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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMARYUS MOORE,

Defendant - Appellant.

No. 20-3171

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 6:18-CR-10073-JWB-2)

Edward L. Robinson of Robinson Law Firm, LLC, Wichita, Kansas, for Defendant-Appellant.

Molly M. Gordon, Assistant United States Attorney (Duston J. Slinkard, Acting United States Attorney, with her on the brief), Wichita, Kansas, for Plaintiff-Appellee.

Before **BACHARACH**, **SEYMOUR**, and **PHILLIPS**, Circuit Judges.

PHILLIPS, Circuit Judge.

At Jamaryus Moore's initial sentencing hearing, after an extended back and forth between the district court and the parties, the court offered Mr. Moore a choice. Mr. Moore could take (1) an immediate 51-month sentence of imprisonment; or (2) a

48-month sentence of probation, subject to *at least* 84 months' imprisonment for any future probation violation. Mr. Moore took the second option. And for over a year, Mr. Moore upheld his end of the bargain. But one thing led to another, and he ended up violating some travel and housing conditions of his probation. After Mr. Moore admitted his violations, the district court made good on its promise and sentenced him to 84 months' imprisonment.

The question here is whether the district court's sentencing bargain was procedurally unreasonable. We hold that it was. Exercising jurisdiction under 28 U.S.C. § 1291, we reverse and remand for resentencing.

BACKGROUND

Mr. Moore was indicted for robbery under 18 U.S.C. § 1951(a). After he pleaded guilty, the probation office calculated Mr. Moore's advisory guideline range as 51 to 63 months' imprisonment. No party objected to the guideline range, and the district court accepted that calculation.

I. Mr. Moore's Sentencing Hearings

At his initial sentencing hearing, the government led off by recommending a low-end sentence of 51 months' imprisonment. But Mr. Moore had higher hopes—he asked for time served and three years of supervised release.[1]

[1] At the time of his first sentencing hearing, Mr. Moore had served about 9 months' of pretrial confinement, for which he received credit at sentencing.

At first, the district court balked at Mr. Moore's request. Yet it mused that it didn't "want to throw somebody away if there's some hope to get 'em pointed in the right direction." R. vol. 1 at 62. But before forgoing a prison sentence, the district court wanted a "big hammer" by which it could later sentence Mr. Moore to a longer prison term if he violated any conditions of his sentence.[2] R. vol. 1 at 61.

Mr. Moore proposed a six-month trial period, during which the district court could continue to monitor his behavior while he was out on bond. The idea was that this would enable Mr. Moore to show that he was a worthy of a sentence of probation.

The district court was agreeable and offered Mr. Moore a choice. He could take the government's recommended sentence of 51 months' imprisonment, or he could try to comply with the conditions set by the district court to avoid prison.

But the district court warned Mr. Moore that if he violated "any conditions," it would sentence him to *at least* 84 months, and depending on his violations, up to the statutory maximum for his underlying crime, which was 20 years. R. vol. 1 at 66–67; *see also* R. vol. 3 at 59 ("[Y]ou just need to know that I have got 20 years to play with."). The district court twice asked Mr. Moore if he would take that risk. He responded "yes, sir" both times.

[2] Based on Mr. Moore's crime, the maximum sentence he could have received had his supervised release been revoked was 24 months' imprisonment. *See* 18 U.S.C. § 3583(e)(3). To the district court, that wasn't "a real big club in the greater scheme of things." R. vol. 1 at 60. So it declined to adopt Mr. Moore's initial proposal.

About a week later, the parties returned to court to implement Mr. Moore's six-month, trial-period plan. The district court reiterated to Mr. Moore that while it was "prepared to give [him] a low-end guideline sentence, which is what the Government argued for, [of] just over four years," it was also willing to take a chance on him. R. vol. 3 at 13. It then, again, warned Mr. Moore that violating any conditions meant that "seven years is the starting point, and it may get worse from there." R. vol. 3 at 18–19. And once again, Mr. Moore acknowledged that he understood, telling the district court that "he [could] do this." R. vol. 3 at 14. So the district court released Mr. Moore on bond and continued the sentencing hearing for six months.

After six months, Mr. Moore returned to court in full compliance with his conditions. Given that accomplishment, the district court varied from the 51-to-63-month guideline recommendation and sentenced Mr. Moore to four years' probation.[3]

II. Mr. Moore Violates the Conditions of His Probation

About ten months after he was sentenced, Mr. Moore violated travel and housing conditions of his probation.[4] The probation office noted that his violations

[3] We note some confusion about why the district court didn't just sentence Mr. Moore to four-and-a-half years of probation. As we understand it, a violation of his release terms during this initial six-month trial period would have still resulted in the promised sentence of at least 84 months of imprisonment.

[4] Mr. Moore violated probation by failing to update his probation officer on his living situation, traveling to Wichita, and traveling to Washington state without first obtaining his probation officer's or the court's permission.

were the minimal grade-C violations under U.S.S.G. § 7B1.4(a) and recommended the advisory range of 5 to 11 months' imprisonment.

At Mr. Moore's probation-revocation hearing, the parties and the probation office recommended sentences within the advisory range of 5 to 11 months. But the district court circled back to its promised sentence of at least 84 months, reading aloud pertinent passages from the earlier sentencing transcripts. After that, it noted that if this kind of sentencing bargain was going to work in the future, other defendants would "have to know I mean what I say." R. vol. 3 at 109. With that, the district court revoked probation and sentenced Mr. Moore to 84 months' imprisonment, with a three-year term of supervised release to follow. Mr. Moore objected to the sentence as being above the advisory range of 5 to 11 months of imprisonment for his violations. The district court overruled the objection.

Mr. Moore now appeals, arguing that his sentence was procedurally and substantively unreasonable.

DISCUSSION

I. Invited Error

The government relies on the invited-error doctrine to argue that Mr. Moore has waived any right to challenge his sentence. That doctrine "precludes a party from arguing that the district court erred in adopting a proposition that the party had *urged* the district court to adopt." *United States v. Deberry*, 430 F.3d 1294, 1302 (10th Cir. 2005) (emphasis added). As "a species of waiver," a party must intend to relinquish a

right for the invited-error doctrine to apply. *United States v. Rodebaugh*, 798 F.3d 1281, 1304 (10th Cir. 2015).

We have applied the invited-error doctrine in the sentencing context when a defendant has "affirmatively endorse[d] the appropriateness of the length of the sentence before the district court." *United States v. Mancera-Perez*, 505 F.3d 1054, 1059 (10th Cir. 2007). And here, we acknowledge that Mr. Moore accepted the district court's invitation to avoid incarceration altogether, even when that invitation carried the court's promise of a longer prison sentence if he violated any probation condition. Evidently, other defendants have done the same.[5] But if the government expects us to extend the invited-error doctrine to a sentence-in-advance system, it expects too much.[6]

II. Plain Error

We now turn to the merits of Mr. Moore's appeal. He first challenges the procedural reasonableness of his sentence. But because he failed to object to the district court's sentence-in-advance procedure, Mr. Moore concedes that our review is for plain error. *United States v. Poe*, 556 F.3d 1113, 1128 (10th Cir. 2009). Under

[5] The district court noted that "[e]very single person to whom I've extended such an offer, as far as I can recall, has accepted it. Many of them have done well; some of them haven't." R. vol. 3 at 119. It noted that in its experience, its sentencing arrangement "is successful for many people." R. vol. 3 at 116. So the district court's invited-sentence option appears to be a regular part of its sentencing practice.

[6] Applying the invited-error doctrine here would shield from our review even sentence-in-advance sentences all the way up to the statutory maximum.

plain-error review, a defendant must show: "(1) error, (2) that is plain, (3) which affects the party's substantial rights, and (4) which seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (cleaned up).

The government argues that any error would not be plain because Mr. Moore has provided no precedent from the Supreme Court or the Tenth Circuit prohibiting similar sentencing bargains. This argument misses the mark.

The appropriate question is whether the district court plainly erred by employing its sentence-in-advance system. It did. The Supreme Court and this circuit have established a required order of operations in federal sentencings. A district court "is supposed to start with the facts," calculate the advisory guideline range, and then "decide whether a variance is warranted to ensure a just sentence." *United States v. Sabillon-Umana*, 772 F.3d 1328, 1331 (10th Cir. 2014); *see also Gall v. United States*, 552 U.S. 38, 49–50 (2007) (concluding that "a district court should begin . . . by correctly calculating the applicable Guidelines range" before considering the § 3553(a) factors). Thus, the plain error here lies in preordaining a minimum future sentence and bypassing the required analysis that is available only after probation has been revoked.[7]

[7] In effect, the court suspended a minimum term of imprisonment for any future probation violations. That itself was error:

> Prior to the implementation of the federal sentencing guidelines, a court could stay the imposition or execution of sentence and place a defendant on probation. When a court found that a defendant violated a condition of probation, the court could continue probation, with or without

As mentioned, the district court, at the first sentencing hearing, noted the advisory guideline range of 51 to 63 months' imprisonment as calculated in the Presentence Report ("PSR"). Afterward, the district court properly considered the § 3553(a) sentencing factors. It then agreed with the government's recommendation for a low-end, 51-month sentence. But after further discussion, the district court offered Mr. Moore a six-month trial period on bond to see whether he was worthy of a sentence of four years' probation, conditioned on a substituted sentence of at least 84-months' imprisonment for any probation violation. The problem is obvious—the district court couldn't have known whether Mr. Moore's future conduct would justify the at-least-33-month-consecutive increase to its offered 51-month sentence. This makes the district court's sentence-in-advance system procedurally unreasonable. *See Sabillon-Umana*, 772 F.3d at 1331 ("The district court in this case failed to follow

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> extending the term or modifying the conditions, or revoke probation and either impose the term of imprisonment previously stayed, or, where no term of imprisonment had originally been imposed, impose any term of imprisonment that was available at the initial sentencing.
>
> The statutory authority to "suspend" the imposition or execution of sentence in order to impose a term of probation was abolished upon implementation of the sentencing guidelines. Instead, the Sentencing Reform Act recognized probation as a sentence in itself. 18 U.S.C. § 3561. Under current law, if the court finds that a defendant violated a condition of probation, the court may continue probation, with or without extending the term or modifying the conditions, or revoke probation and impose any other sentence that initially could have been imposed. 18 U.S.C. § 3565. For certain violations, revocation is required by statute.

U.S. Sent'g Guidelines Manual ("U.S.S.G.") ch. 7, pt. A, introductory cmt. (U.S. Sent'g Comm'n 2021).

this order of operations . . . . This was error."); *see also United States v. Tatum*, 760 F.3d 696, 697 (7th Cir. 2014) (Posner, J.) ("We don't think a judge can be permitted to . . . commit[] himself in advance to a specified sanction for any violation of probation, committed at any time, under any circumstances. That's too much like sentence first, trial afterwards.").

After a defendant has violated a condition of probation, 18 U.S.C. § 3565(a)(1)–(2) instructs courts to consider any applicable § 3553(a) factors when choosing between (1) continuing him on probation with or without modifications to the term or conditions; or (2) revoking probation and "resentence[ing] the defendant under subchapter A [of Title 18, Chapter 227—Sentences]." In Mr. Moore's case, the district court chose to revoke probation.

But by revoking probation, the district court committed itself to a two-step process under § 3565(a)(2). First, as the word "resentencing" suggests, a district court must reevaluate the case as it stood when the court imposed probation. Under § 3553(a)(4)(A), that takes the court back to the probation office's recommendations, the parties' objections, and the § 3553(a) factors, including a defendant's history, characteristics, and conduct *pre-probation-sentence*. The Introduction to Chapter Seven of the Sentencing Guidelines Manual sums it up well: "Under current law, if the court finds that a defendant violated a condition of probation, the court may . . . revoke probation and impose *any other sentence that initially could have been imposed*." U.S.S.G. ch. 7, pt. A, background (emphasis added).

As for the first step here, the district court had already announced that a 51-month sentence of imprisonment was the appropriate sentence for Mr. Moore's crime. It did so after considering Mr. Moore's pre-probation-sentence conduct and the § 3553(a) factors. R. vol. 1 at 66 ("Fifty-one months is what the Government's asking. You can take that sentence . . . be out of here today and it's behind you, start your sentence."). And because the district court had all this information when it sentenced Mr. Moore to probation, it locked itself into 51 months' imprisonment as the "sentence that could initially have been imposed."

At the second step, and *separately*, as laid out in *United States v. Kelley*, 359 F.3d 1302, 1306 (10th Cir. 2004), a district court must apply the policy statements in Part B—Probation and Supervised Release Violations—of Chapter Seven of the Sentencing Guidelines to impose any penalty "for the violation of the judicial order imposing supervision." U.S.S.G. ch. 7, pt. B, introductory cmt. Indeed, Chapter Seven of the Sentencing Guidelines provides its own sentencing grid (which yielded the 5-to-11-month advisory term for Mr. Moore's probation violation). So at this second step, the district court must consider the § 7B1.4 sentencing grid for the probation violation—*not the sentencing guidelines for the underlying offense*. *See Kelley*, 359 F.3d at 1306 ("[Section] 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 under § 3553(a)(4) is the Chapter 7 policy statements

referenced in § 3553(a)(4)(B).").[8] Thus, a district court must consider Chapter 7's non-binding policy statements (and, more specifically, § 7B1.4) referenced in § 3553(a)(4)(B) when it imposes a sentence for violating probation or supervised release conditions.[9] *Id.*

Besides relying on the plain statutory text, *Kelley* recited § 3553(a)(4)'s legislative history: "The Sentencing Commission proposed adding subsection (a)(4)(B) to clarify that revocation decisions should be guided by 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.* (citing 136 Cong. Rec. S14894–95 (daily ed. Oct. 10, 1990)). Thus, "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.* (quoting 136 Cong. Rec. S14895 (daily ed. Oct. 10, 1990)).

In short, when revoking probation and resentencing under § 3565(a)(2), the Sentencing Guidelines and *Kelley* require district courts to undertake a two-step

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[8] If a district court decides to revoke probation and resentence a defendant, § 3553(a)(4)(A) directs the court to the sentencing-guideline range for the underlying offense. In contrast, § 3553(a)(4)(B) applies "in the case of a violation of probation or supervised release" and directs courts to consider "the applicable guidelines or policy statements issued by the Sentencing Commission."

[9] On the other hand, when a court revokes *supervised release*, it has no need to impose a sentence on the underlying crime—it has already done so, and the defendant has served the sentence. So it has no reason to consider the underlying offense's guideline range under § 3553(a)(4)(A). *See Kelley*, 359 F.3d at 1306. But when revoking probation, § 3553(a)(4)(A) does apply.

analysis. First, they must consider the recommended guideline range in a PSR and impose a sentence for the originally charged crime based only on a defendant's *pre*-probation conduct. And second, they must consider Chapter 7's policy statements and sentence a defendant for the probation violation based only on the defendant's *post*-probation conduct.[10]

Here, nothing in the record suggests that either the district court or the parties undertook the needed two-step analysis. At the revocation hearing, the parties and the probation office referenced the 5-to-11-month range set forth in § 7B1.4. And in turn, the district court simply latched onto its promised 84-month sentence.

We are left to guess as to how the district court arrived at its 84-month sentence. Did the court vary upward to 84 months from § 7B1.4's advisory range of 5 to 11 months? Or did it vary upward from the 51-to-63-month advisory guideline range for Mr. Moore's underlying robbery? Or did it impose unspecified sentences for each category consecutively for a total of 84 months? The last alternative appears unlikely since the district court didn't sort Mr. Moore's pre- and post-probation conduct this way. All this uncertainty defeats meaningful appellate review.

Because Mr. Moore has shown error that is plain, we move to the final two prongs of the plain-error analysis. Under prong three, for Mr. Moore to demonstrate that his "substantial rights" were affected, he must show a "reasonable probability"

[10] Obviously, a district court could choose to impose as part of its sentence, for the originally charged crime or the probation violation, a term of 0 months' imprisonment, subject to our review.

that the error altered his sentence. *See United States v. Dazey*, 403 F.3d 1147, 1175 (10th Cir. 2005). Here, there is such a reasonable probability because it's unclear what sentence the court would have imposed after explaining its two-step analysis at sentencing. *See Sabillon-Umana*, 772 F.3d at 1335.

For the fourth prong of plain-error analysis, Mr. Moore must demonstrate that the error "affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 1333. We conclude this prong is met as well because citizens would have a diminished view of the judicial process and its integrity if "courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands[.]" *Id.*

In sum, Mr. Moore has shown that the district court plainly erred when it sentenced him.[11]

CONCLUSION

Because the district court's sentence-in-advance feature renders the sentence procedurally unreasonable, we vacate Mr. Moore's sentence and remand for resentencing.

[11] Because Mr. Moore has shown plain procedural error, we may remand without considering his substantive-reasonableness challenge. *United States v. Morgan*, 635 F. App'x 423, 447 (10th Cir. 2015).

United States v. Moore, Case No. 20-3171
BACHARACH, J., dissenting

This appeal stems from Mr. Jamaryus Moore's effort to avoid any prison time after pleading guilty to armed robbery. *See* 18 U.S.C. § 1951(a). He faced a guideline range of 51 to 63 months' imprisonment. Despite this guideline range, Mr. Moore requested a sentence of time served (nine months and five days), which would prevent any further imprisonment.

The district court responded by stating that it would consider probation, which would let Mr. Moore avoid any further imprisonment. But the court concluded that probation would be suitable only if it included a strong deterrent to prevent violation of the conditions. So the court responded to Mr. Moore's request by giving him two alternatives. In one, he could get probation; but any violation would trigger a prison sentence of at least 84 months. The other option was a straightforward sentence of 51 months' imprisonment, which represented the floor of the guideline range.

Mr. Moore chose probation, knowing that any violation would result in a prison term of at least 84 months. With that knowledge, he accepted the conditions and violated them anyway, leading the district court to revoke probation and impose the promised sentence of 84 months'

imprisonment. On appeal, Mr. Moore challenges the procedural and substantive reasonableness of the sentence.

The majority reverses, concluding that the district court committed plain error in imposing the sentence. In my view, however, the alleged error isn't reviewable because Mr. Moore knowingly invited the sentencing terms in order to obtain an extraordinary downward variance—going from 51 months to zero. Even if we were to disregard Mr. Moore's role in asking the district court to do what it did, the appellate challenge would fail under the plain-error standard because the alleged error wouldn't seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

1. Mr. Moore agreed to the sentencing terms, knowing that he'd get a prison sentence of at least 84 months if he violated any condition.

Mr. Moore chose probation in the course of three hearings.

At the first sentencing hearing, the court found a guideline range of 51 to 63 months' imprisonment. Based on this guideline range, the government requested a sentence of 51 months' imprisonment. Mr. Moore countered by proposing time served plus supervised release, explaining that he needed to learn "how to be an adult." R. vol. 1, at 48.

The court balked at Mr. Moore's proposal, but expressed a willingness to forgo a prison term. To forgo a prison term, however, the court said that Mr. Moore needed to know that a violation would lead to a long prison term. *Id.* at 61. Mr. Moore responded by proposing a six–month

continuance of the sentencing, suggesting that the extra time would allow him to prove that he would comply with the conditions. *Id.* at 63. The court agreed but warned Mr. Moore that a violation of "any conditions" would trigger a prison sentence of at least 84 months. *Id.* at 66. The court twice asked Mr. Moore if he was willing to accept this consequence of a violation, and Mr. Moore responded "yes" each time. *Id.* at 67. The court also asked Mr. Moore's attorney for any objections, and he had none.

At the second sentencing hearing, the parties agreed to continue the proceedings for another six months. When the six–month period ended, the court would impose the sentence. Mr. Moore said twice that he understood and accepted that if he violated any conditions, he would receive a prison sentence of at least 84 months. Mr. Moore's attorney added: "Mr. Moore ha[d] made it clear . . . that he want[ed] this opportunity, knowing the enhanced penalties that he [was] looking at were he to fail." R. vol. 3, at 15. The court then continued the sentencing for another six months.

When the court reconvened, the court again stated that if Mr. Moore violated the terms, the prison sentence could range from 84 months to 20 years. Mr. Moore's attorney responded that

- his client understood that this deal would "give him a constant reminder that . . . he may go to federal prison for several years" and
- the risk of this penalty was "another thing that we can put in place to help him."

Id. at 56. With Mr. Moore's acceptance of the sentencing terms, the court imposed four years of probation with conditions.

Almost a year later, Mr. Moore was arrested for violating terms of his probation involving housing and travel. The alleged violations were minor, characterized as Grade "C." In light of the agreed terms, however, the court sentenced Mr. Moore to 84 months in prison. Mr. Moore objected to the length of the sentence, but the court overruled the objection. This appeal followed.

2. Mr. Moore invited any possible error by endorsing the sentencing terms, knowing that a violation of conditions would trigger a prison term of at least 84 months.

Mr. Moore invited the alleged errors by endorsing the sentencing terms, which included a condition requiring a prison term of at least 84 months upon revocation for any violation. *See United States v. Mancera-Perez*, 505 F.3d 1054, 1059 (10th Cir. 2007) (When a "defendant affirmatively endorses the appropriateness of the length of the sentence before the district court, we conclude that if[] there was error, it was invited and waived."). In hearings held over the course of a year, Mr. Moore and his counsel repeatedly stated that they had understood and agreed to a prison sentence of at least 84 months upon a violation of any conditions. *See, e.g.*, R. vol. 3, at 15 ("Mr. Moore has made it clear to me that he wants this opportunity, knowing the enhanced penalties that he is looking at were he to fail."). Mr. Moore's attorney not only accepted the

sentencing terms but acknowledged the helpfulness of stiff consequences for a violation, explaining that the threat of a long sentence would help Mr. Moore stay in compliance. *See* pp. 3–4, above.

Given these warnings and statements of approval, the district court could reasonably understand that Mr. Moore not only had approved the sentencing terms but also had considered the potential 84-month prison term as "a constant reminder" and something "to help him." R. vol. 3, at 56; *see Mancera-Perez*, 505 F.3d at 1057 n.3 ("[I]t [is] unjust and a perversion of the integrity and proper administration of justice to allow a defendant affirmatively to support the reasonableness of his sentence before the district court and then to challenge the reasonableness of that sentence on appeal.").

Mr. Moore argues that he didn't invite the alleged errors because the sentencing terms had originated with the district court. Of course, the district court offered Mr. Moore the second sentencing option (probation with a sentence of at least 84 months for any violation) in response to his request for time served. *See* p. 1, above. But let's assume that the sentencing terms had originated with the district court. That assumption doesn't matter because we've never confined invited error to rulings proposed by the defendant. To the contrary, we've found invited error when the defendant endorses a ruling in district court and later challenges that ruling. *E.g.*, *United States v. Robinson*, 993 F.3d 839, 849 (10th Cir.

2021) (concluding that an alleged error was invited when a party agreed to jury instructions and later challenged them); *United States v. Cornelius*, 696 F.3d 1307, 1319–20 (10th Cir. 2012) (same); *John Zink Co. v. Zink*, 241 F.3d 1256, 1259 (10th Cir. 2001) (concluding that an alleged error was invited when the plaintiff agreed to use the district court's statements to interpret an injunction and later challenged that use). A party can thus invite the error by endorsing a ruling proposed by others. *See, e.g.*, *United States ex rel. Bahrani v. ConAgra, Inc.*, 624 F.3d 1275, 1284 (10th Cir. 2010) (finding invited error when the plaintiff agreed to the defendant's motion to bifurcate and later challenged bifurcation). Mr. Moore invited any possible error by repeatedly accepting and endorsing the sentencing terms.

The majority agrees that Mr. Moore chose probation with the knowledge that he'd get a prison term of at least 84 months if he were to violate any probationary condition. But the majority declines to apply the invited-error doctrine based on its characterization of the sentencing terms as "a 'sentence-in-advance system.'" Maj. Op. at 6–7. In my view, the majority's approach conflates invited error with the merits. The imposition of an alleged "sentence-in-advance system" might bear on the existence of an error, but not on whether Mr. Moore had invited that error.

If an error existed, Mr. Moore would have invited that error by endorsing probation even though any violation would subject him to a

prison term of 84 months or more. After repeated warnings, Mr. Moore knowingly embraced the sentence terms in order to obtain a sentence of probation. Given the warnings and defense counsel's observation that the threat of an 84-month sentence would help Mr. Moore, I wouldn't disregard his invitation for the district court to do precisely what it did. Mr. Moore's invitation of the alleged error should end our inquiry.

3. Even if Mr. Moore hadn't invited the alleged error, it wouldn't have seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

Mr. Moore concedes that he didn't present the district court with his present challenge to the sentence. So even in the absence of invited error, Mr. Moore would have incurred a heavy burden under the plain-error standard. *See United States v. Uscanga-Mora*, 562 F.3d 1289, 1293 (10th Cir. 2009) (stating that the plain-error standard applies when the defendant fails to make procedural objections at sentencing); *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004) (stating that the defendant bears the burden of establishing plain error). Even obvious errors don't satisfy this burden unless they "seriously affect[] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Wireman*, 849 F.3d 956, 962 (10th Cir. 2017) (quoting *United States v. Marquez*, 833 F.3d 1217, 1221 (10th Cir. 2016)).

To assess the fairness, integrity, or public reputation of the proceedings, we should consider not only the eventual revocation sentence

but also the initial sentence, which had provided Mr. Moore with an extraordinary opportunity. At that time, Mr. Moore was facing a guideline range of imprisonment for 51–63 months. But the district court agreed to allow Mr. Moore to avoid *any* prison time if he just complied with the conditions of his probation.

The district court didn't coerce or even push Mr. Moore. To the contrary, the court warned Mr. Moore three times that if he violated any of the conditions, he would go to prison for at least 84 months.

The first warning came when the court responded to defense counsel's request to continue the sentencing to give Mr. Moore an opportunity to avoid any prison time. The court explained that to make this opportunity meaningful, a violation of any conditions would require a severe prison sentence. The court selected an 84-month term as the minimum if Mr. Moore were to violate any conditions. The court then asked Mr. Moore if he was "willing to take that chance in order to prove that [he could] turn [his] life around[.]" R. vol. 1, at 67. Mr. Moore responded: "Yes, sir." *Id.*

The second warning came nine days later, when the court conducted another hearing. The court asked Mr. Moore again whether he understood that if he chose to avoid any prison time, a violation of any conditions would result in a prison sentence of at least 84 months:

> Do you understand that if you just go forward with the sentencing that was already scheduled, I'm prepared to give you a low-end guideline sentence, which is what the Government argued for, just over four years; but if I were to go through with this plan to delay sentencing and give you a trial run on this release program, if you want to call it that, then from the moment you step out the door of this courtroom, if you violate any of the conditions that I set for you, then the starting point for your sentence is seven years, and it may get worse, depending on how bad you violate the conditions.
>
> Do you understand that?

R. vol. 3, at 13.

Mr. Moore answered: "Yes, sir." *Id*.

The third warning came minutes later. The court again questioned Mr. Moore, explaining that

- the conviction for armed robbery was serious and
- the judge didn't want to risk the safety of others.

Id. at 18–19. With this explanation, the court repeated that a violation of any condition would trigger a minimum prison sentence of 84 months. *Id.* at 8–9. The court again asked Mr. Moore if he was "sure [he was] up for it," and Mr. Moore again replied "Yes, sir." *Id.* at 9.

In summary, Mr. Moore said three times that he understood the consequence of a violation and agreed to it. This wasn't gratuitous. In exchange, Mr. Moore obtained an extraordinarily lenient sentence, avoiding any prison time despite a guideline range of 51–63 months. In these circumstances, few members of the public would question the

fairness, integrity, or public reputation of the sentencing proceedings. Indeed, as Mr. Moore acknowledges, "[t]he first (and understandable) thought from anyone reviewing these events might be, 'Moore made a deal, he broke the deal, and he got exactly what he was warned he might get under the deal.'" Appellant's Opening Br. at 8. In my view, Mr. Moore accurately predicts public reaction to his violation of conditions after obtaining an extraordinary opportunity to avoid any prison time for armed robbery.

This is not the first time that we've addressed the fairness, integrity, or public reputation of the proceedings when a defendant agrees to a lenient sentence after being warned that a violation of any condition would automatically result in a substantial prison term. For example, in *United States v. Rausch*, 638 F.3d 1296 (10th Cir. 2011),[1] the defendant obtained an attractive opportunity to avoid any prison time for a serious crime (possessing child pornography). *Id.* at 1298. The guideline range called for a prison term of 97 to 121 months. *Id.* But the court imposed a sentence of time served (which consisted of just one day in prison) and a lifetime term of supervised release. *Id.* The defendant violated the supervised-release terms by viewing adult pornography. *Id.* Despite the violation, the court

[1] We later overruled *Rausch* on other grounds. *United States v. Bustamante-Conchas*, 850 F.3d 1130 (10th Cir. 2017) (en banc); *see* note 3, below.

declined to impose any prison time. But the court warned the defendant that if he again violated any of the conditions, he would get the statutory maximum of two years in prison. *Id.* at 1299.

The *Rausch* defendant violated the conditions a second time and faced a petition to revoke his conditions. *Id.* Like Mr. Moore, the *Rausch* defendant committed a relatively minor violation (Grade C) of his conditions. *See United States v. Rausch*, No. 1:07-cr-00497-JLK, Transcript of Hearing on Revocation of Supervised Release, ECF Doc. No. 92, at 8 (D. Colo. May 13, 2010).[2] Though the violation was relatively minor, the court carried out its promise, revoking the conditions and ordering two years in prison. *Rausch*, 638 F.3d at 1299. The defendant appealed, arguing that the district court had plainly erred by automatically ordering the two-year prison term. *Id.*

We held that even if the district court had committed an obvious error, it would not have seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.* at 1301. We reasoned that the defendant had obtained multiple warnings and the district court had simply carried out its agreement with the defendant:

> This was [the defendant's] third sentencing appearance before this district judge and his second for alleged violations of supervised release. The court had warned him as far back as the preliminary scheduling hearing regarding the first release

[2] We can take judicial notice of this document. *United States v. Smalls*, 605 F.3d 765, 768 n.2 (10th Cir. 2010).

> violations that additional violations would result in prison time. Moreover, the court specifically told [the defendant] that it would impose the two-year statutory maximum upon further violations as far back as the first revocation hearing when it also personally invited [the defendant] to speak in mitigation of sentence. At both hearings, [the defendant] expressly acknowledged the court's conditions, stating "yes, sir" after the court's warnings. Accordingly, when [the defendant] again violated the terms of his supervised release, the district court made good on its agreement with him and imposed a two-year prison sentence.

Id.

Like the *Rausch* defendant, Mr. Moore obtained an attractive opportunity to avoid prison. Both the *Rausch* defendant and Mr. Moore were able to avoid any prison time, but were warned that any violation would automatically result in a hefty prison term. The *Rausch* defendant was promised the statutory maximum of 24 months in prison; Mr. Moore was promised at least 84 months in prison. In *Rausch*, an error wouldn't seriously affect the fairness, integrity, or public reputation of the judicial proceedings because the district court had simply "made good on its agreement" with the defendant. *Id.* The same is true here.[3]

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[3] We later addressed the fairness, integrity, or public reputation of the proceedings when the district court fails to permit allocution. *United States v. Bustamante-Conchas*, 850 F.3d 1130 (10th Cir. 2017) (en banc). There we said that at the initial sentencing, a failure to permit allocution would ordinarily undermine the fairness, integrity, or public reputation of the proceedings. *Id.* at 1142. In doing so, however, we distinguished resentencings like the one in *Rausch*. We explained the continued vitality of *Rausch* because the failure to permit allocution involved a resentencing based on a violation of conditions (rather than the initial sentence):

Mr. Moore argues that public perception of the judiciary would be undermined by allowing his sentence to stand despite an alleged statutory violation. But we consider the fairness, integrity, or public reputation of the proceedings only when the district court has otherwise committed an obvious violation of federal law. *See, e.g.*, *United States v. Dazey*, 403 F.3d 1147, 1179 (10th Cir. 2005) (stating that not "all constitutional *Booker* errors that affect substantial rights also undermine the integrity,

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> In some cases, a district court makes clear—following an initial opportunity to allocute—that it is certain to impose a specific sentence if a defendant violates supervised release. For example, in *Rausch*, the defendant repeatedly violated the terms of his supervised release. At his first revocation hearing, the court invited the defendant to allocute and warned that it would impose a two-year prison term upon any further violations. After the defendant again violated the terms of supervised release, the court sentenced him as promised without inviting further allocution. Other circuits have declined to remand under similar circumstances.

Id. at 1142–43 (citing *Rausch*, 638 F.3d at 1298–99); *see also United States v. Pitre*, 504 F.3d 657, 663 (7th Cir. 2007) (concluding that the failure to permit allocution at a hearing to revoke supervised release did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings because the defendant had agreed to remain on supervised release after being warned that any violation would automatically result in revocation and an 18–month prison sentence), *cited with approval in Bustamante-Conchas*, 850 F.3d at 1143; *United States v. Reyna*, 358 F.3d 344, 352–53 (5th Cir. 2004) (en banc) (same when the district court carried out an agreement to impose a 12–month prison sentence for violating a term of supervised release), *cited with approval in Bustamante-Conchas*, 850 F.3d at 1143. As in these cases, we're addressing an alleged error in resentencing rather than in the initial sentence. *See* Maj. Op. at 9–10.

fairness, or public reputation of judicial proceedings"). So a legal violation in itself could not undermine the fairness, integrity, or public reputation of the proceedings.

Mr. Moore endorsed not only the sentencing terms but also the promise of stiff consequences for a violation, stating that those potential consequences would help him remain in compliance. In these circumstances, the district court's fulfillment of its word would not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. So even if an error were otherwise obvious, Mr. Moore wouldn't have satisfied the plain-error test.

4. The district court did not abuse its discretion on the substantive reasonableness of the sentence.

Mr. Moore argues that the sentence is not only procedurally unreasonable but also substantively unreasonable[4] because

- the 84-month term exceeded the bounds of permissible choice and
- the balance of factors was arbitrary, capricious, or manifestly unreasonable.

The majority does not address this challenge because it reverses on procedural reasonableness. If we were to affirm on procedural

[4] Mr. Moore also argues that an upward departure would have been unreasonable. But the parties agree that the court deviated from the guideline range through a variance rather than a departure. *See United States v. Sells*, 541 F.3d 1227, 1237 n.2 (10th Cir. 2008) (discussing the difference between a departure and a variance).

reasonableness, however, we'd review the substantive reasonableness of the sentence under the abuse-of-discretion standard, considering the totality of circumstances. *United States v. Balbin-Mesa*, 643 F.3d 783, 787 (10th Cir. 2011); *United States v. Alvarez-Bernabe*, 626 F.3d 1161, 1165 (10th Cir. 2010).

Mr. Moore and the government agreed that the applicable guideline range was five to eleven months based solely on the revocation of probation. But the court could "impose any other sentence that initially could have been imposed" upon revocation of probation. U.S. Sent'g Guidelines Manual ch. 7, pt. A, Introduction 2(a) (U.S. Sent'g Comm'n 2018). The guidelines served merely as recommendations.[5]

In considering these recommendations, the court applied the statutory factors and accounted for Mr. Moore's extraordinary opportunity to avoid prison despite the existence of a stiff guideline range. *See, e.g.*, *United States v. Kippers*, 685 F.3d 491, 499–501 (5th Cir. 2012) (relying in part on the district court's previous leniency in upholding the substantive

[5] Mr. Moore's eventual sentence matched the median sentence for his crime of armed robbery: In 2019, when the sentencing terms were struck, the national median sentence for federal robbery was 84 months' imprisonment for defendants falling within Mr. Moore's criminal-history category of III. 2019 Sourcebook of Federal Sentencing Statistics 81 (U.S. Sent'g Comm'n 2019); *see United States v. Sample,* 901 F.3d 1196, 1201 (10th Cir. 2018) (using the Sentencing Commission statistics as part of the sentencing inquiry under 18 U.S.C. § 3553(a)(6)).

reasonableness of a four-year prison term when resentencing the defendant). In similar circumstances, we have upheld the reasonableness of sentences that substantially exceeded the guideline ranges. *See United States v. Jones*, 678 F. App'x 626, 630 (10th Cir. 2017) (unpublished) (rejecting a challenge to the substantive reasonableness of a 48–month sentence for a second violation of supervised release when the guideline range for the violation was 6 to 12 months but the underlying crimes of conviction carried revocation sentences of 4 and 2 years);[6] *see also Kippers*, 685 F.3d at 500–501 (upholding the substantive reasonableness of a 48–month prison sentence when the top of the guideline range was 9 months for revocation of probation because the offense leading to revocation of the defendant's probation had been "particularly violent"); *United States v. Verkhoglyad*, 516 F.3d 122, 128, 134–36 (2d Cir. 2008) (upholding the substantive reasonableness of a 57–month prison sentence when the top of the guideline range was 11 months for revocation of probation, but the top of the guideline range for the underlying crime of conviction was 57 months).

5. Conclusion

I would affirm the sentence. In my view, Mr. Moore knowingly invited the sentencing terms in order to avoid any prison time after

[6] *Jones* is persuasive but not precedential. *See* 10th Cir. R. 32.1(A).

pleading guilty to armed robbery. Mr. Moore knew the risks because the district court had repeatedly warned him that any violation would trigger a prison term of at least 84 months. With these warnings, the court had repeatedly asked Mr. Moore—in hearing after hearing—whether he wanted to go forward with the sentencing terms despite the risk of a prison sentence of 84 months or more for any violation. Mr. Moore not only agreed each time, but his attorney pointed out that the stiff consequences of a violation would help Mr. Moore by keeping him in compliance. So in my view, Mr. Moore knowingly invited any potential error, foreclosing his appellate challenge.

Even if we were to overlook his invitation of the alleged error, the district court's enforcement of the sentencing terms—after the repeated warnings to Mr. Moore—wouldn't seriously affect the fairness, integrity, or public reputation of the judicial proceedings.

Because Mr. Moore invited any potential error and failed to satisfy the test for plain error, I respectfully dissent.