

No. 22-7847

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

REPLY TO THE BRIEF IN OPPOSITION

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REPLY TO THE UNITED STATES’S BRIEF IN OPPOSITION

ARGUMENT

The government contends that the Eleventh Circuit’s decision does not conflict with any decision of this Court or any other court of appeals, that the Eleventh Circuit correctly rejected Mr. Moran’s challenge to the sufficiency of the substantial step evidence, that there is no meaningful circuit split, and that no further review is warranted. However, the circuits are openly split as to the proper approach to plain error review of unpreserved sufficiency challenges, and a resolution of that split by this Court would result in meaningful relief for Mr. Moran, because he would get review under the proper standard.

I. There is a meaningful circuit split as to the application of plain error review to unpreserved sufficiency challenges, and this Court should resolve it.

The government does not directly dispute that the circuits are split as to the proper approach to plain error review of unpreserved insufficiency claims. However, it contends that the circuits are not “meaningfully divided on the effect of applying plain-error review to forfeited sufficiency claims,” and that the different approaches lack “clear practical significance.” Gov’t Br. in Opp. at 9-10. Contrary to the government’s contention, there is a meaningful circuit split as to the approach to plain error review, and that split has a significant practical effect.

Prior to the Eleventh Circuit’s decision below, the circuits were divided as to whether the approach is practically indistinguishable from de novo review or whether it is a more stringent standard that requires a showing of a manifest miscarriage of

justice. *See* Pet. at 6-11. In arguing that there is no meaningful circuit split, the government ignores *United States v. Burris*, 999 F.3d 973, 977 (6th Cir.), *cert. denied*, 142 S. Ct. 473, 211 L. Ed. 2d 286 (2021), which directly stated that there is a circuit split on this issue. The *Burris* court noted that “several of our sister 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*.” 999 F.3d at 977. That is because “[a] conviction based on insufficient evidence, which endangers an ‘essential’ element of the Constitution’s due process guarantee, *Jackson v. Virginia*, 443 U.S. 307, 316 (1979), 99 S. Ct. 2781, clearly affects substantial rights and the fairness, reputation and integrity of the court system.” 999 F.3d at 977. The *Burris* court acknowledged that “[m]ost circuits, however, agree that a more stringent standard of review applies to unpreserved challenges.” *Id.* at 978. The court continued, “Because this standard predates *Jackson* and runs afoul of *Olano*’s instructions involving plain-error review, we are concerned that our court may have chosen the wrong side of this circuit split.” *Id.*

The *Burris* court explained that it was prevented from departing from its published decisions on that “wrong side,” because they “remain[] controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision.” *Id.* The two-way split described by the *Burris* court already had a significant practical effect. If some courts say that plain error review of unpreserved sufficiency challenges is functionally the same as de novo review, and others say it is

not, it is self-evident that the courts take meaningfully different approaches to plain error review.

Now, there is a three-way split; the Eleventh Circuit's approach states 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.'" Pet. App'x B10. Insofar as the Eleventh Circuit requires binding, specific precedent to find plain error, and the other circuits do not, it is clear the Eleventh Circuit adopted a different standard that has a significant practical effect. Indeed, in Mr. Moran's case, the practical effect was that without a binding, specifically on point case, the court was not even willing to examine the degree of evidentiary insufficiency with respect to the substantial step element. Its approach deviated dramatically from the other, already-split circuits that consider evidentiary insufficiency itself a means of meeting the plain error standard.

This Court's intervention is needed. *See Burris*, 999 F.3d at 978 (explaining that, despite having possibly chosen the "wrong side" of the circuit split, prior circuit precedent controlled until this Court or the en banc circuit court overrules the prior decision). *Id.* The circuit split has only worsened with time, and this Court should resolve the split by holding that a lack of sufficient evidence to support an essential element of a conviction satisfies plain error review.

II. If the Eleventh Circuit had not departed from both sides of the circuit split, it would have found Mr. Moran had the right to relief.

Mr. Moran's right to relief under the correct standard is a question for remand; it is not a barrier to certiorari, contrary to the government's suggestion. *See* Gov't Br. in Opp. at 12-13. Nevertheless, had the Eleventh Circuit evaluated the evidentiary insufficiency as to the substantial step element instead of departing from both sides of the previous split, it would have found that Mr. Moran had the right to relief.

The government claims that "regardless of the standard, the court of appeals correctly concluded that the evidence was sufficient to support petitioner's attempt conviction." Gov't Br. in Opp. at 13. But the Eleventh Circuit did no such thing with respect to the substantial step element. It did not analyze the substantial step evidence or make any finding as to whether it was sufficient. The opinion unambiguously stated that Mr. Moran could not succeed on plain error review without binding precedent specifically and directly resolving the issue. Pet. App'x B10. Mr. Moran's convictions under § 2251(a) would survive plain error review under either side of the previous split: the *Jackson* rule or the manifest-miscarriage-of-justice standard. Thus, a resolution in favor of either side of the previous split would impact Mr. Moran's case on remand.

Here, the evidence of a substantial step, a key element of the offense, was so tenuous that Mr. Moran's attempted production convictions are shocking and would meet even the more stringent manifest-miscarriage-of-justice standard. *See United States v. Todosijevic*, 161 F.3d 479, 483 (7th Cir. 1998). To prove a substantial step,

the government was required to show “an act that would normally result in committing the offense.” *United States v. Singer*, 963 F.3d 1144, 1160 (11th Cir. 2020). The Eleventh Circuit recognized that Mr. Moran’s comments were unlikely to have succeeded in the production of child pornography; thus, they were not acts that would normally result in committing the offense. *See* Pet. App’x B3, B4, B7, B11. Indeed, during oral argument, one judge stated to the government, “It seems so unlikely. I don’t know how anybody could think that this would result in the creation of child pornography in this scenario.” Oral Arg. at 13:16-26. Mr. Moran’s substantial rights, as well as the fairness and integrity of the courts, were seriously affected when he was convicted for a crime that, as a matter of law, he did not commit. *See United States v. Cruz*, 554 F.3d 840, 845 (9th Cir. 2009) (citing *United States v. Olano*, 507 U.S. 725, 732 (1993)). So, although the merits are a question for remand, Mr. Moran would have been entitled to relief had the Eleventh Circuit not departed from both sides of the previous split, making resolution of this issue even more important.

III. Although he would be entitled to relief under the correct plain error review standard, Mr. Moran preserved the substantial step issue.

Notably, Mr. Moran preserved the substantial step issue, and the harm of the Eleventh Circuit’s finding to the contrary was amplified by the court’s erroneous approach to plain error review. Citing to the district court’s statements in the trial transcript, the government claims that the record shows Mr. Moran did not preserve the sufficiency issue with respect to the substantial step element. Gov’t Br. in Opp. at 13. However, the statements of defense counsel are what matters for preservation.

Defense counsel contended there was insufficient evidence of intent and *additionally* argued that because there was no communication between the bloggers and Mr. Moran beyond the post itself, there could be no “attempt.” D. Ct. Doc. 171 at 72:5-19. Further, the portion of the transcript that the government cites does not support its argument: the district court stated that Mr. Moran argued that “there’s not sufficient evidence to have the images created.” *Id.* at 132:1-4. And in denying the motion, the district court addressed the substantial step issue at greater length than the intent issue. *Id.* at 133-34. The substantial step issue was sufficiently preserved.

CONCLUSION

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

Respectfully submitted,

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