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United States Court of Appeals
Tenth Circuit

August 28, 2026

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MALACHI MATHIAS MOON SEALS,

Defendant - Appellant.

No. 24-1028

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:22-CR-00245-CNS-1)

Jacob Rasch-Chabot, Assistant Federal Public Defender (Virginia L. Grady, Federal Public Defender, with him on the briefs), Office of the Federal Public Defender, Denver, Colorado, for Defendant-Appellant.

Ethan A. Sachs, Criminal Division, Appellate Section, United States Department of Justice, Washington, D.C. (A. Tysen Duva, Assistant Attorney General, and Josh A. Goldfoot, Deputy Assistant Attorney General, Criminal Division, Appellate Section, United States Department of Justice, Washington, D.C.; Peter McNeilly, United States Attorney; and J. Bishop Grewell, Appellate Chief, United States Attorney's Office, District of Colorado, Denver, Colorado, with him on the briefs) for Plaintiff-Appellee.

Frederick R. Yarger (Virginia M. Creighton, with him on the brief), Wheeler Trigg O'Donnell LLP, Denver, Colorado, filed an Amicus Curiae Brief Urging Affirmance of *Moore I*.

Before **HOLMES**, Chief Judge, **HARTZ**, **TYMKOVICH**, **MATHESON**, **BACHARACH**, **PHILLIPS**, **McHUGH**, **MORITZ**, **EID**, **CARSON**, **ROSSMAN**, and **FEDERICO**, Circuit Judges.

TYMKOVICH, Circuit Judge.

This case requires us to clarify how district courts impose sentences after an offender has violated his probation conditions. Under federal law and the United States Sentencing Guidelines, we conclude that after a court revokes probation, 18 U.S.C. § 3553(a)(4) requires the resentencing court to consider the recommended sentence under Chapter 7 of the Sentencing Guidelines Manual for the offender's probation violation; and then, when considering whether to vary from that recommended sentence, the court should consider Chapter 5's recommended sentence for the offender's original offense.

Malachi Moon Seals pleaded guilty to six counts of threatening members of Congress and their families, *see* 18 U.S.C. § 115(a)(1), and six counts of sending those threats in interstate communication, *see* 18 U.S.C. § 875(c). His presentence report calculated a guidelines range of 33 to 41 months' imprisonment, a function of his total offense level of 20 and criminal-history category of I. Because his guidelines range was so high, he did not qualify for a probation sentence. *See* U.S. Sent'g Guidelines Manual § 5B1.1 (U.S. Sent'g Comm'n 2021). But the Guidelines being advisory, *see United States v. Booker*, 543 U.S. 220, 245 (2005), the government, the probation office, and Moon Seals urged the district court to vary from the Guidelines and impose a term of probation. The court—"with severe hesitation"—acquiesced and sentenced Moon Seals to five years' probation. R., Vol. III at 164.

Within days, Moon Seals violated the conditions of his probation by threatening a former federal official. The court revoked his sentence of probation, and then "resentence[d]" Moon Seals, as required by 18 U.S.C. § 3565(a)(2). In *United States v. Moore* (*Moore I*), 30 F.4th 1021 (10th Cir. 2022), we explained how a court must resentence a defendant after revoking probation: *first*, the court "impose[s] a sentence for the originally charged crime based only on a defendant's *pre*-probation conduct" with reference to Chapter 5 of the Guidelines Manual, and *second*, the court "sentence[s] a defendant for the probation violation based only on the defendant's *post*-probation conduct" with reference to Chapter 7 of the Guidelines Manual. *Moore I*, 30 F.4th at 1027. The court here resentenced Moon Seals to 36 months' imprisonment.

We now reject *Moore I*'s two-step sentencing procedure. *Moore I*'s approach finds little persuasive support in the text of the relevant statutes and is at odds with other circuits' sentencing procedures. And the countervailing considerations urged by *Moore I* in support of its reading of the statutes cannot justify our departure from Congress's own instruction.

Congress tells courts to sentence a defendant "in the case of a violation of probation," according to "the applicable guidelines or policy statements" in Chapter 7. 18 U.S.C. § 3553(a)(4)(B). That means that a court employs the typical tools in assessing and sentencing for the *new* conduct—the violation of probation. It does not tell courts to first sentence the defendant for his underlying crime under Chapter 5 and then to sentence him for the probation violation under Chapter 7.

When sentencing a defendant after revoking his probation, a court must consider the sentencing range recommended by Chapter 7 of the Guidelines; it should consider the range recommended by Chapter 5 when deciding whether to vary from the Chapter 7 range.

Under this single-step process, the district court here was required to take Chapter 7's recommended range as its starting point. Because it did not do so, we **REVERSE** Moon Seals's sentence and **REMAND** for resentencing.

I. Background

An eighteen-year-old Malachi Moon Seals visited the government websites of several members of Congress and left messages threatening the officials and their families. He threatened torture—"If I don't see this bill passed . . . I'll make sure I put you threw [sic] the most horrific pain humanely processable [sic]." R., Vol. I at 21. He threatened murder—"I can't wait to kill both of your families with the lowest levels of honoree [sic] and respect just like you give to this country." R., Vol. I at 23. And he threatened rape—"I think I'll rape your wife first," R., Vol. I at 23, and "I congratulate you . . . on turning my life goals into flaying and raping your children." R., Vol. I at 24. In response to these threats, some of these officials hired security details.

A grand jury indicted Moon Seals on six counts of threatening federal officials and their families, *see* 18 U.S.C. § 115(a)(1), and six counts of sending those threats in interstate communication, *see* 18 U.S.C. § 875(c). He pleaded guilty to all counts.

Moon Seals's presentence report recommended a sentence of 33 to 41 months' imprisonment, based on his total offense level of 20 and criminal-history category of I. At the sentencing hearing, Moon Seals asked for probation. The government agreed. Though it was a "really tough call," the prosecutor decided to "go out on [a] limb" for Moon Seals because he had made significant rehabilitative progress and probation would allow him to "ensure that this upward trajectory" would "continue[]." R., Vol. III at 158. The court hesitated to impose probation, but it did so, after deciding to set several special conditions on Moon Seals's probation.[1] Two conditions were "critical to [the court's] ruling that probation [was] appropriate." R., Vol. III at 173. Moon Seals's communication devices were subject to monitoring by the probation office, and he was prohibited from sending threats to any person. R., Vol. I at 36.

Within days Moon Seals violated that second condition. He sent a threat laced with racial epithets to a former federal intelligence official: "You better take this seriously. [Official's] life, is in danger. and I will slaughter him into oblivion." R., Vol. I at 39. Having learned of that threat, the probation office petitioned for an arrest warrant and requested that the court revoke Moon Seals's probation. Moon Seals was arrested, and he admitted to the probation violations.

[1] In addition to the mandatory conditions a court must impose on a probationer, the court may impose special conditions to tailor the sentence to the probationer's particular circumstances. *See* 18 U.S.C. § 3563(b).

The court held a revocation hearing. The court first revoked Moon Seals's probation and then resentenced him—as required by § 3565(a)(2)—in accordance with the typical sentencing factors in 18 U.S.C. § 3553(a). One factor, § 3553(a)(4), instructs courts to consider the sentencing range recommended by the relevant chapter of the Guidelines Manual. Moon Seals argued that the court needed to consider Chapter 7, which recommended a sentence between 3 and 9 months' imprisonment. U.S. Sent'g Guidelines Manual § 7B1.4 (U.S. Sent'g Comm'n 2021); R., Vol. III at 14. And for its part, the government acknowledged that *Moore I* created some sort of "relationship between" the "guidelines for the underlying offense" in Chapter 5 and "the guidelines for a revocation in Chapter 7," but it asked the court to impose a sentence within the Chapter 5 guidelines, which recommended 33–41 months' imprisonment. R., Vol. III at 28. The court sided with the government, explaining that "it appears that I could use either range" in Chapter 5 or Chapter 7, but it "st[u]ck to" the Chapter 5 range of 33–41 months' imprisonment. R., Vol. III at 38. The court sentenced him to 36 months' imprisonment. R., Vol. I at 69.

Moon Seals appealed his sentence. He alleged that the court plainly erred by misapplying step one of the *Moore I* framework.[2] More specifically, he argued that the court was required to impose a zero-month sentence at step one because the court had failed, when imposing his original sentence, to identify an alternative sentence

[2] He argued for preservation purposes only that *Moore I* was wrongly decided.

that would be imposed if Moon Seals violated his probation conditions. Finding that *Moore I* did not require a sentencing court to declare an alternative sentence, the original panel rejected that argument and affirmed Moon Seals's sentence.

Moon Seals then filed a petition for rehearing en banc, raising his preserved argument that *Moore I* was wrongly decided. We granted the petition to decide whether *Moore I* correctly held that resentencing following revocation of probation requires the court to *first*, sentence the defendant for his underlying conduct according to Chapter 5, and *second*, sentence the defendant for his probation violation according to Chapter 7. Because neither Moon Seals nor the government chose to defend *Moore I*'s two-step approach, we appointed Amicus Frederick Yarger to argue in *Moore I*'s favor. He has ably discharged that duty, and we thank him for his service.

II. Discussion

We begin with an overview of the statutory scheme for probation and revocation. We then reject *Moore I*'s two-step process in favor of a one-step process. And finding that the district court here did not take Chapter 7 as its starting point, we reverse and remand for resentencing.

A. **Moore I**

Congress passed the Sentencing Reform Act of 1984 to standardize sentencing procedures in the federal courts. Pub. L. No. 98-473, 98 Stat. 1987. Under that sentencing scheme, courts have three options when sentencing an individual defendant: a term of probation, a fine, or a term of imprisonment. 18 U.S.C.

§ 3551(b). Perhaps the most familiar sentence is one of imprisonment, under which the defendant is incarcerated for a particular term. 18 U.S.C. §§ 3581, 3582. When imposing imprisonment, the court may also impose a term of supervised release, which is served after the term of imprisonment and during which the defendant is monitored for compliance with several conditions (for example, that the defendant not commit another crime). *See* 18 U.S.C. § 3583(a), (d).

The sentencing court may also forgo a term of imprisonment entirely and instead impose probation. 18 U.S.C. § 3561(a). Like supervised release, probation requires the defendant to subject himself to monitoring, agreeing to abide certain conditions of probation. But unlike supervised release, probation is a stand-alone sentence; it is imposed *instead* of imprisonment, not in *addition* to imprisonment. This "sentence of probation remains conditional and subject to revocation until its expiration or termination." 18 U.S.C. § 3564(e).

If a probationer violates his probation conditions, as Moon Seals did here, the court has two options: it may "continue [the defendant] on probation, with or without extending the term or modifying or enlarging the conditions," or it may "revoke the sentence of probation." 18 U.S.C. § 3565(a)(1), (2). If the court chooses to revoke the defendant's probation, then the court must "resentence the defendant under subchapter A." 18 U.S.C. § 3565(a)(2). Subchapter A comprises 18 U.S.C. §§ 3551–3559.[3]

Thus, the court must consider the familiar § 3553(a) factors when it resentences a defendant after revoking his probation. Section 3553(a)(4) is the crux of the dispute here. That provision requires the court to consider:

> (4) the kinds of sentence and 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) of title 28 . . . ; and
> > > (ii) that . . . are in effect on the date the defendant is sentenced; 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) of title 28.[4]

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[3] In full, § 3565(a) states:

> (a) Continuation or Revocation.—If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extent that they are applicable—
>
> > (1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or
> >
> > (2) revoke the sentence of probation and resentence the defendant under subchapter A.

[4] The entire § 3553(a) factors are (1) the "nature and circumstances of the offense and the history and characteristics of the defendant"; (2) "the need for the sentence" to "reflect the seriousness of the offense," adequately deter criminal conduct, "protect the public from further crimes of the defendant," and rehabilitate the defendant; (3) "the kinds of sentences available"; (4) the "kinds of sentence and the sentencing range established by" the sentencing guidelines; (5) policy statements

18 U.S.C. § 3553(a)(4). Subparagraph A directs a sentencing court to Chapter 5 of the Sentencing Guidelines Manual, adopted pursuant to its authority under 28 U.S.C. § 994(a)(1), which permits the Commission to issue guidelines "for use of a sentencing court in determining the sentence to be imposed in a criminal case." Subparagraph B, on the other hand, directs sentencing courts to Chapter 7 of the Guidelines Manual, which the Sentencing Commission promulgated pursuant to its power under § 994(a)(3). 28 U.S.C. § 994(a)(3) (authorizing Sentencing Commission to issue "guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18"). Putting all this together, § 3553(a)(4) tells courts to look for the recommended sentence in Chapter 5 for "the applicable category of offense committed by the applicable category of defendant . . . or . . . in the case of a violation of probation," in Chapter 7. The flowchart below contrasts *Moore I*'s framework and the correct framework.

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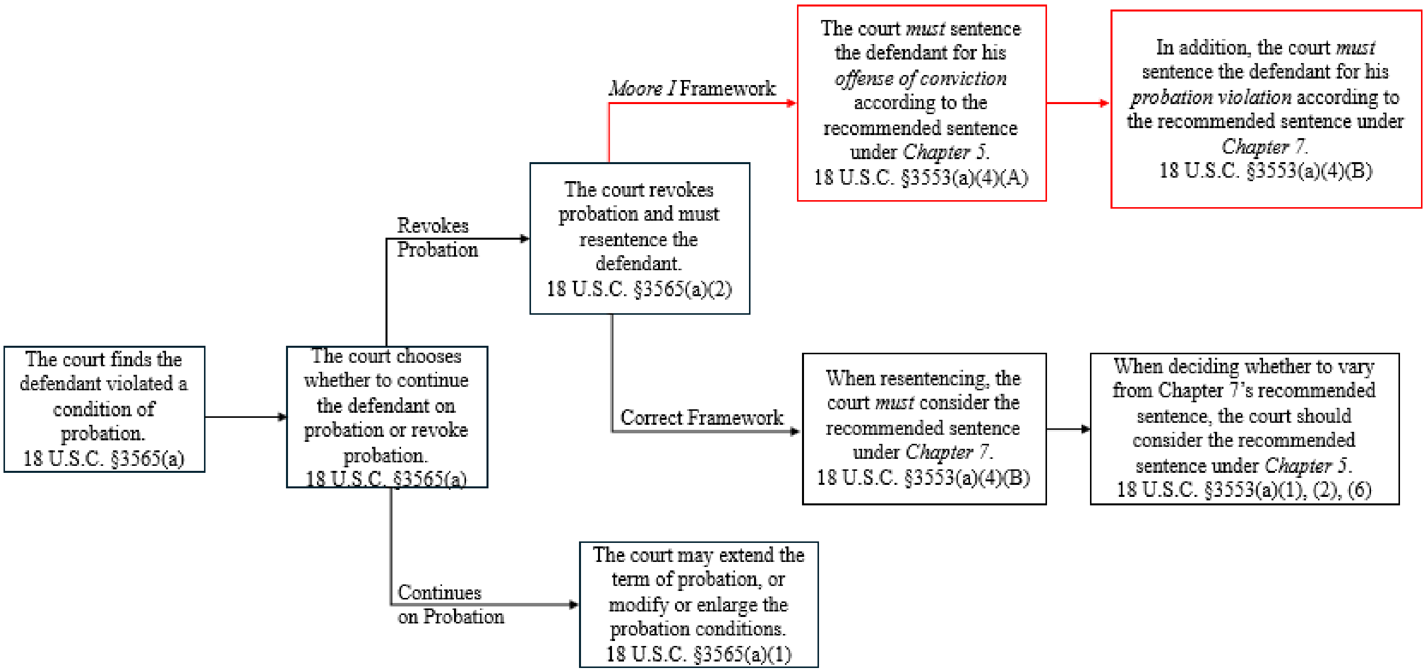
of the Sentencing Commission; (6) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"; and (7) "the need to provide restitution" to victims.



Our basic discussion of § 3553(a)(4)'s text goes a long way toward showing *Moore I*'s error. We of course "begin, as we always do, with the statute's text." *United States v. Broadway*, 1 F.4th 1206, 1211 (10th Cir. 2021) (citing *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F.3d 1133, 1143 (10th Cir. 2005)). And if the text is unambiguous, we apply its plain meaning. *Id.* The plain meaning derives from "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

First, take the word "resentence" in § 3565(a)(2). "Resentence" means "to impose a new or revised sentence . . . on (someone who has already been sentenced for a crime)." *Resentence*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/resentence (last visited June 9, 2026); *see also Resentencing*, Black's Law Dictionary (7th ed. 1999) ("The act or an instance of imposing a new or revised criminal sentence."). Amicus and the dissent suggest that "resentence" must mean that the defendant is sentenced again *for the crime he was originally sentenced for*; otherwise, he has not been resentenced. They focus on *Merriam-Webster*'s definition of "resentence" as imposing a new or revised sentence on "someone who has *already been sentenced for a crime*." *Resentence*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/resentence (last visited June 9, 2026) (emphasis added). They then infer that resentencing occurs only if the court sentences the defendant for the particular crime he has already been sentenced for. Amicus Br. at 6. So, they argue, § 3565(a)(2)'s use of "resentence" means the court must impose a new sentence for the crime the defendant has already been sentenced for—the underlying crime—as *Moore I*'s first step requires.

But they read too much into the dictionary's definition of "resentence." The definition's parenthetical requires only that the defendant have been sentenced before, not that the new sentence be punishing the same conduct as the original sentence. The court need not resentence the defendant for the underlying crime to satisfy § 3565(a)(2) because the court, when it revokes the defendant's *original sentence* of probation, must now impose a *new sentence* of imprisonment—it must, in other words, *resentence* the defendant. *See United States v. Augustin*, 16 F.4th 227, 232 (6th Cir. 2021) (describing resentencing as "beginning the sentencing process anew" (quoting *United States v. Thomason*, 940 F.3d 1166, 1171 (11th Cir. 2019))).

Now consider § 3553(a)(4)'s two component clauses. Subparagraphs A and B are separated by an "or," which is "almost always disjunctive." *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 87 (2018) (quoting *United States v. Woods*, 571 U.S. 31, 45 (2013)). "Statutory context," however, "can overcome the ordinary, disjunctive meaning of 'or.'" *Id.* The statutory text thus gives the court two alternatives—Subparagraph A or Subparagraph B—when sentencing a defendant. Subparagraph A is the more general provision, instructing courts to use Chapter 5 when generally imposing a sentence, but Subparagraph B addresses a more specific situation—"case[s] of a violation of probation or supervised release." 18 U.S.C § 3553(a)(4)(B). And because "it is a basic principle of statutory construction that a specific [provision] . . . controls over a general provision," Subparagraph B is the appropriate provision to use for probation violations, not Subparagraph A. *HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) (per curiam); *see also Bloate v. United States*, 559 U.S. 196, 207–08 (2010) ("[G]eneral language of a statutory provision . . . will not be held to apply to a matter specifically dealt with in another part of the same enactment . . . ." (quoting *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932))). That's the normal, common-sense reading of that language. Suppose you went to a jazz club, and a sign on the door informed you, "The cover charge is $40, or if you're a club member, $10." No member would fork over a $50 bill.

Amicus and the dissent contend that statutory context overcomes the presumption that "or" is used disjunctively here; it is instead, according to them, used conjunctively. We disagree. If Congress wanted a conjunctive connector, it could have used "and"—as it did in Subparagraph A itself. *See* § 3553(a)(4)(A) (instructing courts to consider the guidelines "issued by the Sentencing Commission pursuant to section 994(a)(1) . . . *and* . . . [that] are in effect on the date the defendant is sentenced"). Congress's use of the conjunctive "and" shows that it knows how to require courts to follow two subsidiary statutory provisions. It did not do so here. *Fish v. Kobach*, 840 F.3d 710, 740 (10th Cir. 2016) ("When Congress knows how to achieve a specific statutory effect, its failure to do so evinces an intent *not* to do so." (citing *United States v. Burkholder*, 816 F.3d 607, 615 (10th Cir. 2016))). Amicus suggests that Congress could not have used conjunctive "and" in § 3553(a)(4) to achieve its desired effect because to do so would require a sentencing court to use both Subparagraph A and Subparagraph B, even at original sentencings where no probation violation has occurred. But using a conjunctive "and" would not lead to that result: Subparagraph B would not be triggered at an original sentencing where no probation violation occurred because it applies "in the case of a violation of probation or supervised release." 18 U.S.C. § 3553(a)(4)(B). Congress could have used "and." It did not.

The statute's evolution likewise undermines *Moore I*. As originally enacted, § 3565(a)(2) instructed the sentencing court to "impose any other sentence that was available under subchapter A at the time of the initial sentencing." The statute thus linked the post-revocation sentence to the pre-revocation sentence—as step one of the *Moore I* framework does. But Congress later delinked those two sentences: it amended § 3565(a)(2) and instructed courts to "resentence the defendant under subchapter A," allowing the court broader discretion to impose a sentence other than one that was originally available. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, sec. 110506, 108 Stat. 1796, 2017. That change of language suggests that Congress meant to divorce the post-revocation sentence from the sentences available for the underlying crime—exactly what *Moore I* requires the court to consider at step one.

We have already rejected a two-step process like *Moore I* when the court sentences a defendant after revoking his supervised release. In *United States v. Kelley*, we explained "§ 3553(a)(4)(A) has no application when a violation of the defendant's conditions of supervised release is at issue; in such cases the relevant consideration . . . is the Chapter 7 policy statements referenced in § 3553(a)(4)(B)." 359 F.3d 1302, 1306 (10th Cir. 2004). To be sure, *Kelley* did not address revoking probation; it addressed revoking supervised release, which is governed by 18 U.S.C. § 3583(e)(3).[5] And as Amicus points out, that provision does not require the court to "resentence" the defendant; it enables the court to require the defendant to serve all or part of the statutorily authorized term of supervised release in prison. But that distinction makes little difference. Admittedly, § 3565(a)(2) and § 3583(e)(3) are

[5] Section 3583(e)(3) allows the court to "revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release" if the court finds the defendant violated his supervised-release conditions.

different statutory provisions with different statutory text. Both provisions, however, still require the court to consider § 3553(a)(4)—the crux of the dispute here. Sections 3565(a)(2) and 3583(e)(3) may have different starting points, but they have the same end point. And when *Kelley* rejected the application of Chapter 5's guidelines range, it did so based on a fundamental textual point in § 3553(a)(4). Noting the "statute's use of the disjunctive 'or,'" the court explained that the "natural reading of § 3553(a)(4)" refers courts in supervised-release violations to "the Chapter 7 policy statements referenced in § 3553(a)(4)(B)." *Kelley*, 359 F.3d at 1306. That textual observation applies equally to sentencings for probation violations, notwithstanding the different statutory starting points.[6]

Other circuits follow this straightforward reading. They require sentencing courts to consider Chapter 7's recommended sentencing range. *See, e.g.*, *United States v. Tschebaum*, 306 F.3d 540, 544 (8th Cir. 2002) ("[W]e are of the view that when a defendant's probation is revoked a sentencing court should give attention to the policy statements found in chapter 7 of the sentencing guidelines . . . ."). They also bless considering both Chapter 5 and Chapter 7. *See, e.g.*, *United States v.*

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[6] Moreover, Amicus's argument that *Moore I* does not conflict with *Kelley* falls flat. He suggests the court rejected Chapter 5's application because those who violate supervised release, having served the term of imprisonment for the underlying crime, are "simply not in a position comparable to defendants facing initial sentencing for commission of the underlying crime." Amicus Br. at 14 (quoting *Kelley*, 359 F.3d at 1307). But *Kelley*'s observation does not distinguish between violators of supervised release and *violators of probation*; it distinguishes violators of supervised release and "defendants facing initial sentencing for commission of the underlying crime." *Kelley*, 359 F.3d at 1307.

Michael, 12 F.4th 858, 860 (8th Cir. 2021). But we have found no circuit that *requires* a court to consider both Chapter 5 and Chapter 7 in the way *Moore* does. *See, e.g.*, *United States v. Cook*, 291 F.3d 1297, 1301–02 (11th Cir. 2002) (affirming sentence based on consideration of Chapter 7 alone).[7]

Pointing to legislative history, Amicus and the dissent highlight statements by Senator Thurmond, who sponsored the 1994 amendment. But Senator Thurmond's comments do not help Amicus and the dissent. He explained that adding § 3553(a)(4)(B) would ensure that revocation decisions would be made "based upon sentencing guidelines and policy statements issued by the Commission specifically for that purpose"—that is, the Chapter 7 guidelines and policy statements. 136 Cong. Rec. 28228 (1990). That statement rejects using the Chapter 5 guidelines for post-revocation sentencing. So would another piece of legislative history:[8] "[t]he proposed amendment makes it clear that it is the guidelines or policy statements issued specifically to guide revocation decisions, and not the guidelines and policy

[7] In *United States v. Olabanji*, the Ninth Circuit found error when a district court "fail[ed] to consider the range applicable to the underlying offense after rejecting the range prescribed by the [Chapter 7] policy statements." 268 F.3d 636, 639 (9th Cir. 2001). But unlike *Moore I*, *Olabanji* did not find that both § 3553(a)(4)(A) *and* (B) applied to sentencing following probation revocation; it instead identified § 3553(a)(4)(B) as the relevant provision. *Id.* at 638–39. Regardless, *Olabanji*'s holding may no longer be tenable in light of *United States v. Booker*, 543 U.S. 220 (2005), which severed the key provision *Olabanji* used to reach its conclusion—§ 3553(b)(1). *See Booker*, 543 U.S. at 258; *Olabanji*, 268 F.3d at 639.

[8] This quotation comes from a letter written by Judge William Wilkins, Chair of the Sentencing Commission, explaining the amendment's purpose.

statements applicable at initial sentencing, that govern court decisions when considering violations of probation or supervised release." *Id.* at 28231.

Amicus and the dissent also raise the specter of absurd results to support their interpretation. First, they suggest that our one-step framework will create a windfall for the probation violator. As they see it, the violator wins when the court imposes a sentence of probation, despite a high recommended sentence range like Moon Seals's, but later imposes a much lower sentence within the Chapter 7 range. *First*, we doubt this windfall will be as pervasive as Amicus suggests. Moon Seals's *probation sentence* is the outlier; it was an enormous bet on rehabilitation. The heartland case for probation are defendants who fall within Zone A or Zone B of the Chapter 5 guidelines, which typically carry sentences of 0–6 months (Zone A) or sentences up to 15 months (Zone B). And with Chapter 7 recommending sentences up to 14 months for Grade C violations, the delta between the Chapter 5 and Chapter 7 ranges is not nearly so stark as suggested.

Second, in the rarer case like Moon Seals's, the windfall comes at the outset when the court imposes probation instead of the range recommended under Chapter 5. But even if the disparity arises at resentencing for the probation violation, the court may still vary upwards—and indeed even consider the Chapter 5 range—when considering, for example, § 3553(a)(1) ("the nature and circumstances of the offense and the history and characteristics of the defendant") and § 3553(a)(6) ("the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"). *See* U.S. Sent'g Guidelines

Manual ch. 7, pt. A, introductory cmt. 3(b) (U.S. Sent'g Comm'n 2021) ("[A]t revocation the court should sanction primarily the defendant's breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator."); *United States v. Verkhoglyad*, 516 F.3d 122, 130 n.5 (2d Cir. 2008) (observing that a court is not "precluded from considering" the Chapter 5 range under § 3553(a)'s factors).

Moore I's proponents also fear that a one-step framework will frustrate appellate review of sentences for probation violations. If a court must consider Chapter 7's range and then vary upward to a sentence within Chapter 5's range, we could not, according to their logic, "apply the two different standards of review for substantive reasonableness under Chapter 5 and Chapter 7." *United States v. Moon Seals*, 156 F.4th 1065, 1077 (Phillips, J., concurring), *vacated and reh'g en banc granted*, 164 F.4th 1205. But our standard of review for sentences based on Chapter 5 and Chapter 7 is the same. *United States v. Steele*, 603 F.3d 803, 807 (10th Cir. 2010) (explaining that reasonableness review for sentences "in excess of that recommended by the Chapter 7 policy statements" is "the same analysis as the reasonableness standard of review" prescribed by *Booker*); *see also United States v. Contreras-Martinez*, 409 F.3d 1236, 1241 & n.2 (10th Cir. 2005). Moreover, any concern that we will not be able to identify the reasons for the court's upward variance into the Chapter 5 range is alleviated by § 3553(c)'s requirement that a court explain its reasons for the upward variance. § 3553(c) ("The court . . . shall state in open court the reasons for its imposition of a particular sentence . . . ."). In the decades before *Moore I*, we had no difficulty reviewing sentences for probation violations; the difficulties won't start now. Nor have other circuits identified any problems with substantive reasonableness review in their one-step regimes.

In the dissent's view, we have made a costly error: using the text of the statutes alone as the cornerstone of our interpretation. Our interpretation, according to the dissent, should also be guided by the legislative history of the statutes, with a particular view to how Judge Wilkins, the Chair of the Sentencing Commission, and Senator Strom Thurmond, Chair of the Senate Judiciary Committee and sponsor of the 1994 amendments, interpreted the statutes. The dissent contends our textual analysis of § 3553(a)(4) does not comport with the "*Smith* fix," the aim of the 1994 amendments according to the statutes' legislative history. *See* Dissenting Op. at 37 n.8 ("I don't care whether 'or' is disjunctive or conjunctive. . . . What *is* important is that 'or' is part of the *Smith* fix.").

As we read the dissent, it argues that revoking probation under § 3565(a)(2) triggers *two* proceedings—one to sanction the offense of conviction and another to sanction the probation violation. So when the court sanctions the defendant for the offense of conviction, § 3553(a)(4)(A) directs the court to Chapter 5, and in the separate proceeding to sanction the probation violation, § 3553(a)(4)(B) directs the court to Chapter 7. *See* Dissenting Op. at 28, 33–34, 37 n.8. But what justifies splitting a "resentence . . . under subchapter A" into two proceedings—one for the offense of conviction, the other for the probation violation? Senator Thurmond's statements on the Senate floor and Judge Wilkins's correspondence with the senator, according to the dissent. Judge Wilkins and Senator Thurmond may have understood §§ 3565(a)(2) and 3553(a)(4) as authorizing separate sanctioning proceedings. But the Chairman of the Senate Judiciary Committee—influential as he may be—is still one member of Congress, and his private views are not Congress's views as expressed in law. *See FS Credit Opportunities Corp. v. Saba Cap. Master Fund, Ltd*, 146 S. Ct. 1546, 1558 (2026) ("Congress expresses itself as a body through the text it enacts[.]").

The dissent also suggests that "resentence the defendant under subchapter A" means only "resentencing for the original offense." Dissenting Op. at 28. But that's not what Congress said. Instead, it instructed courts to "resentence" the defendant, with no mention that the resentencing under subchapter A would only be for the original offense. In the end, we defer to the text of § 3565(a)(2) and § 3553(a)(4). Section 3565(a)(2) instructs the court to resentence the defendant under subchapter A, and when the court does so, it applies § 3553(a). When resentencing, it must therefore choose whether to follow § 3553(a)(4)(A) *or* (B). For the reasons explained above, we think the court must follow (B).[9]

[9] Reading § 3565(a)(2) as instructing courts to resentence only for the offense of conviction raises another issue for the dissent: § 3553(a)(4)(B) would not be triggered; Chapter 7 would not apply. The dissent suggests that § 3553(a)(4)(B) is a "standalone direction" to sentence the defendant for the probation violation. Dissenting Op. at 28. It is unclear what authority exists for a court to issue a probation-violation sentence from § 3553(a)(4)(B) alone.

Accordingly, we abrogate the two-step framework of *Moore I* in favor of a one-step framework. As required by § 3553(a)(4)(B) for probation violations, the sentencing court must consider the range of imprisonment recommended by Chapter 7. Section 3553(a)(4)(A) does not apply. The court *may* vary upwards (as with any sentence) according to the § 3553(a) factors, and in making this determination, the court should consult Chapter 5's recommended range of imprisonment, particularly when considering § 3553(a)(1), (2), and (6).[10] As with any variance, the court must explain its upward variance.

In the end, a court imposing a sentence for a probation violation does what it must do in every case: apply the § 3553(a) factors and holistically evaluate the offender—his "history and characteristics," § 3553(a)(1), the need to deter him from further criminal conduct and protect the public from his further crimes, § 3553(a)(2), and ensure he faces a sentence proportional to offenders with "similar records" who are guilty of "similar conduct," § 3553(a)(6), among other factors—and impose a sentence that is no greater than necessary to achieve these objectives. The

[10] Considering the defendant's pre-probation conduct for sentencing purposes is permissible because by statute, "[n]o limitation shall be placed on the information concerning the background, character, and conduct" of the defendant. 18 U.S.C. § 3661. And considering the defendant's prior offenses when determining an appropriate sentence does not threaten double jeopardy. *See Witte v. United States*, 515 U.S. 389, 403–404 (1995) (finding no double jeopardy issue when a prior offense enhanced the defendant's sentence for the crime of conviction because the enhancement "evinc[es] the judgment that a particular offense should receive a more serious sentence," given the recidivist "character of the offender").

defendant's offense of conviction and recommended sentence range under Chapter 5 are relevant to those considerations.

B. Remand for resentencing

The framework adopted above requires a district court to take Chapter 7's recommended range as its starting point. But believing it "could use either" Chapter 5 or Chapter 7, the court "specifically reject[ed] the application of Chapter 7." R., Vol. III at 38. That was error. As explained above, a court *must* take Chapter 7's recommendation range of imprisonment as its starting point. Because the court here did not do so, we reverse and remand for resentencing.

III. Conclusion

We reject *Moore I*'s sentencing procedure in favor of the following one. When resentencing a defendant after revoking his probation, the court must consider Chapter 7's recommended sentence range. 18 U.S.C. § 3553(a)(4). It should consider Chapter 5's recommended sentence range when determining whether to vary from Chapter 7's range. Because the court here failed to start with Chapter 7's recommended range, we reverse Moon Seals's sentence and remand for resentencing.

No. 24-1028, *United States v. Moon Seals*
PHILLIPS, Circuit Judge, dissenting.

For forty-two years, our court has heeded the statutory command of the Sentencing Reform Act of 1984 for uniformity and proportionality in federal sentencing. Today, the majority breaks that streak by reversing our decision in *United States v. Moore* (*Moore I*), 30 F.4th 1021 (10th Cir. 2022). Based on a mistaken and incomplete interpretation of two 1994 statutory amendments (18 U.S.C. §§ 3565(a)(2) and 3553(a)(4)(B)), which were passed for a very specific purpose unacknowledged by the majority opinion, the majority returns us to the pre-1984 discretion-driven, disparity-ridden, hope-I-get-the-lenient-judge sentencing system. Thankfully, this wrong turn is limited to revocation-of-probation situations. But even that is a big, jagged chip of granite off this circuit's previously smooth face of uniformity and proportionality for federal sentencings.

Moore I provides a sensible, uniform, and statutory-and-guidelines-directed two-step sentencing scheme for probation violators. Though the two steps can occur in either order, *Moore I* described the first step as punishing the offense of conviction, and the second step as punishing the probation violation. The *Moore I* system measures separate conduct for separate punishments under separate sentencing tables in the Guidelines Manual. But the majority jettisons that for its own system, one that inexplicitly authorizes district courts to disregard the probation violator's underlying offenses of conviction. If a violent felon like Mr. Moore, or a threateningly violent defendant like Mr. Moon Seals, manages to obtain a downward variance to a sentence of probation, he likely lands in clover. Even if the court revokes his probation, he stands a good chance of a substantially lesser sentence than he would have gotten if the court had never entrusted him with probation. For some reason, the majority apparently thinks that Congress in 1984 and 1994 intended such a result despite its primary, oft-stated concern being the enforcement of mandatory sentencing ranges.

Congress would never have agreed to the majority's counter-Sentencing Reform Act of 1984-style system allowing "freebies" for the underlying offenses of convictions of probation violators. The majority tells us that despite having enacted mandatory sentencing ranges in 1984, which stood until *United States v. Booker*, 543 U.S. 220 (2005), Congress meant to give district courts discretion to impose *no prison time* for probation violators' underlying offenses of conviction. And the majority insulates that decision from our review. Depending on the fortuity of judge assignments, violent-leaning felons like Mr. Moore and Mr. Moon Seals might well never serve a day for their offenses of conviction, despite multi-year Chapter 5 guideline ranges. Quite a deal.

After criticizing *Moore I*'s two-step sentencing process (applying separate steps in punishing the offense of conviction and in sanctioning the probation violation), the majority adopts its own two-step system. For its step one, as mentioned, it improperly eliminates a Chapter 5 sentence for the offense of conviction but then at least properly funnels the probation-violation sanctioning to Chapter 7 of the Guidelines Manual, via 18 U.S.C. § 3553(a)(4)(B). The majority's second step comes out of left field. Without statutory or sentencing-guidelines authority, and having repealed Chapter 5 sentences for offenses of conviction (again, which were mandatory from 1984 until 2003 and remain advisory still), the majority gives district courts discretion to tiptoe back to Chapter 5 to "peek" at its now-abandoned sentencing range (even by the majority's telling) formerly covering the offense of conviction and then to use it as a springboard to sentence above the Chapter 7 range (despite the Chapter 7 range being for the breach of trust in violating probation, *not* for the offense of conviction). Quite a stretch.

Apart from the implausibility that Congress would have favored this result, the majority's second step suffers from another big problem. Once the majority refashions § 3565(a)(2)'s "resentence . . . under subchapter A" as covering the probation violation alone under Chapter 7, via § 3553(a)(4)(B), it has locked the district court into the self-contained, inescapable Chapter 7. Neither the statutes nor the sentencing guidelines offer the majority a way out of Chapter 7 for its end-around, step-two Chapter 5 peek. Section 3553(a)(4)(B) and Chapter 7 are one-way streets. No U-turns are allowed. By design, Chapter 7 sets the sanction for the probation violator's breach of trust—not imprisonment for the underlying offense, a job left to Chapter 5. *Moore I* tracks the statutes and guidelines and requires no unauthorized leaps.

If looking for another reason to conclude that the statutes and guidelines prohibit the majority's Chapter 5–peek system, look no further than its results. The majority's system permits *great* sentencing disparities among similar offenders committing similar conduct—all contrary to 18 U.S.C. § 3553(a)(6). Some district courts will lower the boom after peeking, and some won't even peek. Again, compare that system to the uniformity, proportionality, and fairness under *Moore I*'s statutory-based two steps. Quite a difference.

In addition, the majority's discretionary Chapter 5–peek system (again, supposedly required by the 1994 amendments) will impinge on our ability to obey the Supreme Court's command that we meaningfully review sentences. With *Moore I*, we reviewed sentences for offenses of conviction and sanctions for probation violations in their two separate stacks. Each had its own guideline range within its own sentencing table and its own standard of review. Now, under the majority's discretionary-peek system, we'll be asked to review hybrid sentences blended from Chapters 7 and 5. Questions will abound without *Moore I*'s easily understood review rules.

So I write to explain why the majority's approach is mistaken, to mourn *Moore I*'s passing, and (I hope) to catch the eye of any passerby with a wrecking ball and a cement mixer, perhaps the Supreme Court or the Sentencing Commission.

I. Introduction

The majority's analysis wrongly fuses 18 U.S.C. §§ 3565(a)(2) and 3553(a)(4)(B). By doing that, the majority scuttles the required resentencing for the offense of conviction after the court's revocation of the *conditional* sentence of probation. Just like that, any sentence for the offense of conviction goes poof. Instead, the majority's un-resentencing is an initial sentencing for the probation violation. The majority drops § 3565(a)(2) at the headwaters of subchapter A—§ 3551(a)—for a meaningless meandering downstream only to be netted at § 3553(a)(4)(B) every single time. The majority's resulting un-resentencing system leaves only Chapter 7's meager advisory range available. Neither § 3553(a)(4)(B) nor Chapter 7 permit use of § 3553(a)(4)(A) or the § 3553(a) factors to manipulate that range. So good-bye to real resentencings at which the court imposes imprisonment for the offense of conviction. And hello to un-resentencings at which defendants line up to accept freebie, zero-month sentences for their offenses of conviction.

But the majority can hardly leave it that way. After all, most reasonable people won't think that wiping out any punishment for the offense of conviction is a reasonable result. So the majority devises a daring rescue plan as seen in the second part of this quote: "When sentencing a defendant after revoking his probation, a court must consider the sentencing range recommended by Chapter 7 of the Guidelines; *it should consider the range recommended by Chapter 5 when deciding whether to vary from the Chapter 7* *range*." Majority Op. at 4 (emphasis added). Missing from this is any recognition (1) that legitimate variances are already available under Chapter 7, tied to the degree of the breach of trust in violating probation, and (2) that Chapter 5 sentences are meant to punish the offense of conviction, not the Chapter 7 breach of trust.

As a warmup before deciphering the majority's counter-textual conclusion, here are the federal statutory sections before and after the 1994 amendments. I begin with 18 U.S.C. § 3565(a)(2). The pre-1994 italicized text was stricken by the 1994 amendment, and the post-1994 italicized text was inserted in its place:

Pre-1994:

> (a) CONTINUATION OR REVOCATION.—If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in [18 U.S.C.] § 3553(a) to the extent that they are applicable—
>
> > (1) continue him on probation, with or without extending the term o[r] modifying or enlarging the conditions; or
> >
> > (2) revoke the sentence of probation and *impose any other sentence that was available under subchapter A* [*18 U.S.C. §§ 3551–59*] *at the time of the initial sentencing*.

Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1837, 1995 (emphasis added).

Post-1994:

> (a) CONTINUATION OR REVOCATION.—If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure,

> and after considering the factors set forth in [18 U.S.C.] § 3553(a) to the extent that they are applicable—
>
> > (1) continue him on probation, with or without extending the term o[r] modifying or enlarging the conditions; or
> > (2) revoke the sentence of probation and *resentence the defendant under Subchapter A* [18 U.S.C. §§ 3551–59].

See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110506, 108 Stat. 1796, 2017 (emphasis added).

Next, I turn to 18 U.S.C. § 3553(a)(4). The post-1994 italicized text was added to the pre-1994 text:

Pre-1994:

> (a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> > . . .
> >
> > (4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) . . . .

Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1837, 1989–90 (emphasis added).

Post-1994:

> (a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> > . . .

> (4) the kinds of sentence and the sentencing range established for—
>
> > (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code. . . *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) of title 28, United States Code* . . . .

See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280001, 108 Stat. 1796, 2095–96 (emphasis added).

Our job is to interpret the statutory language from its text and context. With that in mind, before addressing the text of the 1994 amendments, I run through the relevant background to the two disputed 1994 statutory amendments quoted above. Though the historical information and the legislative history might come a bit early, I explain later why the two 1994 amendments are, at the very least, ambiguous.

A. The Sentencing Reform Act of 1984

Until 1984, "the federal sentencing system was almost entirely unregulated: judges sentenced without any legal constraints other than broad statutory penalty ranges (e.g., from probation to twenty years of imprisonment for bank robbery)." Brent E. Newton & Dawinder S. Sidhu, *The History of the Original United States Sentencing Commission, 1985-1987*, 45 Hofstra L. Rev. 1167, 1169 (2017). Under this system, "there was virtually no appellate review of the sentences imposed." *Id.* "Once federal district judges decided upon a sentence, they were not required to give any reasons for the particular sentences that they imposed." *Id.* at 1170. And because two executive-branch agencies—the United States Parole Commission and the Bureau of Prisons—controlled the "back end" of sentences, parole and good-time allowances led to "many federal prisoners [being] released well before the expiration of the sentences of imprisonment imposed by federal district courts." *Id.*

A bipartisan movement swelled against the discretionary and indeterminate sentencing system in federal courtrooms. Hon. William W. Wilkins, Jr., Phyllis J. Newton & John R. Steer, *Competing Sentencing Policies in a "War on Drugs Era*," 28 Wake Forest L. Rev. 305, 305–06 (1993). The dissatisfaction concerned the disparity in sentences for similar violators committing similar offenses and the lack of truth in sentencing—the time in fact served being a fraction of the pronounced sentence. *Id.*

In 1984, after years of discussion, Congress enacted the Sentencing Reform Act as part of the Comprehensive Crime Control Act of 1984. Brent E. Newton, *supra*, at 1183–87; Wilkins, *supra*, at 305–06. The Act passed overwhelmingly with bipartisan support. Brent E. Newton, *supra*, at 1184 & n.110; Wilkins, *supra*, at 305. President Ronald Reagan signed the bill into law on October 12, 1984. Wilkins, *supra*, at 310. Soon after, Congress created the United States Sentencing Commission. Judge William W. Wilkins served as

Chairman, a post he held throughout the years involved in this appeal.[1] *See* Brent E. Newton, *supra*, at 1188 & n.135. Congress directed the Commission to develop "mandatory" sentencing policies to "avoid . . . unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct." *Id.* at 1185 (quoting 28 U.S.C. § 991(b)(1)(B)); *see also* William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 Wash. & Lee L. Rev. 63, 87 (1993) ("No purpose was more important to Congress and the several Administrations that worked for years to enact the Sentencing Reform Act of 1984 than the avoidance of unwarranted disparity and resulting unfairness in the sentencing of similarly situated defendants.").

Seeking uniformity in sentencing, "Congress directed the Commission to decide what offense and offender characteristics were relevant for sentencing . . . and also to establish corresponding sentencing ranges." Brent E. Newton, *supra*, at 1185. The sentencing guidelines were to "avoid[] unwarranted disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of the guidelines." *Id.* (citation modified). Congress "specifically directed the Commission to give

[1] The Senate confirmed the initial Commission members on October 16, 1985. Brent E. Newton, *supra*, at 1188.

'particular attention' to providing certainty and fairness and avoiding unwarranted sentencing disparities." *Id.* at 1185 n.118 (quoting 18 U.S.C. § 994(f)).

After being confirmed by the Senate on October 16, 1985, Chairman Wilkins and the other Commission members set off on a herculean task of assembling the first iteration of the federal sentencing guidelines within the deadline provided. On April 13, 1987, they submitted the original Guidelines Manual to Congress. *Id.* at 1188. For its first eighteen months, the Commission had spent time researching, drafting, and debating issues underlying the first Guidelines Manual. *Id.* But the guidelines are evolutionary, and more work lay before the Commission.

B. The United States Sentencing Guidelines: Chapter 7

In the original 1987 version of the Sentencing Manual, the commission devoted just two pages to Chapter 7, entitled "Violations of Probation and Supervised Release." But by 1990 much of the Sentencing Commission's original work had cleared, so it was able to devote significant time to preparing a rewrite of Chapter 7. Among other things, the new version included a separate sentencing table at § 7B1.4 specifically for violations of probation and supervised release. On April 26, 1990, the commission submitted to Congress proposed amendments for the 1990-year cycle. Minutes of May 4, 1990, U.S. Sent'g Comm'n Bus. Mtg. Even so, the Chapter 7 amendments continued to be debated by the commission. *Id*. With Congressional approval, the amendments would go into effect on November 1, 1990. *Id.*

All went smoothly up through July 30, 2007. But on July 31, 2007, the upcoming version of Chapter 7 was threatened by the publishing of *United States v. Smith*, 907 F.2d 133 (11th Cir. 1990). Despite the majority's not mentioning *Smith*, anyone interpreting the 1994 amendments to 18 U.S.C. §§ 3565(a)(2) and 3553(a)(4)(B) must begin by understanding the *Smith* "problem" and its "fix."

C. The Meteorite: *United States v. Smith*

In *United States v. Smith*, the Eleventh Circuit rocked the system for sanctioning violations of probation under § 3565(a)(2). In the Eleventh Circuit and other circuits soon adopting its view, the *Smith* rule rendered the proposed 1990 amendments to Chapter 7 a nullity, despite Congress's soon approving those amendments and making them effective on November 1, 1990. Then came a four-year odyssey to enact amendments to §§ 3565(a)(2) and 3553(a)(4) and override the *Smith* decision. Finally, in 1994, the two amendments became law as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. Law No. 103-322, 108 Stat. 1796. To understand those amendments, we need to understand the *Smith* problem and its fix.

In *Smith*, a defendant pleaded guilty to possessing counterfeit currency in violation of 18 U.S.C. § 472. 907 F.2d at 134. Because his offense occurred after November 1, 1987, the 1987 version of the sentencing guidelines applied at the sentencing hearing. *Id.* For the defendant's offense of conviction, the guidelines set an adjusted offense level of 11—a base offense level of 9 plus two levels for the defendant's aggravating role in organizing the "two-person scheme to pass counterfeit bills." *Id.* Because of the defendant's timely guilty plea, he received a two-level reduction for acceptance of responsibility. So his total offense level was 9. Together with his criminal-history category of I, the defendant's *mandatory* guideline range was 4 to 10 months. *Id.* Because the four-month minimum term did not exceed six months, the defendant was eligible for a sentence of probation with a term of community confinement. *Id.* The court imposed a sentence of three years of probation, with four months to be spent at a community treatment center. *Id.* As a condition of probation, the court required that the defendant remain drug-free. *Id.*

While at the community center, the defendant failed two drug tests. *Id.* For that misconduct, the probation office petitioned the court to revoke the sentence of probation. *Id.* In revoking probation, the court observed that the sentencing guidelines gave it no direction on how to sentence a defendant after revocation of probation. *Id.* Left on its own, the court defaulted to "the statutory maximum for the underlying offense." *Id.* After that, the court "implicitly adopted the probation officer's recommendation and imposed a prison term of eighteen months." *Id.* That was the top end of the mandatory guideline range after the probation officer updated its recommendation to add four more offense levels for the defendant's post-sentencing possession of controlled substances in violation of his probation conditions. *Id.* at 134. The defendant appealed the district court's 18-month sentence. *Id.*

The Eleventh Circuit reversed. In a "case of first impression," it determined that the district court had erred in two ways: "(1) in holding that the guidelines do not apply to probation revocation proceedings and (2) in imposing a prison sentence (eighteen months) that exceeded the one originally available under the guidelines at the time of initial sentencing (four to ten months)." *Id.* at 135. In reaching this result, the court relied on the 1984 version of 18 U.S.C. § 3565, quoting and italicizing it as follows:

> (a) Continuation or Revocation.—If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in [18 U.S.C.] section 3553(a) to the extent they are applicable—
>
> > (1) continue him on probation, with or without extending the term [or] modifying or enlarging the conditions; or
> >
> > (2) revoke the sentence of probation and *impose any other sentence that was available under subchapter A [18 U.S.C. §§ 3551–59] at the time of the initial sentencing.*

Id.

From the italicized language, the Eleventh Circuit concluded that "the district court was required to apply the guidelines" and that the original guidelines calculation "delimit[ed] the sentences that were then available." *Id.* That was so because the probation-violating conduct necessarily occurred after the original sentencing hearing. *Id.* With that, the court concluded that "no upward adjustment in [the defendant's] total offense level could have been based on that conduct, and the longer sentence of imprisonment [anything beyond the ten-month, high end of the original mandatory guidelines range] resulting from such an adjustment was therefore not 'available.'" *Id.*

So as *Smith* stated it, the district court could "impose a new sentence *within* the applicable range prescribed by law, *i.e.*, statute and guidelines, at the time of initial sentencing—in this case, within a range of four to ten months." *Id.* at 136. Otherwise stated, the district court could independently consider the probation violation and penalize it with any time not yet imposed for the original offense—but only up to the top end of the mandatory guideline range set at sentencing. *Id.*

Key for our purposes, *Smith* limited any incarceration sanction for the probation violation to any months available under the mandatory guideline range after imposition of the sentence for the underlying crime of conviction. *Id.* at 135. So, for example, for defendants sentenced to the top end of the mandatory guideline range for the offense of conviction, the court could impose no sanction for the probation violation. *See id.* In other words, in that circumstance, the mandatory guideline range would be the full amount of punishment for the offense of conviction *and the probation violation*.

The upcoming amendments to Chapter 7, which would go into effect on November 1, 1990, with Congressional approval, did not work that way. The new Chapter 7 allowed courts to impose an *incremental* sanction for the probation violation. For that, it provided its own, separate sentencing table. The bottom line was that incarceration times for the offense of conviction and for the probation violation were to be *separate*. But so long as *Smith*'s interpretation of § 3562(a)(2)'s language—"and impose any other sentence that was available under subchapter A at the time of the initial sentencing"—held sway, courts would be *constrained* from imposing the new Chapter 7's sanction for the probation violation.

D. Chairman Wilkins and the Sentencing Commission Respond

On August 21, 1990, at its first business meeting after *Smith* was decided, Chairman Wilkins sought general comments "regarding the August 14, 1990, draft of the proposed Probation and Supervised Release Revocation Policy Statements" and announced that "a final vote on the matter will occur at the August 28 Commission meeting." Minutes of Aug. 21, 1990, U.S. Sent'g Comm'n Bus. Mtg. In addition, "[t]he Commission discussed a recent 11th Circuit decision [*Smith*] relating to revocation of probation and whether to seek a statutory amendment regarding this issue." *Id.* After this discussion, a commissioner "made a motion to proceed with drafting a legislative proposal" in response, and "[t]here was a consensus to proceed with drafting." *Id.*

On August 24, 1990, Chairman Wilkins sent a letter to Senator Strom Thurmond, the Ranking Member of the Committee on the Judiciary.[2] 136 Cong. Rec. 28230 (1990). Referring to *Smith*, Chairman Wilkins offered proposals for "clarification of the statute on revocation of probation to ensure this sanction also will be applied consistent with Congressional intent." *Id.* In response to *Smith*, Chairman Wilkins advised Senator Thurmond that "the Commission recommends *minor modifications* to 18 U.S.C. § 3565, pertaining to revocation of probation, and to 18 U.S.C. § 3553, pertaining to factors to be considered by courts in the imposition of sentence." *Id.* (emphasis added). He advised that "[t]he 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, thereby negating any implication in current statutory language that the guidelines applicable to the initial sentencing of defendants also apply to probation revocation decisions." *Id.* Then citing 28 U.S.C. § 994(a)(3)—by which Congress instructed the Commission "to issue guidelines or policy statements for the revocation of probation and supervised release"—Chairman Wilkins stated the Commission's belief that "Congress clearly intended that these guidelines or policy statements, rather than those

[2] The Sentencing Reform Act of 1984 passed overwhelmingly and with bipartisan backing. As a small sampling of this, Senate co-sponsors included Senators Strom Thurmond, Edward M. Kennedy, Joseph R. Biden, and Orrin Hatch. *United States v. O'Neil*, 11 F.3d 292, 300 (1st Cir. 1993).

applicable to initial sentencing, be used by courts when sanctioning probation (or supervised release) violators."[3] *Id.*

Chairman Wilkins specified the Commission's disagreement with *Smith*—namely, that *Smith* had directed "that the guideline range applicable to the initial sentencing decision also *constrains* the court when it revokes probation." *Id.* (emphasis added). He faulted *Smith* for interpreting § 3565(a)(2) as precluding courts "from considering *the probation violation itself* as a basis for sentencing above the original guideline range applicable at the defendant's initial sentencing." *Id.* (emphasis added). The problem with *Smith*, he said, was that "courts in the Eleventh Circuit *will be constrained* by a guideline range that, in our view, will be inadequate to sanction probation violations appropriately in many cases." *Id.* (emphasis added). And he noted that "in some cases (for example, those in which the defendant was sentenced to probation with a condition of jail confinement for a period of time) a defendant *will be subject to little or no imprisonment sanction* even where there was a serious breach of probation conditions." *Id.* (emphasis added). Chairman Wilkins expressed concern that *Smith* "would appear . . . effectively to block courts in that circuit from using [policy statements just approved by the commission to guide courts in making] probation revocation decisions." *Id.*

[3] Chairman Wilkins stated that "while we believe the Eleventh Circuit decision is plainly contrary to sound policy and congressional intent, we cannot say it is an implausible reading of the statute [§ 3565(a)(2)] or that other courts may not come to a similar conclusion." 136 Cong. Rec. 28230.

As the "fix" to these *Smith* problems, Chairman Wilkins sought the "minor modifications" to 18 U.S.C. §§ 3565(a)(2) and 3553(a)(4)(B). *Id.* These statutory amendments would override *Smith* and "promote an interpretation that is consistent with Congressional intent under the Sentencing Reform Act." *Id.*

As for *Smith*'s barring district courts from sanctioning probation violations with any incarceration time above the top end of the Chapter 5 mandatory guideline range for the offenses of conviction, Chairman Wilkins asked Senator Thurmond to delete the § 3565(a)(2) text that *Smith* thought dispositive, that is, the statute's direction to "impose any other sentence that was available under subchapter A [18 U.S.C. §§ 3551–59] at the time of the initial sentencing." *Id.* In its place, Chairman Wilkins proposed language directing the court to "resentence the defendant under the provisions of subchapter A of this chapter [18 U.S.C. §§ 3551–59]." *Id.* As Senator Thurmond advised his colleagues in the "Explanation of Probation Revocation Proposal," Chairman Wilkins proposed adding the § 3553(a)(4)(B) language to fill an "omission" from the Sentencing Reform Act of 1984—one commanding that courts consider the Chapter 7 policy statements created under 28 U.S.C. § 994(a)(3). *Id.* at 28231. In other words, the § 3553(a)(4)(B) amendment inserted a needed provision that Congress had overlooked in 1984—just a cleanup on aisle 1984.

This shows that Chairman Wilkins saw his proposed amendments for §§ 3565(a)(2) and 3553(a)(4)(B) as securing a two-step sentencing procedure after revocations of probation. Just as we later held in *Moore I*, at the first step (the § 3565(a)(2) resentencing) the Chapter 5 sentencing range for the original offense of conviction would remain in place. At the second step, the Chapter 7 policy statement for the probation violation would apply without considering the mandatory guideline for the offenses of conviction.

Chairman Wilkins's correspondence leaves no doubt that his goal was to *separate* Chapter 5 and Chapter 7, not to *merge* them as the majority opinion now does:

- "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, thereby negating any implication in current statutory language [*see Smith*, 907 F.2d 133] that the guidelines applicable to the initial sentencing of defendants also apply to probation revocation decisions." *Id.* at 28230.

- "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, rather than those applicable to initial sentencing, be used by courts when sanctioning probation (or supervised release) violators." *Id.* Chairman Wilkins continued this thought by contrasting *Smith*'s rule as one that "constrains the court when it revokes probation" and permits "only a sentence . . . within the guideline range applicable to the defendant's initial sentencing decision." *Id.* Chairman Wilkins also disagreed with *Smith*'s rule "interpret[ing] the statute [§ 3565(a)(2)] to preclude a court from considering the probation violation itself as a basis for sentencing above the original guideline range applicable at the defendant's initial sentencing." *Id.*

- Seeking to ensure a meaningful incremental sanction for a probation violation, Chairman Wilkins stated that "[a]s a result of the [*Smith*] court's holding, courts in the Eleventh Circuit will be constrained by a guideline range that, in our view, will be inadequate to sanction probation violations appropriately in many cases. Additionally, in some cases (for example, those in which the defendant was sentenced to probation with a condition of jail confinement for a period of time) a defendant will be subject to little or no imprisonment sanction even where there was a serious breach of probation conditions." *Id.*

- Chairman Wilkins sought "to remove any doubt that these pronouncements [the Commission's Chapter 7 policy statements]—not those applicable to initial sentencing decisions—are the appropriate reference for revocation purposes." *Id.*

On the separate point of district courts' future access to the upcoming Chapter 7 policy statements, Chairman Wilkins expressed concern that *Smith*'s rule would "impede Commission plans to implement a system of policy statements for revocation decisions, preparatory to issuing guidelines for revocation at a future date." *Id.* He declared that "*Smith* would appear, however, effectively to block courts in that circuit from using these [upcoming Chapter 7] policy statements for probation revocation decisions." *Id.* To avoid *that*, he proposed amending § 3553(a)(4) by adding a subsection (B) reading as follows: "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 28 U.S.C. § 994(a)(3)." *Id.*

Agreeing with Chairman Wilkins, Senator Thurmond sought the amendments to §§ 3565(a)(2) and 3553(a)(4) that Chairman Wilkins proposed. So, first, Senator Thurmond sought to replace the language from § 3565(a)(2) that *Smith* depended on—"impose any other sentence that was available under subchapter A at the time of the initial sentencing"—with Chairman Wilkins's proposed language: "resentence the defendant under the provisions of subchapter A of this chapter." *Id.* at 28231. In the "Explanation of Probation Revocation Proposal," Senator Thurmond advised his colleagues that *Smith* had "erroneously construed" the "[a]t the time of initial sentencing" language "to mean a sentence in accordance with the sentencing guidelines applicable at initial sentencing of the defendant." *Id.* Also advocating the two-step procedure that *Moore I* later incorporated, Senator Thurmond contrasted the substitute text as "permit[ting] courts to resentence a defendant whose probation sentence is revoked to *another* statutorily authorized sentence—i.e., a sentence authorized under sections 3551–3559 of title 18." *Id.* (emphasis added). He declared that a "resentence" was needed "because, under the Sentencing Reform Act [of 1984], probation is a sentence; therefore, when a probation sentence is revoked, the defendant must be 'resentenced.'" *Id.* Thus, Senator Thurmond's proposed amendment would, and later did, solve Chairman Wilkins's first problem with *Smith*.

Second, Senator Thurmond sought to amend § 3553(a)(4) by adding the above-referenced subsection (B) "to provide a direct reference to Sentencing Commission guidelines or policy statements applicable to revocation decisions." *Id.* As he stated it, "[t]he proposed amendment makes it clear that it is the guidelines or policy statements issued specifically to guide revocation decisions, and *not* the guidelines and policy statements applicable at initial sentencing, that govern court decisions when considering violations of probation or supervised release." *Id.* (emphasis added). The whole goal was to keep the sentence for the offense of conviction *separate from* the sanction for probation. The amendments were to stake a fence between the two different concerns.

He noted that the "[c]urrent statutory language in section 3553 contains no reference to guidelines or policy statements issued by the Commission pursuant to 28 U.S.C. § 994(a)(3), the paragraph authorizing and directing the Commission to promulgate guidelines or policy statements for the revocation of probation and supervised release." *Id.* So the amended text would provide the needed "analogous directive in section 3553 requiring court consideration of these particular guidelines or policy statements." *Id.* Once again, Senator Thurmond tracked Chairman Wilkins's requested changes and his reasoning for them. Section 3553(a)(4)(B) was needed to correct an "*omission*" in the Sentencing Reform Act of 1984. *Id.* (emphasis added).

In 1991, Senator Thurmond advised his colleagues that "[c]urrent law . . . does not expressly command court consideration of guidelines or policy statements governing violations of probation and supervised release that derive from Commission authority under 28 U.S.C. § 994(a)(3)." 137 Cong. Rec. 14822 (1991). To correct this "oversight," he said, § 3553(a)(4) requires "court consideration of Commission guidelines or policy statements pertaining to violations of probation and supervised release." *Id.* He emphasized that honoring the Sentencing Reform Act's command required "that all court decisions affecting the imposition or modification of sentence are to be structured by the standards of the Act and by Sentencing Commission guidelines and/or policy statements relevant to the *particular* sentencing recommendation." *Id.* (emphasis added). In other words, sentencing for offenses of conviction is done through Chapters 1–5 via 18 U.S.C. § 994(a)(1), and sentencing for probation violations is done through Chapter 7 via § 994(a)(3).

In essence, the 1994 amendments to §§ 3565(a)(2) and 3553(a)(4)(B) kept Chapter 5 from devouring Chapter 7. Ironically, as shown below, the majority misreads those amendments and has Chapter 7 devouring Chapter 5. Otherwise stated, the majority turns *Smith* upside down—*Smith* jammed the Chapter 7 sanction into the mandatory Chapter 5 range for the offense of conviction, and the majority jams the Chapter 5 range into the Chapter 7 range for the probation-violation sanction. The 1994 statutory amendments cured the narrow problem caused by *Smith*; today's interpretation of those same two amendments creates a broader and even worse one.

II. The Majority Opinion

A. Majority's Step One

At its first step, the majority concludes "that after a court revokes probation, 18 U.S.C. § 3553(a)(4) requires the resentencing court to consider the recommended sentence under Chapter 7 of the Sentencing Guidelines Manual for the offender's probation violation." Majority Op. at 2. This conclusion leaves out some of its underlying assumptions. When fleshed out, it manifests the majority's misunderstanding of statutory terms and how Congress's sentencing system works. I take it piece by piece below.

1. Section 3565(a)(2): "Resentencing"

The majority treats "resentence the defendant under subchapter A" as collaring both the offense of conviction and the probation violation. Then trekking through subchapter A up through § 3553(a)(4)(A), the majority encounters statutory provisions focusing on the offense of conviction. Nary a mention of a probation violation. But on reaching § 3553(a)(4)(B), the majority seizes on the words "or (B) in the case of a violation of probation or supervised release" and reads them as all-consuming. The majority concludes that this language overrides § 3553(a)(4)(A)—that is, it reads (A) or (B) as a one-time, mutually exclusive sorting. And by that reading, it eliminates any sentencing for the offense of conviction to which the conditional sentence of probation hung.

The majority's failure to consider *Smith* is costly. Recall that the present version of § 3562(a)(2) substituted "resentence the defendant under subchapter A" for the *Smith* era (pre-1994) text version of § 3562(a)(2): "impose any other sentence that was available at the time of sentencing." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110506, 108 Stat. 1796, 2017. Unlike how the majority reads the post-1994 version of § 3565(a)(2), *Smith* didn't read the pre-1994 § 3565(a)(2) as directing it to eliminate Chapter 5's mandatory sentencing range for the offense of conviction.

In fact, *Smith* read "available at the time of offense" as the sentence available *for* the offense of conviction. And Congress didn't change this meaning by using "resentence the defendant under subchapter A." Both the pre- and post-1994 versions of § 3565(a)(2) zero in on the offense of conviction. In passing the 1994 statutory amendments, Congress didn't seek to eliminate the then-*mandatory* guideline range for the offense of conviction.[4] It passed the amendments to implement the *Smith* "fix"—that is, to require that district courts calculate and impose a separate and incremental sentence under Chapter 7. Incremental to what? The Chapter 5 sentence, of course.

The majority's bundling the offense of conviction and the probation violation for one trip through "resentence the defendant under subchapter A" makes no sense. First, does the majority really contend that in 1994, the middle of the mandatory-guideline regime, Congress decided to forgive the offense of conviction and eliminate the mandatory Chapter 5 sentencing range? All without saying so? No pre-*Booker* cases support that view. Second, if Congress intended that result, wouldn't it have simply said in § 3565(a)(2) "resentence *under § 3553(a)(4)(B)*?" And doesn't Congress's failure to use that language

[4] I don't understand the majority's "link" and "delink" discussion or how it reads *Moore I* in the discussion. *See* Majority Op. at14–15. I think the majority might just be saying that *Moore I* at step one required a resentencing on the original offense under Chapter 5. If so, I agree. And if by "delinking," the majority is expressing its view that sentencing for the original offense no longer occurs, I agree the majority is saying that, but I dispute the 1994 amendments did any such thing.

show that it had *something else* in mind with the words “resentence the defendant under subchapter A”? And can’t that something else only be the resentencing of *the original offense of conviction* under subchapter A (just as the court initially sentenced the defendant before granting probation)?

The majority also ignores persuasive authority contradicting its interpretation of “resentence the defendant under subchapter A.” By our good fortune, Judge Wilkins was the first circuit judge to interpret § 3565(a)(2)’s “resentence the defendant under subchapter A” language. In *United States v. Schaefer*, he read the post-1994 version of § 3565(a)(2) this way: “This amended provision plainly permits a district court to begin the sentencing process anew and to impose *any sentence* appropriate under the provisions of subchapter A, *i.e.*, one that satisfies statutory *and guideline* requirements.” 120 F.3d 505, 507 (4th Cir. 1997) (emphasis added). From this, what makes sense is that “begin the sentencing process anew” means *re*start the sentencing again as though probation had never been granted. When a court revokes a *conditional* sentence of probation, it starts over where it left off. *See* 18 U.S.C. § 3564(e).

In contrast, as the majority would have it, “begin the sentencing process anew” means a “resentence” at which the court *ignores* everything considered at the original sentencing (e.g., the “statutory and guideline requirements”), including the presentence report required by § 3552(a). Under that view of § 3565(a)(2), the district court can revoke probation, impose a Chapter 7 sanction using the § 7B1.4 range, jack up the Chapter 7 sanction with the hijacked Chapter 5 range that has nothing to do with the Chapter 7 breach of trust, and close the case. That's a *re*sentencing?

Finally, before addressing § 3553(a)(4)'s use of "or (B)," I note how dependent the meaning of that subsection is on the meaning of § 3565(a)(2)'s "resentence the defendant under subchapter A." If "resentence the defendant under subchapter A" means start over as if the district court never granted probation, that ends any need to discuss the "or" preceding § 3553(a)(4)(B). After all, if § 3565(a)(2) commands resentencing for the original offense, we can't read the simultaneously enacted § 3553(a)(4)(B) as undoing that command. Instead, we would have to read § 3553(a)(4)(B) as operating in the sensible way the dissent says it does. Section 3553(a)(4)(B) would be a standalone direction for sentencing the narrow probation violation just like it is for supervised release. It wouldn't rely on subchapter A, but just itself. Even so, I turn to § 3553(a)(4)(B).

2. Section 3553(a)(4): "or (B)"

Reading "resentencing under subchapter A" as the majority does fails to acknowledge that almost all of subchapter A (§§ 3551 through 3559) concerns the *offense* of conviction, not a probation *violation*. Again, if Congress had intended for § 3553(a)(4)(B) to immunize probation violators from being sentenced for their offenses of conviction, it had a simpler way of doing it—just write § 3565(a)(2) as "resentence *under § 3553(a)(4)(B)*." In effect, the majority reads § 3565(a)(2) that way despite the subsection's not saying that. According to the majority, every probation revocation must journey through all of subchapter A even though all that matters is § 3553(a)(4)(B). Such a regal role for § 3553(a)(4)(B) leaves (a)(4)(A) a dead letter. And not just mostly dead as the majority would have it in its Step 2, but plain dead, no twitching.

Again, the majority goes wrong by ignoring *Smith*. By its reading of the pre-1994 version of § 3565(a)(2), *Smith* forced the probation-violation sanction into the mandatory Chapter 5 sentencing range, which often prevented an adequate incremental penalty for the probation violation. And that result conflicted with the Sentencing Commission's more-robust Chapter 7 (and § 7B1.4's sentencing table) that would go into effect on November 1, 1990. The Chapter 7 sentencing table would set sentencing ranges for categories of probation violation incremental to Chapter 5's sentencing table. And that all came *before Smith* and the 1990 (enacted in 1994) amendments. In approving the two 1994 statutory amendments and earlier approving the Chapter 7 amendments, Congress showed that it agreed with this aim.

In short, the concern of Congress and the Sentencing Commission was in keeping probation violators from receiving too *little* punishment, not too much. Imprisonment for the offense of conviction alone wasn't sufficient. It should go without saying that Congress wasn't interested in "freebies" and rewards for probation violators—it was interested in making sure they paid for *both* their offenses of conviction and their probation violations.

As seen, the majority's mistake is in not recognizing that § 3553(a)(4)(B) is a freestanding provision implementing 28 U.S.C. § 994(a)(3). The freestanding nature of § 3553(a)(4)(B) applies equally to probation and supervised-release violators. The effect of § 3553(a)(4)'s "or" is to direct the sentencing court to the proper framework for the *particular* sentencing at issue. That is, if a court is resentencing the offense of conviction after revoking a conditional sentence of probation, § 3553(a)(4)(A) directs it to Chapters 1 through 5 of the guidelines created under 28 U.S.C. § 994(a)(1). ***Or*** if the court is sanctioning a probation revocation, § 3553(a)(4)(B) directs it to Chapter 7 as created under 28 U.S.C. § 994(a)(3). The "or" preceding § 3553(a)(4)(B) is a gatekeeper—its job is to keep the two separate things separate. No using Chapter 5 to sanction under Chapter 7, and no using Chapter 7 to sentence under Chapter 5.

On this point, *United States v. Kelley*, 359 F.3d 1302 (10th Cir. 2004) (Ebel, J.) is instructive, despite the defendant in that case being a multi-time supervised-release violator, rather than a single-time probation violator like Mr. Moon Seals. *Id.* at 1303. The court spoke expansively when it stated that "[t]he Sentencing Commission proposed adding subsection (a)(4)(B) to clarify that *revocation decisions* should be guided by the guidelines and policy statements issued by the commission specifically for that purpose, not by the guidelines that were applicable to the defendant's underlying offense." *Id.* at 1306. And it relied on the Wilkins-Thurmond legislative history to back that up, quoting this part of it: "Congress clearly intended that these guidelines or policy statements [Chapter 7], rather than those applicable to initial sentencing [Chapter 5], be used by courts when sanctioning probation (or supervised release) violators." *Id.* (quoting 136 Cong. Rec. 28230 (1990)). The court disallowed consideration of § 3553(a)(4)(A) in arriving at a sanction under Chapter 7 for the supervised-release violation, ruling that "in such cases the relevant consideration under § 3553(a)(4) is the Chapter 7 policy statements referenced in § 3553(a)(4)(B)." *Id.* As seen from the quote, the same applies to probation. *Kelley* read "or (B)" the same way I do.[5] It disallowed consideration of § 3553(a)(4)(A) and thus Chapter 5 in punishing the Chapter 7 violation. So no Chapter 5 peek would have been welcome, just as it shouldn't be in our appeal.

[5] The majority relies on *Kelley* to support the majority's statement that "[w]e have already rejected a two-step process like *Moore I* when the court sentences a defendant after revoking his supervised release." Majority Op. at 15. This misses the mark. The majority quotes some *Kelley* language that I have quoted above: "§ 3553(a)(4)(A) has no application when a violation of the defendant's conditions of supervised release is at issue; in such cases the relevant consideration . . . is the Chapter 7 policy statements referenced in § 3553(a)(4)(B)." *Id.* (quoting 359 F.3d at 1306). But the majority wrongly says that *Kelley* defeats *Moore I*'s two-step sentencing system (first, sentencing the offense of conviction under Chapter 5; and second, sanctioning the probation violation under Chapter 7). *Id.* at 16. It errs by not acknowledging that *Kelley* is acting entirely within Chapter 7. Because it is a supervised-release case, *Moore I*'s first step had already long passed. The district court had imposed sentence for Mr. Kelley's offense of conviction, and Mr. Kelley had served it. So because *Kelley* was a supervised-release case, *Kelley* had no reason to consider *Moore I*'s first step, let alone reject it. My key takeaway from *Kelley* is that it concludes that § 3553(a)(4)(A) does not apply to the Chapter 7 violations. I wholeheartedly agree.

From the day it enacted the Sentencing Reform Act of 1984, Congress expressed its clear intent to keep sentencings for offenses of conviction and probation violations separate. We need look no further than 28 U.S.C. § 994(a)(1) (commanding the promulgation of guidelines for determining the appropriate length of a term of imprisonment) and § 994(a)(3) (commanding the promulgation of "guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in section 3565 of title 18"). Congress maintained this dichotomy in § 3553(a)(4)(A) and (B). In fact, those subsections reference their separate § 994(a)-creation language. Activating one does not deactivate the other. From the outset, §§ 994(a)(1) and (a)(3) have staked a fence line separating punishments for offenses of conviction and probation violations. *Moore I* was correct to ensure that never the twain shall meet.

To understand the workings of § 3553(a)(4)(B), the majority need look only to Senator Thurmond's explanation for it. He explained that § 3553(a)(B) filled an "omission" in the Sentencing Reform Act of 1984. 136 Cong. Rec. 28230 (1990). Here is how he described the need to enact § 3553(a)(4)(B) to fill the inadvertent omission: "Current law, however, does not expressly command court consideration of guidelines or policy statements governing violations of probation and supervised release that derive from Commission authority under 28 U.S.C. § 994(a)(3)." 137 Cong. Rec. 14822 (1991). He explained that § 3553(a)(4)(B) "corrects this oversight by amending 18 U.S.C.

§ 3553(a)(4) to require court consideration of Commission guidelines or policy statements pertaining to violations of probation and supervised release." *Id.* Can the purpose of the amendment be more clearly stated?

In evaluating the majority's interpretation of the 1994 amendments, consider this common situation. Suppose the court imposes a sentence of probation on a defendant on July 1. On July 15, the probation office petitions to revoke probation. On August 1, the court holds a hearing, finds a violation, and elects to revoke probation. As I understand it, the court could impose the resulting Chapter 7 sanction after hearing from the parties. The court could say, "Marshal, Mr. Moore left the state without probation's permission, so I'm sanctioning him with a low-end, three-month jail term, please take him away. Counsel, I'll see you and Mr. Moore for a resentencing hearing on September 15. Make sure you have all your witnesses here and evidence ready to present for my consideration. Good-bye." Then on September 15, after a full resentencing hearing, the court could impose a Chapter 5 guidelines sentence, varying up or down from the advisory range if it chose. I am uncertain whether the majority disputes this.[6] If not, I assume the majority has no issue with district courts continuing to use the *Moore I* framework if they so wish.

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[6] As the primary author of *Moore I* and *Moon Seals*, I have always referred to the resentencing of the offense of conviction as "step 1," but as in the above example, it can be step 2 just as easily and usually will be. In hindsight, I wish I'd deemed the probation revocation as step 1 and the offense-of-conviction sentencing as step 2. But depending on how the district court proceeds, steps 1 and 2 can switch back and forth.

As another point favoring *Moore I*'s two-step sentencing system, we can rely on the Sentencing Manual itself. Section 4A1.2(k) directs how to compute criminal-history points. In doing so, it adds the separate imprisonment times imposed for the offense of conviction and for the probation violation: "In the case of a prior revocation of probation . . . add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history points for § 4A1.1(a), (b), or (c), as applicable." U.S. Sent'g Guidelines Manual § 4A1.2(k)(1) (2021). The two incarceration periods mentioned are those included in *Moore I*'s two steps.

Finally, as the newcomer to § 3553(a), § 3553(a)(4)(B) must be read consistently with its entrenched neighbor, § 3553(a)(6). Subsection (a)(6) states that "[t]he court, in determining the particular sentence to be imposed, shall consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." This restates a big part of why Congress passed the Sentencing Reform Act of 1984. Contrary to § 3553(a)(6)'s direction to *avoid* unwarranted sentencing disparities, the majority's interpretation of § 3553(a)(4)(B) *creates* them. In fact, when it comes to creating disparities, the majority is "moving like a tremendous machine."[7] Congress passed the Sentencing Reform Act of

[7] Chic Anderson's memorable call as Secretariat separated from Sham and the field at the 1973 Belmont Stakes.

1984 to end this now-relicensed, luck-of-the-draw sentencing world, driven by the happenstance of which particular judge is sentencing the defendant.

B. Majority's Step Two

I acknowledge that the majority claims that it has a "one-step" sentencing system. Majority Op. at 8, 19–21. But the majority doesn't acknowledge as a second step what district courts do with their newfound discretion to take the Chapter 5 peek or not. Whichever way the district court chooses, the choice itself is a second step.

The majority strips the offense of conviction from the sentencing analysis and thereby strands the entire sentencing decision inside the inescapable Chapter 7. I can't sympathize with the majority's plight from doing so—namely that reasonable people will think three to nine months isn't a reasonable prison sentence for a handgun-wielding, liquor-store robber like Mr. Moore or a death-threatening menace like Mr. Moon Seals. The majority's *need* to fashion a Chapter 5 rescue plan to try to escape § 3553(a)(4)(B) and Chapter 7 isn't a *legal basis* to do so. In fact, the need for a rescue plan should tip off the majority that its statutory interpretation is faulty. Neither Congress nor the Sentencing Commission has authorized the majority's discretionary Chapter 5 peek, which is simply a hunched, backdoor dash to § 3553(a)(4)(A) and Chapter 5, an avenue the majority's own interpretation of "or B" forecloses.

1. The Framework of the Sentencing Guidelines

The first problem with the majority's analysis is that Chapters 5 and 7 cover different things. It would make no sense for a district court to say, "Looking at what your Chapter 5 range would have been if the *Moon Seals* en banc court hadn't erased it (for Moon Seals, 33 to 41 months), I am going to increase your Chapter 7 time by 33 months (or whatever number of months between 0 and the statutory maximum of 120 months) even though your offense of conviction is obviously unrelated to your probation-violating conduct breaching my trust." Offenses of conviction and probation violations don't mix and match. In fact, as shown above, Congress and the Sentencing Commission have gone to a lot of trouble keeping them *separate*.

Further, it is unclear how this Chapter-7-boosting will even work. Say a court "sees the good" in a multi-time convicted armed bank robber whose latest offense carries a high total offense level and criminal-history category. The court decides to "take a chance" and varies downward to award probation, presumably with an equally accommodating AUSA as prosecuted Mr. Moon Seals. The next week the probationer violates a probation condition by traveling across state lines without permission. Under *Moore I*, after revoking probation, the court would, in whichever order of hearings it chose, (1) resentence the defendant for his bank-robbery offense of conviction under Chapter 5 and the § 3553(a) factors and (2) sanction the defendant for his probation violation under Chapter 7. That is what those two chapters are built for. Under the majority's approach, the district court could no longer sentence the armed bank robbery. So that's a freebie offense of conviction. To try to contain the fallout from this astonisher, the majority permits the district court to "peek" at the Chapter 5 range after variances (or maybe without looking at variances, I'm uncertain) and then drag it back to Chapter 7 to punish the offense of conviction under the false label of *a breach of trust for violating probation*. None of this makes sense or fits the statutory and guidelines framework.

2. 18 U.S.C. § 3553(a)(4)

The majority opinion is emphatic that "or (B)" is disjunctive and thus that (a)(4)(A) and (B) are mutually exclusive.[8] Majority Op. at 14–15. For probation violators like Mr. Moon Seals, the majority declares that "[s]ection 3553(a)(4)(A) does not apply." *Id.* at 22. It needs to stick with that. It can't

[8] I don't care whether "or" is disjunctive or conjunctive. If § 3553(a)(4) read "and (B)" instead, the majority would still say that (B) overrides (A), as the more specific. What *is* important is that "or" is part of the *Smith* fix. It separates the probation-violation sanction from the imprisonment time for the offense of conviction. It doesn't say choose the red or blue pill. It says if you're at the probation-violation stage, use Chapter 7, or if you're at the resentencing stage, use Chapter 5. It ensures that the November 1, 1990, version of Chapter 7, with its separate sentencing table, can be enforced, which *Smith* had prevented. Under §§ 3565(a)(2) and 3553(a)(4)(A) and (B), the district court addresses what it's asked to do *at a given instant*. If it's sanctioning a probation violation, it gains its authority to do so and direction how by going directly to § 3553(a)(4)(B). It doesn't waste time and effort by consulting each section in subchapter A—which concerns the offense of conviction. But if resentencing the offense of conviction after revoking the sentence of probation, it runs through subchapter A, including the § 3553(a) factors in general and § 3553(a)(4)(A) in particular.

wiggle free with a statement that "[t]he court *may* vary upwards (as with any sentence) according to the § 3553(a) factors, and in making this determination, the court should consult Chapter 5's recommended range of imprisonment, particularly when considering § 3553(a)(1), (2), and (6)." *Id.* What the majority really is saying is § 3553(a)(4)(A) does not apply—unless the majority really needs it to "apply" so that the final sentence isn't ridiculously low. Again, this twisting and twirling is unnecessary under *Moore I*. (And as a note to the reader, as stated below, I think the majority leaves the other § 3553(a) factors behind too when it applies "or (B)" and beelines for Chapter 7.)

Once properly invoked, § 3553(a)(4)(B) rules out everything for the upcoming probation-violation sentence except what § 3553(a)(4)(B) allows. And all that § 3553(a)(4)(B) allows in determining a probation-violation sentence is "the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code." So Chapter 7. And as discussed next, Chapter 7 is self-contained.

3. U.S.S.G. Chapter 7

Nothing in Chapter 7 authorizes or contemplates the majority's discretionary leap back to § 3553(a)(4)(A) for its Chapter 5 peek. Both § 3553(a)(4)(B) and Chapter 7 are absolute and all-inclusive. And that makes sense. The 1994 amendments were enacted after *Smith* to unjam Chapter 5 and 7 and to keep them separate from each other.

The majority describes its Chapter 5 peek as a Chapter 7 “upward variance into the Chapter 5 range.” Majority Op. at 19. Neither the statutes nor the Sentencing Manual permits this. On one hand, the majority disavows any statutory ability to resentence the offense of conviction under Chapters 1 through 5 of the Sentencing Manual under § 3553(a)(4)(A), but on the other hand, it allows a court to do the same thing through a “variance” in the Chapter 7 range using the abandoned Chapter 5 range. It bears repeating: Chapters 5 and 7 are fenced apart *by design*. They address separate concerns. The majority cannot treat the Chapter 5 advisory range for the offense of conviction like a Chapter 2 specific offense characteristic or a Chapter 3 upward adjustment to Chapter 7’s sentencing table.

In formulating Chapter 7, the sentencing commission chose to “consider[] a violation resulting from a defendant’s failure to follow the court-imposed conditions of probation or supervised release as a ‘breach of trust.’” U.S. Sent’g Guidelines Manual ch. 7, pt. A(3)(b) (2021). Under this approach, “the nature of *the conduct leading to the revocation* would be considered in measuring the extent of the breach of trust.” *Id.* (emphasis added). The intent was “to sanction the violator for failing to abide by the conditions of the court-ordered supervision.” *Id.* The Chapter 7 policy statements “seek to prescribe penalties *only for* the violation of the judicial order imposing supervision.” *Id.* ch. 7, pt. B, introductory commentary (emphasis added). The sole mentioned use for § 3553(a) is to help courts determine whether the probation-violation sanction should "be served consecutively or concurrently to an undischarged term of imprisonment." *Id.* Obviously, that issue isn't part of the present appeal.

"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)." *Id.* § 7B1.3(b). The sentencing table at that section sets ranges based on (1) the Grade of Violation (graded more seriously from C to A) and (2) the Criminal History Category previously calculated for the offense of conviction. *Id.* § 7B1.4(a). In Chapters 5 and 7, the Guidelines Manual furnishes separate sentencing tables for the separate conduct activating them. *See id.*; *id.* ch. 5, pt. A. Nothing in the Guidelines Manual approves of the majority's leap back to § 3553(a)(4)(A) for its Chapter 5 peek. And nothing approves using a Chapter 5 peek in varying from the Chapter 7 sentencing ranges.

All the majority offers otherwise is this statement from Chapter 7's introduction: "[A]t revocation the court should sanction primarily the defendant's breach of trust, while taking into account, to a limited degree, the seriousness of the underlying violation and the criminal history of the violator." Majority Op. at 19 (quoting U.S. Sent'g Guidelines Manual ch. 7, pt. A(3)(b) (2021)). But far from approving the use of Chapter 5 to set Chapter 7 prison time, this language reinforces that Chapter 7's focus is on the breach of trust. In referring to the seriousness of the *underlying violation*, Chapter 7 refers to the probation-violating conduct, not to the conduct underlying the offense of conviction. And the "criminal history" referred to is accounted for in the Chapter 7 table itself.

4. General § 3553(a) Factors

Nor would any of the § 3553(a) factors help the majority in authorizing district courts to increase Chapter 7 sanctions for probation violations. The majority claims that the probation-violation-sentencing court can rely on § 3553(a)(1) to consider "the nature and circumstances of the offense and the history and characteristics of the defendant." Majority Op. at 18 (quoting 18 U.S.C. § 3553(a)(1)). But, as throughout subchapter A, § 3553(a)(1) refers to the *offense*—not to the probation *violation*. That focus on the offense fits § 3553(a)(4)(A), not § 3553(a)(4)(B).

In addition, the majority faces the same old problems. Section 3553(a)(4)(B), whose language the majority says is specific and thus beats any general language, Majority Op. at 13, is all-inclusive for what courts may consider: "The court, in determining the particular sentence to be imposed, *shall consider* . . . the kinds of sentences and the sentencing range established *for* . . . (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) of title 28, United States Code." 18 U.S.C. § 3553(a)(4)(B) (emphasis added). That directs the exclusive use of Chapter 7, not § 3553(a). Section 3553(a)(1), (2), and (6) all have their place—

but it's in evaluating the sentence for the offense of conviction.[9] By immunizing the offense of conviction, the majority throws these subsections overboard too.

And the majority faces another problem, too. Section 3565(a)—Revocation of Probation—tells us exactly *when* courts may turn to § 3553(a) factors. Courts may use those factors ("to the extent that they are applicable") in determining *whether* to revoke probation. But nothing authorizes courts to use those factors in imposing the probation-violation sanction. *See* 18 U.S.C. § 3565(a).

5. 18 U.S.C. § 3661

In a footnote to close the opinion, the majority states that "[c]onsidering the defendant's pre-probation conduct for sentencing purposes is permissible

[9] I acknowledge that *Kelley* says that "[t]o be sure, pursuant to 18 U.S.C. § 3553(a)(1), the seriousness of the offense is one factor among many the district court should consider in sentencing upon revocation of supervised release, whether or not the district court elects to depart from the Chapter 7 recommended sentencing range." 359 F.3d at 1306. If *Kelley* is speaking to the "offense" leading to revocation of the supervised release, I agree. If *Kelley* is speaking to the original offense of conviction, I disagree, because § 3553(a)(4)(B) and Chapter 7 are all-inclusive. But even if a district court somehow has room to consider § 3553(a)(1)'s "nature and circumstances of the offense and the history and characteristics of the defendant" under those provisions, that information would be relevant only in measuring the degree of the breach of trust under Chapter 7 (and I can't see how it would be). The majority stretches for § 3553(a)(1), (2), and (6) as legitimizing its Chapter 5 peek. It needs to be able to circle back from Chapter 7 to § 3553(a)(4)(A) to peek at the Chapter 5 range, or be stuck with a three- to nine-month sentencing range as perhaps varied by the degree of the breach of trust. And *Kelley*, § 3553(a)(4)(B), and Chapter 7 foreclose that circling back.

because by statute, '[n]o limitation shall be placed on the information concerning the background, character, and conduct' of the defendant." Majority Op. at 22 n.10 (quoting 18 U.S.C. § 3661). Again, the same old problems. The majority reasons that the "or" preceding § 3553(a)(4)(B) leaves (a)(4)(A) and its Chapter 5 calculation inapplicable. *See* Majority Op. at 22. And it should recognize that Chapter 7 provides its own exclusive factors to be used for sanctioning probation revocations. *See id.* Further, as with subchapter A's provisions, subchapter B's § 3661 focuses on an appropriate sentence for "a person convicted of an *offense*." So under § 3553(a)(1) and (2), all "information concerning the background, character, and conduct of a person" is fair game for that purpose. 18 U.S.C. § 3661. But that's not so in the probation-violation setting. As mentioned, § 3553(a)(4)(B) and Chapter 7 limit the relevant considerations to those contained in those provisions. Moreover, even if § 3553(a)(1) and (2) applied, they could not boost the Chapter 7 probation-violation sentence with Chapter 5's range built on the offense of conviction.

C. Ambiguity

I would conclude that *Moore I* correctly read "resentence the defendant under subchapter A" and "or (B)" as unambiguous. But as shown above, those provisions are at the very least ambiguous. And the ambiguity opens the door to the quoted legislative history, a poison pill for the majority. And this legislative history is gold. It's not a staffer typing a committee report or a Representative Joseph or Josephine Schmoe speaking on C-SPAN at midnight.

Senator Thurmond was the Chairman of the Senate Judiciary Committee in 1984 and helped shepherd the Sentencing Reform Act of 1984 through Congress, and he was the Ranking Member of the Senate Judiciary Committee in 1990 and 1994 when helping pass the 1994 amendments now at issue. And Judge Wilkins was then the initial Sentencing Commission Chairman, who led the Commission in its creation of the sentencing guidelines and then crafted and explained the same 1994 amendments. The legislative history leaves no doubt about why the 1994 amendments for §§ 3562(a)(2) and 3553(a)(4)(B) were needed and how they fixed the need.

Following the lead of the parties, the majority quotes two incomplete snippets from legislative history to contend that the legislative history is mixed. Majority Op. at 17–18. First, it says that Senator Thurmond "explained that adding § 3553(a)(4)(B) would ensure that revocation decisions would be made 'based upon sentencing guidelines and policy statements issued by the Commission specifically for that purpose'—that is, the Chapter 7 guidelines and policy statements." *Id.* at 17 (quoting 136 Cong. Rec. 28228 (1990)). Second, it quotes this statement: "[t]he proposed amendment makes it clear that it is the guidelines or policy statements issued specifically to guide revocation decisions, and not the guidelines and policy statements applicable at initial sentencing, that govern court decisions when considering violations of probation or supervised release." *Id.* at 17–18 (quoting 136 Cong. Rec. 28231

(1990)). It concludes that the two statements "reject[] using the Chapter 5 guidelines for post-revocation sentencing." *Id.* at 17.

This grievously misunderstands what Senator Thurmond and Chairman Wilkins said and supplies the crumbly cornerstone of the majority opinion.[10] The quoted snippets do *not* reject Chapter 5 guidelines for "post-revocation sentencing." They reject using the then-mandatory Chapter 5 sentencing range to *constrain* a district court from imposing an *incremental* sanction for the probation violation under Chapter 7. Remember, the 1990 rewrite of Chapter 7 lay on the doorstep. Partly for that reason, the snippets from Chairman Wilkins and Senator Thurmond address the need to *separate* Chapter 7 from Chapter 5. Not one word of legislative history suggests that Senator Thurmond and Chairman Wilkins—again, *in an era of mandatory guidelines*—ever contemplated repealing the mandatory Chapter 5 sentencing range for the offenses of conviction and leaving those offenses unpunished.

When considering the likelihood of what would have been a revolutionary repeal of Chapter 5 for probation violators, especially in 1994 during the mandatory-guidelines era, contrast that with Chairman Wilkins describing the two proposed statutory amendments as "minor modifications." 136 Cong. Rec. 28230 (1990). And the next year, speaking to his colleagues,

[10] The majority opinion uses similar snippets as do Moon Seals and the government in their briefing. So the reader can see the hollowness of these arguments, I attach the relevant pages of the legislative history to this dissenting opinion.

Senator Thurmond describing the proposed amendments as "technical and clarifying proposals." 137 Cong. Rec. 14821 (1991).

Further, look at just some of the legislative-history language the majority ignores: (1) Chairman Wilkins protesting that *Smith* precluded courts "from considering the probation violation *itself* as a basis for sentencing *above the original guideline range* applicable at the defendant's initial sentencing" (so insisting on a sanction for the probation violation incremental to the Chapter 5 sentence for the offense of conviction); (2) Chairman Wilkins stating the Commission's belief that "Congress clearly intended that these guidelines or policy statements, rather than those applicable to initial sentencing, be used by courts *when sanctioning probation (or supervised release) violators*" (but not when sentencing offenses of conviction, which remained under Chapter 5); and (3) Chairman Wilkins criticizing *Smith* because under it "courts in the Eleventh Circuit will be constrained by a guideline range that, in our view, will be *inadequate to sanction probation violations appropriately* in many cases" (needing probation violations to be sanctioned separately from Chapter 5 as the 1990 Chapter 7 does). 136 Cong. Rec. 28230 (1990) (emphasis added).

D. Probation Under Zone A and B of the Sentencing Manual

Under U.S.S.G. § 5B1.1, probation is available only if the defendant's advisory guideline range falls within Zone A or B of the Chapter 5 sentencing table. In Mr. Moon Seals's case, the district court impliedly granted a twelve-level downward variance to reach Zone A and its associated zero-to-six-month advisory sentencing range. Neither the parties nor the district court mentioned the number of levels or gave a meaningful explanation for dropping from a total offense level of 20 to 8. The government didn't object, so presumably this defect is waived.

But a variance to Zone A or B still leaves a major issue in this appeal, and future appeals. What effect does a downward variance to Moon Seals's Zone A range of zero to six months have on his resentencing for the offense of conviction (if *Moore I* applied) or to his Chapter 5 peek (under the new rule of majority opinion). The cases are legion—including *Moore I* and *Moon Seals*—in which the court warns of dire consequences if the defendant violates probation. These threats are directed at a prospect or promise of a higher sentence for the offense of conviction after any probation violation.

I think a court is locked in by the Chapter 5 range calculated to allow probation under § 5B1.l. The downward variance must be justified and explained. An *earned* downward variance shows what the sentence for the offense of conviction would be with or without a sentence of probation. Before varying down, the court must consider the PSR and the § 3553(a) factors. I don't see how the sentencing range can change based on post-probation-sentence conduct. So if the court had affirmed *Moore I*, I would have voted to limit the court to the zero-to-six-month range at step one for Mr. Moon Seals.[11] And in the majority's system, I would limit any Chapter 5 peek to that range too. An incidental benefit to doing so would be to dampen the grievous disparity problem created by the majority's post–*Moore I* system. But I concede defeat on those points.

At a bare minimum though, the majority should insist that a district court justify any Chapter 5 boosts to Chapter 7 sanctions by explaining how that upward boost ties to *the breach of trust* for violating probation.

E. Meaningful Review

Under *Moore I*, the standards of review for Chapter 5 guidelines and Chapter 7 policy statements were established. That enabled us to meet our duty to meaningfully review sentences. I am uncertain how we are supposed to review guidelines' prison time imported from Chapter 5 into Chapter 7 to boost a probation-violation sanction. District courts can already vary upward from Chapter 7's ranges found at § 7B1.4 based on the degree of the breach of trust shown by the defendant's violation of probation and criminal history. Trying to meaningfully review a sentence for the degree of a breach of trust based on an

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[11] In *Moore I*, the district court offered the defendant the low-end of the applicable sentencing range, 51 months, if he chose to forego a sentence of probation. We held the district court to that 51 months for the offense of conviction at step one, reasoning that the sentence could not increase based on post-offense conduct. *Moore I*, 30 F.4th at 1025–26.

upward variance for something entirely different—the offense of conviction—appears to me to be futile. The two things don't mix.

Further, I think that reviewing Chapter 5 guidelines and reviewing Chapter 7 policy statements are two different things. In *United States v. Vigil*, 696 F.3d 997 (10th Cir. 2012), considering policy statements, we said that "a court does not need to find severe or exceptional circumstances to impose a sentence above the range suggested in the Chapter 7 policy statements, which are not mandatory and *even less compelling than* established Guidelines." *Id.* at 1002–03 (emphasis added). And 18 U.S.C. § 3742(e)(4) sets a different standard of review than used in *Gall v. United States*, 552 U.S. 38 (2007) and *Rita v. United States*, 551 U.S. 338 (2007)—a "plainly unreasonable" standard—for "offense[s] for which there is no sentencing guideline."

By mixing oil and water—Chapter 5 and Chapter 7—the majority gives us hybrid sentences we haven't confronted yet. Using the Chapter 5 peek, does the district court first review the advisory range there for reasonableness under the § 3553(a) factors before transporting all or some of it to Chapter 7? Must the amount transported be within a Chapter 5 range approved as reasonable? Can the court vary dramatically upward from the Chapter 5 range and then reinsert the heightened range in Chapter 7, after obtaining a more lenient standard of review? Does it matter how a court splits the total sentence between Chapter 7 and Chapter 5? Must each piece be segregated and reviewed separately? Or may the district court just give a glob total number of months without segregating? Would a total three-month sentence be presumed reasonable as within the three-to-nine-month range for Mr. Moore and Mr. Moon Seals? Would combining the top ends of the Chapter 5 and Chapter 7 guideline ranges also be presumed reasonable? Would combining double the top ends of those ranges be reasonable? Double on one and triple on the other? Maybe the majority is correct that all this will be smooth sailing. But I see some seasickness ahead. Our settled standards of review and direction under *Moore I* provided fairness and certainty. No longer.

F. Remand

The majority's remand in Mr. Moon Seals's case also poses thorny questions. First, the panel reviewed the sentence under the plain-error standard. It concluded that Mr. Moon Seals could not show substantial prejudice, because his 36-month sentence lay within the Chapter 5 range of 33 to 41 months. And whether the district court's sentence was a coincidence or not, we noted that 36 months just happened to be the sum of the low ends of the Chapters 5 and 7 advisory ranges. *Moon Seals*, 156 F.4th at 1070 n.7. Under the majority's system, what happens on remand? Would we affirm if the district court this time said it won't peek at Chapter 5 and imposes the low end of three months for the probation violation? Would we affirm if the district court imposes no time for the probation violation and boosts that by 36 months under Chapter 5, having already said that 36 months is appropriate under Chapter 5? Would we affirm if the court imposes 24 months under Chapter 7 and boosts it by

60 months after the Chapter 5 peek? I suspect that we'd affirm all these possibilities, which shows the disparity problem in living color.

G. Circuit Court Decisions

The majority says that "*Moore I*'s approach . . . is at odds with other circuits' sentencing procedures." Majority Op. at 3. Again, *Moore I*'s two-step approach involved separate sentencings for separate conduct using separate sentencing tables located in the same Sentencing Manual. In counting circuit courts, what the majority fails to mention is that none of those decisions have analyzed the 1994 amendments in any depth or even considered the legislative history from the mouths of the two primary actors—Chairman Wilkins and Senator Thurmond. If by saying *Moore I* is "at odds" with the other circuits the majority means to say that the other circuits have considered and rejected *Moore I*'s two-step approach, it is wrong. Twenty-odd years of circuit precedents have produced a scattered grab-bag of opinions with little analysis. That is hardly a condemnation of *Moore I*. Nor is it an endorsement of the majority's approach here. In fact, so far as I see, no circuit has replicated the majority's Chapter 5–peek approach either. The cases aren't helpful. Even so, to be complete, I recite them below.

Some of the circuit-court cases that the majority cites (as well as others discussed below) focus on Chapter 5. That isn't consistent with either *Moore I* or the majority opinion's approach in this case. I note that the majority cites the first three listed.

1. In *United States v. Michael*, 12 F.4th 858 (8th Cir. 2021), the district court revoked a sentence of probation in a child-pornography case (the defendant suffered from Asperger's syndrome and had a mental capacity of a 13- or 14-year-old) and imposed a 96-month sentence. *Id.* at 859. The Chapter 7 range for the probation violation was three to nine months. *Id.* at 860. But the Eighth Circuit keyed in on the Chapter 5 range in setting the sentence: "When a probationary sentence is revoked, applying the presumption of reasonableness to a term of imprisonment *falling within the original Sentencing Guidelines range* for the underlying crime of conviction is natural." *Id.* (emphasis added). The circuit added that "in the case of a probation violation, defendants have not served a term of incarceration. A defendant ought not be placed in a better position to challenge the reasonableness of a Guidelines sentence for a crime of conviction after violating probation than he is before breaching the court's trust." *Id.* (citing *United States v. Verkhoglyad*, 516 F.3d 122, 135 (2d Cir. 2008)). I agree.

2. In *Verkhoglyad*, the court sentenced a probation violator to 57 months of imprisonment. 516 F.3d at 124. The Chapter 7 range was 5 to 11 months, and the Chapter 5 range was 46 to 57 months. *Id.* at 125, 127. The Second Circuit rejected the defendant's argument that the district court erred by not mentioning his Chapter 7 range. *Id.* at 128. The circuit deemed this silence unimportant when that range had been mentioned in the violation report. *Id.* at 129. So the court affirmed the 57-month sentence that was based on the

original Chapter 5 sentencing range. *Id.* at 124, 127. Again, this does not align with the majority opinion's present approach.

3. In *United States v. Olabanji*, 268 F.3d 636 (9th Cir. 2001), the defendant pleaded guilty to forgery, which carried a zero-to-six-month range under Chapter 5. *Id.* at 637. After receiving probation, the defendant violated his conditions, and the district court revoked the sentence of probation. *Id.* The Chapter 7 range was three to nine months. *Id.* The Ninth Circuit "acknowledge[d] that § 3565(a)(2) might be read to require only the consideration of the policy statements *or* the sentencing guidelines, given the use of the disjunctive in § 3553(a)(4)(B)." *Id.* at 639. As the majority opinion in our case notes, the court relied on § 3553(b)—stricken as unconstitutional by *Booker*—to conclude that the district court erred by not "consider[ing] the sentencing guidelines range for the underlying offense as part of the calculus for imposing an appropriate term of incarceration." *Id.*; Majority Op. at 17 n.7. The reliance on § 3553(b) was mistaken, but the rest remains. Again, that does not align with the majority's present approach.

Other cases cited by the majority (and others as discussed below) focus on Chapter 7. I note that the majority cites the first two cases.

1. In *United States v. Cook*, 291 F.3d 1297 (11th Cir. 2002), a defendant pleaded guilty to interstate transportation of stolen checks. *Id.* at 1298. The Chapter 5 guideline range was 4 to 10 months. *Id.* After obtaining a sentence of probation, the defendant violated her conditions, and the district court revoked

probation. *Id.* at 1299. The Chapter 7 range was 5 to 11 months. *Id.* The court imposed a 24-month sentence. *Id.* On appeal, the Eleventh Circuit stated that the Chapter 7 range was not binding, meaning that the district court need only *consider* that range in determining a sentence. *Id.* at 1301–02. The circuit ruled that "the district court did not err in ordering Cook to serve a sentence of twenty-four months in prison because the district court complied with the provisions of subchapter A." *Id.* at 1302. The district court had itemized reasons for exceeding the Chapter 7 range, all tied to the defendant's breach of trust in violating her probation conditions. *Id.* at 1299. So I agree with the majority that this sentence was "based on consideration of Chapter 7 alone." Majority Op. at 17. This illustrates that Chapter 7 has its own mechanism for varying upward depending on the defendant's violation and criminal history. *Cook* doesn't align with the majority's present approach.

2. In *United States v. Tschebaum*, 306 F.3d 540 (8th Cir. 2002), the defendant pleaded guilty of making a false statement to the IRS. *Id.* at 542. After a substantial-assistance reduction, his Chapter 5 sentencing range qualified him for a sentence of probation. *See id.* But he violated his conditions, and the district court revoked his probation. *Id.* The court sentenced him to 30 months of imprisonment. *Id.* On appeal, the Eighth Circuit stated that "when a defendant's probation is revoked a sentencing court should give attention to the policy statements found in chapter 7 of the sentencing guidelines" and "then sentence the defendant within the statutory limits of the

original crime." *Id.* at 544. Because the sentence was under Chapter 7, the "plainly unreasonable" standard of review applied. *Id.* (quoting 18 U.S.C. § 3742(a)(1)). The district court had varied up from the 10 to 14 months Chapter 7 range because "the suggested range did not adequately reflect the seriousness of [the defendant's] probation violation." *Id.* So again, this case relies on a Chapter 7 variance upward based on the defendant's breach of trust—not his underlying offense of conviction. I support that.

3. In *United States v. Kippers*, 685 F.3d 491 (5th Cir. 2012), a defendant pleaded guilty to using a telephone in committing a conspiracy to possess an illegal drug with an intent to distribute it. *Id.* at 493–94. The district court agreed to a sentence of probation. *Id.* at 494. The defendant assaulted his daughter, and the court revoked his probation sentence. *Id.* At first, the district court had planned to extend his term of probation, but the defendant angered the court by minimizing his assault and calling his daughter a liar. *See id.* at 495. Though Chapter 7 set an advisory range of three to nine months for the violation, the court imposed a four-year sentence. *Id.* at 496. On appeal, the Fifth Circuit affirmed after noting that the sentence "reflected the seriousness of the crime providing the basis for the revocation [the assault on the daughter]." *Id.* at 500.

4. In *United States v. Moulden*, 478 F.3d 652 (4th Cir. 2007), a defendant pleaded guilty to conspiring to commit bank fraud and pass counterfeit checks. *Id.* at 653. The district court granted a three-year sentence of probation. *Id.*

After many violations, the court finally revoked probation. *Id.* at 654. The Chapter 7 advisory range was three to nine months. *Id.* Finding that inadequate, the court imposed an 18-month sentence for “flaunt[ing] the rules of the court” and “the requirements of probation.” *Id.* On appeal, the Fourth Circuit applied “plainly unreasonable” as the standard of review. *Id.* at 655. The circuit affirmed the defendant’s sentence “in light of [the defendant’s] pattern of refusing to conform to the requirements of probation.” *Id.* at 658.

In a third batch of cases, the courts cite Chapters 5 and 7 ranges and arrive at a sentence without explaining the role of either the offense of conviction or probation violation as the reason for the sentence. The majority cites none of these three cases.

1. In *United States v. Holdsworth*, 830 F.3d 779 (8th Cir. 2016), the defendant pleaded guilty to being a felon in possession of a firearm. *Id.* at 780. Despite the defendant’s long criminal history, the district court agreed to impose a sentence of probation. *Id.* The defendant’s Chapter 5 range was 41 to 51 months. *Id.* After the defendant violated probation, the court revoked his “supervised release.”[12] *Id.* at 781–82. His advisory range under Chapter 7 was 8 to 14 months. *Id.* at 782. The court imposed a 51-month sentence. *Id.* Because the “resulting sentence of 51 months’ imprisonment was within the statutory

[12] The opinion may be mistaken in using “supervised release.” The first mention of a revocation was while the defendant was still on probation. *Holdsworth*, 830 F.3d at 781.

limit and therefore not ‘contrary to law,’” the Eighth Circuit affirmed. *Id.* at 784, 786.

2. In *United States v. Tatum*, 760 F.3d 696 (7th Cir. 2014), the defendant pleaded guilty to using a telephone to facilitate his drug crime. *Id.* at 696. Though agreeing to a sentence of probation, the district court cautioned the defendant that any violations of the probationary conditions would result in a two-year prison sentence. *Id.* at 696–97. After the defendant violated the conditions, the court imposed the promised sentence. *Id.* at 697. The Chapter 7 range was 7 to 13 months. *Id.* On appeal, the Seventh Circuit concluded that the sentence was lawful because it was within the statutory range. *Id.* But on separate grounds, the circuit reversed after determining that preannouncing the penalty for a violation is “too much like sentence first, trial afterwards.” *Id.*

3. In *United States v. Vixamar*, 679 F.3d 22 (1st Cir. 2012), two defendants pleaded guilty to two counts each of passport fraud. *Id.* at 24. For me, this is the most difficult case to categorize. The district court sentenced the defendants to a three-year term of probation with a term of home confinement. *Id.* The violations were soon coming, including depositing for themselves a check from an elderly woman in hospice care and stealing a check from a nursing-home resident. *Id.* at 24–25. After revoking the sentences of probation, the court calculated one defendant’s Chapter 7 range at 6 to 12 months and the other’s at 8 to 14 months. *Id.* at 27. The court sentenced each defendant to 36 months of imprisonment. *Id.* On appeal, the defendants argued that their

sentences were substantively unreasonable. *Id.* at 29. The First Circuit noted that the statutory-maximum sentences were 20 years, that the top ends for the defendants' Chapter 5 ranges for their original offenses were 18 and 24 months, and that the top ends of the defendants' Chapter 7 ranges for their probation-violation sanctions were 12 and 14 months. *Id.* at 32. The circuit affirmed the sentences after noting that the record made "clear that the *entire* 36-month sentence was sparked by her breach of trust[.]" *See id.* at 33–34.

All told, the circuit cases aren't illuminating. They take different approaches and don't apply either the sentencing method of *Moore I* or of the majority's opinion.

III. Conclusion

For the reasons stated, I would affirm Moon Seals's sentence and continue *Moore I* as the governing precedent in our circuit for the questions posed by this appeal.

knowledging the role English has played in forging this great Nation. Through our shared language, we communicate, we debate our differences and reach compromises, and we express the beliefs in freedom and individual rights that make us uniquely American.

The issue of official language is common sense. It is communication. It is whether Americans will continue to bridge the differences that could easily divide us. It is having one common element, amid our rich diversity, that gives us the essential tool for working within our communities and economy. A shared language provides a cultural guidepost that we must maintain for the sake of our unity, prosperity and democracy.

I am privileged to introduce legislation to designate English the official language of our government. The Language of Government Act affects only the language of public business, not private conversation. It does not affect the home, the church, or the community. It does not affect the home, the church, or the community. It will not affect emergency health services or translators in court cases. But it does affect the future of our Nation.

By Mr. THURMOND (for himself, Mr. BIDEN, and Mr. KENNEDY):

S. 3180. A bill to amend provisions of title 18, United States Code, relating to terms of imprisonment and supervised release following revocation of a term of supervised release; to the Committee on the Juduciary.

IMPLEMENTING AND CLARIFYING CERTAIN RECOMMENDATIONS OF THE U.S. SENTENCING COMMISSION

● Mr. THURMOND. Mr. President, today I rise to introduce legislation which will implement various technical and clarifying proposals related to the revocation of supervised release and probation. This important measure is cosponsored by Senator BIDEN and Senator KENNEDY. These proposals were suggested to me by the U.S. Sentencing Commission with the desire that they might be promptly enacted so that the supervised release component of sentences will function as Congress intended.

Regarding the history of the U.S. Sentencing Commission, in 1984, I worked with Senator BIDEN, Senator KENNEDY, and other colleagues on the Judiciary Committee and in the Senate to formulate the Sentencing Reform Act which was enacted into law as part of the Comprehensive Crime Control Act of 1984. The Sentencing Reform Act focused on two major problems in the Federal criminal justice system: First, the disparity in sentences imposed on individuals convicted of similar crimes; and second, the actual time served by those convicted of crimes which was often much less than the sentence imposed. In an effort to address these problems, the Sentencing Reform Act created the U.S. Sentencing Commission. Its purpose is to formulate guidelines to be used by judges in the sentencing process. As a result of the Commissions efforts, people now convicted of similar crimes will serve similar sentences and the sentences imposed will reflect the actual time that must be served.

Despite the success of the Sentencing Commission and its guidelines, steps must be taken to ensure that it is free to carry out its duties and responsibilities. The legislation I am introducing today will enhance the Commission's ability to carry out its mandate.

Briefly, this legislation would make the following changes to current law. First, it would clarify that Federal courts retain the flexibility to order an additional period of supervised release following the imposition of a term of imprisonment for a violation of a condition of supervised release. This measure would also grant the Sentencing Commission greater flexibility in drafting sentencing guidelines for the sanctioning of offenders who, while on supervised release, are found in possession of a controlled substance. This greater flexibility will enable the Commission to draft guidelines and policy statements that best achieve the goals of consistency and proportionality that the sentencing reform act was intended to cover.

Finally, this bill provides that decisions to revoke supervised release should be based upon sentencing guidelines and policy statements issued by the Commission specifically for that purpose. The effect of this change would be to settle a split among the Federal courts on the issue of whether the guidelines applicable to initial sentencing of defendants also apply to probation revocation decisions.

In closing, the technical changes embodied in this legislation are consistent with original congressional intent under the Sentencing Reform Act. I believe this legislation will further the goals of the Sentencing Reform Act to provide uniformity in sentencing as well as assure that sentences will be served in their entirety.

For these reasons, I strongly urge my colleagues to closely review this legislation.

Mr. President, I ask unanimous consent that two letters I received from Judge William Wilkins, Chairman of the U.S. Sentencing Commission, detailing these technical amendments be printed in the RECORD.

There being no objection, the letters were ordered to be printed in the RECORD, as follows:

U.S. SENTENCING COMMISSION,
Washington, DC, July 26, 1990.

Senator STROM THURMOND,
Ranking Member, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATOR THURMOND: I am pleased to transmit to you two legislative proposals that the Sentencing Commission approved for submission to Congress at its July 24, 1990, meeting. Although the proposals are primarily technical in nature, the Commission believes they would make a useful policy contribution to the proper, congressionally intended role of supervised release within the federal criminal justice system.

In brief, the Commission recommends the following changes:

(1) Ensure the Availability of Supervised Release Following Revocation (and Other Related Changes)—The Commission recommends that 18 U.S.C. § 3583(e)(3) be amended to clarify that courts retain flexibility to order an additional period of supervised release following the imposition of a term of imprisonment for a violation of a condition of supervised release. While current law can be read to allow this kind of flexibility already, a decision by the Ninth Circuit has recently rejected such a construction—although the court acknowledged as a policy matter that its decision appeared to run counter to the purposes of the supervised release statute. The proposed amendment would help ensure the more flexible reading the court favored for policy reasons and the Commission also believes would better reflect congressional intent in this area. Other subsections of the proposed amendment are designed to complement the central feature just described or to effect a purely technical change.

(2) Provide Flexibility as to the Amount of Prison to be Served Upon Revocation for Drug Possession—The Commission also recommends that 18 U.S.C. § 3583(g) be amended to allow greater flexbility in sanctioning offenders on supervised release who are found to be in possession of a controlled substance. In this case, the greater flexibility would enable the Commission to draft guidelines and policy statements that best achieve the goals of consistency and proportionality that the Sentencing Reform Act was intended to foster. This proposal parallels and complements a similar provision is the Crime Control bill recently passed by the Senate pertaining to revocation of probation for drug possession.

A fuller explanation of these two amendments in included with the Commission's proposed amendment language enclosed with this letter. Because the recent court decision may lead to undesirable applications of the supervised release statute, the Commission recommends congressional action, especially on the first of these proposals, at the earliest opportunity. In addition, because the Commission expects to issue policy statement governing supervised release revocation this fall, timely passage of both of these proposals would also help enhance the effectiveness of the newly issued policy statements in achieving their intended objectives.

The Commission appreciates your assistance on this matter.

Sincerely,

WILLIAM W. WILKINS, Jr.,
Chairman.

PROPOSALS

PROPOSAL ONE: TO ENSURE THE AVAILABILITY OF SUPERVISED RELEASE FOLLOWING REVOCATION (AND OTHER RELATED CHANGES)

Sec. 1. (a) Subsection (e)(3) of section 3583 of title 18, United States Code, is amended to read as follows:

"(3) revoke a term of supervised release, and require the person to serve in prison all or part of the term of supervised release authorized by statute for the offense of which the defendant was convicted without credit for time previously served on postrelease supervision, if it finds by a preponderance of the evidence that the person violated a condition of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure that are applicable to probation revocation and to the provisions of applicable policy statements issued by the Sentencing Commission, except that a person whose term is revoked under this paragraph may not be required to serve more than 3 years in prison if the offense for which the person was convicted was a Class B felony or more than 2 years in prison if the offense was a Class C or D felony.".

(b) Subsection (e)(5) of section 3583 of title 18, United States Code, is redesignated as subsection (e)(4).

(c) Section 3583 of title 18, United States Code, is amended by adding at the end the following new subsection:

"(h) Where a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3) of this section, the court may include the requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such term of supervised release shall not exceed the term of supervised release authorized by statute for the offense of which the defendant was convicted, less any term of imprisonment that was imposed upon revocation of supervised release.".

PROPOSAL TWO: TO PROVIDE FLEXIBILITY AS TO THE AMOUNT OF PRISON TO BE SERVED UPON REVOCATION FOR DRUG POSSESSION

Sec. 1. Subsection (g) of section 3583 of title 18 United States Code, is amended to read as follows:

"(g) Possession of controlled substances. If the defendant is found by the court to be in the unlawful possession of a controlled substance, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3) of this section."

EXPLANATION OF AMENDMENTS TO ENSURE AVAILABILITY OF SUPERVISED RELEASE FOLLOWING REVOCATION

PROPOSED SUBSECTION 1 (a)

This subsection amends 18 U.S.C. § 3583(e)(3) to authorize a court to order a defendant, upon revocation of his or her term of supervised release, to serve a period of imprisonment not exceeding the maximum period of supervised release that initially could have been imposed under the statute. In contrast to the proposed amendment, the maximum period of imprisonment that may be ordered upon revocation of supervised release under current law generally may not exceed the term of supervised release actually imposed at the original sentencing.[1] The proposed amendment retains the present limitation in § 3583(e)(3) that the maximum period of imprisonment ordered upon revocation may not exceed three years if the defendant was originally sentenced for a Class B felony, or two years if the defendant was sentenced for a Class C or D felony.

The provision is designed to complement a proposed new subsection 3583(h) that expressly authorizes a court to order further supervision after the defendant completes a prison term that has been imposed for violating a condition of supervised release. The amendment also would permit courts greater flexibility to impose imprisonment sanctions for serious violations of the conditions of supervised release, without being limited by the maximum of the original term of supervised release imposed. The modification avoids anomalies that otherwise may result under the current statute. For example, Defendant X, convicted of a B felony and given a one-year (below-guideline) term of supervised release, commits a serious violation of his supervised release term; upon revocation, he could be ordered to serve no more than one year in prison (unless the court first extended the term to three years or more, a bifurcated procedure that is to say the least, more cumbersome). Defendant Y, also convicted of a B felony and given a three-year term of supervised release, violates an equally serious condition of supervised release; under current law, he could be ordered to serve up to three years in prison. Under the proposed amendment, a court would have equal flexibility to order a three-year period of imprisonment for each defendant.

The proposed also maintains a proper relationship between alternative sanctions, ensuring that extending the term of supervision would be used as a less punitive sanction than revocation, whereas the converse may be true under current law. Without this change, a defendant subject to a short period of supervised release who commits a serious violation warranting revocation would potentially face less imprisonment time than another defendant who committed a less serious violation but whose term of supervised release had previously been extended for minor violations.

While the proposal may on the surface appear to increase widely the potential prison exposure for defendants, in actual practice this effect would be quite limited due to the fact that current sentencing guidelines require minimum supervised release terms equal or greater to the maximum imprisonment sanction authorized under the statute (unaffected by this proposal) for all offenses except Class A felonies. Thus, the only types of cases potentially affected by this change will be defendants who have been sentenced for Class A felonies who are given supervised release terms less than the statutory maximum and those who are given a period of supervised release less than required by the guidelines.

PROPOSED SUBSECTION 1 (b)

In order to correct a technical error in the existing statute, subsection (e)(5) is redesignated as subsection (e)(4).

[1] An exception to this rule would occur if, pursuant to § 3583(e)(2), the court had extended the term of supervised release beyond the original term imposed. In this case, current law would allow a court to order that an offender serve in prison all or part of the extended term upon revocation.

PROPOSED SUBSECTION 1(c)

This subsection provides clear authority for a court, in appropriate cases, to order a further period of supervision upon release from imprisonment when supervised release is revoked. While an argument can be made that the present statute already permits a court, at a minimum, to order a defendant to recommence the unexpired portion of a term of supervised release, the Ninth Circuit of Appeals has recently held to a contrary. See *United States* v. *Behnezhad*, No. 89-10529 (9th Cir. July 3, 1990). The court recognized that the policy result of its holding was undesirable, stating:

"Since there would be great virtue and much benefit to all concerned if courts were given more flexibility in this area, we embrace this result with velleity. Nevertheless, embrace it we must for Congress has spoken."

The authority to impose further supervision following revocation would appear to best serve the purposes of the supervised release scheme. Absent such flexibility, courts may be reluctant to revoke supervised release, even in the face of serious breaches of supervision conditions, because doing so could lead to an early expiration of criminal justice control; once the prison term imposed upon revocation were served, the defendant would be unsupervised even though his conduct could well demonstrate to the court an even greater need for supervision than at the defendant's original sentencing. Thus, an offender serving a lengthy supervised release term—for example, 10 years (as is possible for some controlled substance offense)—who violated a condition requiring a short period of re-imprisonment—for example, 90 days—would have virtually the entire 10-year supervised release term extinguished if he committed the violation early in the term. Indeed, this possibility arguably may encourage violations of supervised release conditions. Alternatively, this result may compel some courts to impose a longer period of imprisonment than otherwise would be needed to punish the violation, in order to maintain criminal justice control since post-release supervision would not be available.

The proposed change seeks to avoid presenting the court with the choice between doing too little and doing more than necessary by permitting the court to order a further term of supervised release following an imprisonment sanction. The length of this additional term of supervision could not exceed the maximum term of supervised release originally imposable under amended subsection (e)(3), as reduced by any period of imprisonment the defendant served upon revocation. Furthermore, a defendant could only be ordered to resume supervised release if he had served less time in prison upon revocation than the maximum allowed under subsection (e)(3) (i.e., less than three years for a B felony, less than two years for a C or D felony, less than one year for a Class A misdemeanor). This ensures that revocation will be a statutorily available sanction at all times that a defendant is serving a period of supervised release.

Among conceivable policy choices, this proposal strikes a middle ground. At one extreme of the policy options, a court could be empowered to impose an entirely new term of supervised release undiminished by any period of imprisonment served as a revocation sanction. This option could result, however, in a defendant remaining on supervised release indefinitely. At the other extreme, a defendant could be given credit for both time on supervision plus time in prison following revocation. This option, perhaps available under existing law (reading the statute differently from the Ninth Circuit construction), provides less flexibility for the court and would undermine the objective of providing a period of post-imprisonment supervision for defendants.

Under this middle-ground proposal a defendant will fullfill his supervised release requirement by either satisfactorily serving the period of supervision (as it may be extended, or imposed following imprisonment upon revocation) or upon revocation(s), by serving in prison the maximum period allowed by law. The proposal, therefore, embodies a "declining balance" approach to the satisfaction of a supervised release obligation under which both the maximum prison sanction available upon revocation and the maximum period of additional supervision that may be mandated following imprisonment are progressively reduced by any period of additional imprisonment the defendant is ordered to serve upon revocation.

EXPLANATION OF AMENDMENT ON REVOCATION FOR DRUG POSSESSION

The Commission also recommends an additional, unrealated amendment to 8 U.S.C. § 3583(g), pertaining to mandatory revocation for a defendant found by the court to have possessed a controlled substance. The proposal would retain the mandatory revocation requirement but would eliminate the requirement that the defendant be ordered to serve in prison at least one-third of the term of supervised release.

The existing "one-third" requirement arbitrarily bases the sanction on the length of the term of supervised release to which the defendant is subject, rather than on the seriousness of the violation and is unnecessary in a system in which court revocation decisions are structured by sentencing guidelines. In determining the length of an imprisonment sanction to be imposed upon revocation on a defendant found in unlawful possession of a controlled substance, the court is required to consider any applicable guidelines or policy statements issued by the Sentencing Commission. These Commission pronouncements, in order to be consistent with the statute, necessarily must require revocation of supervised release for illegal drug possession and can better ensure consistency and proportionality of punishment for such violations.

Additionally, the new language substitutes the term "revoke" for the existing term "terminate" and inserts the word "unlawful" before "possession" in order to clarify the intent of the provision.

U.S. SENTENCING COMMISSION,
Washington, DC, August 24, 1990.
Senator STROM THURMOND,
Ranking Member, Committee on the Judiciary, Washington, DC.

DEAR SENATOR THURMOND: On July 26, 1990, I transmitted to you two technical and clarifying legislative proposals relating to the revocation of supervised release that the Sentencing Commission recommends for prompt enactment so that the supervised release component of sentences will function as Congress intended. Subsequent events have led the Commission to supplement those proposals with the attached proposed clarification of the statute on revocation of probation to ensure this sanction also will be applied consistent with Congressional intent.

Specifically, the Commission recommends minor modifications to 18 U.S.C. § 3565, pertaining to revocation of probation, and to 18 U.S.C. § 3553, pertaining to factors to be considered by courts in the imposition of sentence. 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, 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, rather than those applicable to initial sentencing, be used by courts when sanctioning probation (or supervised release) violators. However, on July 31, 1990, the U.S. Court of Appeals for the Eleventh Circuit, without any discussion of this express directive to the Commission, held in *United States* v. *Smith*, No. 89-8226, that the guideline range applicable to the initial sentencing decision also constrains the court when it revokes probation. In particular, the court held that the provision of 18 U.S.C. § 3565(a)(2) authorizing a court upon revocation of probation to "impose any other sentence that was available . . . at the time of the initial sentencing" does not encompass any other sentence authorized by statute but, rather, encompasses only a sentence authorized by statute that is within the guideline range applicable at the defendant's initial sentencing decision. Moreover, the court interpreted the statute to preclude a court from considering the probation violation itself as a basis for sentencing above the original guideline range applicable at the defendant's initial sentencing.

As a result of the court's holding, courts in the Eleventh Circuit will be constrained by a guideline range that, in our view, will be inadequate to sanction probation violations appropriately in many cases. Additionally, in some cases (for example, those in which the defendant was sentenced to probation with a condition of jail confinement for a period of time) a defendant will be subject to little or no imprisonment sanction even where there was a serious breach of probation conditions. Nevertheless, while we believe the Eleventh Circuit decision is plainly contrary to sound policy and congressional intent, we cannot say it is an implausible reading of the statute or that other courts may not come to a similar conclusion.

Furthermore, to the extent this view of the law is sustained, it will impede Commission plans to implement a system of policy statements for revocation decisions, preparatory to issuing guidelines for revocation at a future date. Toward this end, the Commission has just approved a set of policy statements to guide courts in making decisions regarding the revocation of probation and supervised release and plans to distribute them in the next several weeks. The Eleventh Circuit decision in *Smith* would appear, however, effectively to block courts in that circuit from using these policy statements for probation revocation decisions.

The attached proposed legislative change modifies the statutory language upon which the Eleventh Circuit rested its decision to promote an interpretation that is consistent with Congressional intent under the Sentencing Reform Act. It specifically references the guidelines or policy statements issued by the Commission under 18 U.S.C. § 994(a)(3) to remove any doubt that these pronouncements—not those applicable to initial sentencing decisions—are the appropriate reference for revocation purposes.

The Commission recommends congressional enactment of this probation revocation proposal, as well as the proposals on supervised release revocation previously transmitted, at the earliest opportunity.

If I can provide any additional information with respect to any of these proposals, please do not hesitate to contact me, or have your staff contact John Steer, the Commission's General Counsel at 626-8500.

Sincerely,

WILLIAM W. WILKINS, Jr.,
Chairman.

PROBATION REVOCATION PROPOSAL

SEC. 1. (a) Subsection (a)(2) of section 3565 of title 18, United States Code, is amended by striking "impose any other sentence that was available under subchapter A at the time of the initial sentencing" and inserting in lieu thereof "resentence the defendant under the provisions of subchapter A of this chapter".

(b) Subsection (a)(4) of section 3553 of title 18, United States Code, is amended by inserting "(A)" after "established for" and by inserting at the end prior to the semicolon ", 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 28 U.S.C. 994(a)(3)".

2. Note: Conforming changes also to be made in 18 U.S.C. § 3565 (a) and (b), taking into account pending crime bill provisions.

§ 3565. Revocation and probation

(a) Continuation or revocation.—If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considering the factors set forth in section 3553(a) to the extend that they are applicable—

(1) continue him on probation, with or without extending the term of [1] modifying or enlarging the conditions; or

Notwithstanding any other provision of this section, if a defendant is found by the court to be in possession of a controlled substance, thereby violating the condition imposed by section 3565(a)(3), the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of the original sentence.

§ 3553. Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court in determining the particular sentence to be imposed shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

[1] So in original. Probably should be "or".

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, to other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for (A) the applicable category of offense committed by the applicable category of defendant, as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced, 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 28 U.S.C. 994(a)(3);

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

EXPLANATION OF PROBATION REVOCATION PROPOSAL

Subsection (a) amends 18 U.S.C. § 3565(a)(2) by deleting language instructing a court upon revocation of probation to "impose any other sentence that was available under subchapter A at the time of the initial sentencing." In lieu of this language, the court would be authorized to "resentence the defendant under the provisions of subchapter A of this chapter." The phrase "available under subchapter A at the time of the initial sentencing" recently was erroneously construed by the Court of Appeals for the Eleventh Circuit in *United States* v. *Smith*, No. 89-8226 (July 31, 1990) to mean a sentence in accordance with the sentencing guidelines applicable at initial sentencing of the defendant. In contrast, the substitute language would permit courts to resentence a defendant whose probation sentence is revoked to another statutorily authorized sentence—i.e., a sentence authorized under sections 3551-3559 of title 18.

Although the substitute language deletes the phrase "at the time of the initial sentencing," the ex post facto clause of the Constitution nevertheless would prevent a defendant whose probation is revoked from facing a greater statutory penalty than authorized under statutes in effect when the original offense was committed. The term "resentence" in the substitute proposal is appropriate because, under the Sentencing Reform Act, probation is a sentence; therefore, when a probation sentence is revoked, the defendant must be "resentenced."

Subsection (b) of the proposal amends 18 U.S.C. § 3553(a)(4)—factors to be considered in imposing sentence—to provide a direct reference to Sentencing Commission guidelines or policy statements applicable to revocation decisions. The proposed amendment makes it clear that it is the guidelines or policy statements issued specifically to guide revocation decisions, and not the guidelines and policy statements applicable at initial sentencing, that govern court decisions when considering violations of probation or supervised release. Current statutory language in section 3553 contains no reference to guidelines or policy statements issued by the Commission pursuant to 28 U.S.C. § 994(a)(3), the paragraph authorizing and directing the Commission to promulgate guidelines or policy statements for the revocation of probation and supervised release.[1] Thus, under current law, although the Commission is directed to issue such pronouncements, there is no analogous directive in section 3553 requiring court consideration of these particular guidelines or policy statements. The proposed amendment corrects this omission and incorporates court consideration of Commission guidelines or policy statements for revocation decisions into the sentencing scheme of this chapter of the Sentencing Reform Act.

Concurrent with the above proposed amendments, conforming changes should be made in the last sentence of 18 U.S.C. § 3565(a) and in 18 U.S.C. § 3565(b). These conforming changes will need to be coordinated with pending amendments to these subsections contained in Senate and House versions of the Comprehensive Crime Control Act of 1990.

[1] Paragraph (4) of section 3553(a) requires courts to consider guidelines for initial sentencing decisions issued by the Commission under 28 U.S.C. § 994(a)(1). Paragraph (5) of section 3553(a) requires courts to consider policy statements issued by the Commission under § 994(a)(2).

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE, V. PHILBERT RAY SMITH, DEFENDANT-APPELLANT

[No. 89-8226 Non-Argument Calendar]

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

1990 U.S. App. LEXIS 12850

JULY 31, 1990.

PRIOR HISTORY: [*1]

Appeal from the United States District Court or the Southern District of Georgia. No. CR488-76; Vining, Judge.

Counsel: W. Douglas Adams, Brunswick, Georgia, for Defendant-Appellant. Kathryn M. Aldridge, AUSA, Savannah, Georgia, for Plaintiff-Appellee.

Judges: Tjoflat, Chief Judge, Clark, Circuit Judge, and Henderson, Senior Circuit Judge.

OPINION BY: TJOFLAT

Opinion: Philbert Ray Smith appeals from an order of the district court revoking his probation and sentencing him to a term of incarceration. We vacate Smith's sentence and remand the case to the district court of resentencing.

I.

On August 15, 1988, Smith pled guilty to an information charging him with possession of counterfeit United States currency in violation of 18 U.S.C. § 472 (198, for which the maximum statutory term of imprisonment is fifteen years. Because the offense occurred after November 1, 1987, Smith's sentence was governed by The Sentencing Reform Act of 1984, Pub.L. No. 98-473, 98 Stat. 1987 (codified, as amended, in scattered sections of 18 and 18 U.S.C.), and the sentencing guidelines promulgated thereunder, see United States Sentencing Commission, Guidelines Manual (West Nov. 1989) (hereinafter Sentencing Guidelines). Under the guidelines, [*2] the base offense level for offenses involving counterfeit currency is 9. See id. § 2B5.1(a). In his presentence investigation report, to which neither party objected, the probation officer adjusted the offense level upward by two levels based on defendant's role as an organizer of the two-person scheme to pass counterfeit bills, see id. § 3B1.1(c), and downward by two levels based on his acceptance of responsibility, see id. § 3E1.1(a), for a total offense level of 9. The probation officer placed Smith in Criminal History Category I. The applicable sentencing range, therefore, was from four to ten months of imprisonment, see id. ch. 5, pt. A sentencing tbl. & commentary. Because the minimum term of imprisonment specified by the sentencing table was between one and six months, Smith was eligible for probation provided he served a term of community confinement. See id. § 5B1.1, 5C2.1(c)(2), 5C2.1(e)(2). On November 21, 1988, the district court implicitly adopted the probation officer's guideline application and imposed a sentence of three years' probation, with four [1] months to be spent at a community treatment center, on the condition that, inter alia, Smith [*3] remain drug-free.

Smith entered the Chatham County Community Treatment Center in December 1988. Two drug tests administered while Smith was at the Center revealed the presence of drugs in his urine. Smith was expelled from the Center after the second test, and his probation officer petitioned the court for revocation of Smiths probation. The probation officer appended to the petition a report on Smith's conduct while on probation and recommended a new sentence of eighteen months' imprisonment followed by a two-year term [*4] of supervised release. The recommended sentence was calculated by applying the sentencing guidelines as follows:

Total offense level for the offense of conviction: 9.

Base offense level for the conduct that violated probation: [2] +4.

Adjustments: +/−0.

Total: 13.

Criminal History Category: 1.

Applicable Guideline.

Range: 12-18 months.

Sentence Recommendation: 18 months.

On March 6, 1989, the district court held a hearing and revoked Smith's probation. The court correctly noted that the guidelines do not specify how a court is to proceed after revoking a guideline sentence of probation, see id. ch. 7, then stated: "[T]here being no [*5] guidelines [on resentencing after probation revocation], the Court then reverts to the statutory maximum for the underlying offense, in this case possession of counterfeit bills. The maximum punishment prescribed by statute for that is fifteen years." The court then implicitly adopted the probation officer's recommendation and imposed a prison term of eighteen months followed by a period of supervised release not to exceed three years.

II.

In this case of first impression for the courts of appeals, Smith argues that the district court erred (1) in holding that the guidelines do not apply to probation revocation proceedings and (2) in imposing a

[1] Under the Comprehensive Crime Control Act of 1984, probation is a type of sentence in and of itself. See 18 U.S.C. § 3561 (1988); S. Rep. No. 225, 98th Cong., 2d Sess. 88, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3271. Under prior law, the court would either (1) suspend the imposition of sentence and put the defendant on probation, or 92) impose a prison sentence, suspend its execution, and put the defendant on probation. See 18 U.S.C. § 3651 (1982) (repealed 1986).

[2] See Sentencing Guidelines § 2D2.1(a)(3) (base offense level of 4 for possession of controlled substances not covered specifically by other subsection).

prison sentence (eighteen months) that exceeds the one originally available under the guidelines at the time of initial sentencing (four to ten months). We agree.

The statute governing probation revocation provides in relevant part:.

(a) Continuation or Revocation.—If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Rule 32.1 of the Federal Rules of Criminal Procedure, and after considerating the factors set forth in [*6] [18 U.S.C.] section 3553(a) to the extent that they are applicable—.

(1) continue him on probation, with or without extending the term [or] modifying or enlarging the conditions; or

(2) revoke the sentence of probation and impose any other sentence that was available under subchapter A [18 U.S.C. § 3551-3559] at the time of the initial sentencing.

18 U.S.C. § 3565 (1988) (emphasis added).[3]

At the time of Smith's initial sentencing, the district court was required to apply the guidelines. Thus, the guidelines, as well as the statutory maximum for the offense of conviction, determined what sentences were "available" at that time. [*7] Before the district court could impose a proper sentence under the guidelines, it has to make findings of fact concerning Smith's total offense level and criminal history category, which it did by adopting the findings in the probation officer's original report without objection from either party. Naturally, the facts established at the time of inital sentencing could include only conduct that had already occurred. Because the conduct that constituted a probation violation had not yet occurred, no upward adjustment in Smith's total offense level could have been based on that conduct, and the longer sentence of imprisonment resulting from such an adjustment was therefore not "available." Thus, pursuant to section 3565, the guidelines control the imposition of a new sentence after probation revocation in the sense that the original determinations of total offense level and criminal history category, based upon relevant facts established at the time of sentencing, delimit the sentences that were then available. The probation officer's use of the guidelines—adding the base offense level for the post-sentencing conduct that violated probation to the total offense level for the offense [*8] of conviction—was clearly incorrect in light of section 3565.

The relevant facts before the court at the time of initial sentencing also determine whether and to what extent the district court may depart from the guidelines after probation revocation. If at that time the court had before it information that would have justified a departure, the court may revisit those facts and, based upon them, may choose to depart when imposing the new sentence. In such a case, the sentence departing from the guidelines was available at the time of initial sentencing, although the court did not at that time choose to depart or event to identify the information that supported a possible departure. The proper extent of the departure (subject to the statutorily prescribed sentencing range) depends, of course, upon the relevant sentencing facts originally before the court rather than on the conduct that constituted the probation violation.

This is not to say that post-sentencing conduct is irrelevant to probation revocation proceedings. Where revocation is not mandatory, the district court[4] may certainly consider such conduct when deciding whether to revoke probation or to continue it, either [*9] on the same or different terms, see id. § 3563(c), 3565(a)(1). Furthermore, after revoking probation, the district court has discretion to impose a new sentence within the applicable range prescribed by law, i.e., statute and guidelines, at the time of initial sentencing—in this case, within a range of four to ten months. Common sense suggests that the court ought to be able to consider the conduct giving rise to revocation (i.e., post-sentencing conduct) in deciding what sentence to select within the guideline range or even whether to depart from the guidelines, provided the conduct justifying departure (i.e., pre-sentencing conduct upon which departure could have originally been based) was brought to the court's attention at the initial sentencing hearing. Similarly, where a term of supervised releae is discretionary, see Sentencing Guidelines § 5D1.1(b), the court ought to be able to consider the probation violation in deciding whether to impose such a term. And whether supervised release is discretionary or mandatory, see id. § 5D1.1(a), the court should be able to consider the violation in determining the conditions, and within the range prescribed [*10] by law, the duration of the term, see id. § 5D1.2

In the case at hand, the district court's imposition of a three-year term of supervised release fell within the applicable sentencing range for a Class C felony. See id. § 5D1.2(b)(2) (offense is Class C felony if statutory term is from ten to twenty-five years). Supervised release is mandatory, however, only if a prison sentence of more than one year is imposed, see id. § 5D1.1(a); in such cases as the one at hand, where the applicable prison sentence is less than one year, the court has discretion with respect to supervised release, see id. § 5D1.1(b). In view of the court's erroneous imposition of a sentence exceeding one year, we cannot know whether the court would have imposed a term of supervised release had it exercised its discretion in the matter. Therefore, on remand, district court should decide not only where to sentence Smith within the four-to ten-month range but also whether [*11] to impose a term of supervised release, and, if the court so decides, its duration. For these purposes, the court may consider Smith's conduct on probation.

III.

For the foregoing reasons, we vacate Smith's sentence and remand the case to the district court for resentencing consistent with this opinion.

Vacated and remanded.●

[3] Section 3565, as amended in 1988, requires revocation when a defendant on probatios is found to be in possession of a controlled substance. See 18 U.S.C. § 3565(a). The terms of the amendment apply only to persons whose probations began after December 31, 1988, however, and therefore do not apply to this case. See Pub. L. 100-690, title VII, § 7303(d), 102 Stat. 4181, 4464.

[4] See, e.g., supra note 3; Sentencing Guidelines § 7A1.2(a).

ADDITIONAL COSPONSORS

S. 2044

At the request of Mr. BIDEN, the name of the Senator from Georgia [Mr. NUNN] was added as a cosponsor of S. 2044, a bill to require tuna products to be labeled respecting the method used to catch the tuna, and for other purposes.

S. 2111

At the request of Mr. SIMON, the names of the Senator from Indiana [Mr. COATS], the Senator from Montana [Mr. BURNS], the Senator from Colorado [Mr. ARMSTRONG], the Senator from Wisconsin [Mr. KASTEN], and the Senator from Minnesota [Mr. BOSCHWITZ] were added as cosponsors of S. 2111, a bill designating the month of May as "Asian/Pacific American Heritage Month."

S. 2637

At the request of Mr. REID, the names of the Senator from Pennsylvania [Mr. HEINZ] and the Senator from Vermont [Mr. JEFFORDS] were added as cosponsors of S. 2637, a bill to amend the Toxic Substances Act to reduce the levels of lead in the environment, and for other purposes.

S. 2729

At the request of Mr. CHAFEE, the names of the Senator from California [Mr. CRANSTON], the Senator from Massachusetts [Mr. KENNEDY], and the Senator from Hawaii [Mr. AKAKA] were added as cosponsors of S. 2729, a bill to amend the Coastal Barrier Resources Act, and for other purposes.

S. 2754

At the request of Mr. BIDEN, the name of the Senator from Georgia [Mr. FOWLER] was added as a cosponsor of S. 2754, a bill to combat violence and crimes against women on the streets and in homes.

S. 2796

At the request of Mr. COHEN, the name of the Senator from Connecticut [Mr. LIEBERMAN] was added as a cosponsor of S. 2796, a bill to amend title IV of the Higher Education Act of 1965 to allow resident physicians to defer repayment of their title IV student loans while completing a resident training program accredited by the Accreditation Council for Graduate Medical Education or the Accrediting Committee of the American Osteopathic Association.

S. 2813

At the request of Mr. GRAHAM, the name of the Senator from Alabama [Mr. SHELBY] was added as a cosponsor of S. 2813, a bill to authorize the minting of commemorative coins to support the training of American athletes participating in the 1992 Olympic Games.

S. 2954

At the request of Mr. DODD, the names of the Senator from Delaware [Mr. BIDEN], the Senator from Massachusetts [Mr. KENNEDY], the Senator from Nebraska [Mr. KERREY], the Senator from Nevada [Mr. BRYAN], the Senator from Maryland [Ms. MIKULSKI], and the Senator from New York [Mr. MOYNIHAN] were added as cosponsors of S. 2954, a bill to place relearn what Utah has to offer to athletes, businesses, and families. Nowhere else in the world can one find such friendly, outgoing people in a region that is so profoundly blessed by natural beauty.

Adoption of this concurrent resolution today will demonstrate to the world that Congress supports Utah and America in this Olympic effort.

As one who represents the great people of Utah, I can say with confidence that we are prepared to host the Olympics, that we are proud to live in Utah, and that we welcome the world with open arms to experience firsthand the many wonders of our beautiful State and this great Nation.

Mr. MOYNIHAN. Madam President, speaking as a Senator from New York, I would simply like to note with great satisfaction the proposal that the winter games be held in Salt Lake City. They were held in Lake Placid in 1978, if I recall, and were a great success and a great joy. I wish all the Olympiads the joy of it.

The PRESIDING OFFICER. Without objection, the preamble is agreed to and the concurrent resolution is agreed to.

The concurrent resolution, with its preamble, is as follows:

S. CON. RES. 46

Whereas the International Olympic Committee will meet on June 15, 1991, at Birmingham, England, to consider the selection of a site for the 1998 winter Olympic games;

Whereas Salt Lake City, Utah, has been selected by the United States Olympic Committee as the United States candidate for the 1998 winter Olympic games;

Whereas it is the consensus of the Members of Congress of the United States that the designation by the International Olympic Committee of Salt Lake City, Utah, as the site of the 1998 winter Olympic games would be a great honor for all the people of the United States; and

Whereas the people of Utah, who symbolize the heart of America's pioneer spirit, and who have for a number of years fully supported the effort to bring the winter Olympic games to the United States, have fashioned their Olympic bid with the goal of establishing the world's finest winter sports center based upon Olympic ideals: Now, therefore, be it

Resolved by the Senate (the House of Representatives concurring), That the International Olympic Committee be advised that the Congress of the United States would welcome the holding of the 1998 winter Olympic games in Salt Lake City, Utah, the site so designated by the United States Olympic Committee; and be it further

Resolved, That the Congress of the United States expresses the sincere hope that Salt Lake City, Utah, will be selected as the site for the 1998 winter Olympic games, and pledges its cooperation and support of their successful fulfillment in the highest sense of the Olympic tradition.

Mr. SIMPSON. Madam President, I move to reconsider the vote by which the concurrent resolution was agreed to.

Mr. MOYNIHAN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

TO AMEND PROVISIONS OF TITLE 18, UNITED STATES CODE, RELATING TO TERMS OF IMPRISONMENT AND SUPERVISED RELEASE FOLLOWING REVOCATION OF A TERM OF SUPERVISED RELEASE

Mr. SIMPSON. Madam President, I ask unanimous consent that the Judiciary Committee be discharged from further consideration of S. 188, regarding the Sentencing Commission. I ask for its immediate consideration.

The PRESIDING OFFICER. Without objection it is so ordered. The clerk will read as follows:

A bill (S. 188) to amend provisions of title 18, United States Code, relating to terms of imprisonment and supervised release following revocation of a term of supervised release.

The PRESIDING OFFICER. Is there objection to the immediate consideration of the bill?

There being no objection, the Senate proceeded to consider the bill.

Mr. THURMOND. Madam President, I rise to urge my colleagues to support this important bill, S. 188, which will implement various technical and clarifying proposals related to the revocation of supervised release and probation. This important measure is cosponsored by Senator BIDEN and Senator KENNEDY. These proposals were suggested to me by the U.S. Sentencing Commission with the desire that they might be promptly enacted so that the supervised release component of sentences will function as Congress intended.

Regarding the history of the U.S. Sentencing Commission, in 1984, I worked with Senator BIDEN, Senator KENNEDY, and other colleagues on the Judiciary Committee and in the Senate to formulate the Sentencing Reform Act which was enacted into law as part of the Comprehensive Crime Control Act of 1984. The Sentencing Reform Act focused on two major problems in the Federal criminal justice system: First, the disparity in sentences imposed on individuals convicted of similar crimes; and second, the actual time served by those convicted of crimes which was often much less than the sentence imposed. In an effort to address these problems, the Sentencing Reform Act created the U.S. Sentencing Commission. Its purpose is to formulate guidelines to be used by judges in the sentencing process. As a result of the Commission's efforts, people now convicted of similar crimes will serve similar sentences and the sentences imposed will reflect the actual time that must be served.

Despite the success of the Sentencing Commission and its guidelines, steps must be taken to ensure that it is free to carry out its duties and responsibilities. The legislation I am introducing today will enhance the Commission's ability to carry out its mandate.

Briefly, this legislation would make the following changes to current law. First, it would clarify that Federal courts retain the flexibility to order an additional period of supervised release following the imposition of a term of imprisonment for a violation of a condition of supervised release. This measure would also grant the Sentencing Commission greater flexibility in drafting sentencing guidelines for the sanctioning of offenders who, while on supervised release, are found in possession of a controlled substance. This greater flexibility will enable the Commission to draft guidelines and policy statements that best achieve the goals of consistency and proportionality that the Sentencing Reform Act was intended to cover.

Finally, this bill provides that decisions to revoke supervised release should be based upon sentencing guidelines and policy statements issued by the Commission specifically for that purpose. The effect of this change would be to settle a split among the Federal courts on the issue of whether the guidelines applicable to initial sentencing of defendants also apply to probation revocation decisions.

In closing, the technical changes embodied in this legislation are consistent with original congressional intent under the Sentencing Reform Act. I believe this legislation will further the goals of the Sentencing Reform Act to provide uniformity in sentencing as well as assure that sentences will be served in their entirety.

For these reasons, I strongly urge my colleagues to support this important measure.

Madam President, I ask unanimous consent that an explanation of the provisions be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

EXPLANATION OF PROVISIONS

The purposes of this legislation are to clarify the statutory provisions relating to revocation of probation and supervised release to ensure that they work within the scheme of the Sentencing Reform Act of 1984 as intended. The bill would: (1) make more explicit the intent of Congress in the Sentencing Reform Act 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; (2) clarify the circumstances mandating revocation of probation and supervised release for possession of a controlled substance or firearm, and ensure that any defendant committing such violations of supervision is required to serve a term of imprisonment; (3) authorize a court upon revocation of supervised release to imprison the defendant up to the maximum statutory period of supervised release (but not exceeding five years for a Class A felony, three years for a Class B felony, two years for a C or D felony, and one year in any other case); (4) expressly authorize a court to order an additional period of supervised release to follow a period of imprisonment when supervised release is revoked; and (5) provide authority for a court to adjudicate violations of supervised release for which a summons or warrant was timely issued, even though the term of supervised release expired before the court could act on the alleged violation.

SECTION 1. IMPOSITION OF SENTENCE

Under subsection (a)(4) of 18 U.S.C. §3553, a court currently is required to consider guidelines issued by the Sentencing Commission pursuant to 28 U.S.C. §994(a)(1). Additionally, under subsection (a)(5) of 18 US..C. §3553, a court currently must consider policy statements issued by the Commission pursuant to 28 U.S.C. §994(a)(2). Current law, however, does not expressly command court consideration of guidelines or policy statements governing violations of probation and supervised release that derive from Commission authority under 28 U.S.C. §994(a)(3).

Section 1 of the bill corrects this oversight by amending 18 U.S.C. §3553(a)(4) to require court consideration of Commission guidelines or policy statements pertaining to violations of probation and supervised release. The amendment thereby strengthens and clarifies the Sentencing Reform Act principle that all court decisions affecting the imposition or modification of sentence are to be structured by the standards of the Act and by Sentencing Commission guidelines and/or policy statements relevant to the particular sentencing determination.

SECTION 2. TECHNICAL CORRECTION TO MANDATORY CONDITIONS OF PROBATION

Section 2 of the bill makes a technical correction in 18 U.S.C. §3563(a)(3), relating to the mandatory condition of probation prohibiting a defendant from possessing controlled substances. The amendment substitutes the more technically precise term "unlawfully possess a controlled substance" for the existing phrase "possess illegal controlled substances".

SECTION 3. REVOCATION OF PROBATION

a. Clarification of Imposable Sentence.

In general, 18 U.S.C. §3565 currently permits courts to respond to violations of conditions of probation in a variety of ways, including revocation of probation and imposition of "any other sentence that was available under subchapter A at the time of the initial sentencing." 18 U.S.C. §3565(a)(2). Ignoring the context of the Sentencing Reform Act as a whole (including the specific directive to the Sentencing Commission to issue guidelines or policy statements for revocation of probation and supervised release, 28 U.S.C. §994(a)(3)), several courts of appeals have narrowly interpreted the phrase "any other sentence that was available under subchapter A at the time of the initial sentencing" to mean a sentence within the guideline range applicable to the initial sentencing decision. *See United States* v. *Smith*, 907 F.2d 133 (11th Cir. 1990); *United States* v. *von Washington*, 915 F.2d 390 (8th Cir. 1990); *United States* v. *White*, 925 F.2d 284 (9th Cir. 1991); *United States* v. *Alli*, —F.2d—, 1991 WL 47409 (4th Cir. 1991).

The effect of these decisions is to severely restrict the discretion of the court to sanction serious violations of probation conditions. This 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.[1] 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.[2] *See United States* v. *Alli, supra* (Norton, J., dissenting).

In contrast, the policy statements issued by the Sentencing Commission effective November 1, 1990, 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.

Section 3 of the proposed legislation addresses this problem—a problem that has grown increasingly serious with several other circuits having followed the interpretative decision first adopted by the Eleventh Circuit in *Smith, supra*. The legislation amends the language in section 3565 by striking the phrase "any other sentence that was available under subchapter A at the time of initial sentencing." As amended, section 3565 would permit a court, upon revocation of probation, to "resentence the defendant under subchapter A." The purpose of this amendment is to clarify Congressional intent under the Sentencing Reform Act of 1984 that, upon revocation of probation, a defendant may be resentenced to any authorized sentence up to the statutory maximum(s) for the offense for which the defendant was initially sentenced to probation. Within these statutory constraints, the court's discretion would be guided by any guidelines or policy statements issued by the Sentencing Commission, pursuant to 28 U.S.C. §994(a)(3), for probation revocation and resentencing determinations.

b. Mandatory revocation for controlled substance or firearm possession.

Section 3565(a) currently mandates revocation of probation in the case of any defendant who is found by the court to be in the possession of a controlled substance. The same provision purports to require that the defendant be resentenced "to not less than one-third of the original sentence." While the probable intent of this provision was to require imposition of an imprisonment term of at least one-third of the original term of probation, the existing language is ambiguous.[3] Moreover, even if the provision is consistently construed to have this meaning, the "one-third" minimum requirement arbitrarily varies the sanction according to the length of the initially-imposed term of probation, instead of rationally relating the punishment to the nature and seriousness of the violation and other relevant considerations. Recognizing these problematic aspects of the current statutory language, the Senate approved a provision in its version of the 1990 Crime Control Act (S. 1970, 101st Congress) that would have eliminated the one-third minimum requirement; however, this provision was not included in the enacted version of that legislation.

Section 3(b) of the proposed legislation clarifies this potentially problematic language. It also combines into one new subsection the provisions mandating revocation of probation for violations relating to controlled substance or firearms possession. Substantively, the amendment essentially carries forward the provision in S. 1970 of the last Congress relating to mandatory revocation of probation for controlled substance possession. Under the provision, revocation of probation would continue to be mandated in the case of any defendant who unlawfully possesses a controlled substance while on probation. The length of the required term of imprisonment imposed upon resentencing would be structured by the guidelines or policy statements issued by the Sentencing Commission for such determinations.

Similarly, the proposed legislation carries forward present law policy of mandating revocation of probation and a sentence to a term of imprisonment, structured by Sentencing Commission guidelines or policy statements, in the case of a defendant who violates probation by possessing a firearm. Significantly, the proposal also closes a gap in the current statutory provision mandating revocation for firearm possession. Under current law, revocation is mandated only "if the defendant is in actual possession of a firearm." The amendment strikes the word "actual," and is thereby intended to cover both actual and constructive firearm possession. In view of the danger to society inherent in firearm possession by those probationers prohibited by law or their conditions of probation from having a firearm, no sound reason exists for mandating revocation and imprisonment in the case of a defendant found with a firearm on his person, while not imposing such sanctions on the defendant found to have a firearm in close proximity (for example, in a jacket in his closet).

In addition, the proposal more closely correlates the circumstances under which revocation for firearm possession is mandated with the circumstances under which probationers are prohibited from possessing a firearm. Under current law, it is discretionary with the sentencing court whether to prohibit a defendant from having a firearm as a condition of probation. *See* 18 U.S.C. §3563(b)(9). Whether or not such a condition is imposed, a defendant on probation is always subject to the prohibition against committing another Federal, State, or local crime. *See* 18 U.S.C. §3563(a)(1). While a first blush the current provision in Section 3565(b) appears to mandate revocation whenever a probationer is found to have actually possessed a firearm, it is doubtful whether probation could be revoked if no condition of probation has been violated. Consequently, under current law, it would appear that revocation for actual firearm possession is mandated if either the mandatory condition under section 3563(a)(1) or the discretionary condition under section 3563(b)(9) is violated.

The proposed legislation more clearly states the circumstances under which firearm possession by a probationer would lead to mandatory revocation and a sentence of imprisonment. Revocation would be mandated if the defendant violates probation by possessing a firearm in violation of Federal law,[4] whether or not the court had imposed the discretionary condition under section 3563(b)(9) prohibiting firearm possession. If the court did impose such a condition, and the defendant violated it, revocation would also be mandated, even if the violation would not have constituted a Federal offense.[5] On the other hand, the proposal would not mandate revocation if the court had not imposed a discretionary condition prohibiting firearm possession and the defendant's posses-

[1] Footnotes at end of article.

sion of a firearm violated State or local law (but not Federal law). Because of the wide variation in conduct relating to firearm possession proscribed by State and local law, it seems preferable to leave to court discretion (guided by Sentencing Commission guidelines or policy statements) whether revocation is warranted under such circumstances.

Finally, proposed section 3(b) would substitute language identical to that contained in section 3(a) of the bill for the problematic phrase "any other sentence that was available under subchapter A." As indicated *supra*, this phrase has been construed by several courts of appeals to restrict the available revocation sentence to a sentence within the guideline range applicable to the initial sentence. The proposed replacement language will ensure greater flexibility for courts to impose an appropriate sentence following revocation.

In keeping with the procedures and standards applicable to revocation proceedings under Rule 32.1 of the Federal Rules of Criminal Procedure and pertinent case law, it is intended that determinations of unlawful possession of a controlled substance or a firearm are to be made by the court based upon a preponderance of the evidence. It is not necessary that the defendant actually have been convicted of unlawfully possessing a controlled substance, or a firearm, as the case may be.

SECTION 4. SUPERVISED RELEASE AFTER IMPRISONMENT

a. Technical and Conforming Amendments.

The bill effects a technical and conforming change in the existing language in 18 U.S.C. §3583(d), relating to mandatory revocation of supervised release for possession of a controlled substance. The amendment conforms the language to the analogous provision in section 3565, relating to mandatory revocation of probation for controlled substance possession, as such provision is amended by Section 3(b) of this legislation.

The proposal also substitutes the term "defendant" for the term "person" throughout section 3583(e) to conform to usage of the term elsewhere in the sentencing provisions of title 18.

b. Maximum Period of Imprisonment Upon Revocation of Supervised Release, Class A Felony Offenses.

Under current law, a defendant convicted of a Class A felony (an offense for which the maximum term of imprisonment is life imprisonment or death) may be sentenced to a term of supervised release of up to 5 years (longer, in the case of some controlled substances offenses). If such term of supervised release subsequently is revoked due to defendant violations, the defendant may be required to serve an additional period of imprisonment equal to all or part of the supervised release term. In comparison, for Class B, C, and D felonies, the maximum period of additional imprisonment that may be ordered upon revocation of supervised release is always at least one year less than the maximum term of supervised release that may be imposed for that class of offense (*i.e.*, for Class B felonies, maximum supervised release term=5 years, maximum period of re-imprisonment=3 years; for Class C and D felonies, maximum supervised release=3 years, maximum re-imprisonment=2 years).[6] For Class E felonies and Class A misdemeanors, the maximum term of supervised release is the same as the maximum period of re-imprisonment; *i.e.*, 1 year.

These "caps" on re-imprisonment time following revocation of supervised release were enacted as part of the Sentencing Act of 1987 (Sec. 25, P.L. 100-182, Dec. 7, 1987), concurrently with extension of the maximum imposable terms of supervised release from three to five years for Class A and B felonies, and from two to three years for Class C and D felonies (Sec. 8 of Sentencing Act of 1987). No cap was placed on the re-imprisonment time for Class A felonies, however.

The proposed legislation rewrites section 3583(e)(3), pertaining to revocation of supervised release, to enhance the clarity of the subsection and to impose a limit of five years on the period of additional imprisonment that can be ordered upon revocation of supervised release in the case of Class A felonies. In part, the five-year cap on re-imprisonment time for Class A felonies addresses a concern voiced by some that authorization of a subsequent period of supervised release following revocation of supervised release and re-imprisonment (*see* proposed section 3583(h)) would lead to unduly lengthy periods of supervision and re-imprisonment. The caps on total re-imprisonment time following revocation of supervised release, made applicable by this legislation to all offenses for which supervised release is authorized, together with the crediting toward the cap of all time in official detention (*see* 18 U.S.C. §3585(b)), should serve to alleviate these concerns.

c. Mandatory Revocation of Supervised Release for Controlled Substance or Firearm Possession.

Section 3583(g) currently mandates revocation of supervised release and a prison term of at least one-third the term of supervised release if a defendant is found to possess a controlled substance. In contrast, there is no comparable provision in current law mandating revocation of supervised release for firearm possession.

The proposed legislation remedies this omission by mandating revocation of supervised release if the defendant possesses either a controlled substance or a firearm. The language of the amended subsection 3583(g) parallels that in amended section 3565(b), pertaining to mandatory revocation of probation for such violations. At the same time, the minimum period of re-imprisonment required upon mandatory revocation of supervised release is repealed. The guidelines or policy statements issued by the Sentencing Commission can more rationally structure appropriate sanctions for controlled substance and firearm violations of supervised release than can a statutory minimum that arbitrarily varies with the length of the supervised release term.

(d) Additional Term of Supervised Release Following Revocation of Supervised Release.

Current statutory law is silent on whether a court, upon revoking a term of supervised release, may order an additional period of supervision to follow the period of re-imprisonment imposed. Addressing the issue, the United States Court of Appeals for the Ninth Circuit has held that present section 3583 provides distinct, mutually exclusive alternatives. Consequently, "a court may not revoke a person's supervised release, order a term of incarceration *and* then order another term of supervised release." *United States* v. *Behnezhad*, 907 F.2d 896, 898 (9th Cir. 1990). At the same time, the court observed that "there would be great virtue and much benefit to all concerned if courts were given more flexibility in this area." *Id.*, at 900.

Proposed section 3583(h) expressly authorizes a court, within limits, to order an additional period of supervision following revocation of supervised release and re-imprisonment. To ensure that revocation remains an available sanction whenever a defendant is serving a supervised release term, the legislation empowers a court to order an additional term of supervision following incarceration *only* if the defendant has served less time in prison for previous supervised release violations than the maximum authorized period of re-imprisonment for the applicable class of the offense for which the defendant was originally sentenced (*i.e.*, the "cap" on re-imprisonment has not been reached). For example, if a defendant convicted of a Class C felony was required to serve two years in prison following revocation of supervised release, no additional term of supervised release would be authorized because the two-year cap on re-imprisonment for Class C felonies would have been reached. In contrast, if a defendant convicted of a Class B felony was revoked and ordered to serve a two-year prison term, an additional period of supervised release could still be ordered because the three-year cap on re-imprisonment time for Class B felonies would not have been reached.

Under the legislation, the maximum length of additional supervised release term may not exceed the maximum period of supervised release authorized by statute for the offense, less any term of imprisonment imposed upon revocation. For example, in the case of a Class C felony for which the maximum supervised release term is three years, a defendant who is revoked and re-imprisoned for 18 months could be ordered to serve as much as 18 additional months on supervised release (36-month maximum term of supervised release −18 months imprisonment=18 months possible re-release supervision). If the same defendant was again revoked, he could be re-imprisoned for not exceeding six months (24-month cap −18 months previously-served imprisonment=6 months allowable imprisonment) and if so imprisoned, could not thereafter be placed on supervision (because the two-year imprisonment cap would have been reached). Thus, under the proposal, a defendant would always be credited for incarceration time against both the cap on re-imprisonment and the maximum authorized period of supervised release. However, the defendant would not be credited for actual time spent on supervision (*i.e.*, "street-time") prior to a violation or revocation. The latter policy of not crediting "street-time" reflects the need to provide strong incentives to encourage compliance with applicable supervision conditions throughout a required period of supervised release. It also reflects the practical difficulty in many cases of determining precisely when a violaction occurred. This difficulty is compounded in the case of multiple violations.

Under the Sentencing Reform Act scheme, supervised release functions as the rough equivalent of parole under the former sentencing system, insofar as providing a supervised transition for a defendant from prison back into society. Congress envisioned that supervised release would serve multiple sentencing purposes of protecting the public, deterrence of further criminal activity and rehabilitation. *See* 18 U.S.C. §3583(c). When revocation of supervised release is warranted, provision for an additional period of supervision to follow any necessary period of imprisonment continues to promote these purposes. Absent authorization of an additional supervision component, courts may be faced with a Hobson's choice between under-punishment (continuing a defendant on supervision who merits a more severe sanction) and over-punishment (re-imprisonment for a longer period than otherwise necessary to sanction a supervised release violation). This provision of the legislation provides courts with the clear statutory authority to avoid choosing among these equally unsatisfactory extremes.[7] Instead, the court will have sufficient flexibility to both punish supervised release violations and provide an additional supervision component, the need for which may be all the greater because of the defendant's violation(s).

As one means of responding to supervised release violations, current law permits a court to extend the length of a supervised release term to the maximum term authorized for the class of the offense. Recognizing this existing authority, this legislation provides comparable flexibility for a court to re-imprison a defendant for the maximum term authorized for the class of the offense. Limiting the re-imprisonment period to the maximum of the term of supervised release actually imposed would reduce court flexibility in sanctioning serious violations and create anomalies vis-a-vis cases in which the term had previously been extended to the statutory maximum.

(d) Delayed Revocation of Supervised Release.

Under existing 18 U.S.C. §3565(c), a court has authority to revoke probation after the term of probation has expired in the limited circumstances where a warrant or summons alleging a violation was filed prior to the end of the probation term. In such a case, the court has continued jurisdiction to revoke and resentence for a "reasonably necessary" period beyond the expiration of the probation term.

In contrast, existing statutory law is silent in respect to court authority to adjudicate alleged violations of supervised release and, if warranted, revoke supervised release after the term of supervised release has expired. The proposed legislation fills this gap in current law by providing continued court jurisdiction to adjudicate alleged supervised release violations and revoke supervised release if a warrant or summons was timely filled before the end of the supervised release term. The proposed language parallels the existing statutory provision for delayed probation revocation.

FOOTNOTES

[1] Although the issue has not yet been adressed by the appellate courts, it would appear that violations arising out of controlled substance possession, for which section 3565(a) mandates revocation and a minimum sentence of "not less than one-third of the orginial sentence," should be excepted from the rule of these several cases. On the other hand, firearm violations, for which section 3565(b) mandates revocation but no minimum imprisonment sanction, would appear to be within the scope of these case holdings because that subsection employs a statutory phrase identical to the language in section 3565(a)(2) construed by these several courts of appeals.

[2] It may even produce the anomalous result of a zero imprisonment sanction for a probation violation for which imprisonment is clearly warranted or even mandated. Consider, for example, a defendant with an initial guideline range of 0-6 months whom the court sentences to three years probation with a condition of 6 months intermittent confinement in the local jail on weekends and a condition prohibiting firearm possession. If, after satisfying the intermittent confinement requirement, the defendant violates probation by possessing a firearm, revocation would be mandated under section 365(b), but because the defendant must be credited with six months' time spent in offical detention under 18 U.S.C. §3585, no additional imprisonment sanction could be imposed (under the statutory construction adopted by the several appellate courts).

[3] Arguably, the phrase could be interpreted to mean one-third of the minimum or maximum of the guideline range applicable at the initial sentencing decision. It is also conceivable that some courts will find the language sufficiently ambiguous to be unenforceable as a mandatory provision.

[4] For example, under 18 U.S.C. §922(g)(1), it is unlawful for a person convicted of a crime punishable by imprisonment for a term exceeding one year (a felony under Federal law) to posses a firearm; it is also unlawful for any unlicensed person to possess certain, more dangerous firearms. *See, e.g.*, 26 U.S.C. §5861, 18 U.S.C. §922(o).

[5] If the defendant has been sentenced to probation for a misdemeanor it would not necessary violate Federal law for the defendant to possess a handgun, but such possession could be in violation of the section 3563(b)(9) discretionary condition, if applicable.

[6] The maximum term of supervised release may be greater for some controlled substance offenses, but the maximum periods of re-imprisonment remain as stated.

[7] A plausible argument can be made that Congress did not intend revocation of supervised release to extinguish the entirety of a defendant's remaining supervised release term. Rather, it may have been envisoned that revocation of supervised release would operate similarly to revocation of special parole terms (as such terms were authorized prior to the Omnibus Anti-Drug Act of 1986 for certain defendants convicted of conntrolled substance offenses). Under that approach, a defendant could be reparoled if the defendant served in prison less than the entire special parole period.

The PRESIDING OFFICER. The bill is before the Senate and open to amendment. If there be no amendment to be proposed, the question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading, was read the third time, and passed, as follows:

S. 188

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. IMPOSITION OF SENTENCE.

Section 3553(a)(4) of title 18, United States Code, is amended to read as follows:

"(4) the kinds of sentence and the sentencing range established for—

"(A) the applicable category of offense committed by the applicable category of defendant as set forth in guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; 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) of title 28, United States Code;".

SEC. 2. REVOCATION OF PROBATION.

Section 3565(a) of title 18, United States Code, is amended—

(1) in paragraph (1) by striking "of" and inserting "or"; and

(2) in paragraph (2) by striking "impose any other sentence that was available under subchapter A at the time of the initial sentencing" and inserting "resentence the defendant under subchapter A".

SEC. 3. SUPERVISED RELEASE AFTER IMPRISONMENT.

Section 3583 of title 18, United States Code, is amended—

(1) in subsection (e)—

(A) in paragraph (3) by striking "supervised release without credit" and inserting "supervised release authorized by statute for the offense of which the defendant was convicted without credit"; and

(B) by redesignating paragraph (5) as paragraph (4); and

(2) by striking subsection (g) and inserting the following:

"(g) POSSESSION OF CONTROLLED SUBSTANCES.—If the defendant is found by the court to be in the unlawful possession of a controlled substance, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

"(h) SUPERVISED RELEASE FOLLOWING REVOCATION.—When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized under subsection (e)(3), the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense of which the defendant was convicted, less any term of imprisonment that was imposed upon revocation of supervised release.".

Mr. SIMPSON. Madam President, I move to reconsider the vote by which the bill was passed.

Mr. MOYNIHAN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

THE ENERGY AND WATER APPROPRIATIONS BILL

Mr. MOYNIHAN. Madam President, I ask unanimous consent that the majority leader, following consultation with the Republican leader, may proceed at any time to the consideration of Calendar No. 117, H.R. 2427, the energy and water appropriations bill, notwithstanding the provisions of rule XXII.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

Mr. MOYNIHAN. I thank the Chair.

NATIONAL FOREST SYSTEM MONTH

Mr. MOYNIHAN. Madam President, I ask unanimous consent that the Judiciary Committee be discharged from further consideration of Senate Joint Resolution 159 designating National Forest System Month; that the Senate then proceed to its immediate consideration; that the joint resolution be deemed read a third time and passed; that the motion to reconsider be laid upon the table; and that the preamble be agreed to.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

The joint resolution was deemed read a third time and passed.

The preamble was agreed to.

The joint resolution, with its preamble, is as follows:

S.J. RES. 159

Whereas 1991 marks the 100th anniversary of the National Forest System with the establishment of the first forest reserve in 1891, the Yellowstone Park Timber Land Reserve;

Whereas the establishment of this first forest reserve marked a fundamental change in