

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	Case No. 24-1028
	)	
v.	)	District of Colorado
	)	22-cr-00245-CNS-1
MALACHI MATHIAS MOON	)	
SEALS,	)	
	)	
Defendant-Appellant.	)	

Appellant's Petition for Rehearing En Banc

Rule 40(b)(2) Statement

At an initial sentencing, the district court generally must correctly calculate the advisory guideline range, consider the § 3553(a) factors, and impose a reasonable sentence within the statutory range. Resentencing upon revocation of probation follows this familiar formula, the main difference being that the advisory range is based on the policy statements in Chapter 7 of the Guidelines (governing probation and supervised release), not the range for the underlying offense in Chapter 5. At least, this is the procedure adopted by every circuit court besides the Tenth. *See United States v. Vixamar*, 679 F.3d 22, 32-33 (1st Cir. 2012); *United States v. Verkhoglyad*, 516 F.3d 122, 127-32 (2d Cir. 2008); *United States v. Albright*, 67 F. App'x 751, 755-56 (3d Cir. 2003); *United States v. Moulden*, 478 F.3d 652, 656-58

(4th Cir. 2007); *United States v. Kippers*, 685 F.3d 491, 497-501 (5th Cir. 2012); *United States v. Hudson*, 207 F.3d 852, 852-54 (6th Cir. 2000); *United States v. Tatum*, 760 F.3d 696, 697 (7th Cir. 2014); *United States v. Michael*, 909 F.3d 990, 993-95 (8th Cir. 2018); *United States v. Olabanji*, 268 F.3d 636, 637-39 (9th Cir. 2001); *United States v. Cook*, 291 F.3d 1297, 1299-1302 (11th Cir. 2002).

In the Tenth Circuit, this Chapter 7-based punishment is imposed “*in addition to*” a new Chapter 5-based punishment for the underlying offense. *United States v. Moon Seals*, --- F.4th ----, 2025 WL 2942705, at *6 (10th Cir. Oct. 17, 2025). That’s because in *United States v. Moore (Moore I)*, 30 F.4th 1021 (10th Cir. 2022), a two-judge majority *sua sponte* determined that, upon probation revocation, the district court must employ a “two-step process”: *first*, the court must resentence the defendant on the underlying offense based on the Chapter 5 guidelines range; and *second*, it must add an additional punishment for the probation violation based on Chapter 7.

Because *Moore I*’s two-step process “conflicts with an authoritative decision of another United States court of appeals,” Fed. R. App. P. 40(b)(2)(C)—indeed, it conflicts with decisions in *every* court of appeals—en banc consideration is warranted. See Bobby R. Baldock, Joel M. Carson II, Bryston C. Gallegos, *Strategic Considerations for Going En Banc in the Tenth Circuit*, 100 Den. L. Rev. 325, 335 (2023) (“An intercircuit conflict ... is an

important consideration for en banc review” and “is more likely when Tenth Circuit authority is an outlier compared to a large majority of other circuits that have addressed an issue.”).

Indeed, two judges have recognized this issue merits en banc review, asserting that the “reasoning of the two-step sentencing procedure set forth in [*Moore I*] should be addressed in a future case where it is objected to below and raised before us on direct appeal.” *United States v. Moore* (*Moore III*), 119 F.4th 1232, 1232-33 (10th Cir. 2024) (Tymkovich, J., concurring) (joined by Carson, J.). This is that case, and this Court should grant en banc review.

Background

After Mr. Moon Seals admitted to violating conditions of his probation, the district court revoked probation. *Moon Seals*, 2025 WL 2942705, at *2. At the resentencing, Mr. Moon Seals urged the district court not to apply *Moore I*’s two-step process and to instead impose sentence based on the Chapter 7 range, which in his case was 3-9 months. *Id.* The district court declined to do so and instead imposed 36 months of imprisonment based on the original offense guideline range of 33 to 41 months. *Id.* at *2-3.

On direct appeal, Mr. Moon Seals raised a challenge to *Moore I*’s two-step process for preservation purposes only. *Id.* at *6. A three-judge panel affirmed without addressing the merits of *Moore I*. *Id.* However, in a concurring opinion, Judge Phillips wrote separately to address *Moore I* “in

view of the likelihood of further challenges built on doubts expressed by a different panel in *Moore II*.” *Id.* at *6. *See United States v. Moore (Moore II)*, 96 F.4th 1290, 1300 (10th Cir. 2024) (“If 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.”). The concurrence set out to support *Moore I* primarily by doing a deep dive into the legislative history of the relevant statutes, 18 U.S.C. §§ 3553(a)(4), 3565(b). *Id.*

Mr. Moon Seals now petitions this Court for en banc review.

Discussion

This Court should go en banc to consider *Moore I*’s two-step process, which is contrary to the procedure adopted by every other circuit, as well as incorrect.

In *Moore I*, a two-judge majority 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 underlying conviction using the original offense guideline range. *Id.* at 1026-27. And second, it must impose an additional punishment for the probation violation using the Chapter 7 range. *Id.*

Every other court of appeals has held that, in resentencing a defendant upon revocation of probation, the district court imposes a single punishment based on the advisory range in Chapter 7. *See Vixamar*, 679 F.3d at 32-33;

Verkhoglyad, 516 F.3d at 127-32; *Albright*, 67 F. App'x at 755-56; *Moulden*, 478 F.3d at 656-58; *Kippers*, 685 F.3d at 497-501; *Hudson*, 207 F.3d at 852-54; *Tatum*, 760 F.3d at 697; *Michael*, 909 F.3d at 993-95; *Olabanji*, 268 F.3d at 637-39; *Cook*, 291 F.3d at 1299-1302. *Moore* *I*'s two-step process is thus in direct conflict with decisions in every other circuit, making the Tenth Circuit an extreme outlier. It is also incorrect. The relevant statutes, legislative history, and guidelines confirm that, upon revoking probation, courts must resentence the defendant based on the Chapter 7 sentencing range alone.

The *Moon Seals* concurrence's analysis of the legislative history does not prove otherwise. Indeed, the excerpts from the congressional record on which it relies completely undermine its position. That is, they repeatedly and expressly state that only Chapter 7 applies to sentences imposed upon revocation of probation, not Chapter 5—the very process that every other circuit has adopted.

Accordingly, this Court should grant en banc review to consider *Moore I*'s two-step process.

A. The relevant statutes, guidelines, and legislative history provide for a single punishment based on the Chapter 7 policy statements.

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 sentencing range provided in the Guidelines. Specifically, it provides that the district court must consider the “sentencing range established 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 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). The guidelines or policy statements referenced in subsection (B) are those that expressly apply to revocation of probation and supervised release, which are found in Chapter 7. *See* 28 U.S.C. § 994(a)(3). Thus, the general sentencing statute provides that, when sentencing upon revocation of probation, the district court must consider the range set forth in the Chapter 7 policy statements, not the Chapter 5 guideline range.

The legislative history of § 3565(b) and § 3553(a)(4) confirms this interpretation. As the *Moon Seals* concurrence describes in depth, *see* 2025 WL 2942705, at *6-10, both statutes took their current form in 1994. Before

that amendment, § 3565(b) provided that, upon revoking probation, the district court could “impose any other sentence that *was available* under subchapter A *at the time of the initial sentencing*.” § 3565(b) (emphasis added). And § 3553(a)(4) contained only the text of what is now subsection (A), referring only to the Chapter 5 guidelines range. Based on this language, several courts held that, upon revoking probation, the district court had to impose a sentence within the original guidelines range, because that was the sentence that “was available under subchapter A at the time of the initial sentencing.” *See, e.g., United States v. Smith*, 907 F.2d 133 (11th Cir. 1990).

In 1994, Congress amended § 3565(b) to simply state that the court must “resentence the defendant under subchapter A,” removing the requirement that the sentence was previously available at the time of the initial sentencing. And Congress added the alternative subsection (B) to § 3553(a)(4), providing that, “in the case of a violation of probation or supervised release,” courts must consider “the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3),” i.e., the policy statements in Chapter 7. These changes had been drafted by Judge Wilkins, who was then Chairman of the Sentencing Commission, and sponsored by Senator Thurmond. As Judge Wilkins and Senator Thurmond repeatedly explained throughout the congressional record,

the purpose of the amendments was to clarify that Chapter 7, not Chapter 5, applies to resentencing upon revocation of probation:

The clarifying language will provide that revocation decisions are to be based upon sentencing guidelines and policy statements issued by the Commission specifically for that purpose [i.e., Chapter 7], thereby negating any implication in current statutory language that the guidelines applicable to the initial sentencing of defendants also apply to probation revocation decisions.

...

It specifically references the guidelines or policy statements issued by the Commission under 18 U.S.C. § 994(a)(3) [i.e., Chapter 7] to remove any doubt that these pronouncements—*not those applicable to initial sentencing decisions*—are the appropriate reference for revocation purposes.

137 Cong. Rec. 28230 (1990) (statement of Sen. Thurmond) (emphasis added).

Senator Thurmond was perhaps even more explicit at the next legislative session, unambiguously asserting that the original offense guideline “is no longer applicable” and that the sentence is constrained “only” by the statutory maximum penalty and Chapter 7:

The bill would: (1) make more explicit ... that, when revoking a probationary sentence, the guideline range operative at the time the defendant was sentenced to probation *is no longer applicable*; rather the court is constrained *only* by the maximum statutory penalties for the offense and any Sentencing Commission guidelines or policy statements specifically applicable to probation revocation [i.e., Chapter 7].

137 Cong. Rec. 14821 (1991) (emphasis added).

Consistent with the statutory language and legislative history, Chapter 7 itself purports to provide the applicable range of imprisonment upon revocation of probation: “In the case of a revocation of probation, the

applicable range of imprisonment is that set forth in § 7B1.4 (Term of Imprisonment).” § 7B1.3(b). In turn, § 7B1.4 states, “The range of imprisonment applicable upon revocation is set forth in the following table.”

Accordingly, the relevant statutes, legislative history, and guidelines provide that probation-revocation sentences must be based on the Chapter 7 sentencing range alone.

B. The other ten circuits have all held that the sentencing range in Chapter 7 applies to the entire sentence imposed upon revocation of probation.

Based on the relevant statutes, guidelines, and legislative history, all ten other circuits have held that the sentencing range in Chapter 7 applies to the entirety of the sentence imposed upon revocation of probation. *See Vixamar*, 679 F.3d at 32-33, *Verkhoglyad*, 516 F.3d at 127-32, *Albright*, 67 F. App’x at 755-56, *Moulden*, 478 F.3d at 656-58, *Kippers*, 685 F.3d at 497-501, *Hudson*, 207 F.3d at 852-54, *Tatum*, 760 F.3d at 697, *Michael*, 909 F.3d at 993-95, *Olabanji*, 268 F.3d at 637-39, *Cook*, 291 F.3d at 1299-1302. Because this Court’s holding in *Moore I* conflicts with these decisions, this Court should grant en banc review.

To be sure, none of these decisions expressly consider and reject *Moore I*’s two-step process. But in each case, that the Chapter 7 sentencing range applies to the entire probation-revocation sentence was “essential to the determination of the case” and therefore constituted part of the holding, as

opposed to mere dicta, *Moore II*, 96 F.4th at 1300. Accordingly, *Moore I*'s two-step process genuinely “conflicts” with the holdings of every other circuit within the meaning of Rule 40(b)(2)(C).

For example, in several of these cases, the defendants argued that, even after the 1994 amendments to § 3553(a)(4) and § 3565(b), district courts continued to be bound by the original guidelines range upon revocation of probation. *Albright*, 67 F. App'x at 755-55, *Hudson*, 207 F.3d at 853-54, *Cook*, 291 F.3d at 1299-1300. In rejecting this argument, the courts held that, based on the 1994 amendments, the original offense guideline no longer applied and that the defendant must be resentenced based on Chapter 7. Thus, while these cases did not expressly consider the two-step approach, their holdings are irreconcilable with *Moore I*.

Similarly, several decisions addressed whether a defendant's probation-revocation sentence was procedurally reasonable. *See Verkhoglyad*, 516 F.3d at 127-32, *Moulden*, 478 F.3d at 656-58, *Kippers*, 685 F.3d at 497-501, *Hudson*, 207 F.3d at 852-54, *Michael*, 909 F.3d at 993-95, *Olabanji*, 268 F.3d at 637-39.¹ In doing so, they necessarily had to decide what the correct

¹ It should be noted that the Ninth Circuit's approach contains a unique quirk. That is, while it recognizes that courts must consider the Chapter 7 range under § 3553(a)(4)(B), it has also held that the original offense guideline must be considered as “guidelines applicable to similar offenses and offenders” under § 3553(b). *Olabanji*, 268 F.3d at 637-39. This still directly conflicts with *Moore I*.

procedure was. To that end, each held that resentencing upon probation revocation requires consideration of the Chapter 7 sentencing range. *See, e.g., Michael*, 909 F.3d at 994 (holding the sentence was procedurally unreasonable because there was no indication the district court considered or weighed the Chapter 7 policy statements before imposing a sentence above the Chapter 7 range).

Finally, several courts held that Chapter 7 applied to the entirety of the probation-revocation sentence in deciding whether the defendant's probation-revocation sentence was substantively unreasonable. *See Verkhoglyad*, 516 F.3d at 127-32, *Moulden*, 478 F.3d at 656-58, *Kippers*, 685 F.3d at 497-501, *Tatum*, 760 F.3d at 697, *Michael*, 909 F.3d at 993-95, *Cook*, 291 F.3d at 1299-1302. In *Michael*, for example, the Eighth Circuit held that the sentence of 96 months was substantively unreasonable in light of the Chapter 7 range of 3-9 months, notwithstanding that it was one month below the original offense guideline range. *Id.* at 995. The court's conclusion that the Chapter 7 range applies to the entire revocation sentence, not the Chapter 5 range, was essential to that holding, and it directly conflicts with *Moore*'s two-step process.

Accordingly, *Moore*'s two-process conflicts with decisions in every other court of appeals.

C. The concurrence’s analysis of the legislative history does not support *Moore I*’s two-step process.

In defense of *Moore I*, the *Moon Seals* concurrence does a deep dive into the legislative history and concludes that it “precisely shows that Congress, in coordination with Judge Wilkins, created the two-step sentencing procedure set forth in *Moore I*.” 2025 WL 2942705, at *8 (Phillips, J. concurring). On the contrary, the legislative history confirms that the approach taken by every other circuit is correct.

1. The congressional record repeatedly states that Chapter 5 does *not* apply upon revocation, nor is there any reference to *Moore I*’s step one.

The concurrence quotes four passages from Judge Wilkins’ letter to Senator Thurmond purportedly demonstrating that the purpose of the proposed statutory amendments was “to secure a two-step sentencing procedure after revocations of probation.” *Id.* at *8. “At the first step, the Chapter 5 guideline for the original offense of conviction would remain in place. At the second step, the Chapter 7 policy statements for the probation violation would apply.” *Id.*

However, the quotations say nothing about a “first step” where “the Chapter 5 guideline for the original offense of conviction would remain in place.” *Id.* Instead, they repeatedly state that the revocations should be based on Chapter 7 and that the original offense guidelines do not apply:

- “The clarifying language will provide that revocation decisions are to be based upon sentencing guidelines and policy statements issued by the Commission specifically for that purpose [i.e., Chapter 7], thereby negating any implication in current statutory language that the guidelines applicable to the initial sentencing of defendants also apply to probation revocation decisions.”
- “Since the Commission is instructed under 28 U.S.C. § 994(a)(3) to issue guidelines or policy statements for the revocation of probation and supervised release, we believe Congress clearly intended that these guidelines or policy statements [i.e., Chapter 7], rather than those applicable to initial sentencing, be used by courts when sanctioning probation (or supervised release) violators.”
- Judge Wilkins sought “to remove any doubt that these pronouncements [i.e., Chapter 7]—not those applicable to initial sentencing decisions—are the appropriate reference for revocation purposes.” *Id.*

Id. at *9 (quoting 136 Cong. Rec. 28230 (1990)). These quotations directly contradict, rather than support, the two-step process.

However, the concurrence maintains they support the two-step approach because they “leave[] no doubt that his object was to *separate* Chapter 5 and Chapter 7.” *Id.* In other words, although the letter states that Chapter 7 applies to probation revocations, and Chapter 5 does not, it is implicitly talking only about step two—Chapter 5 still applies in a separate step one. But again, nowhere in Judge Wilkins’ letter or the greater congressional record is there any mention of a step one where Chapter 5 still applies. Thus, the better interpretation is that when the congressional record repeatedly states that Chapter 7 applies to probation revocation sentences and Chapter 5 does not, it means just that.

Accordingly, Judge Wilkins' letter does not support, let alone create, *Moore I*'s two-step sentencing procedure. Instead, the letter expressly explains that the procedure adopted by every other circuit court is correct.

2. The Chapter 7 ranges are significantly more punitive than a probationer's original offense guideline.

The concurrence's analysis is also tainted by its erroneous assumption that the Chapter 7 revocation ranges are less punitive than the original offense guidelines in Chapter 5. As a result of this false premise, the concurrence mistakenly believes that imposing only a Chapter 7-based punishment upon revocation of probation would grant defendants an extraordinary windfall and that Judge Wilkins and Congress could not have intended such an absurd result. *Id.* at *10 ("They did not favor a nonsensical result of *rewarding* a probation violator with a substantially reduced guideline range for violating their conditions of probation."). Thus, the concurrence concludes, they must have intended the Chapter 7 punishment to be imposed *in addition to* a resentencing on the original offense, not *instead of* a Chapter 5-based sentence—hence, the two-step process. After all, the purpose of the amendment was to allow "district courts to impose an *incremental* sanction for a probation violation above the *then-mandatory* Chapter 5 sentencing guideline range for the offense of conviction." *Id.* That purpose would be clearly frustrated if the revocation sentence was based

solely on a range that was even lower than the original offense guideline range.

However, it is simply not the case that the Chapter 7 ranges were lower than a probationer's original offense guideline range. That's because, under the then-mandatory guidelines, probation was an option only for those with extremely low guideline ranges. The potential Chapter 7 ranges were much higher.

Under the mandatory guidelines in effect at the time, a district court could impose a straight probation sentence only if the defendant's minimum guideline range was 0 (i.e., a range of 0-6 months). § 5B1.1(a)(1) (1990). If the minimum was 1 to 6 months, then the court could order probation provided that a condition of probation was serving the minimum term in some sort of confinement (e.g., a halfway house). § 5B1.1(a)(2) (1990). Thus, any probationer's original offense guideline range maxed out at 6-12 months.

By comparison, 3-9 months was the *minimum* range on the Chapter 7 sentencing table, while the maximum range was a whopping *33-41 months*. § 7B1.4 (1990). Thus, upon revocation of probation, a defendant's original offense guideline range was a mere 0-6 to 6-12 months, but the Chapter 7 recommendation ranged from 3-9 months all the way up to 33-41 months. In other words, the Chapter 7 sentencing ranges on the whole were significantly more punitive than the probation-eligible Chapter 5 guidelines. And in most

cases, the Chapter 7 range was going to be higher than the original offense guideline.

Indeed, this was precisely Judge Wilkins' concern and his motivation for proposing the statutory changes. That is, the Sentencing Commission was on the verge of promulgating the Chapter 7 guidelines, which provided for penalties of up to 41 months of imprisonment, but courts of appeals had held that the revocation sentence could not exceed the original guideline range, which was often 6 months, and at most was 12 months. Thus, in most cases, district courts would be unable to impose the sentences recommended in Chapter 7. The concern was not, as the concurrence mistakenly assumes, that the relatively meager Chapter 7 ranges could not be added to the more punitive original offense guidelines to provide incremental punishments. It was that Chapter 7 by itself provided harsher penalties than the underlying offense guidelines, and these alone could not be imposed. The congressional record explains it well:

Th[e current] construction of the applicable statutory language means, for example, that in the case of a defendant sentenced to probation under an initial guideline range of 0 to 6 months imprisonment, the court would generally be limited upon revocation of probation to a maximum sentence of 6 months imprisonment, regardless of the seriousness of the violation. Because the guidelines applicable at a defendant's initial sentencing permit a probation sentence, absent a departure decision by the court, only when the bottom of the range does not exceed six months, this interpretation of the statute will result in an inadequate sanction for probation violations in many cases.

In contrast, the policy statements issued by the Sentencing Commission effective November 1, 1990 [i.e., Chapter 7], provide ranges of imprisonment that more adequately accommodate the varying seriousness of probation violations. Unfortunately, full implementation of these policy statements presently is frustrated by the narrow statutory interpretation adapted in these several circuits.

137 Cong. Rec. 14822 (1991) (Explanation of Provisions).

Contrary to the concurrence’s assumption, Chapter 7’s sentencing ranges were not lower than the original offense guidelines in Chapter 5—they were higher. They were not minimal terms of imprisonment intended to be added onto the more substantial Chapter 5 guidelines ranges to provide incremental punishment as part of a two-step process—they were significant punishments meant to stand on their own. Basing the entire revocation sentence on Chapter 7 did not result in a windfall for defendants, nor lead to “nonsensical” results. Indeed, as the legislative history makes clear, and as every other circuit court has held, that is precisely the procedure the statute calls for.

Conclusion

Mr. Moon Seals respectfully requests that this Court grant his petition for rehearing en banc.

Respectfully submitted,

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