No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

COLUM MORAN,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

A. Fitzgerald Hall, Esq.
Federal Defender

Melissa Fussell, Esq.
Counsel of Record
Assistant Federal Defender
201 S. Orange Avenue, Suite 300
Orlando, Florida 32801
Telephone: (407) 648-6338
Email: Melissa_Fussell@fd.org

QUESTION PRESENTED

Whether a conviction predicated on insufficient evidence can meet the plain error standard in the absence of explicit statutory language or on-point, binding precedent that specifically and directly addresses the exact issue.

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PETITION FOR A WRIT OF CERTIORARI

Colum Moran respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in *United States v. Moran*, 57 F.4th 977 (11th Cir. 2023).

ORDER AND OPINION BELOW

The district court's judgment is provided in Appendix A. The Eleventh Circuit's published opinion affirming the district court's judgment is provided in Appendix B. The order denying the petition for rehearing is provided in Appendix C.

JURISDICTION

The United States District Court, Middle District of Florida, had jurisdiction over this criminal case under 18 U.S.C. § 3231. Pursuant to 28 U.S.C. § 1291, the Eleventh Circuit Court of Appeals had jurisdiction to review the final order of the district court. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Rule 52(b) of the Federal Rules of Criminal Procedure provides:

* * * * *

A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

18 U.S.C. § 2251 provides in pertinent part:

* * * * *

> (a) Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor in or affecting interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct, shall be punished as provided under subsection (e), if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed, if that visual depiction was produced or transmitted using materials that have been mailed, shipped, or transported in or affecting interstate or foreign

commerce by any means, including by computer, or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed.

STATEMENT OF THE CASE

On May 20, 2020, Mr. Moran was charged with three counts of attempted production of child pornography under § 2251(a) (Counts 1-3) and one count of possessing child pornography under § 2252(a)(4)(B) (Count 4). The charges arose from sexually explicit comments that were submitted on public, wholesome, commercially-sponsored "mom blog" posts. The comments implied that the anonymous commenter would like to see nude images of the children who were featured on the blogs. The bloggers did not reply to the comments, nor did the comments actually appear on the blogs. Rather, the comments were caught by the blogs' filtering and review processes.

1. The case proceeded to jury trial. After the government's case-in-chief, Mr. Moran moved for a judgment of acquittal. Defense counsel argued that the government had not shown that Mr. Moran had the requisite intent for Counts 1, 2, and 3, and that while there

was evidence Mr. Moran harassed the bloggers, there was no evidence he attempted to create child pornography. The district court denied the motion.

2. The jury convicted Mr. Moran of Counts 1-4. To do so, they had to find the government proved beyond a reasonable doubt that, among other things, Mr. Moran's comments "would have resulted in the ordinary or likely course of things" in the mom bloggers posting child pornography on wholesome, commercial mom blogs.

3. The district court sentenced Mr. Moran to 64 years' imprisonment. On Counts, 1, 2, and 3, Mr. Moran was sentenced to 216 months' imprisonment on each count, to be served consecutively. On Count 4, Mr. Moran was sentenced to 180 months' imprisonment: 60 months to run concurrent with Count 3, and 120 months to be served consecutively. The district court also sentenced Mr. Moran to a lifetime of supervised release.

On appeal, Mr. Moran challenged his convictions on Counts 1, 2, and 3—the § 2251(a) attempted production of child pornography counts—on sufficiency of the evidence grounds. The Eleventh Circuit affirmed his convictions, finding, *inter alia*, that he had not preserved his evidentiary

sufficiency challenge with respect to the substantial step element and that he had not established plain error. Mr. Moran's petition for rehearing was denied on March 20, 2023.

REASONS FOR GRANTING THE WRIT

For decades, the circuits have been split on how to apply the plain error standard to evidentiary insufficiency claims. It was previously undisputed that evidentiary insufficiency could itself show plain error, at least in some cases. Until the Eleventh Circuit's decision in *Moran*, the circuits were divided only as to the degree of evidentiary insufficiency required to establish plain error. "Generally, the government's failure to prove an essential element of an offense is a miscarriage of justice—one sufficient to warrant reversal of the conviction for plain error." *United States v. Johnson*, 19 F.4th 248, 263 (3d Cir. 2021); *cf. Kotteakos v. United States*, 328 U.S. 750, 764 n.18 (1946) ("[W]hen the error relates to that minimum so that, if eliminated, the proof would not be sufficient, necessarily the prejudice is substantial.").

The Eleventh Circuit erred when it held that a conviction predicated on insufficient evidence could not meet the plain error standard in the absence of explicit statutory language or on-point,

binding precedent specifically and directly addressing the issue. The Eleventh Circuit's *Moran* opinion conflicts with both sides of the circuit split, effectively holding that, without binding precedent resolving a specific evidentiary issue, evidentiary insufficiency—no matter how clear or obvious—is not plain error. Moreover, the Eleventh Circuit's ruling was wrong regardless of the correct standard, because Mr. Moran preserved the issue, and even if he had not, the evidentiary insufficiency was plain error under any of the standards.

A. The Eleventh Circuit departed from both sides of the decades-old circuit split on plain error review for evidentiary insufficiency claims.

In *Jackson v. Virginia*, this Court recognized "an essential of the due process guaranteed by the Fourteenth Amendment" is "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof." 443 U.S. 307, 316 (1979). The standard for insufficiency cases outlined in *Jackson* is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319. For decades, the circuits have been split as to the proper review of unpreserved insufficiency claims. While it is

difficult to delineate the precise dividing line, prior to *Moran*, the circuits were split as to what degree of evidentiary insufficiency established plain error.

Several "circuits have observed that the plain-error review applied to unpreserved sufficiency-of-the-evidence challenges is materially the same as de novo review under *Jackson*." *United States v. Burris*, 999 F.3d 973, 977-78 (6th Cir. 2021) (recognizing that prior panel precedent prevented it from taking that position), *cert. denied*, 211 L. Ed. 2d 286, 142 S. Ct. 473 (2021); *see also United States v. Williams*, 934 F.3d 1122, 1128 n.6 (10th Cir. 2019) (describing plain error review of sufficiency challenge as "essentially the same as the usual de novo standard"); *United States v. Gadson*, 763 F.3d 1189, 1217 (9th Cir. 2014) (noting "that plain error review of a sufficiency claim is only 'theoretically more stringent than the standard for a preserved claim'"); *United States v. Wolfe*, 245 F.3d 257, 261 (3d Cir. 2001) ("[T]he prosecution's failure to prove an essential element of the offense constitutes plain error under Rule 52(b)."); *United States v. White*, 1 F.3d 13, 17 (D.C. Cir. 1993) ("The *Jackson* standard already suggests that we would only reverse for an error that was 'plain' (in the sense of 'obvious') and requires, by definition,

that the error prejudice substantial rights."); *United States v. McIntyre*, 467 F.2d 274, 276 n.1 (8th Cir. 1972) ("In any event, the plain error doctrine, Fed. R. Crim. P. 52(b), would undoubtedly apply in any case where evidence is lacking to support a conviction since under those circumstances it would clearly affect the substantial rights of the defendants.").

Some of the circuits that have indicated that the *Jackson* standard is materially the same nevertheless use the regular "plain error" language, describe the standard as requiring a manifest miscarriage of justice, or characterize the standard as more stringent. *See, e.g.*, *United States v. Alexander*, 817 F.3d 1205, 1209 n. 3 (10th Cir. 2016) ("In similar situations, we have 'sometimes used' plain-error language. . . . But 'the standard actually applied is "essentially the same as if there had been a timely motion for acquittal"' at the close of all the evidence."); *See United States v. Williams*, 784 F.3d 798, 802 (D.C. Cir. 2015) (describing the burden for unpreserved insufficiency claims as "even heavier"); *United States v. Calhoun*, 721 F.3d 596, 600 (8th Cir. 2013) ("Submitting a charged offense to the jury is plain error 'only if there was a manifest miscarriage of justice, which would occur if there is no evidence of the

defendant's guilt or the evidence on a key element of the offense was so tenuous that a conviction would be shocking.'").

Other circuits, including the Eleventh Circuit, have inconsistently applied a standard equivalent to *Jackson* despite more often taking the position that the "manifest miscarriage of justice" standard is materially different. *See, e.g., United States v. Delgado*, 672 F.3d 320, 352 (5th Cir. 2012) (Dennis, J., dissenting) ("Two panels of this court held that insufficiency-of-the-evidence is a plain error that must be corrected (although later panels have unfortunately failed to follow these decisions)."); *United States v. Barrington*, 648 F.3d 1178, 1192 (11th Cir. 2011) ("In sum, the evidence was sufficient to support Barrington's convictions for aggravated identity theft. There is no plain error."); *United States v. Allen*, 127 F.3d 260, 264-266 (2d Cir. 1997) (analyzing an abandoned sufficiency claim under *Jackson* standard); *United States v. Green*, 296 F. App'x 337, 338 (4th Cir. 2008) (reviewing unpreserved sufficiency claim for plain error and analyzing it under *Jackson* standard).

A minority of circuits have consistently maintained that plain error review for unpreserved insufficiency claims is materially different from

the *Jackson* standard. *See United States v. Todosijevic*, 161 F.3d 479, 483 (7th Cir. 1998); *United States v. Kilcullen*, 546 F.2d 435, 441 (1st Cir. 1976) ("But while doubtless no court would sustain an essentially unfounded conviction, we think it correct to insist that evidentiary challenges be put in the first instance to the trial judge, who is in the best position to rule on such matters; and when this is not done, the appellant must then demonstrate 'clear and gross' injustice."). Previously, the Eleventh Circuit's general—if sometimes inconsistent—position was that "where a defendant fails to preserve an argument as to the sufficiency of the evidence in the trial court, the predominant rule in [the Eleventh] [C]ircuit—established by a long and unchallenged line of cases—is better stated as requiring that we uphold the conviction unless to do so would work a 'manifest miscarriage of justice.'" *United States v. Fries*, 725 F.3d 1286, 1291 n.5 (11th Cir. 2013). Where "evidence on a key element of the offense is so tenuous that a conviction would be shocking," the rule required a finding of a manifest miscarriage of justice. *Id.* at 1291.

The Fifth Circuit has acknowledged that "[t]hese combined standards are tantamount to the eye of a virtually impassable needle." *United States v. Yusuf*, 57 F.4th 440, 445 (5th Cir. 2023), *cert. denied*, No.

22-7145, 2023 WL 3046217 (U.S. Apr. 24, 2023). The Sixth Circuit recently recognized that the miscarriage-of-justice "standard predates *Jackson* and runs afoul of *Olano*'s instructions involving plain-error review," expressing "concern[ ]that our court may have chosen the wrong side of this circuit split." *Burris*, 999 F.3d at 978.

Despite growing criticism of the minority side of the Circuit split, the Eleventh Circuit's holding in *Moran* imposed an even more stringent standard: without direct, binding precedent, criminal defendants cannot prevail on sufficiency grounds even if the record is *devoid* of evidence on a key element of the offense. Binding precedent is one way of satisfying the plain error test, but it is not *itself* a prong of the plain error test. *See, e.g., Greer v. United States*, 141 S. Ct. 2090, 2096 (2021) (setting out four-pronged plain error test); *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016) (explaining that second prong requires showing that error is clear or obvious). For defendants like Mr. Moran, the Eleventh Circuit's holding has effectively replaced the second prong of plain error with a more stringent condition requiring binding law directly on point, which misinterprets this Court's plain error standard and runs counter to how most circuits apply plain error to evidentiary insufficiency claims.

B. Under either the *Jackson* rule or the manifest-miscarriage-of-justice standard, the finding that there was sufficient evidence to establish that Mr. Moran took a substantial step toward production of child pornography was plain error.

The jury that convicted Mr. Moran was instructed that a substantial step "must be an act which, unless frustrated by some condition or event, would have resulted, in the ordinary and likely course of things, in the commission of the crime being attempted." *United States v. Rothenberg*, 610 F.3d 621, 627 n.8 (11th Cir. 2010). "It must be an act that would normally result in committing the offense." *United States v. Singer*, 963 F.3d 1144, 1160 (11th Cir. 2020). Other circuits agree that a substantial step requires that the act would have resulted in the commission of the crime "in the ordinary and likely course of things." *See, e.g., United States v. Gladish*, 536 F.3d 646, 648 (7th Cir. 2008) (Posner, J.) ("You are not punished just for saying that you want or even intend to kill someone, because most such talk doesn't lead to action. You have to do something that makes it reasonably clear that had you not been interrupted or made a mistake . . . you would have completed the crime."); *United States v. Smith*, 264 F.3d 1012, 1016 (10th Cir. 2001); *Walters v. Maass*, 45 F.3d 1355, 1359 (9th Cir. 1995); *United States v. Mazzella*, 768 F.2d 235, 239 n.5 (8th Cir. 1985). "The cases universally hold that mere

intention to commit a specified crime does not amount to an attempt. It is essential that the defendant, with the intent of committing the particular crime, do some overt act adapted to, approximating, and which in the ordinary and likely course of things will result in the commission of the particular crime." *United States v. Joyce*, 693 F.2d 838, 841 (8th Cir. 1982); *United States v. Manley*, 632 F.2d 978, 988 (2d Cir. 1980).

In *Moran*, the government did not produce evidence that Mr. Moran's comments were capable of, in the ordinary and likely course of things, causing the mom bloggers to produce and post child pornography. The Eleventh Circuit acknowledged this, recognizing the unlikelihood that Mr. Moran's comments would have succeeded in the production of child pornography. *See* Op. at 2, 10, 17. Notably, during oral argument, one judge stated to the government, "It seems so unlikely. I don't know how anyone could think that this would result in the creation of child pornography under these circumstances." Oral Arg. at 13:17. Later, a different judge noted that "I can't find any case, any reported case, where the actual message itself, without more, is deemed a substantial step." Oral Arg. at 20:29. Where the record was devoid of evidence as to the

substantial step, Mr. Moran's convictions under § 2251(a) would survive plain error review under either side of the circuit split.

C. The Eleventh Circuit's ruling is wrong.

Even if, as the Eleventh Circuit held, the plain error standard requires Mr. Moran to show that there was binding precedent directly on point, the Eleventh Circuit wrongly ruled that he did not do so. The Eleventh Circuit incorrectly distinguished *United States v. Lee*, 29 F.4th 665 (11th Cir. 2022), as dealing with completed violations of § 2251(a) rather than attempted violations. But *Lee* was an attempt case, and the court stated that "[a]s applied in this case, § 2251(a) requires only that a defendant arrange for a minor to engage in sexually explicit conduct for the purpose of creating a visual depiction." *Id.* at 671, 674; *see also id.* at 675 ("[A]s relevant here, § 2251(a) requires proof that the defendant arranged for a minor to engage in sexually explicit conduct for the purpose of creating a visual depiction of that conduct."). Although that language originally came from *United States v. Ruggiero*, 791 F.3d 1281, 1284–85 (11th Cir. 2015), *Lee* stated that attempt required "arranging," repeating it multiple times in the opinion. Indeed, that was one of the primary bases of the opinion, and it was in the context of the "strictly

elemental" *Blockburger* analysis; it is therefore binding Eleventh Circuit precedent that attempted production under § 2251(a) necessarily requires that the defendant "arranged for a minor to engage in sexually explicit conduct for the purpose of creating a visual depiction of that conduct" in every attempted production of child pornography case. *See Lee*, 29 F.4th at 670-71. Furthermore, being convicted of attempted production of child pornography without evidence sufficient to establish the substantial step element clearly affected Mr. Moran's substantial rights and seriously affected the fairness of the judicial proceedings. Mr. Moran is currently serving a sixty-four-year prison sentence, approximately forty-nine years of which are for making online comments that were never even posted on the blogs and had no realistic chance of resulting in the production of child pornography.

Moreover, even if Mr. Moran could not satisfy plain error review, the Eleventh Circuit incorrectly found that Mr. Moran failed to challenge the sufficiency of the substantial step element when moving for acquittal. Issue preservation does "not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue." *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469–

70 (2000). While trial counsel did not use the particular words "substantial step," a review of the record shows that trial counsel specifically addressed the sufficiency of the "attempt" actus reus element, which can be proven only through a substantial step. Further, the record shows that the district court and the government understood that and spoke of the insufficiency of the actus reus element in terms of the presence of a substantial step. In denying the motion for acquittal, the district court addressed the substantial step issue in considerably more detail than the intent issue. Thus, there is no concern here that the district court was not apprised of the substantial step issue. Accordingly, the Eleventh Circuit's ruling was wrong regardless of the correct standard and must be corrected.

D. This case is an excellent vehicle to resolve the conflict.

This case is an ideal vehicle for further review and gives this Court the opportunity to harmonize conflicting decisions in the circuit courts. Given the entrenched nature of the conflict, this Court's review is needed to resolve the inconsistencies both among and within the circuits.

CONCLUSION

For the above reasons, Mr. Moran respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

A. Fitzgerald Hall, Esq.
Federal Defender

/s/ Melissa Fussell
Melissa Fussell, Esq.
Counsel of Record
Assistant Federal Defender
201 S. Orange Avenue, Suite 300
Orlando, Florida 32801
Telephone: (407) 648-6338
Email: Melissa_Fussell@fd.org