**Case 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.

On Appeal from the United States District Court
for the District of District of Colorado (Denver)
The Honorable Charlotte N. Sweeney, District Judge
D.C. Case No. 1:22-cr-00245-CNS

# Appellant's Opening Brief

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Oral argument is requested.

August 2, 2024

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A. Judgment in a Criminal Case

# Table of Authorities

## Cases



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## Prior or Related Appeals

In this appeal, Mr. Moon Seals argues that this Court incorrectly created a two-step process for probation revocation sentencings in *United States v. Moore* (*Moore I*), 30 F.4th 1021 (10th Cir. 2021). This issue is the subject of a petition for rehearing en banc currently pending before this Court in *United States v. Moore* (*Moore II*), No. 22-3173.

## Jurisdiction

The district court had jurisdiction over this federal criminal case under 18 U.S.C. § 3231. The district court entered judgment on January 18, 2024. R. vol. 1 at 68.[1] Mr. Moon Seals filed a notice of appeal on January 23, 2024. *Id.* at 73. This Court has appellate jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

## Issue Presented

I. In *United States v. Moore* (*Moore I*), 30 F.4th 1021 (10th Cir. 2022), this Court held that sentencing upon a probation revocation follows a two-step process: *first*, the district court must resentence the defendant based solely on pre-probation conduct and the initial guideline range; and *second*, the district court must impose a separate sentence for the probation violation based on the Chapter 7 guideline range. Is *Moore I*'s two-step process incorrect because the relevant statutes and guidelines clearly call for a single sentence based solely on the Chapter 7 guideline range? **(For preservation only)**

II. Did the district court plainly err in failing to employ *Moore I*'s two-step process?

## Statement of the Case

### I. Mr. Moon Seals is sentenced to probation for making online threats to government officials.

In November 2021, an 18-year-old Malachi Moon Seals began sending vulgar and disturbing threats to several members of Congress through their official websites. *See* R. vol. 2 at 8, 10. As a result, a grand jury indicted Mr. Moon Seals on six counts

[1] Record citations are to the volume filed in this Court and the page number in the bottom, right-hand corner of each page.

of threatening a federal official and/or their family members in violation of 18 U.S.C. § 115(a)(1) and six counts of interstate communication of threats in violation of 18 U.S.C. § 875(c). R. vol. 1 at 5-12. Mr. Moon Seals entered into a plea agreement with the government under which he agreed to plead guilty to all twelve counts. *Id.* at 13. Although the parties estimated Mr. Moons Seals' guideline range would be 24-33 months of imprisonment, the government agreed to a sentence of probation. *Id.* at 14, 27.

Following his guilty plea, a probation officer prepared a presentence report (PSR). R. vol. 2 at 5, 155. The PSR calculated Mr. Moon Seals' guidelines range as 33-41 months of imprisonment, higher than the parties' estimate. *Id.* at 26, 175. Nevertheless, the probation officer agreed with the parties that probation was the appropriate sentence and recommended a term of four years. *Id.* at 30, 179. In support of the downward variant sentence, the PSR explained that Mr. Moon Seals had no prior criminal history; that he suffered a traumatic brain injury requiring surgery when he was four years old; that he recently underwent surgery to replace the plate in his head and relieve pressure on his brain, which pressure could have played a role in the offense; and that it was undisputed that he took no steps toward carrying out the threats and was not a danger to the community. *Id.* at 34-35.

At sentencing, the district court accepted the recommendation of the parties and probation and imposed a five-year term of probation. R. vol. 1 at 34; vol. 3 at 168.

## II. The district court revokes probation and sentences Mr. Moon Seals based on the original offense guideline range.

Less than two weeks into Mr. Moon Seals' probation, a probation officer filed a petition alleging that Mr. Moon Seals violated two conditions of his probation by sending an online threat to a former director-level officer of the CIA. R. vol. 1 at 39. Mr. Moon Seals was arrested and ordered detained pending a hearing on the probation violations. *Id.* at 45-46.

Prior to the hearing, the probation officer issued a probation violation report (PVR). R. vol. 2 at 262. According to the PVR, the threat amounted to a Grade C violation. *Id.* at 264. When combined with Mr. Moon Seals' criminal history category of I, the PVR observed that the policy statements in Chapter 7 of the Guidelines Manual provided for a guideline range of 3 to 9 months of imprisonment. *Id.* at 264 (citing U.S.S.G. § 7B1.4(a)). Nevertheless, the PVR asserted that a 1992 case from this Court, *United States v. Maltais*, 961 F.2d 1485 (10th Cir. 1992), held that upon revocation of probation, a district court was required to impose a sentence within the original guideline range, which was 33 to 41 months. *Id.* at 264. Accordingly, the PVR recommended imposing 33 months of imprisonment, the bottom of the original range. *Id.*

Mr. Moon Seals filed an objection to the PVR's guideline calculation. R. vol. 1 at 60. Mr. Moon Seals explained that the relevant statutes and guidelines make clear that the applicable guideline range upon revocation of probation is found in Chapter

7, which expressly applies to revocations of probation. *Id.* at 61-62 (citing, e.g., 18 U.S.C. § 3553(a)(4)(B); U.S.S.G. § 7B1.3(b) ("In the case of revocation of probation . . . the applicable range of imprisonment is that set forth in § 7B1.4.")).

He further explained that *Maltais* was inapposite for two reasons. First, it was decided long before *United States v. Booker*, 543 U.S. 220 (2005), when the guidelines range was still mandatory. *Id.* at 62. And second, the defendant in *Maltais* was originally sentenced before Chapter 7 existed, and applying Chapter 7 at his revocation sentencing actually increased his guidelines range above what was available at his original sentencing. *Id.* at 62-63. Under those unique circumstances, this Court held the district court was limited to the original offense guideline and erred in applying Chapter 7. *Id.* Here, however, as in the typical case, Chapter 7 provided the applicable guideline range, which was 3 to 9 months of imprisonment. *Id.* at 63.

For its part, the government argued that the original offense guideline range was appropriate. R. vol. 2 at 299. In support, it cited *United States v. Moore* (*Moore I*), 30 F.4th 1021 (10th Cir. 2022). *Id.* at 298. In *Moore I*, this Court held that when sentencing upon probation revocation, a district court must follow a "two-step process." *Moore I*, 30 F.4th at 1026. "First, they must consider the recommended guideline range in a PSR and impose a sentence for the originally charged crime based only on a defendant's *pre*-probation conduct." *Id.* at 1027. "And second, they must consider Chapter 7's policy statements and sentence a defendant for the probation violation based only on the defendant's *post*-probation conduct." *Id.* Although the

government acknowledged *Moore I* and said it was "instructive," the government did not urge the district court to strictly adhere to the two-step process. Rather, it simply advocated for a sentence within the original guideline range. R. vol. 2 at 299.

At the hearing, Mr. Moon Seals acknowledged that *Moore I* set out a "two-step process" where the district court must first resentence the defendant on the original offense based solely on "pre-probation conduct" and then separately sentence the defendant for the probation violation based solely on the "post-probation conduct." R. vol. 3 at 13. However, Mr. Moon Seals argued that this language from *Moore* was merely dicta and was incorrect. *Id.* Indeed, Mr. Moon Seals pointed out that this very issue—whether the two-step process was binding precedent or merely dicta—was then before the Tenth Circuit in *Moore II*. *Id.* Accordingy, Mr. Moon Seals maintained that Chapter 7 provided the applicable guideline range:

> So what I'm asking this Court to do is start at Chapter 7, and Chapter 7 very clearly says in 7B1.3 – 7B1.3(b), in a case of a revocation of probation or supervised release, the applicable range of imprisonment is that set forth in 7B1.4, which is that chart. So I think that the appropriate guideline range to start from is that promulgated by that chart here. We have Grade C conduct. We have a defendant who is a Criminal History Category I with no other prior criminal history, and the applicable range is 3 to 9 months.

*Id.* at 14.

Accordingly, based on that guideline range, Mr. Moon Seals argued that nine months was an appropriate sentence.

The district court acknowledged Mr. Moon Seals's position that Chapter 7 provided the applicable guideline range and that the government and probation urged it to impose a sentence within the original guideline range. According to the district court, it was within its discretion to use "either range." *Id.* at 38 ("[I]t appears that I could use either range."). And it decided that the original offense guideline range was more appropriate:

> So I am choosing not to follow -- I acknowledge Chapter 7. It is advisory. I'm not following it. . . . I will stick to the 33 to 41 months under the original offenses, and I believe that will be the range that is appropriate here.

*Id.* at 38-39.

Based on the original offense guideline range, and in consideration of the § 3553(a) factors, the district court imposed a guideline sentence of 36 months of imprisonment. *Id.* at 43-44.

Mr. Moon Seals appealed. R. vol. 1 at 73.

## III. After sentencing, this Court affirms that *Moore*'s two-step process is part of the holding and constitutes binding precedent.

After sentencing, during the pendency of this appeal, a panel of this Court decided in *Moore II* that *Moore I*'s two-step process was part of the holding, not dicta, and it is therefore binding precedent in this Circuit. *United States v. Moore* (*Moore II*), 96 F.4th 1290, 1293-94 (10th Cir. 2024). The panel admitted it was "not without some doubt as to the correctness of *Moore*'s mandatory two-step process." *Id.* Indeed, it noted that "[i]f presented with the issue as one of first impression, this panel might

very well conclude Moore's reading of the relevant statutes and Sentencing Guidelines is correct." *Id.* at 1302. However, the panel concluded that *Moore I*'s two-step process was not so "dead wrong" that an exception to the law-of-the-case doctrine applied. *Id.* Accordingly, this two-step process is binding on all district courts in the Tenth Circuit.[2]

## Summary of Argument

**I.** In *Moore I*, this Court held, sua sponte, that probation revocation sentencings follow "a two-step process." *United States v. Moore* (*Moore I*), 30 F.4th 1021, 1026 (10th Cir. 2022). First, the district court must resentence the defendant based solely on pre-probation conduct using the original offense guideline range. *Id.* at 1026-27. And second, it must impose a separate sentence based solely on post-probation conduct using the Chapter 7 guideline range. *Id.* This is clearly incorrect. The relevant statutes and guidelines provide that a district court imposes only one sentence based solely on the Chapter 7 guideline range for the probation violation—it does not also impose a new and separate sentence on the original offense. *See* 18 U.S.C. § 3553(a)(4) (instructing courts to consider the Chapter 7 guidelines upon probation revocation); U.S.S.G. § 7B1.3(b) ("In the case of a revocation of probation or supervised release, the applicable range of imprisonment is that set forth in § 7B1.4."). The district court erred by failing to apply the Chapter 7 guideline range. Although this issue is

[2] A petition for rehearing en banc is currently pending in *Moore II*, No. 22-3173.

foreclosed by binding precedent, Mr. Moon Seals preserves the issue for further review.

**II.** Even if *Moore I*'s two-step process were correct, the district court still erred because it failed to follow it. That is, it employed a one-step process and imposed a middle-of-the-guidelines sentence based solely on the original offense guideline. Under *Moore I*, this was plainly erroneous. Moreover, while it might seem counterintuitive, there is a reasonable probability that Mr. Moon Seals would receive a lower sentence under the two-step process. That's because *Moore I* makes clear that, at step one, the district court must resentence based *solely* on *pre*-probation conduct. Thus, in *Moore I*, where the district court had announced an alternative sentence of imprisonment it deemed appropriate at the initial sentencing, the district court was "locked" into that previously announced sentence of imprisonment upon revocation. Where, as here, there is no alternative sentence of imprisonment, it stands to reason that the district court is "locked" into the sentence it originally imposed, i.e. probation. Next, at step two, the district court is required to consider only the Chapter 7 guidelines, which here was just 3 to 9 months of imprisonment. Thus, under the two-step process, Mr. Moon Seals is realistically looking at a total sentence of 3 to 9 months of imprisonment, significantly lower than the 36 months the district court imposed based solely on the original offense guideline. Accordingly, the plain error affects Mr. Moon Seals' substantial rights, and this Court should remand for resentencing.

## Argument

### I. *Moore I* incorrectly held that probation-revocation sentencings require a two-step process involving both a resentencing on the original offense and a separate sentence for the probation violation (Preservation only).

In *Moore I*, a panel of this Court held, sua sponte, that probation revocation sentencings follow "a two-step process." *United States v. Moore* (*Moore I*), 30 F.4th 1021, 1026 (10th Cir. 2022). First, the district court must resentence the defendant on the original offense based solely on pre-probation conduct using the original offense guideline range. *Id.* at 1026-27. And second, it must impose a separate sentence for the probation violation based solely on post-probation conduct using the Chapter 7 guideline range. *Id.*

Until *Moore I*, this two-step process had never been employed in any federal court. That's because the relevant statutes, legislative history, and guidelines indicate that a district court imposes only one sentence based solely on the applicable guideline range for the probation violation—it does not also impose a new and separate sentence for the original offense. *See* 18 U.S.C. § 3553(a)(4); U.S.S.G. § 7B1.3(b).

As he argued below, Mr. Moon Seals maintains that *Moore I*'s two-step process is incorrect and that Chapter 7 supplies the applicable guideline range upon revocation of probation. *See* R. vol. 1 at 60; vol. 3 at 9-14. Although Mr. Moon Seals acknowledges that *Moore I* and *Moore II* foreclose this issue, *see United States v. Moore* (*Moore II*), 96 F.4th 1290 (10th Cir. 2024), he raises the argument here to preserve it for en banc or Supreme Court review.

### A. The two-step process is contrary to the plain language of the relevant statutes, the legislative history, and the applicable guidelines, and it had never been employed in any federal court.

The probation-revocation statute provides that, if a defendant violates a condition of probation, the district court may "revoke the sentence of probation and resentence the defendant under subchapter A." 18 U.S.C. § 3565(b). Subchapter A applies to all sentencings and contains the oft-cited § 3553(a) factors, including (a)(4), which requires district courts to consider the applicable guidelines range. Specifically, it provides that the district court must consider the guideline range for:

> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—(i) issued by the Sentencing Commission pursuant to section 994(a)(1) . . . ***or***
> (B) ***in the case of a violation of probation or supervised release***, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3).

*Id.*

The guidelines and policy statements referenced in subsection (A) are those generally used in imposing sentence in a criminal case, including the familiar sentencing table in Chapter 5 of the Guidelines. *See* 28 U.S.C. § 994(a)(1). Those referenced in subsection (B) are those that expressly apply at probation and supervised release revocations, all of which are found in Chapter 7. *See* 28 U.S.C. § 994(a)(3).

In other words, the general sentencing statute states that the district court must consider (A) the guidelines applicable to the underlying offense, ***or*** (B) in the case of a

violation of probation or supervised release, the Chapter 7 guidelines. By using the disjunctive "or," the plain language of the statute does not permit *Moore I*'s two-step process under which the district court imposes a sentence based on the original offense ***and*** the probation violation. Indeed, as an earlier Tenth Circuit panel concluded, albeit in an unpublished opinion, "It is doubtful that Congress could have more clearly stated that, in formulating sentences, district courts are generally to consider the guidelines promulgated pursuant to [§ 994(a)(1)], while in cases concerning revocation of probation or supervised release they are to consider the applicable guidelines or policy statements issued pursuant to § 994(a)(3)." *United States v. Vogt*, 106 F.3d 414 (10th Cir. 1997) (unpublished).

A review of the relevant legislative history further confirms that Congress intended for courts, when faced with a probation revocation, to consider Chapter 7 only. As the Third Circuit noted, § 3553(a)(4)(B) was added as part of a 1994 amendment to the statute. *United States v. Schwegel*, 126 F.3d 551, 554 (3rd Cir. 1997). This amendment was intended to make clear that courts were to consider the probation revocation-specific guidelines and policy statements when sentencing for a probation revocation. *Id.*

> As the then-Chairman of the [Sentencing] Commission, Fourth Circuit Judge William W. Wilkins, Jr., explained in a letter to Senator Strom Thurmond, the purpose of the amendment was to make it clear that resentencing for probation and supervised release violations should be based "upon sentencing guidelines and policy statements issued by the Commission specifically for that purpose," rather than upon the guidelines applicable to the initial sentencing.

*Id.* (citing 136 Cong. Rec. S14894-95).

The Guidelines implement this plain statutory command. Section 7B1.3, which governs revocations of probation and supervised release, expressly provides, "In the case of a revocation of probation or supervised release, the applicable range of imprisonment is that set forth in § 7B1.4 (Term of Imprisonment)." § 7B1.3(b). Again, the Sentencing Commission could hardly have been more clear. Upon revocation of probation, the applicable range of imprisonment is based on the sentencing table in § 7B1.4. That next section is equally clear: "The range of imprisonment applicable upon revocation is set forth in the following table." § 7B1.4. Conspicuously absent from the guideline is any mention that, upon revocation, the district court must also resentence the defendant on the original offense, or that the revocation table comprises only one small part of the total recommended sentence of imprisonment. Rather, it clearly contemplates that § 7B1.4 provides the *entire* "range of imprisonment applicable upon revocation." *Id.* It leaves no room for the possibility that *Moore I*'s two-step process is correct.

Tellingly, counsel is unaware of any federal court having employed the two-step process before it was mandated in *Moore I*. This strongly suggests that, in the 30 years since § 3553(a)(4)(B) was added to make clear that probation-revocation sentences are governed by Chapter 7, district courts have had no trouble understanding that, and they have uniformly followed the plain language of the statute and guidelines.

Accordingly, *Moore I*'s two-step process is contrary to § 3553(a) and its legislative history, Chapter 7 of the Guidelines, and every district court to have previously imposed a sentence upon revocation of probation. As Mr. Moon Seals argued below, the applicable guideline range upon revocation is that provided in Chapter 7. The district court erred in concluding otherwise.

## II. The district court plainly failed to employ *Moore I*'s two-step process.

Assuming the ongoing validity of *Moore I*'s two-step process, the district court erred by failing to employ it here. Because Mr. Moon Seals did not raise this argument below, this Court's review is for plain error. *United States v. Jones*, 74 F.4th 1065, 1068 (10th Cir. 2023). Under that standard, this Court will reverse "when there is '(1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* (citation omitted). Because Mr. Moon Seals can satisfy plain error, this Court should vacate the judgment and remand for resentencing.

### A. The district court's error is plain.

Under *Moore I*, when sentencing upon revocation of probation, district courts must "undertake a two-step process." *Moore I*, 30 F.4th at 1027. "First, they must consider the recommended guideline range in a PSR and impose a sentence for the originally charged crime based only on a defendant's *pre*-probation conduct." *Id.* "And second, they must consider Chapter 7's policy statements and sentence a defendant for the probation violation based only on the defendant's *post*-probation conduct." *Id.*

The district court failed to employ the requisite two-step process here. Rather, the district court incorrectly thought it "could use either range"—i.e., either the guidelines range for the original offense *or* the Chapter 7 guidelines. The district court effectively collapsed the two steps into one flawed one, applying only the original offense guideline and considering all of Mr. Moon's pre- and post-probation conduct. In light of *Moore I*'s creation of this two-step process and *Moore II*'s declaration that it constitutes binding precedent, the district court plainly erred in failing to follow it. *See United States v. Cantu*, 964 F.3d 924, 935 (10th Cir. 2020) (An error is plain "if it is clear or obvious under current, well-settled law of this court or the Supreme Court." (citation omitted)); *United States v. Salas*, 889 F.3d 681, 686-87 (10th Cir. 2018) ("[An] error is plain if it is 'clear or obvious at the time of the appeal.'" (citation omitted)); *accord Henderson v. United States*, 568 U.S. 266, 276 (2013).

### B. There is a reasonable probability Mr. Moon Seals would have received a lower sentence but for the error, and this Court should remand for resentencing.

In the sentencing context, an error affects substantial rights if there is a reasonable probability the district court would have imposed a lower sentence but for the error. *United States v. Rosales-Miranda*, 755 F.3d 1253, 1258-59 (10th Cir. 2014). "The reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different." *United States v. Starks*, 34 F.4th 1142, 1157 (10th Cir. 2022) (citation omitted). Instead, a "reasonable probability is a

probability sufficient to undermine confidence in the outcome." *Id.* (citation omitted). Here, there is a reasonable probability that the district court would have imposed a lower sentence under *Moore I*'s two-step process.

At first blush, one might assume that Mr. Moon Seals would have received a *higher* sentence under the two-step process, not a lower one. But a closer look at *Moore I* reveals why that's not the case.

The issue actually presented in *Moore I* was whether the district court erred in employing a "sentence-in-advance system." 30 F.4th at 1024. That is, at the initial sentencing, the district court gave Mr. Moore a choice between 51 months of imprisonment, as the government requested, or a term of probation with the threat of 84 months of imprisonment for any probation violation. *Id.* at 1023. The district court made clear that it was "prepared to give" him 51 months of imprisonment, but was "also willing to take a chance on him" and give him probation. *Id.* Mr. Moore opted for probation, he later violated his conditions, and the district court sentenced him to 84 months of imprisonment as promised. *Id.* at 1024. The *Moore I* panel held that this sentence-in-advance system was plainly erroneous. *Id.* at 1025-26. It then went on to state, sua sponte, that probation-revocation sentencings entail this "two-step process."

As *Moore I* explained the first step, "a district court must reevaluate the case as it stood when the court imposed probation. Under § 3553(a)(4)(A), that takes the court back to the probation office's recommendations, the parties' objections, and the § 3553(a) factors, including a defendant's history, characteristics, and conduct *pre-*

*probation-sentence*." 30 F.4th at 1026. "As for the first step" in *Moore I*, "the district court had already announced that a 51-month sentence of imprisonment was the appropriate sentence for Mr. Moore's crime. It did so after considering Mr. Moore's pre-probation-sentence conduct and the § 3553 (a) factors." *Id.* "And because the district court had all this information when it sentenced Mr. Moore to probation, it locked itself into 51 months' imprisonment." *Id.*

While *Moore I* did not purport to limit the two-step process to cases where the court announces alternative sentences of imprisonment and probation, that is the only circumstance where such a procedure makes sense. That's because in the typical case, as here, if the district court is genuinely transporting itself back to the case as it stood at the original sentencing for purposes of step one, then it is necessarily "locked" into the sentence it actually imposed, i.e., probation. Where no such alternative sentence of imprisonment was announced, a district court cannot in good faith impose any other sentence if it is faithfully adhering to *Moore I*'s requirement that it consider only *pre-probation conduct* in resentencing the defendant at step one. In other words, because there are no changed circumstances to consider at step one, and no previously announced alternative sentence of imprisonment to impose, a district court cannot justify any change in the sentence. Accordingly, had the district court here correctly applied *Moore I*'s two-step process, it would have been compelled to impose a sentence of probation, i.e., zero months of imprisonment, at step one. Indeed, as *Moore I* acknowledged, "a district court could choose to impose as part of its

sentence[] for the originally charged crime . . . a term of 0 months' imprisonment." *Id.* at 1027 n.10.

"At the second step, and *separately*, . . . a district court must apply the policy statements in Part B—Probation and Supervised Release Violations—of Chapter Seven of the Sentencing Guidelines to impose any penalty 'for the violation of the judicial order imposing supervision.'" *Id.* at 1026 (quoting U.S.S.G. ch. 7, pt. B, introductory cmt.). "Indeed, Chapter Seven of the Sentencing Guidelines provides its own sentencing grid . . . . So at this second step, the district court must consider the § 7B1.4 sentencing grid for the probation violation—*not the sentencing guidelines for the underlying offense*." *Id.*

Here, at step two, the district court would be required to consider only the Chapter 7 guideline range of 3-9 months of imprisonment. Indeed, it would be prohibited from considering the sentencing guidelines for the underlying offense at this step. Thus, there is a reasonable probability that the district court would have imposed a guideline sentence of 3-9 months at step two. When combined with the zero months of imprisonment the district court is locked into at step one, Mr. Moon Seals would be looking at a total sentence of just 3-9 months of imprisonment. Accordingly, there is a reasonable probability that, but for the error, the district court would have imposed something less than 36 months of imprisonment. Therefore, the error affected Mr. Moon Seals' substantial rights.

Finally, the fourth prong is satisfied as well. Indeed, it is presumptively satisfied where, as here, there is a reasonable probability that the defendant is serving a longer sentence than they otherwise would have but for the error. *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014) ("And turning to plain error's fourth prong, what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?"). Accordingly, Mr. Moon satisfies all four prongs of plain error.

## Conclusion

This Court should vacate the judgment and remand for resentencing.

## Statement Concerning Oral Argument

Oral argument is requested because counsel believes it will aid the Court's resolution of the issues raised in this appeal.

Respectfully submitted,

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## Certificate of Compliance

As required by Fed. R. App. P. 32(g)(1), I certify that this brief is proportionally spaced and contains 4,604 words. I relied on my word processor to obtain the count, and the information is true and correct to the best of my knowledge.

*/s/ Jacob Rasch-Chabot*
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