No. 22-7847

IN THE SUPREME COURT OF THE UNITED STATES

COLUM PATRICK MORAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's argument, which it reviewed for plain error, that insufficient evidence supported his conviction for attempted enticement of a minor to produce child pornography, in violation of 18 U.S.C. 2251(a) and (e).

ADDITIONAL RELATED PROCEEDINGS

United States District Court (M.D. Fla.):

United States v. Moran, No. 19-cr-40 (Sept. 13, 2021)

United States Court of Appeals (11th Cir.):

United States v. Moran, No. 21-12573 (Jan. 13, 2023)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B12) is published at 57 F.4th 977.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 2023. A petition for rehearing was denied on March 20, 2023 (Pet. App. C1-C2). The petition for a writ of certiorari was filed on June 20, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on three counts of attempted enticement of a minor to produce child pornography, in violation of 18 U.S.C. 2251(a) and (e), and one count of possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B). Pet. App. A1. The district court sentenced petitioner to 768 months of imprisonment, to be followed by a life term of supervised release. Id. at A3-A4. The court of appeals affirmed. Id. at B1-B12.

1. Petitioner left a disturbing comment on a "mom blog" commenting on a photo of a young girl in a swimsuit and graphically describing how he liked to perform a particular sex act with girls in swimsuits like the one in the photo. Pet. App. B4. The blogger's husband (the little girl's father) was an FBI agent, and an investigation ensued. Ibid. The investigation revealed that on three occasions, petitioner had asked other mom bloggers for pornographic photos of their children. Ibid.

One request was sent in response to a blog post about a five-year-old girl learning to take photographs. Pet. App. B4. Petitioner wrote to the blogger that her daughter had done a great job, but that next time the five-year-old should take all of her clothes off and take photos in the mirror, "[e]specially when she's sitting in front of the mirror with her legs spread open so we can

see her vagina." Ibid. (citation omitted). He also suggested that the girl should "spread[] her vagina lips apart with her fingers," insert a toothbrush into her vagina, and then lick the toothbrush. Ibid. (citation omitted).

About a year later, petitioner sent another message to the same blogger about the blogger's six-year-old daughter. Pet. App. B5. He responded to a post about the daughter's morning routine by stating that it was a "[g]reat post," but that he would like to have seen "some pictures of her on the toilet"; photos of "her panties around her ankles, with her legs spread wide enough to see the pee dribbling from between her vagina lips"; and "a couple of good closeups of her vagina." Ibid. (citation omitted).

Petitioner's third message was sent to a blogger who had advertised flushable baby wipes on Instagram. Pet. App. B5. Petitioner referred to the Instagram advertisement and the blogger's twin three-year-old daughters. Ibid. He expressed interest in seeing photos or a video of the twins using the flushable baby wipes, stating he was "curious to see how easily their little fingers can navigate their crotches with them and how well they clean the girl's [sic] vaginas." Ibid. (citation omitted).

Federal law enforcement officers traced petitioner's IP address and searched his apartment. Pet. App B5. On his laptop

and phone, they discovered more than 1000 images of child pornography. Ibid.

2. A grand jury in the Middle District of Florida charged petitioner with three counts of attempted enticement of a minor to produce child pornography, in violation of 18 U.S.C. 2251(a) and (e), and one count of possession of child pornography, in violation of 18 U.S.C. 2252(a)(4)(B) and (b)(2). Superseding Indictment 1-3.

The production statute, Section 2251(a), provides that "[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to 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)." 18 U.S.C. 2251(a). Section 2251(e), in turn, criminalizes attempts to violate Section 2251(a).

At the close of the government's case, petitioner moved for a judgment of acquittal on the attempted production counts. D. Ct. Doc. 171 at 71-73 (Sept. 8, 2012). Petitioner contended that the government had not put forth sufficient evidence of his intent to have the images described in those counts created, asserting that it would be obvious that the bloggers whom he contacted were unlikely to send him the requested photos or post such photos on their sites. Ibid. The district court deferred the motion until

the close of evidence, and petitioner resubmitted it at that point. Id. at 122.

The district court denied the resubmitted motion. D. Ct. Doc. 171, at 131-135. The court stated that it understood petitioner to be arguing that the government had presented insufficient evidence that petitioner intended to have the images created and insufficient evidence that he intended to have the images transmitted using a facility of interstate commerce. Id. at 131-132. Petitioner's counsel confirmed that understanding. Id. at 132. The court then determined that by asking the bloggers to create images showing their children engaging in sexually explicit conduct, petitioner's posts themselves provided sufficient evidence for the jury to find that petitioner intended to persuade the bloggers to create images of children engaged in sexually explicit conduct and to transmit them using a facility of interstate commerce. Id. at 132-135.

The jury found petitioner guilty on all counts. Pet. App. B6. The district court sentenced him to 768 months of imprisonment, to be followed by a life term of supervised release. Id. at A3-A4.

3. The court of appeals affirmed. Pet. App. B1-B12. The court noted that petitioner's appeal asserted "three * * * contentions" challenging the sufficiency of the evidence supporting his attempted-production convictions: a challenge to

the sufficiency in the evidence of his intent, a challenge to the sufficiency of the evidence on the interstate-nexus requirement, and a challenge to the sufficiency of the evidence that he took a substantial step toward the commission of the production offense. Id. at B3. After rejecting the first two challenges, see id. at B6-B10, the court reviewed the third for plain error because petitioner had not "challenge[d] the sufficiency of the substantial-step element at trial when he moved for a judgment of acquittal." Id. at B10. The court determined that petitioner could not establish that any error was plain because the precedent he identified in support of his argument was not "'on point' within the meaning of [the] plain-error precedents." Ibid. The court also observed that petitioner "hasn't even attempted to show that he satisfies" two other prongs of the plain-error standard -- that the error "affected his substantial rights" or that it "seriously affected the fairness of the judicial proceedings." Ibid. (citation omitted).

ARGUMENT

Petitioner contends (Pet. 6-11) that the court of appeals erred in its application of plain-error review to his challenge to the sufficiency of the evidence that he took a substantial step toward completing the attempted-production offense.[1] He further

[1] This Court has denied several petitions for writs of certiorari raising similar claims. See Yusuf v. United States,

contends (Pet. 12-14) that the trial evidence was sufficient to support his attempt conviction. The court of appeals correctly rejected his challenge to the sufficiency of the substantial-step evidence, and its decision does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. In Jackson v. Virginia, 443 U.S. 307 (1979), this Court set forth the standard an appellate court must employ when reviewing a sufficiency-of-the-evidence claim that the criminal defendant preserved. Appellate courts reviewing preserved sufficiency claims ask whether the trial evidence, viewed in the light most favorable to the government, would permit a rational trier of fact to find proof of guilt beyond a reasonable doubt. Id. at 316, 319. When a defendant fails to preserve a sufficiency challenge, however, review is for plain error under the standard set out in United States v. Olano, 507 U.S. 725, 732-736 (1993). Under that standard, a defendant must show (1) an error; (2) that is plain, i.e., clear or obvious; (3) that affects his substantial rights; and (4) that, if left uncorrected, would seriously affect the fairness, integrity, or public reputation of judicial proceedings. Ibid.; see Fed. R. Crim. P. 52(b).

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143 S. Ct. 1793 (No. 22-7145); Burris v. United States, 142 S. Ct. 473 (2021) (No. 21-5771); Carranza v. United States, 573 U.S. 949 (2014) (No. 13-9385); Delgado v. United States, 568 U.S. 978 (2012) (No. 11-10492).

As the Fifth Circuit explained in United States v. Delgado, 672 F.3d 320 (2012) (en banc), cert. denied, 568 U.S. 978 (2012), although the Due Process Clause requires the government to present evidence sufficient to prove each element of a crime beyond a reasonable doubt, see Jackson, 443 U.S. at 316 (citing In re Winship, 397 U.S. 358 (1970)), "[i]t is a truism that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." Delgado, 672 F.3d at 331 (citations and internal quotation marks omitted; brackets in original). When defendants forfeit constitutional claims, courts "routinely review [them] under otherwise-applicable, deferential standards of review." Ibid.

Accordingly, as petitioner appears to acknowledge (Pet. 6-11), the courts of appeals have consistently recognized that the plain-error standard governs forfeited sufficiency-of-the-evidence claims. United States v. Peña-Lora, 225 F.3d 17, 26 (1st Cir. 2000), cert. denied, 531 U.S. 1114 (2001); United States v. Allen, 127 F.3d 260, 264-266 (2d Cir. 1997); United States v. Wolfe, 245 F.3d 257, 261 (3d Cir.), cert. denied, 534 U.S. 880 (2001); United States v. Wallace, 515 F.3d 327, 331-332 (4th Cir. 2008); Delgado, 672 F.3d at 330-331 n.9 (5th Cir.); United States v. Carrillo, 435 F.3d 767, 777 (7th Cir.), cert. denied, 547 U.S. 1174 (2006); United States v. Calhoun, 721 F.3d 596, 600 (8th Cir.

2013); United States v. Gadson, 763 F.3d 1189, 1217-1218 (9th Cir. 2014), cert. denied, 575 U.S. 1028 (2015); United States v. Williams, 934 F.3d 1122, 1127 n.6 (10th Cir. 2019); United States v. Barrington, 648 F.3d 1178, 1192 (11th Cir. 2011), cert. denied, 565 U.S. 1136 (2012); United States v. Spinner, 152 F.3d 950, 956 (D.C. Cir. 1998).

2. Petitioner errs in contending (Pet. 7-11) that the circuits are meaningfully divided on the effect of applying plain-error review to forfeited sufficiency claims.

a. Petitioner asserts that decisions from the Third, Eighth, Ninth, Tenth, and D.C. Circuits make plain-error review in those circuits "materially the same as de novo review under Jackson." Pet. 7-8 (quoting United States v. Burris, 999 F.3d 973, 977-978 (6th Cir.), cert. denied, 142 S. Ct. 473 (2021)). All of those courts, however, have applied plain-error review to unpreserved sufficiency claims. See Williams, 934 F.3d at 1127; Calhoun, 721 F.3d at 600; Gadson, 763 F.3d at 1217-1218; Wolfe, 245 F.3d at 260-261; Spinner, 152 F.3d at 956.

Those courts have simply noted that the additional deference afforded under plain-error review generally has less practical effect when applied to sufficiency claims than it does when applied to other types of claims. See, e.g., Gadson, 763 F.3d at 1217 (stating that "plain error review of a sufficiency claim is only theoretically more stringent than the standard for a preserved

claim") (citation and internal quotation marks omitted).[2] But that is because, as Judge Silberman observed in United States v. White, 1 F.3d 13, 17 (D.C. Cir. 1993), cert. denied, 510 U.S. 1111 (1994), the Jackson standard is already highly deferential to the jury's verdict, so most Jackson errors are "plain" or "obvious" to begin with. It does not mean that those courts have abandoned the plain-error standard or that they have embraced a meaningfully different approach to applying that standard.

b. Petitioner further contends (Pet. 9-11) that some courts of appeals insist that plain error is more stringent than the Jackson standard, reversing only in the case of manifest injustice. Ibid. (citing United States v. Todosijevic, 161 F.3d 479, 583 (7th Cir. 1998); United States v. Kilcullen, 546 F.2d 435, 441 (1st Cir. 1976), cert. denied, 430 U.S. 906 (1977)); see Burris, 999 F.3d at 977-978 (describing different formulations of the standard of review). But the manifest-injustice standard for such claims is an articulation of plain-error review without clear practical significance to the outcomes of particular cases.

For example, the Fifth Circuit, while emphasizing that the second element of plain-error review would require "obvious[] insufficiency," Delgado, 672 F.3d at 331, nevertheless recognizes

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[2] See Williams, 934 F.3d at 1127; Wolfe, 245 F.3d at 261; United States v. White, 1 F.3d 13, 17 (D.C. Cir. 1993), cert. denied, 510 U.S. 1111 (1994); United States v. McIntyre, 467 F.2d 274, 276 n.1 (8th Cir. 1972), cert. denied, 420 U.S. 911 (1973).

that "when no reasonable juror could find an element of a crime proved beyond reasonable doubt, it will often be plain or obvious that the evidence was insufficient," such that "the practical effect of applying a more deferential standard may often be minimal," id. at 332 n.11. And the Third Circuit has made clear that the government's "failure to prove an essential element of an offense is a miscarriage of justice" that would warrant reversal under the plain-error standard because it affects substantial rights and undermines the fairness, integrity, or public reputation of the proceedings. United States v. Johnson, 19 F.4th 248, 263 (2021).

c. Petitioner also contends (Pet. 11) that the description of plain-error review in the decision below, which describes the second element of such review as looking to whether an issue has been "specifically and directly resolved by . . . on point precedent," Pet. App. B10 (citation omitted), adopts an inappropriately strict standard for reviewing unpreserved sufficiency claims. But as petitioner appears to acknowledge (Pet. 10), the clarity or obviousness of an error is typically made apparent by precedent; "lower court decisions that are questionable but not plainly wrong (at time of trial or at time of appeal) fall outside the * * * scope" of the plain-error rule. Henderson v. United States, 568 U.S. 266, 278 (2013) (emphasis omitted). Petitioner here accordingly argued that a prior circuit

decision, United States v. Lee, 29 F.4th 665 (11th Cir. 2022), showed clear error in his case, an argument that the court of appeals considered and rejected.

But given that Jackson itself is binding precedent, petitioner provides no sound basis for concluding that the court of appeals here would deny relief in a case in which it were clear and obvious that a conviction could not be sustained under the Jackson standard. And petitioner's own accounting of circuit precedent on the question presented asserts that the court below has at various times adopted each of the three formulations of plain-error review that he highlights -- including the one he prefers. See Pet. 9-11. As such, it is far from clear that the circuit views those formulations as meaningfully different. And if it does, such an intracircuit conflict would be a matter for the court of appeals itself to address in the first instance. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam). Review in this Court, however, is unwarranted.

3. Petitioner next contends (Pet. 12-14) that under either the Jackson standard or the manifest-miscarriage-of-justice standard, the finding that he took a substantial step toward production of child pornography was plain error. Petitioner's disagreement with the court of appeals on that factbound issue does not warrant further review. This Court has emphasized that "[t]he primary responsibility for reviewing the sufficiency of the

evidence to support a criminal conviction rests with the Court of Appeals." Hamling v. United States, 418 U.S. 87, 124 (1974); see Scales v. United States, 367 U.S. 203, 230 (1961); see also Sup. Ct. R. 10. In any event, regardless of the standard, the court of appeals correctly concluded that the evidence was sufficient to support petitioner's attempt conviction.

4. Finally, petitioner asserts (Pet. 15) that he preserved the substantial step issue. But he does not cite any portion of the record that might show that he did so, and the record in fact shows the opposite. The district court understood petitioner to argue that the government had presented insufficient evidence that petitioner intended to have the images created, and insufficient evidence that he intended to have the images transmitted using a facility of interstate commerce. D. Ct. Doc. 171, at 131-132. Petitioner's counsel confirmed that the court had correctly understood his argument. Id. at 132. And this Court's intervention is unwarranted to resolve a factbound question about whether a sufficiency challenge was adequately preserved.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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