COLUM MORAN,

***PETITIONER*,**

V.

UNITED STATES OF AMERICA,

***RESPONDENT*.**

APPENDIX

Appendices

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

v.

COLUM PATRICK MORAN, JR.

Case Number: 3:19-cr-40(S1)-MMH-JBT

USM Number: 71782-018

Maurice C. Grant, II, FPD
200 W. Forsyth Street
Ste. 1240
Jacksonville, FL 32202

AMENDED JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty of Counts One, Two, Three, and Four of the Superseding Indictment. The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. §§ 2251(a) and (e)	Attempted Enticement of a Minor to Produce Child Pornography	October 2016	One
18 U.S.C. §§ 2251(a) and (e)	Attempted Enticement of a Minor to Produce Child Pornography	August 2017	Two
18 U.S.C. §§ 2251(a) and (e)	Attempted Enticement of a Minor to Produce Child Pornography	September 2018	Three
18 U.S.C. § 2252(a)(4)(B)	Possession of Child Pornography	March 2019	Four

The defendant is sentenced as provided in pages 2 through 9 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The original Indictment is dismissed on the motion of the United States.

IT IS ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Colum Patrick Moran, Jr.
3:19-cr-40(S1)-MMH-JBT

Date of Imposition of Sentence:

July 12, 2021
First Amended: September 13, 2021

Marcia Morales Howard

MARCIA MORALES HOWARD
UNITED STATES DISTRICT JUDGE

September 13, 2021

Colum Patrick Moran, Jr.
3:19-cr-40(S1)-MMH-JBT

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of **SEVEN HUNDRED SIXTY-EIGHT (768) MONTHS, consisting of TWO HUNDRED SIXTEEN (216) MONTHS as to Count One, Count Two, and Count Three, with each of these terms to run consecutively, and a term of imprisonment of ONE HUNDRED EIGHTY (180) MONTHS as to Count Four. The first SIXTY (60) MONTHS of the term of imprisonment as to Count Four will run concurrent with the term of imprisonment imposed as to Count Three. The remaining ONE HUNDRED TWENTY (120) MONTHS as to Count Four will run consecutive to all terms of imprisonment imposed for Counts One, Two, and Three.**

The Court makes the following recommendations to the Bureau of Prisons:

- Incarceration at a facility located as close as possible to Ocala, Florida.
- Defendant receive mental health treatment and sex offender treatment.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By: _____
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of **LIFE, consisting of a LIFE term as to each Count One through Four, all such terms to run concurrently.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
4. You must cooperate in the collection of DNA as directed by the probation officer.
5. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense.
6. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution.

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchucks or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature:_____ Date:_____

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ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

1. You shall participate in a mental health treatment program (outpatient and/or inpatient) and follow the probation officer's instructions regarding the implementation of this court directive. Further, you shall contribute to the costs of these services not to exceed an amount determined reasonable by the Probation Office's Sliding Scale for Mental Health Treatment Services.

2. You shall participate in a mental health program specializing in sexual offender treatment and submit to polygraph testing for treatment and monitoring purposes. You shall follow the probation officer's instructions regarding the implementation of this court directive. Further, you shall contribute to the costs of such treatment and/or polygraphs not to exceed an amount determined reasonable by the probation officer based on ability to pay or availability of third party payment and in conformance with the Probation Office's Sliding Scale for Treatment Services.

3. You shall register with the state sexual offender registration agency(s) in any state where you reside, visit, are employed, carry on a vocation, or are a student, as directed by the probation officer.

4. The probation officer shall provide state officials with all information required under Florida sexual predator and sexual offender notification and registration statutes (F.S. 943.0435) and/or the Sex Offender Registration and Notification Act (Title I of the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109-248), and may direct the defendant to report to these agencies personally for required additional processing, such as photographing, fingerprinting, and DNA collection.

5. You shall have no direct contact with minors (under the age of 18) without the written approval of the probation officer and shall refrain from entering into any area where children frequently congregate including: schools, daycare centers, theme parks, playgrounds, etc.

6. You are prohibited from possessing, subscribing to, or viewing, any images, video, magazines, literature, or other materials depicting children in the nude and/or in sexually explicit positions.

7. Without prior written approval of the probation officer, you are prohibited from either possessing or using a computer (including a smart phone, a hand-held computer device, a gaming console, or an electronic device) capable of connecting to an online service or internet service provider. This prohibition includes a computer at a public library, an internet café, your place of employment, or an educational facility. Also, you are prohibited from possessing an electronic data storage medium (including a flash drive, a compact disk, and a floppy disk) or using any data encryption technique or program. If approved to possess or use a device, you must permit routine inspection of the device, including the hard drive and any other electronic data storage medium, to confirm adherence to this condition. The United States Probation Office must conduct the inspection in a manner no more intrusive

than necessary to ensure compliance with this condition. If this condition might affect a third party, including your employer, you must inform the third party of this restriction, including the computer inspection provision.

8. You shall submit to a search of your person, residence, place of business, any storage units under your control, computer, or vehicle, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. You shall inform any other residents that the premises may be subject to a search pursuant to this condition. Failure to submit to a search may be grounds for revocation.

9. You shall provide the probation officer access to any requested financial information.

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments set forth in the Schedule of Payments.

	Assessment	AVAA Assessment[1]	JVTA Assessment[2]	Fine	Restitution
TOTALS	**$400.00**	**$0.00**	**$0.00**	**$0.00**	**$23,000.00**

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i) all nonfederal victims must be paid in full prior to the United States receiving payment.

[1] Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
[2] Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

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Name of Payee	Total Loss[3]	Restitution Ordered	Priority or Percentage
See Exhibit A		$23,000.00	

☒ The Court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the restitution.

SCHEDULE OF PAYMENTS

The Special Assessment in the amount of **$400.00** is due in full and immediately.

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

While in the custody of the Bureau of Prisons, you shall either (1) pay at least $25.00 quarterly if working a non-Unicor position or (2) pay at least 50 percent of your monthly earnings if working in a Unicor position. Upon release from custody, your financial circumstances will be evaluated, and the Court may establish a new payment schedule accordingly. At any time during the course of post-release supervision, the government or the defendant may notify the Court of a material change in the defendant's ability to pay, and the Court may adjust the payment schedule accordingly.

Unless the court has expressly ordered otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.

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[3] Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

APPENDIX B

57 F.4th 977
United States Court of
Appeals, Eleventh Circuit.

UNITED STATES of
America, Plaintiff-Appellee,
v.
Colum Patrick MORAN,
Jr., a.k.a. Emily lover, a.k.a.
emilylover@aol.com, Defendant-Appellant.

No. 21-12573
|
Filed: 01/13/2023

Synopsis

Background: Defendant was convicted in the United States District Court for the Middle District of Florida, No. 3:19-cr-00040-MMH-JBT-1, Marcia Morales Howard, J., of possession of child pornography and attempted production of child pornography, and he appealed.

Holdings: The Court of Appeals, Newsom, Circuit Judge, held that:

[1] there was sufficient evidence of defendant's intent to support his attempt convictions, and

[2] there was sufficient evidence to satisfy interstate nexus element.

Affirmed.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection.

West Headnotes (8)

[1] **Criminal Law** Review De Novo
Criminal Law Construction in favor of government, state, or prosecution
Criminal Law Inferences or deductions from evidence

Court of Appeals reviews sufficiency of evidence in criminal trial de novo, viewing evidence in light most favorable to government, resolving any conflicts in government's favor, accepting all reasonable inferences that tend to support government's case, and assuming that jury made all credibility choices in support of verdict.

[2] **Criminal Law** Criminal Intent and Malice

Defendant's desire alone—wholly without respect to his likelihood of success—can establish his intent to commit charged crimes.

[3] **Criminal Law** Reasonable doubt
Criminal Law Inferences or hypotheses from evidence

On sufficiency-of-the-evidence review, it is not enough for defendant to put forth reasonable hypothesis of innocence, because sole issue is

whether jury reasonably could have found guilt beyond reasonable doubt.

[4] **Infants** Intent, state of mind, and motive

There was sufficient evidence of defendant's intent to support his convictions for attempted production of child pornography, even if it was unlikely that his comments on otherwise-wholesome internet parenting blogs asking mothers to display sexually explicit images of their young daughters would succeed, and even if defendant was harassing bloggers for his own entertainment; sorts of pornographic images that defendant requested matched his particular preferences, he used what might be viewed as persuasive tactics in his messages to increase likelihood of success, defendant had more than 1,000 images of child pornography and 24 pairs of children's underwear, and defendant denied making requests to mothers. 18 U.S.C.A. §§ 2251(a), 2251(e).

[5] **Commerce** Federal Offenses and Prosecutions

Infants Intent, state of mind, and motive

There was sufficient evidence that defendant knew or had reason to know that visual depictions of child pornography he sought, if produced, would be transported or transmitted using any means or facility of interstate or foreign commerce to support his federal convictions for attempted production of child pornography, even if defendant did not know in advance whether his requests to have mothers produce pornographic images of their young daughters would succeed, in light of evidence that defendant's requests were made on internet parenting websites. 18 U.S.C.A. § 2251(a).

[6] **Commerce** Federal Offenses and Prosecutions

Infants Exhibition or use of child in indecent material or performance

In prosecution for producing child pornography, government must prove that defendant knew that, if produced, pornography he sought would travel in interstate commerce. 18 U.S.C.A. § 2251(a).

[7] **Criminal Law** Necessity of Objections in General

To establish plain error, defendant must show that (1) error occurred; (2) error was plain; (3) it affected his substantial rights; and (4) it seriously affected fairness of judicial proceedings.

[8] Criminal Law Necessity of Objections in General

In absence of explicit language of statute or rule, error cannot be plain unless issue in question has been specifically and directly resolved by on point precedent from Supreme Court or Court of Appeals.

***978** Appeal from the **United States** District Court for the Middle District of Florida, D.C. Docket No. 3:19-cr-00040-MMH-JBT-1

Attorneys and Law Firms

Sara C. Sweeney, U.S. Attorney's Office, Orlando, FL, U.S. Attorney Service - Middle District of Florida, U.S. Attorney, U.S. Attorney's Office, Tampa, FL, for Plaintiff-Appellee.

Melissa Fussell, Assistant Federal Public Defender, Federal Public Defender's Office, Orlando, FL, Maurice C. Grant, II, Federal Public Defender's Office, Jacksonville, FL, Alec Fitzgerald Hall, Federal Public Defender's Office, Tampa, FL, for Defendant-Appellant.

Before Jordan, Rosenbaum, and Newsom, Circuit Judges.

Opinion

Newsom, Circuit Judge:

Colum **Moran**, a collector of child pornography, commented on several "mom blog" posts asking mothers to display sexually explicit images of their young daughters. We must decide whether **Moran's** requests constitute criminal attempts to produce child pornography under 18 U.S.C. § 2251(a) and (e).

Moran contends, in essence, that his requests—posted on otherwise-wholesome mom-blog sites—were so unlikely to succeed that they can't support attempt liability. In particular, he makes three related arguments. First, he asserts that the unlikelihood of success negates his intent to complete the production crime. Second, he says that because he couldn't have known—or even thought—that his plot would succeed, it can't be shown that he "kn[ew] or ha[d] reason to know that such visual depiction w[ould] be transported or transmitted using any means or facility of interstate or foreign commerce," as the production statute requires. Finally, he argues that his verbal requests were too insignificant to constitute the "substantial step" necessary to prove attempt.

We reject all three of **Moran's** contentions. First, the sheer unlikelihood that **Moran's** requests to the mom-bloggers would result in the production of child pornography does not negate his desire—and thus his intent—to produce child pornography, and there is in any event plenty of evidence, even beyond the messages themselves, that he intended to do so. Second, contrary to **Moran's** suggestion, § 2251(a)'s interstate-nexus element does not require that a defendant know ex ante that his plot will succeed—only (as relevant here) that *if* it succeeds, the forbidden images will travel in interstate commerce. Finally, **Moran's** substantial-step argument, which he failed to

clearly present to the district court, fails under plain-error review.

I

"Mom blogs" are websites on which mothers—and likely some fathers—share ***979** parenting stories and tips. They are chock-full of family-oriented and family-friendly content. One illustrative site, "Your Modern Family," is authored and maintained by a mother and retired teacher and includes sections about kids' activities, parenting tips, and marriage and home-management advice. [1] Posts range from ideas for playing with sidewalk chalk to spring-cleaning suggestions—the latter sponsored by a soap company—to tips for the kids' first day of school. [2] The point—**Moran's** point—is that mom-bloggers aren't likely to post child pornography on their sites.

When **Moran** left a disturbing comment on one such blog, authorities launched an investigation. **Moran** had complimented a mom-blogger's young daughter's swimsuit and graphically described how he liked to perform a particular sex act with "pretty" "little girl[s]" in swimsuits like hers. Unbeknownst to **Moran**, that blogger's husband (and the little girl's father) was an FBI agent.

The investigation that ensued revealed that **Moran**, using the handle "Emily lover" at Emilylover@aol.com, had on three occasions asked other mom-bloggers to post pornographic pictures of their children. Warning: **Moran's** messages are vile. But to fairly assess one of his main arguments—namely, that the messages, while harassing, weren't *really* attempts to produce child pornography—we must analyze his comments in some detail.

Moran's first request responded to a mother's blog post about her five-year-old daughter learning to take photographs. **Moran** sent a comment asking the mother to have the girl—whom we'll just call "*A*"—take pornographic pictures of herself:

> She did a great job with these! The next time [*A*] wants to take pictures, you should suggest something fun. Have [*A*] take all her clothes off and take pictures of herself in the mirror. Especially when she's sitting in front of the mirror with her legs spread wide open so we can see her vagina. Maybe she could try spreading her vagina lips apart with her fingers so she can get a good picture of her little pink hole. My niece loves to have her picture taken while she uses the head of her toothbrush inside her vagina. If [*A*] wants to try it, my niece likes to lick the white cream from the brush when she's done. [*A*] would look so cute with her tasty girl goo smeared all over her smiling mouth 

Doc. 128-2.

Not quite a year later, **Moran** sent a second request to the same blogger, also about *A*. This time, **Moran** responded to a post about the now-six-year-old's morning routine:

> Great post! But the pictures I would most like to see are missing. [T]hose would be the ones of [*A*] doing her "morning stuff". In particular, some pictures of her on the toilet would be awesome. I'd like to see her panties around her ankles, with her legs spread wide enough to see the pee dribbling from between her vagina lips. I'd also like a couple of them to show her beautiful smiling face, and a couple of good closeups of her vagina 

Doc. 128-4. **Moran** later suggested that *A*'s mother buy her a sex toy for her 7th ***980** birthday—and even provided a link to facilitate the purchase.

Moran sent his third request to a different blogger, a mother who had recently advertised flushable baby wipes on Instagram. In a comment on one of the mother's blog posts, **Moran** referenced the Instagram ad and the mother's twin three-year-old daughters, whom we'll call "*B*" and "*C*":

> I'm really interested in the flushable wipes you were talking about on IG [Instagram]! Can you please post some pictures or a video of [*B*] and [*C*] using them? I'm curious to see how easily their little fingers can navigate their crotches with them and how well they clean the girl's vaginas.
>
> Thanks 

Doc. 128-7.

Federal law-enforcement officers traced the IP address from which **Moran** had sent all three messages to his residence. When officers searched **Moran's** apartment, they seized his laptop and cell phone, which together contained more than 1,000 images of child pornography—many of toddlers. Forensic computer evidence demonstrated that **Moran** had specifically searched for pornography involving seven- and eight-year-olds. It also revealed since-deleted file folders called "Babies" and "Potty time," as well as files with names like "Toilet_Girls" and "8yo school girl." Separately, investigators found 24 pairs of children's underwear in **Moran's** house—even though no children lived there. When officers interviewed **Moran** during the search, he denied ever posting messages as "Emily lover."

The government charged **Moran** with one count of possession of child pornography, *see* 18 U.S.C. § 2252(a)(4)(B) and (b)(2), and three counts of attempted production of child pornography, *see id.* § 2251(a) and (e). The jury convicted **Moran** on all four counts, and the judge sentenced **Moran** to 64 years' imprisonment.

II

Moran now appeals the attempted-production convictions. In relevant part, the production statute makes it unlawful for any person to:

> employ[ ], use[ ], persuade[ ], induce[ ], entice[ ], or coerce[ ] any minor to engage in ... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct ... 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.

Id. § 2251(a). Subsection (e) of the same statute provides for the punishment of "[a]ny individual who ... attempts ... to violate" § 2251(a). **Moran** challenges his attempted-production convictions on three related grounds, which we will consider in turn. [3]

A

Moran first contends that the government can't prove a necessary element of its case—namely, that he had "the specific intent or mens rea to commit the underlying charged crimes." *United States v. Yost*, 479 F.3d 815, 819 (11th Cir. 2007). Here, therefore, the evidence must show that **Moran** intended, for instance, to "entice[ ] ... any minor to engage in ... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct" ***981** and that he "kn[ew] or ha[d] reason to know that such visual depiction w[ould] be transported or transmitted using any means or facility of interstate or foreign commerce." 18 U.S.C. § 2251(a).

[1] Even viewing the evidence in the light most favorable to the government, **Moran** says, a jury couldn't conclude that he actually wanted—intended—the bloggers to post child pornography. [4] He says so for two related reasons. First, he asserts that specific intent requires that he "at least think [success] might be plausible," Br. of Appellant at 20, and that his efforts to procure child pornography via comments on mom-blogs were almost surely destined to fail. Second, he insists that he was obviously just "internet trolling"—that is, harassing the bloggers for his own entertainment—rather than actually trying to produce child pornography. We find neither argument persuasive.

[2] As to the first, **Moran** is simply mistaken. A defendant's desire alone—wholly without respect to his likelihood of success—can establish his intent. The Supreme Court has been perfectly clear about this:

> [A] person who acts ... intends a result of his act ... under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that the result is practically certain to follow from his conduct, whatever his desire may be as to that result.

United States *v. U.S. Gypsum Co.*, 438 U.S. 422, 445, 98 S.Ct. 2864, **57** L.Ed.2d 854 (1978) (citing W. LaFave & A. Scott, *Criminal Law* 196 (1972)); *accord, e.g.*, *Tilton v. Playboy Ent. Grp.*, 554 F.3d 1371, 1377 (**11th Cir**. 2009) (observing that " '[p]urpose' refers to the desire that a particular result will occur"). Using the Supreme Court's terminology, **Moran** could have "consciously desired"—and thus intended—to produce child pornography, however remote the "likelihood of that result happening."

[3] **Moran's** internet-troll theory suffers from a similar flaw. On sufficiency-of-the-evidence review, it isn't "enough for a defendant to put forth a reasonable hypothesis of innocence" because the sole issue is whether a jury "reasonably could have found guilt beyond a reasonable doubt." ***United States*** *v. Lebowitz*, 676 F.3d 1000, 1013 (**11th Cir**. 2012) (citation omitted). And because evidence of one purpose doesn't exclude another, the government needn't prove that **Moran** "was single-minded in his purpose." *Id.* **Moran** could have, for example, desired both outcomes—that his messages would both (1) troll people *and* (2) result in the production of child pornography.

[4] The fundamental question under the deferential sufficiency-of-the-evidence standard, then, is whether a jury could reasonably conclude that **Moran** consciously desired the bloggers whom he contacted to post pornographic images. The jury had ample evidence from which it could find that **Moran** had the requisite intent: (1) **Moran's** messages themselves; (2) his demonstrated sexual interest in children; and (3) his false exculpatory statements.

First, to state the obvious, evidence that **Moran** asked for child pornography *is* evidence that he desired to obtain—and thus ***982** to produce—child pornography. To be sure, the unlikelihood that **Moran's** mom-blog comments would actually net child pornography—and their consistency with a trolling theory—might *weaken* their evidentiary value. But they are most assuredly evidence. Two characteristics mark **Moran's** messages, in particular, as probative. For one, the sorts of pornographic images that they requested matched **Moran's** particular preferences. Two requests were for images of children on the toilet, and **Moran's** stash included a deleted folder called "Potty time"

and files named "Toilet_Girls." And **Moran's** collection of children's underwear included some for kids the same age as the targeted bloggers'—between three and six years old. For another, **Moran** used what might be viewed as persuasive tactics in his messages to increase their likelihood of success: In one, he bragged that his "niece loves to have her picture taken" in a particular way, implying that the blogger's children would as well; in another, he emphasized that the blogger's children would be "smiling"; and in yet another, he suggested that a blogger buy her child a sex toy and sent her a link to it.

Second, **Moran's** sexual interest in children speaks to his desire to obtain child pornography. A jury could reasonably conclude that an individual who has more than 1,000 images of child pornography and 24 pairs of children's underwear—despite having no children living with him—meant what he said when he asked the bloggers to post or send him pictures. *Cf.* ***United States*** *v. Gillis*, 938 F.3d 1181, 1190 (**11th Cir**. 2019) (noting that possession of child pornography is evidence of intent to have sex with a minor).

Third, **Moran's** false exculpatory statements —dishonestly denying that he had ever posted under the pseudonym "Emily lover"—are substantive evidence of his guilt. *See* ***United States*** *v. Hughes*, 840 F.3d 1368, 1385 (**11th Cir**. 2016). Because **Moran** lied about not being "Emily lover," a jury could reasonably doubt his lawyer's suggestion during closing argument that his posts were just part of an elaborate joke and evidence of nothing but trolling.

In sum, the government presented sufficient evidence for a jury to conclude beyond a reasonable doubt that **Moran** consciously wanted the bloggers to make and send him child pornography—and that he therefore had the intent necessary for the attempted-production charge.

B

Moran separately contends that there is insufficient evidence to satisfy § 2251(a)'s interstate-nexus element. Again, in relevant part, § 2251(a) makes it unlawful for any person to "employ[ ], use[ ], persuade[ ], induce[ ], entice[ ], or coerce[ ] any minor to engage in ... any sexually explicit conduct for the purpose of producing any visual depiction of such conduct ... 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." 18 U.S.C. § 2251(a).[5]

[5] Plenty of evidence would allow a jury to reasonably conclude that **Moran** knew that, *if produced—i.e.*, if posted on the internet or sent to emilylover@aol.com—the child pornography that he sought would travel in interstate commerce. But **Moran** insists that to know that "such visual depiction" will travel interstate, ***983** he must first know *that there will be a visual depiction*. *See* Br. of Appellant at 34–38. That is, he says, he must know that his attempt to produce the photo will succeed. The government contends, by contrast, that he needed to know only that the depictions would move in interstate commerce *if produced*.

The government's reading is the better one. As relevant here, § 2251(a) contains three interrelated clauses. The first makes clear that a completed violation requires proof of conduct: A defendant must "employ[ ], use[ ], persuade[ ], induce[ ], entice[ ], or coerce[ ] any minor to engage in ... any sexually explicit conduct." The second specifies that the defendant must have a "purpose of producing [a] visual depiction of such conduct." And the third requires the defendant to "know[ ] or ha[ve] reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce." Ordinarily, when one clause refers to an action, a second requires that action to be for the purpose of producing a thing, and the third refers to what someone "knows" about "such" thing, the final clause is understood to be implicitly conditioned on the successful production of the thing. Consider the following illustrative example:

> John takes notes on his hikes for the purpose of producing a book about hiking, and he *knows* that *such* a book will sell millions of copies.

The average reader wouldn't take the last clause to mean that John knows *that* he will write a book—only that John knows what will happen *if he does write one*.

More generally, proscribing an action (*e.g.*, inducing certain conduct) rather than the outcome of that action (here, producing depictions) contemplates that the outcome might not result. But when we ask what one "knows" about the product of "such" outcome, the question is ordinarily understood as taking for granted the attempt's success—and the outcome's realization. So, for instance:

> Jane is sending applications to out-of-state colleges. She *knows* that she will move away to attend *such* schools.

The latter sentence doesn't communicate anything about Jane's knowledge of whether her application for admission will be accepted—only her knowledge about what will happen *if it is*.

Moran's contrary reading—that a defendant must know in advance that his scheme will result in the production of child pornography—is untenable. While he emphasizes the unusual facts here—he says that he *knew* he would *fail*—his argument sweeps much more broadly: It would exculpate anyone who *didn't know* that he would *succeed*. But can any criminal ever really know ex ante that his scheme will succeed? On **Moran's** understanding, if a would-be child-pornography producer can show that he harbored any uncertainty about whether he might be arrested before he could complete his crime—or even more so, if the government couldn't prove that he had none—an acquittal would be required. That's pretty much every case. [6]

***984** **[6]** We hold that in a prosecution for producing child pornography under §

2251(a), the government must prove that the defendant knew that, *if produced*, the pornography he sought would travel in interstate commerce. Under this standard—which applies to attempt prosecutions under § 2251(e) as well, *see, e.g.*, *United States v. Lee*, 603 F.3d 904, 913–14 (11th Cir. 2010) (requiring the same mens rea for attempt as for the completed crime)—the evidence against **Moran** is clearly sufficient.

C

Finally, **Moran** contends that the evidence is insufficient to satisfy attempted production's actus reus element—namely, that he "took actions that constituted a 'substantial step toward the commission of [the] crime.' " *Yost*, 479 F.3d at 819 (quoting *United States v. Root*, 296 F.3d 1222, 1227–28 (11th Cir. 2002)). The problem is that he didn't challenge the sufficiency of the substantial-step element at trial when he moved for a judgment of acquittal. Instead, he argued only that the government hadn't presented sufficient evidence of his *intent*. *See* Doc. 171 at 131–32. Accordingly, we may review **Moran's** sufficiency challenge to the substantial-step element only for plain error. *See* *United States v. Baston*, 818 F.3d 651, 663–64 (11th Cir. 2016); *United States v. Dunlap*, 279 F.3d 965, 966–67 (11th Cir. 2002).

[7] **[8]** To establish plain error, **Moran** must show that "(1) an error occurred; (2) the error was plain; (3) it affected his substantial rights; and (4) it seriously affected the fairness of the judicial proceedings." *United States v. Ramirez-Flores*, 743 F.3d 816, 822 (11th Cir. 2014). With respect to the second prong, in particular, we have held that in the absence of "explicit language of a statute or rule," an error "cannot be plain unless the issue" in question has been "specifically and directly resolved by ... on point precedent from the Supreme Court or this Court." *United States v. Sanchez*, 940 F.3d 526, 537 (11th Cir. 2019).

Moran hasn't met his burden of establishing all four prongs of the plain-error standard. *See* *Greer v. United States*, —— U.S. ——, 141 S. Ct. 2090, 2097, 210 L.Ed.2d 121 (2021). In an effort to satisfy the second prong, **Moran** invokes just one relevant decision, *United States v. Lee*, 29 F.4th 665 (11th Cir. 2022). But *Lee* is hardly "on point" within the meaning of our plain-error precedents. The portions of *Lee* that **Moran** cites deal with completed violations of § 2251(a), not attempts. The critical language—"arrange for a minor to engage in sexually explicit conduct," *id.* at 671—comes directly from *United States v. Ruggiero*, 791 F.3d 1281, 1284–85 (11th Cir. 2015), in which the defendant pleaded guilty to a completed violation of § 2251(a) and an attempted violation of § 2422(b). *Id.* at 1284. Moreover, and in any event, **Moran** hasn't even attempted to show that he satisfies the last two prongs of the plain-error standard. Accordingly, he hasn't shown an entitlement to plain-error relief.

*985 III

For the foregoing reasons, we hold (1) that a defendant's desire to produce child pornography is sufficient to establish his intent for purposes of proving an attempted violation of § 2251(a), no matter how unlikely his attempt is to succeed, and that the evidence here was sufficient to establish Moran's desire; (2) that § 2251(a)'s interstate-commerce element does not require a defendant to know ex ante that child pornography will be produced, and that there was sufficient evidence of Moran's knowledge that the images, *if produced*, would travel in interstate commerce; and (3) that Moran's belated substantial-step argument fails plain-error review.

AFFIRMED.

All Citations

57 F.4th 977, 29 Fla. L. Weekly Fed. C 2147

Footnotes

1 To be clear, "Your Modern Family" isn't one of the sites that Moran targeted. To protect the identities of the children at issue in this case, we won't identify the names of those sites here.

2 *See* https://www.yourmodernfamily.com (last visited Nov. 4, 2022).

3 It is undisputed here that a defendant can violate § 2251(a) and (e) even without communicating directly with a minor. *See* *United States v. Lee*, 603 F.3d 904, 913 (11th Cir. 2010) (holding that those provisions apply to individuals who "attempt[ ] to produce child pornography by communicating with only an adult intermediary").

4 "We review the sufficiency of the evidence in a criminal trial de novo. We must: (1) view the evidence in the light most favorable to the government; (2) resolve any conflicts in favor of the government; (3) accept all reasonable inferences that tend to support the government's case; and (4) assume that the jury made all credibility choices in support of the verdict." *United States v. Lebowitz*, 676 F.3d 1000, 1013 (11th Cir. 2012) (citation omitted).

5 Section 2251(a)'s interstate-nexus element contains three independently sufficient clauses. *See* *United States v. Smith*, 459 F.3d 1276, 1289 (11th Cir. 2006). Here, however, the government relied only on the first.

6 To be clear, Moran's position wouldn't just insulate him from attempt liability; it would exculpate anyone who actually induces a minor to engage in explicit conduct with the hope of producing a depiction so long as the inducer wasn't certain that he

would succeed in producing a depiction. Consider an example. An individual equips a room with cameras and connects them to a computer that randomly—*i.e.*, without any manual input—selects 50% of days to record. The individual then induces a minor to engage in sexual conduct in the room, with the hope that the act produces a visual depiction. If it was a recording day, he could argue, as **Moran** does here, that he didn't "know" depictions would be produced such that they would travel in interstate commerce. But as we have explained, § 2251(a)'s third clause requires only knowledge that they will travel in interstate commerce *if they are produced*.

And the oddity of **Moran's** position doesn't end with § 2251(a). Sections 2251(b)—which provides for punishment of parents who allow their children to be used for child pornography—and 2251(d)—which provides for punishment of those who solicit child pornography—contain similar language. *See* 18 U.S.C. § 2251(b) ("such ... person knows or has reason to know that such visual depiction will be transported"); *id*. § 2251(d)(2)(A) ("such person knows or has reason to know that such notice or advertisement will be transported").

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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March 20, 2023

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 21-12573-AA
Case Style: USA v. Colum Moran, Jr.
District Court Docket No: 3:19-cr-00040-MMH-JBT-1

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

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REHG-1 Ltr Order Petition Rehearing

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-12573-AA

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

COLUM PATRICK MORAN, JR.,
a.k.a. Emily lover,
a.k.a. emilylover@aol.com,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: JORDAN, ROSENBAUM, and NEWSOM, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42