as a previously convicted felon, in violation of 18 U.S.C. § 922(g)(1), are distinct offenses, each including at least one element that the other does not, and there is no indication here that Congress intended that a defendant convicted of both a § 922(g)(1) offense and a § 5861(d) offense not be punished cumulatively for both.

United States v. Concepcion, 983 F.2d 369, 391 (2d Cir. 1992) (internal citations omitted).

Because Olmeda was charged with these “distinct offenses,” his double jeopardy challenge fails.

Id.

II. Procedural Reasonableness of the Sentence

We review a sentence for procedural reasonableness under a “deferential abuse-of-discretion standard.” *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc) (quoting *Gall v. United States*, 552 U.S. 38, 41 (2007)). Procedural review must “ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately

explain the chosen sentence.” *Gall*, 552 U.S. at 51. We review the district court’s interpretation of the Guidelines *de novo*, and its findings of fact (including those made after a *Fatico* hearing) for clear error. *United States v. Salim*, 549 F.3d 67, 72–74 (2d Cir. 2008).

The district court properly calculated the Guidelines. First, the 4-level increase under § 2K2.1(b)(1)(B) for an offense involving 8 to 24 firearms was appropriate because the indictment listed the 22 firearms Olmeda possessed and he pleaded guilty to all counts in the indictment. Second, the 4-level increase for an obliterated serial number was appropriate because the Government provided a Bureau of Alcohol, Tobacco, Firearms, and Explosives’s inventory report that described the evidence seized from Olmeda’s storage locker, which included a .45 caliber semi-automatic pistol with an obliterated serial number. This satisfies the preponderance of the evidence standard. *See United States v. Carmona*, 873 F.2d 569, 575 (2d Cir. 1989). Moreover, although this fact was not alleged in the indictment, it was permissible for the court to use it in calculating his sentence because it did not result in an increase beyond the statutory maximum. *See United States v. Sheikh*, 433 F.3d 905, 906 (2d Cir. 2006).

Additionally, we see no error, clear or otherwise, in the district court’s finding that the *Fatico* hearing supported a 4-level enhancement for possessing a firearm in connection with another felony offense. Witness and ballistic evidence supported the finding that Olmeda attempted to assault two police officers and that he was later arrested with the same gun that he had used in the attempt. Olmeda need not be found guilty of this offense for the enhancement to apply. *See U.S.S.G. § 2K2.1(b)(6)(B)*.

Olmeda’s contention that the district court raised his offense level beyond a cap of 29 is incorrect. As the Guidelines require, his offense level for § 2K1.1(b)(1) through (b)(4) was capped at 29. U.S.S.G. § 2K2.1(b)(4). The 4-level increase for possession of a weapon that was

used in another felony was pursuant to § 2K2.1(b)(6) and thus outside of the capped subsections.

Olmeda also argues that the district court erred by including a 1995 conviction in his criminal history because the conviction preceded his December 2011 offense by more than 15 years. However, U.S.S.G. § 4A1.2(e)(1) instructs district courts to “count any prior sentence of imprisonment exceeding one year and one month, whenever imposed, that resulted in the defendant being incarcerated during any part of such fifteen-year period.” Here, the district court’s criminal history calculation was correct because Olmeda was incarcerated for a 1995 felony conviction though 1998, within 15 years of the offenses at issue here. And his contention that the district court erred by not granting him a downward departure is not reviewable on appeal because there is no indication that the district court believed it lacked the authority to depart. *United States v. Jackson*, 658 F.3d 145, 153–54 (2d Cir. 2011). To the contrary, the district court explicitly stated at sentencing that it had taken Olmeda’s arguments about a departure into consideration.

Olmeda’s arguments that the district court did not adequately explain its sentence and failed to provide a written statement of reasons are equally unavailing. The district court’s explanation for the 151-month sentence—the seriousness of the crime and specific deterrence—was more than adequate and the district court did provide a statement of reasons notwithstanding the fact that it was not required to do so in this case. See *United States v. Sindima*, 488 F.3d 81, 85 (2d Cir. 2007); 18 U.S.C. § 3553(c).

The district court did not err in its application of U.S.S.G. § 5G1.2(d) by imposing Olmeda’s terms of imprisonment on five counts to run currently at the statutory maximum of ten years and imposing the term of imprisonment on the sixth count to run consecutively. Olmeda claims that his 151-month sentence exceeds the statutory maximum, but the statutory maximum applies to an individual count and here the combined sentence was not greater than the total

punishment range calculated under the Guidelines. *United States v. Loeb*, 45 F.3d 719, 723 (2d Cir. 1995). And, because a defendant has no right to concurrent sentences, the district court did not err by ordering that the term of imprisonment on the sixth count run consecutively. *United States v. White*, 240 F.3d 127, 135–36 (2d Cir. 2001).

III. Substantive Reasonableness of the Sentence

A sentence will be set aside on substantive grounds “only in exceptional cases where the trial court’s decision cannot be located within the range of permissible decisions, that is, when sentences are so shockingly high, shockingly low, or otherwise unsupportable as a matter of law that allowing them to stand would damage the administration of justice.” *United States v. Aldeen*, 792 F.3d 247, 255 (2d Cir. 2015) (internal quotation marks omitted). Here, as “in the overwhelming majority of cases, [Olmeda’s] Guidelines sentence . . . fall[s] comfortably within the broad range of sentences that would be reasonable in the particular circumstances.” *United States v. Perez-Frias*, 636 F.3d 39, 43 (2d Cir. 2011) (per curiam) (quoting *United States v. Fernandez*, 446 F.3d 19, 27 (2d Cir. 2006)). Given the seriousness of his offense, the duration of the sentence is not “shocking” and the district court’s focus on specific deterrence in the sentence was reasonable given Olmeda’s repeat offenses and the potential harm to the public.

IV. Reasonableness of the Term of Supervised Release

We review *de novo* questions of law related to the imposition of conditions of supervised release and “the conditions themselves” for abuse of discretion. *United States v. Reeves*, 591 F.3d 77, 80 (2d Cir. 2010). “[R]elease conditions must . . . be ‘reasonably related’ to certain prescribed sentencing factors and ‘involve no greater deprivation of liberty than is reasonably necessary’ to achieve the purposes of sentencing.” *Id.* (alteration omitted) (quoting 18 U.S.C. § 3583(d)). The Guidelines state that “[i]f the court has reason to believe that the defendant is in need of

psychological or psychiatric treatment," it may impose a "condition requiring that the defendant participate in a mental health program approved by the United States Probation Office." U.S.S.G. § 5D1.3(d)(5).

The record revealed that Olmeda had a long history with weapons: his 1995 conviction was for possession of a flame thrower, 18 pipe bombs, 1,100 rounds of ammunition, an Uzi, a sawed-off shotgun, and a silencer, and his 2002 was conviction for possession of more than 300 rounds of ammunition. He continued to possess firearms despite these convictions. *Cf. United States v. Barajas*, 331 F.3d 1141, 1147 (10th Cir. 2003) (defendant's "long record of violent incidents supports the district court's conclusion that [he] needed mental health counselling"). And the district court stated that Olmeda's sentence was designed to deter him and to protect the public from further crime, factors that are reasonably related to the counseling condition. Additionally, the district court had ample opportunity to observe and interact with Olmeda during his case and to reasonably determine that mental health services were warranted. *See United States v. Lopez*, 258 F.3d 1053, 1057 (9th Cir. 2001) (holding that the record and the court's observations supported the imposition of mental health counseling). Thus, the imposed condition was reasonably related to Olmeda's "history and characteristics." 18 U.S.C. § 3553(a)(1).

IV. Right to Self-Representation

"A defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard. The *pro se* defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, . . . and to address the court . . . at appropriate points . . ." *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984). The record shows that Olmeda was afforded these rights. He submitted numerous motions, objections, and sentencing submissions; the district court acknowledged receipt them and reviewed them with

Olmeda at conferences. It also granted Olmeda additional time for responses and ample opportunities to orally address the court. The district court approved forensic and DNA consultants for the *Fatico* hearing and responded to his objections at the sentencing hearing. In sum, nothing in the record suggests that Olmeda was prevented from participating in the sentencing proceedings or denied his right to represent himself, despite whatever difficulties he encountered as an incarcerated *pro se* litigant.

Each of the aforementioned arguments is without merit; however, for the reasons stated in an accompanying opinion, we **REMAND** with instructions to vacate the sentence and resentence in a manner consistent with the opinion.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court


Catherine O'Hagan Wolfe

APPENDIX D

APPENDIX D

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA

v.

Antonio Olmeda

JUDGMENT IN A CRIMINAL CASE

Case Number: 13 cr 626

USM Number: 23097-056

Pro Se, Standby counsel Marlon Kirton

Defendant's Attorney

THE DEFENDANT:

- pleaded guilty to count(s) one through six
- pleaded nolo contendere to count(s) _____ which was accepted by the court.
- was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC 922(g)(1)	Felon in possession of a firearm	12/19/2011	None
18 USC 924(a)(2)			

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- The defendant has been found not guilty on count(s) _____

Count(s) _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

10/15/2015

Date of Imposition of Judgment

RMIS

Signature of Judge

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: 10/15/15

Richard M. Berman
Name of JudgeU.S.D.J., S.D.N.Y.
Title of Judge

10/15/2015

Date

DEFENDANT: Antonio Olmeda
CASE NUMBER: 13 cr 626

Judgment—Page 2 of 7

ADDITIONAL COUNTS OF CONVICTION

DEFENDANT: Antonio Olmeda
CASE NUMBER: 13 cr 626

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

120 months on counts one through five to run concurrently to one another followed by 31 months on count six to run consecutively for a total term of 151 months.

The court makes the following recommendations to the Bureau of Prisons:

It is recommended that the defendant receive medical treatment while incarcerated and that he be placed in the Devens facility located in Massachusetts.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____.

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____.

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Antonio Olmeda
CASE NUMBER: 13 cr 626Judgment—Page 4 of 7**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of:
three years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. (Check, if applicable.)
- The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Antonio Olmeda
CASE NUMBER: 13 cr 626

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ADDITIONAL SUPERVISED RELEASE TERMS

- 1-Throughout the period of supervised release, defendant shall participate in weekly therapeutic counseling by a licensed therapist. The defendant may be required to contribute to the costs of services rendered (copayment) in an amount to be determined by the probation officer, based on ability to pay or availability of third party payment;
- 2- If deemed necessary by probation, defendant shall participate in a program approved by the U.S. Probation Office for substance abuse and which program shall include testing to determine whether the defendant has reverted to the use of drugs or alcohol. The defendant may be required to contribute to the costs of services rendered (copayment) in an amount to be determined by the probation officer, based on ability to pay or availability of third party payment;
- 3-Defendant shall be supervised in his district of residence;
- 4-Defendant shall report to probation within 48 hours of his release from custody.

DEFENDANT: Antonio Olmeda
CASE NUMBER: 13 cr 626

Judgment — Page 6 of 7

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

Assessment Fine Restitution
TOTALS \$ 600.00 \$ 0.00 \$ 0.00

- The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

TOTALS \$ **0.00** \$ **0.00**

- Restitution amount ordered pursuant to plea agreement \$ _____
 - The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).
 - The court determined that the defendant does not have the ability to pay interest and it is ordered that:
 - the interest requirement is waived for the fine restitution.
 - the interest requirement for the fine restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Antonio Olmeda
CASE NUMBER: 13 cr 626

Judgment — Page 7 of 7

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A Lump sum payment of \$ 600.00 due immediately, balance due
 not later than _____, or
 in accordance C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- The defendant shall pay the cost of prosecution.
 - The defendant shall pay the following court cost(s):
 - The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

**Additional material
from this filing is
available in the
Clerk's Office.**