

No. 24-1028

IN THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

v.

MALACHI MATHIAS MOON SEALS,  
Defendant-Appellant.

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**ANSWER BRIEF OF THE UNITED STATES**

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On Appeal from the United States District Court  
for the District of Colorado  
The Honorable Charlotte N. Sweeney  
D.C. No. 22-CR-00245-CNS

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MATTHEW T. KIRSCH  
Acting United States Attorney

JESS D. MEKEEL  
Assistant U.S. Attorney  
1801 California Street  
Suite 1600  
Denver, Colorado 80202  
(303) 454-0100

Attorneys for Plaintiff-Appellee  
United States of America

**ORAL ARGUMENT NOT REQUESTED**

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### **STATEMENT OF RELATED CASES**

None.

### **CITATION CONVENTION**

This brief cites to the record on appeal by volume and page number: e.g., “I:68” refers to Volume I, page 68, of the record (here, the judgment).

### **JURISDICTIONAL STATEMENT**

The district court had jurisdiction over this criminal proceeding under 18 U.S.C. §§ 3231 and 3564-65. Judgment was entered on January 18, 2024. I:68. The defendant timely appealed five days later. I:73. This Court has jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

After pleading guilty to sending threats to public officials, Malachi Moon Seals was sentenced to probation. He violated probation almost immediately by threatening another public official. At sentencing, the district court rejected the U.S.S.G. § 7B1.4 range of 3 to 9 months as a windfall and imposed 36 months' imprisonment based on the original offense range of 33 to 41 months. Moon Seals now argues that *United States v. Moore (Moore I)*, 30 F.4th 1021 (10th Cir. 2022), which set out a two-step process for probation-revocation sentencing, was wrongly decided. He also argues that the district court plainly erred by not strictly following *Moore I*'s two-step process.

1. Did Moon Seals waive his challenge to *Moore I* based on his appeal waiver? Is this case an appropriate vehicle for review of *Moore I*, given that the parties agree the court did not apply *Moore I*?

2. Did Moon Seals waive his challenge to the district court's sentencing analysis based on his appeal waiver and the invited-error doctrine? If he did not, can he show plain error where there is not a reasonable probability that his sentence would have been any lower under a strict application of *Moore I*?

## STATEMENT OF THE CASE

### **I. Moon Seals peppers government officials with graphic and vulgar online threats.**

Between November 2021 and January 2022, Moon Seals sent numerous threatening messages to members of Congress and other officials. II:159-65. The messages were vulgar, were tailored to the recipients, and described desires to rape, torture, and kill the officials and their families. II:159-65. Several officials requested security details due to the messages. III:118, 156-57.

When questioned by the FBI, Moon Seals admitted sending the threats and intending to cause psychological harm. II:135, 165. But he said that the messages were his “therapy,” that he did not intend to act on them, and that he would not send any more. II:165.

### **II. Moon Seals refuses to stop sending threats.**

Because of his possible mental health issues and lack of prior convictions, the government proposed a diversion plea. II:91; III:114. But after Moon Seals sent a threat to the United States Capitol Police, the government withdrew the offer. II:92; III:114, 173. The government then proposed a plea to a single count of sending an interstate threat (18 U.S.C. § 875(c)), with the government agreeing to probation. II:92;

III:115. But Moon Seals sent more threats to the Capitol Police, so the government withdraw the offer. II:92; 112; III:115. And Moon Seals continued sending threats, including to the Capitol Police and the Supreme Court. II:92, 113-17.

### **III. Moon Seals is indicted, pleads guilty, and is sentenced to probation.**

Moon Seals was indicted on six counts of threatening federal officials and/or their family members (18 U.S.C. § 115(a)(1)) and six counts of sending interstate threats (§ 875(c)). I:5-10; II:26, 92.<sup>1</sup>

Through a plea agreement, he pleaded guilty and waived his appeal rights, with the government agreeing to not oppose probation. I:13-15.

Although the statute allowed for probation, the guidelines did not.

III:136-37. The guidelines range was 33 to 41 months at an offense level of 20 and criminal history category of I. III:137; II:18-26.

In arguing for probation, defense counsel stressed that Moon Seals's mental health and cranial plate affected his impulsivity and emotional regulation. III:143-56. Counsel contended that Moon Seals

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<sup>1</sup> While on pre-trial supervision, Moons Seals sent threatening messages to a former cabinet official and a local hospital. II:93, 123-27.

had been a changed person since the plate was replaced. III:145.

Counsel opposed imprisonment due to the lack of mental health care and Moon Seals's lack of criminal history. III:147, 152. And counsel stressed Moon Seals's lack of intent to act on his threats. III:142, 152.

For its part, the government discussed the severity of Moon Seals's threats and how many chances he had been given. III:156-57. The government noted that probation was unusual but was willing to take a chance provided there was heightened monitoring. III:158-59.

The court expressed grave concerns but agreed to probation *only* because of the apparent change in Moon Seals's behavior following replacement of his cranial plate. III:163-66. Imposing a five-year term, the court stated that strict conditions were necessary, particularly regarding computer usage. I:30-38; III:168, 173. The court described the sentence as "almost unheard of" and warned Moon Seals that he would be imprisoned if he failed to comply. III:166, 173, 183.

#### **IV. Moon Seals immediately violates his probation.**

Eight days later, Moon Seals sent one of his most vile messages to date, threatening to torture and kill a former CIA officer. I:39-41, 50-52.

The probation office petitioned for revocation of probation based on two Grade C violations. I:39-42. Moon Seals admitted the violations. III:4.

The probation office noted that the U.S.S.G. § 7B1.4 range was 3 to 9 months but recommended 33 months based on the original range. II:264. The prosecution agreed. III:27-28. The prosecution also cited *Moore I*, 30 F.4th at 1027, which directs courts to: (1) consider the original offense range and resentence the defendant based on pre-probation conduct; and (2) consider the § 7B1.4 range and impose a sentence for the violation based on post-probation conduct. II:299.

The defense argued that the two-step process was dicta and that this Court in *Moore II* would tell district courts to start at Chapter 7. III:12-13. But the defense agreed that the district court was not bound by Chapter 7 and could impose any sentence it found appropriate based on § 3553(a), up to ten years. III:10-15. The defense argued for 9 months, at the top end of § 7B1.4(a). III:10-19, 24-25.

**V. The district court considers both ranges but imposes a sentence of 36 months based on the original range.**

The district court indicated that it could use either the original guidelines range or the Chapter 7 range. III:38. The court noted that “Chapter 7 in some senses may make sense,” but rejected that range

because it would give Moon Seals “an unwarranted benefit” of a lower range simply for being on, and violating, probation. III:38. The court also explained that it had been “heavily reluctant to give probation” and had immediately regretted it. III:38. The court next noted that it could base a sentence on the statutory maximum. III:38. But the court was not inclined to do that either. III:38. Instead, the court declared that the original guidelines range was most appropriate. III:38-40.

The court thus sentenced Moon Seals to 36 months. I:66-72. It explained that he had been given many chances yet did not appreciate the severity of his conduct or feel remorse. III:41-43. The court largely discounted Moon Seals’s psychiatric evaluation, including its comparison of his threats to juvenile pranks. III:41-42. The court also was troubled by the report’s conclusion that Moon Seals’s cranial plate was not affecting his brain functioning, which had been “the sole reason” the court granted probation in the first place. III:42. The court further observed that the conduct was dangerous and likely to reoccur. III:43. And the court noted that the public officials needed time to be protected from any further threats by Moon Seals. III:42-44.

## SUMMARY OF ARGUMENT

Moon Seals contends that the district court erred because *Moore I* was wrongly decided and that the district court erred in not following *Moore I*. Both arguments should be deemed waived by the appeal waiver in Moon Seals's plea agreement.

In any event, his challenge to *Moore I* must fail because that decision is binding. *United States v. Moore (Moore II)*, 96 F.4th 1290, 1301 (10th Cir.), *reh'g en banc denied*, No. 22-3173, 2024 WL 4530719 (Oct. 21, 2024). Nor should this Court review it en banc, given that Moon Seals correctly argues that *Moore I* was not followed in this case. And because Moon Seals invited the court to err in not following *Moore I* and cannot show plain error, his challenge to the court's failure to apply *Moore I* also fails.

This Court should affirm the judgment.

## ARGUMENT

### **I. Moon Seals waived his challenge to *Moore I*, which remains binding precedent.**

**Preservation:** The issue is not preserved due to Moon Seals's appellate waiver. Moreover, he did not raise the issue that he raises now: that the court could "consider Chapter 7 only." Opening Br. at 11. Moon Seals stated below that while Chapter 7 was the proper starting place, the original range remained available to the court. III:10. He also argued that *Moore I*'s two-step process was dicta but did not specifically argue that *Moore I* should be overruled. III:13; *see also* II:60-64 (making no mention of *Moore I*). He thus forfeited the issue he now raises.

**Standard of review:** The enforceability of an appeal waiver is reviewed de novo. *United States v. Ibarra-Coronel*, 517 F.3d 1218, 1221 (10th Cir. 2008).

**Argument:** Moon Seals challenges *Moore I*'s holding that courts must (1) resentence a defendant for the original offense based on the original guideline range and pre-probation conduct; and (2) sentence the defendant for the probation violation based on the Chapter 7 range and post-probation conduct. 30 F.4th at 1027. But this issue is covered by the appeal waiver in his plea agreement. Plus, *Moore I* remains binding.

**A. The issue should be deemed waived.**

First, this issue, along with the second one below, should be deemed waived, and the appeal dismissed, based on the appeal waiver in Moon Seals’s plea agreement. *See* 10th Cir. R. 27.3(A)(3)(c) (noting the enforceability of an appeal waiver may be raised in a merits brief).

Through his plea agreement, Moon Seals “waive[d] the right to appeal any matter in connection with this prosecution, conviction, or sentence.” II:15. Although his initial sentence was probation, that sentence was “conditional and subject to revocation until its expiration or termination.” 18 U.S.C. § 3564(e). Under 18 U.S.C. § 3565(a)(2), when probation is revoked, a defendant is *resentenced* on the original offense. *Moore I*, 30 F.4th at 1026. Thus, when Moon Seals’s probation was revoked, the 36 months became the “sentence” for his waiver. II:15.

This Court has enforced appeal waivers following resentencing, noting that “[w]hether a proceeding in the district court is called a sentencing or a resentencing . . . , the result challenged is the same: a sentence that is incorporated in the judgment.” *United States v. Kutz*,

702 F. App'x 661, 667 (10th Cir. 2017).<sup>2</sup> Other courts have specifically enforced appeal waivers with probation revocations. *See United States v. Boone*, 801 F. App'x 897, 903 (4th Cir. 2020). This Court should, too.

Assuming the waiver applies, this Court will enforce it if: (1) the appeal falls within the scope of the waiver; (2) the defendant knowingly and voluntarily waived his appeal rights; and (3) enforcing the waiver would not result in a miscarriage of justice. *United States v. Hahn*, 359 F.3d 1315, 1325-27 (10th Cir. 2004). All three conditions are met.

First, Moon Seals waived his right to appeal “any matter in connection with [his] prosecution, conviction or sentence” unless: (1) the sentence exceeded the statutory maximum; (2) the sentence exceeded the top of the guidelines range for an offense level of 20 and his criminal

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<sup>2</sup> In this sense, revocation of probation is distinct from revocation of supervised release, which must be explicitly included in an appeal waiver. *United States v. Porter*, 905 F.3d 1175, 1180 (10th Cir. 2018). To be sure, the line between probation and supervised release is often blurred. *See, e.g.*, U.S.S.G. ch. 7, pt. A intro. cmt. 4 (“Although there was considerable debate as to whether the sanction imposed upon revocation of probation should be different from that imposed upon revocation of supervised release, the Commission has initially concluded that a single set of policy statements is appropriate.”). But unlike with probation, revocation of supervised release does not involve *resentencing*, as “the defendant has served his sentence.” *Moore I*, 30 F.4th at 1027 n.9. *Porter* thus does not speak to probation revocations.

history; or (3) the government appealed. I:15. Here, the government did not appeal, and 36 months was less than the 10-year maximum and within the guidelines range of 33 to 41 months based on an offense level of 20 and Moon Seals's criminal history. *Hahn*'s first prong is met.

Next, Moon Seals must show that he did not knowingly and voluntarily waive his appeal rights. *United States v. Salas-Garcia*, 698 F.3d 1242, 1254 (10th Cir. 2012). The plea agreement confirms that he did. I:15. And although he may not have known that he would violate his probation and be resentenced to 36 months, a defendant need not "know with specificity the result he forfeits before his waiver is valid." *Hahn*, 359 F.3d at 1327. So this factor too is met.

Lastly, Moon Seals cannot establish a miscarriage of justice. *United States v. Anderson*, 374 F.3d 955, 959 (10th Cir. 2004). He must show that: (1) the court relied on an impermissible factor such as race; (2) the sentence was above the statutory maximum; (3) his waiver was due to ineffective assistance of counsel; or (4) the waiver is otherwise unlawful. *Hahn*, 359 F.3d at 1327. A waiver is "otherwise unlawful" only if an error related to the waiver "seriously affect[s] the fairness,

integrity, or public reputation of judicial proceedings.” *Id.* None of the factors apply.

This issue should be deemed waived by the appeal waiver.

**B. The Court should not address this preservation-only issue.**

Moon Seals raises the validity of *Moore I*'s two-step process solely for preservation, noting the argument is foreclosed by *Moore I* and *Moore II*. With the Court having now denied rehearing en banc in *Moore II*, this Court need not address the issue. *See United States v. McCranie*, 889 F.3d 677, 678 n.3 (10th Cir. 2018) (explaining that when a defendant “preserves” an “issue pending en banc or Supreme Court review,” this Court need “address it no further”).

Nor is this an appropriate case to address *Moore I*. As explained above, Moon Seals failed to preserve the issue below by arguing that *Moore I* was incorrect. And *Moore I*'s process is not at issue in this case given that the parties agree the district court in this case did not actually apply it. Should the two-step process need to be revisited, *see Moore II*, 2024 WL 4530719, at \*1 (Tymkovich, J., concurring in the denial of rehearing en banc), it should be in a case where the process actually occurred. Should this Court decide to reconsider *Moore I* en

banc, the United States requests the opportunity to respond. F.R.A.P. 35(e) (no response to an en banc petition may be filed until ordered).

**II. Moon Seals waived his challenge to the district court's sentencing analysis under his appeal waiver, invited the alleged error, and cannot show plain error under *Moore I*.**

**Preservation:** Moon Seals waived this issue through his appeal waiver and as invited error. He also concedes he forfeited the argument.

**Standard of review:** If the issue is reviewable, plain error applies. Moon Seals must show that: (1) the court erred; (2) the error was obvious under well-established law; (3) there is a reasonable probability the outcome would have been different; and (4) the error undermined the fairness, integrity, or reputation of the proceedings. *United States v. Booker*, 63 F.4th 1254, 1258, 1262 (2023).

**Argument:** Despite claiming that *Moore I* was wrongly decided, Moon Seals argues that the district court failed to apply it. He waived this argument and cannot show plain error.

**A. Moon Seals waived his challenge to any *Moore I* error through his appeal waiver and invited error.**

As with Moon Seals's first issue, the appeal waiver is valid and should be enforced. But his argument should also be deemed waived as invited error. *See ClearOne Commc'ns, Inc. v. Bowers*, 643 F.3d 735, 771

(10th Cir. 2011). This “doctrine prevents a party who induces an erroneous ruling from being able to have it set aside on appeal.” *United States v. Jereb*, 882 F.3d 1325, 1338 (10th Cir. 2018).

Moon Seals argues that the district court erred in failing to apply *Moore I*'s two-step analysis but concedes that he did “not raise this argument” below. Opening Br. at 13. But more than that, he actively *opposed* the two-step analysis, insisting that part of *Moore I* was dicta and sure to be overruled. III:13. To the extent the court did not strictly follow *Moore I*, Moon Seals got his wish, albeit not the desired outcome.

Moreover, the analytical framework that the court used was consistent with the one that Moon Seals proposed. Specifically, he argued that the district court should *start* with the Chapter 7 range. III:10, 13. The court declined to apply that range but did indeed begin its analysis where Moon Seals asked. III:37-38. And after rejecting the Chapter 7 range, the court looked to the original offense range, which Moon Seals had stated *was* permissible. III:10.

To the extent the court's analysis did not strictly follow *Moore I*, the court followed an approach that tracked the one Moon Seals proposed. So the error, if any, was invited and waived.

**B. The court did not plainly err in sentencing Moon Seals within the guidelines range for his original offense.**

Even if preserved, Moon Seals's argument that the district court committed plain error under *Moore I* lacks merit. Specifically, under the third prong of plain error, Moon Seals cannot show a reasonable probability of a lower sentence had the district court strictly applied *Moore I*. *United States v. Burns*, 775 F.3d 1221, 1224 (10th Cir. 2014).

Had the court mechanically applied the two-step process from *Moore I*, the court would have looked to the original offense guidelines range *and* the Chapter 7 range when imposing its sentence, rather than just the original range. The court thus would have considered the ranges of 33 to 41 months and 3 to 9 months (in effect, a combined range of 36 to 50 months). The 36-month sentence was at the bottom of that combined range but in the middle of the original range, upon which the court relied. Had the court also explicitly drawn from the Chapter 7 range, there is every reason to believe that the sentence would have been even *higher*—and certainly not lower. In other words:

- $(\text{Range 1} + \text{Range 2}) \geq (\text{Range 1})$
- $(\text{Range 1} + \text{Range 2}) \geq (\text{Range 2})$

Moon Seals dismisses the math as a “first blush” assumption. Opening Br. at 15. He contends that the court was “locked” into 0 months at step one and that the ultimate sentence, based only on the step two range of 3 to 9 months, would have been less than 36 months. This argument contorts *Moore I* and defies logic.

In *Moore I*, the district court originally announced a 51-month sentence as an alternative to probation. 30 F.4th at 1026. It was because of that announcement of a 51-month sentence as appropriate at the original sentencing that the court was “locked” into that sentence for pre-probation conduct when Moore’s probation violation later required it to engage in the two-step process. *Id.* Here, the district court did not announce what sentence would be appropriate if it did not give Moon Seals probation. But that does not mean the court was locked into its original sentence of probation (0 months). The better reading is that the court was not locked in *at all*.

After all, *Moore I* emphasized that “as the word ‘resentencing’ suggests, a district court must *reevaluate* the case as it stood when the court imposed probation.” *Id.* (emphasis added). And in doing so, the court may “impose *any other sentence that initially could have been*

*imposed.” Id.* (emphasis in original). To conclude that the original sentence at step one should remain probation because the pre-probation situation has not changed ignores *Moore I*'s recognition of the district court's discretion to impose any sentence that could have been imposed initially and its requirement that the court must reevaluate the case as it originally stood. Reevaluate means to reconsider in light of new information. And the new information is that probation was not the appropriate sentence the first time in light of the discovered violations. There simply is no lock-in of the proper outcome of the first step unless the court already analyzed the appropriate alternative to probation at the original sentencing.

Under Moon Seals's interpretation of *Moore I*, a district court would be locked into 0 months at step one *unless* the court announced an alternative sentence on the record at the time of the original sentencing. Otherwise, as he sees it, the court would not be “faithfully adhering to *Moore I*'s requirement that it consider only pre-probation conduct” at step one. Opening Br. at 16 (emphasis omitted). But courts are not required or expected to announce on the record an alternative sentence to probation. And under Moon Seals's reading, a district court

would be locked into a sentence no matter what—the alternative sentence (if it announced one) or 0 months (if it did not). His reading makes step one a ministerial exercise and collapses the analysis.

Moon Seals’s argument ultimately seeks what the defense could not achieve in *Moore II*: overruling, or at least rewriting, *Moore I*’s two-step analysis and directing courts to apply only Chapter 7. This Court should not endorse such an end run around *Moore I*.

In any event, Moon Seals’s “locked in” argument still cannot carry the day. He musters only a conclusory assertion that he would have received a lesser sentence had the court considered only step two’s range of 3 to 9 months. Opening Br. at 17. But there is not a remote possibility that the court would have imposed less than 36 months.

First, Chapter 7 itself would have directed the court to consider the leniency afforded to Moon Seals at the original sentencing. U.S.S.G. § 7B1.4 cmt. n.4.<sup>3</sup> Notably, such an instruction cannot be executed

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<sup>3</sup> Although the application note references downward departures, and Moon Seals’s probation was a downward variance, this is a difference without a distinction for this particular policy. *See Moore II*, 96 F.4th at 1297 n.6 (noting the district court relied on this application note); *see also United States v. Vixamar*, 679 F.3d 22, 33 (1st Cir. 2012).

*without* considering the original guidelines range. And with probation being a downward variance of 33 months from the original range, Moon Seals got a *very* lenient sentence indeed. The district court explained that leniency to Moon Seals at sentencing. III:183. And the sentence was so lenient that the court immediately regretted imposing it. III:38. Based on the leniency the court showed that Moon Seals then betrayed, the court would not have hesitated to depart from the Chapter 7 range.

Next, Chapter 7 stresses that courts should sanction probation violations based on the breach of trust. U.S.S.G. ch.7, pt. A, intro. cmt. (3)(b). Here, the breach could scarcely have been more severe. The violations occurred mere days after probation was imposed. And Moon Seals also did not violate standard conditions, such as staying employed or keeping a current address. *See, e.g.*, II:35. Rather, he violated two of his “special conditions,” including one that the court deemed “critical” to the probation. III:173; I:36. Moon Seals thus breached the court’s trust almost immediately and with conduct mirroring his original crimes. Moreover, as *Moore II* effectively recognized, the greater the variance from the original guidelines to reach probation, the greater the breach

of trust when probation is violated. 96 F.4th at 1290 n.6 (referencing district court’s reasoning based on U.S.S.G. § 7B1.4 cmt. n.4).

Finally, as noted above, Chapter 7 confirms that a court may “impose any other sentence that initially could have been imposed.” U.S.S.G. ch. 7, pt. A (citing 18 U.S.C. § 3565). A review of the transcript, including the “court’s careful development of the record” and its reasoning, should swiftly dispel any notion of a more favorable sentence. *Moore II*, 96 F.4th at 1303. Indeed, the district court could “take into account each of the considerations set out in § 3553(a) in deciding whether to vary from [the] § 7B1.4(a) advisory sentencing range[.]” *Id.* And Moon Seals agrees that the 36-month sentence was based on “consideration of the § 3553(a) factors.” Opening Br. at 6.

The record “leaves absolutely no doubt the district court would not impose a lower sentence under the scheme” Moon Seals proposes. *Id.* Whether  $36 + 0$  or  $0 + 36$ , the result would be the same, and certainly not less than 36. Moon Seals cannot satisfy plain error’s third prong.

**CONCLUSION**

The judgment should be affirmed.

DATED: November 4, 2024.

Respectfully submitted,

MATTHEW T. KIRSCH  
Acting United States Attorney

/s/ JESS D. MEKEEL  
JESS D. MEKEEL  
Assistant United States Attorney