No.

IN THE SUPREME COURT OF THE UNITED STATES

JONATHAN KUYKENDALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Dane K. Chase, Esquire
Florida Bar Number: 0076448
Chase Law Florida, P.A.
111 2nd Ave NE
Suite 334
Saint Petersburg, Florida 33701
Direct: (727) 350-0361
Facsimile: (866) 284-1306
Email: dane@chaselawfloridapa.com

* CJA Counsel of Record

QUESTIONS PRESENTED

Whether a district court can direct a finding on a charged offense as a matter of law?

Whether the invited error doctrine forecloses review where the defendant was not aware of the error and/or where the government is equally at fault for causing the error?

PARTIES TO THE PROCEEDING

Parties to the proceeding include Jonathan Kuykendall (Appellant/Petitioner), Dane K. Chase, Esquire (Appellant/Petitioner's Counsel), Gregory W. Kehoe (Assistant United States Attorney), and D. John Sauer (Solicitor General of the United States of America).

TABLE OF CONTENTS

Question Presented I

Parties to the Proceeding II

Table of Contents III

Table of Authorities IV

Petition for Writ of Certiorari 1

Opinion Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of Facts 2

Reasons for Granting the Petition 5

I. THIS COURT SHOULD GRANT REVIEW TO ESTABLISH THAT A DISTRICT COURT CANNOT DIRECT A FINDING ON A CHARGED OFFENSE AS A MATTER OF LAW, AND THAT THE INVITED ERROR DOCTRINE DOES NOT FORECLOSE REVIEW WHERE THE DEFENDANT WAS NOT AWARE OF THE ERROR AND/OR WHERE THE GOVERNMENT IS EQUALLY AT FAULT FOR CAUSING THE ERROR 5

Conclusion 19

Index to Appendix i

Decision of the 11th Circuit Court of Appeal ..... Appendix A

Order Denying Petition for Panel Rehearing ..... Appendix B

TABLE OF AUTHORITIES

Cases

Cleveland Newspaper Guild, Local 1, v. The Plain Dealer Publishing Co., 839 F.2d 1147 (6th Cir.) 17

Davis v. United States, 160 U.S. 469, 16 S.Ct. 353, 40 L.Ed. 499 (1895) 7

Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) 7

Fryman v. Fed. Crop Ins. Corp., 936 F.2d 244 (6th Cir. 1991) 17,18

Guam v. Alvarez, 763 F.2d 1036 (9th Cir.1985) 13

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 7

Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) 15

Marshall v. United States, 409 F.2d 925 (9th Cir.1969) 13

Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) 7

United States v. Barrow, 118 F.3d 482 (6th Cir. 1997) 18

United States v. Bastian, 770 F.3d 212 (2d Cir. 2014) 17

United States v. Brown, 892 F.3d 385 (D.C. Cir. 2018) 17

United States v. Butler, 74 F.3d 916 (9th Cir.1996) 13

United States v. Coffelt, 529 F. App'x 636, (6th Cir. 2013) 17

United States v. Freeman, 6 F.3d 586 (9th Cir.1993) 13

United States v. Gaudin, 515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995) 5,12

United States v. Gleason, 726 F.2d 385 (8th Cir.1984) 10

United States v. Guthrie, 931 F.2d 564 (9th Cir.1991) 13,15

United States v. Johnson, 718 F.2d 1317 (5th Cir.1983) 9,15,16

United States v. Lawrence, 662 F.3d 551 (D.C. Cir. 2011) 17

United States v. Lerma, 877 F.3d 628 (5th Cir. 2017) 17

United States v. Long, 997 F.3d 342 (D.C. Cir. 2021) 7,10,16,17,18

United States v. Martin Linen Supply Co., 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977) 8

United States v. Montecalvo, 545 F.2d 684 (9th Cir.1976) 15

United States v. Morris, 451 F.2d 969 (8th Cir.1971) 8,9

United States v. Olano, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) 13,14,15,16,18

United States v. Perez, 116 F.3d 840 (9th Cir. 1997) 13,14,16,18

United States v. Reeves, 730 F.2d 1189 (8th Cir.1984) 11

United States v. Rodebaugh, 798 F.3d 1281 (10th Cir. 2015) 17

United States v. Scott, 668 F.2d 384 (8th Cir.1981) 11

United States v. Staufer, 38 F.3d 1103 (9th Cir.1994) 13,15

United States v. Voss, 787 F.2d 393, 398 (8th Cir.1986) 7,8,9,11,12,13,18

United States v. Waterman, 704 F.2d 1014 (8th Cir.1983) 11

United States v. White Horse, 807 F.2d 1426 (8th Cir. 1986) 6,7,11,12,13,18

Constitutional Amendments

U.S. Const. amend. V 1

Statues

18 U.S.C. § 2422(b) 2,6

28 U.S.C. § 1254 1

28 U.S.C. § 1291 1

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the Eleventh Circuit Court of Appeals can be found at *United States v. Kuykendall,* No. 24-13076, 2025 WL 2318712 (11th Cir. Aug. 12, 2025), and is attached as Appendix A.

JURISDICTION

The Judgment of the Eleventh Circuit Court of Appeals, which had jurisdiction under Title 28 U.S.C. § 1291, was entered on August 12, 2025. However, a timely Petition for Rehearing was filed on August 19, 2025, which was not denied until September 22, 2025. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

STATEMENT OF FACTS

On July 19, 2022, a federal grand jury in the Middle District of Florida, Tampa Division, returned a one-count Indictment naming Mr. Kuykendall as the defendant. On February 22, 2024, a one-count Superseding Indictment was returned charging that from on or about June 9, 2022, through on or about June 24, 2022, Mr. Kuykendall, using a facility and means of interstate commerce, committed the offense of Coercion and Enticement of a Minor to Engage in Sexual Activity, in violation of 18 U.S.C. § 2422(b). The Superseding Indictment specifically charged Mr. Kuykendall with "using a facility and means of interstate commerce" to attempt to coerce or entice a minor to engage in sexual activity in violation of 18 U.S.C. § 2422(b).

Mr. Kuykendall ultimately proceeded to trial where the government called Nicolas Itin to testify. Mr. Itin testified he is a special agent with the Department of the Air Force's Office of Special Investigations. According to special agent Itin, from his office on Macdill Air Force Base in Tampa, Florida, he portrayed himself online as a 14 year old girl. Mr. Kuykendall eventually direct messaged Mr. Itin's 14 year old persona through an online application known as Whisper. A large number of Mr. Kuykendall's posts came from his apartment just outside of Macdill Air Force Base. After corresponding via Whisper for a time, the two began to text message one another. The correspondence between the two eventually culminated in Mr. Kuykendall driving to Mr. Itin's persona's residence in Tampa, purportedly for the purpose of engaging in sexual intercourse, and Mr. Kuykendall was ultimately arrested.

With respect to the charge of attempted coercion and enticement of a minor to engage in sexual activity, the jury was instructed:

> It's a Federal crime for anyone, using any facility or means of interstate commerce, including a cellular telephone or the Internet, to attempt to persuade, induce, entice, or coerce a minor to engage in any sexual activity for which any person could be charged with a criminal offense, even if the attempt fails.
>
> The Defendant is charged in Count One with attempting to commit the offense of enticement of a minor.
>
> The Defendant can be found guilty of this crime only if all of the following facts are proved beyond a reasonable doubt:
>
> (1) the Defendant knowingly intended to persuade, induce, entice, or coerce an individual to engage in sexual activity, as charged;
>
> (2) the Defendant used the Internet or a cellular telephone to do so;
>
> (3) at the time, the Defendant believed that the individual was less than 18 years old;
>
> (4) if the sexual activity had occurred, one or more of the individuals engaging in sexual activity could have been charged with a criminal offense under federal law; and
>
> (5) the Defendant took a substantial step towards committing the offense.
>
> …
>
> A cellular telephone and the Internet are facilities of interstate commerce.

(District Court Docket Entry-167, at 10-11).

The jury ultimately returned a verdict of guilty, and Mr. Kuykendall was sentenced to 121 months imprisonment.

On appeal to the 11th Circuit, Mr. Kuykendall argued that the district court reversibly erred by instructing the jury that a cellular telephone and the internet are facilities of interstate commerce, and that they need only find he used one or the other in order to convict, as the improper instruction invaded the province of the jury to determine his guilt or innocence. The 11th Circuit affirmed, finding that because the instruction had been jointly proposed by Mr. Kuykendall and the government any error was invited, and that no error occurred because cell phones and the Internet are facilities of interstate commerce as a matter of law, and there is no precedent from this Court establishing that it was error for the district court to so instruct the jury.

This Petition follows.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO ESTABLISH THAT A DISTRICT COURT CANNOT DIRECT A FINDING ON A CHARGED OFFENSE AS A MATTER OF LAW, AND THAT THE INVITED ERROR DOCTRINE DOES NOT FORECLOSE REVIEW WHERE THE DEFENDANT WAS NOT AWARE OF THE ERROR AND/OR WHERE THE GOVERNMENT IS EQUALLY AT FAULT FOR CAUSING THE ERROR.

At issue in this Petition is whether a district court can direct a finding on a charged offense as a matter of law, and whether the invited error doctrine forecloses review where the defendant was not aware of the error and/or where the government is equally at fault for causing the error. This Court should grant review and establish that the answer to both questions is no.

1. The district court cannot direct a finding as a matter of law.

The district court invaded the province of the jury to determine Mr. Kuykendall's guilt or innocence by improperly instructing them that a cellular telephone and the internet are facilities of interstate commerce, and that they need only find Mr. Kuykendall used one or the other in order to convict. This Court has previously explained that an element of an offense which contains a mixed question of law and fact is to be resolved entirely by the jury, not the factual component by the jury and the legal component by the judge. *See*, *United States v. Gaudin*, 515 U.S. 506, 512–13, 115 S. Ct. 2310, 2314–15, 132 L. Ed. 2d 444 (1995). This Court should now grant review and establish that a district court cannot direct a finding on an element of a charged offense as a matter of law, and Mr. Kuykendall's case and ethe Eighth circuit cases cited *infra*, reveal why.

Under 18 U.S.C. § 2422(b):

> **(b)** Whoever, ***using*** **the mail or** ***any facility or means of interstate or foreign commerce***, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

18 U.S.C. § 2422(b)(emphasis added). Accordingly, by the plain terms of the statute, the government is tasked with proving beyond a reasonable doubt that the offender used the mail or any facility or means of interstate or foreign commerce to commit his offense, or committed the offense within the special maritime and territorial jurisdiction of the United States. *See*, *Id*. Here, the government chose to proceed under a theory that Mr. Kuykendall "used a facility and means of interstate commerce." During trial, instead of permitting the jury to decide for itself whether Mr. Kuykendall used a facility or means of interstate commerce, the court instructed the jury that a cellular telephone and the internet are facilities of interstate commerce, and it need only find that Mr. Kuykendall used one or the other in order to convict, and plainly erred by doing so.

More specifically, in *United States v. White Horse*, 807 F.2d 1426 (8th Cir. 1986), the defendants appealed their convictions for knowingly converting the funds of an Indian tribal organization in violation of 18 U.S.C. § 1163, arguing that the trial court erred in instructing the jury as a matter of law that the Cheyenne River Sioux Tribe Telephone Authority, of which the defendants were directors, was an Indian

tribal organization as defined in 18 U.S.C. § 1163. *White Horse*, 807 F.2d at 1427. The defendants argued that the court "erred by failing to instruct the jury on the law applicable to the question of whether the Telephone Authority constituted an Indian tribal organization and then refusing to allow the jury to determine from the evidence whether the Telephone Authority met the definition." *White Horse*, 807 F.2d at 1428. Although the court "did instruct the jury that in order to reach a guilty verdict it must conclude that the government proved beyond a reasonable doubt that 'the moneys, funds or assets described in the indictment belonged to an Indian Tribal organization[,]'" it "further instructed the jury… that 'the Cheyenne River Sioux Tribe Telephone Authority is an Indian Tribal organization as that term is used in these instructions.'" *Id*. Accordingly, the defendants argued that "the trial judge, not the jury, decided that the government had proved beyond a reasonable doubt that the Telephone Authority constituted an Indian tribal organization as defined in 18 U.S.C. § 1163." *Id*. The Court examined the issue as follows:

> The constitutional right to a jury trial for serious criminal offenses is both a fundamental individual right and a right "fundamental to the American scheme of justice." *Duncan v. Louisiana,* 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491 (1968). A necessary aspect of the right to a jury trial is that every fact essential to the conviction of an individual must be proved beyond the jury's reasonable doubt. *In re Winship,* 397 U.S. 358, 363, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970) (quoting *Davis v. United States,* 160 U.S. 469, 484, 493, 16 S.Ct. 353, 360, 40 L.Ed. 499 (1895)). A judge commits error when he instructs the jury as a matter of law that a fact essential to conviction has been established by the evidence, thus depriving the jury of the opportunity to make this finding. *United States v. Voss,* 787 F.2d 393, 398 (8th Cir.1986) (citing *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39

(1979)). It makes no difference that the evidence supporting proof of that element is "overwhelming," *id.* 787 F.2d at 399, for it is the jury's role, not the judge's, to find the facts essential to a criminal conviction. *United States v. Martin Linen Supply Co.,* 430 U.S. 564, 572–73, 97 S.Ct. 1349, 1355, 51 L.Ed.2d 642 (1977).

Accordingly, we must decide whether the determination that the Telephone Authority is an Indian tribal organization under 18 U.S.C. § 1163 is a fact essential to conviction such that a conviction could stand only if the jury concluded that this fact was proved beyond a reasonable doubt. The parties agree that the government was required to prove that the Telephone Authority was an Indian tribal organization under section 1163. The government contends, however, that the question of whether the Telephone Authority constituted an Indian tribal organization was not a question of fact for the jury. Rather, it was a question of law properly decided by the judge. Such a conclusion, the government urges, is dictated by *United States v. Briddle,* 443 F.2d 443 (8th Cir.), *cert. denied,* 404 U.S. 942, 92 S.Ct. 291, 30 L.Ed.2d 256 (1971), *United States v. Morris,* 451 F.2d 969 (8th Cir.1971), and *United States v. Guy,* 456 F.2d 1157 (8th Cir.), *cert. denied,* 409 U.S. 896, 93 S.Ct. 136, 34 L.Ed.2d 153 (1972).

This court recently examined the necessity of jury instructions as they relate to the essential elements of a crime in *United States v. Voss,* 787 F.2d at 393. We held in *Voss* that jury instructions which did not require the jury to necessarily find that certain property was "used in interstate commerce" —an essential element for conviction—mandated reversal on the basis that the jury did not find that every fact essential to conviction was proved beyond a reasonable doubt. *Id.* at 400. Although there was "overwhelming evidence" that the interstate commerce element had been proved, error was committed because the jury, not the judge, must decide that every fact essential to conviction was established. *Id.* at 398–99.

We concluded in *Voss* that the interstate commerce element was a fact essential to conviction, solely within the jury's province, but we did not address how courts should determine whether the jury or the judge should decide an

issue relating to an essential element of a crime. The government points to several occasions prior to *Voss* where this court has held that an issue relating to an essential element of a crime was properly decided by the judge because that issue consisted solely of a question of law. *See Guy,* 456 F.2d at 1163; *Morris,* 451 F.2d at 972–73; *Briddle,* 443 F.2d at 447–48. These decisions provide limited guidance today. Each is based on distinguishable facts, and each provides scant reasoning for the conclusion that an issue relating to an essential element of a crime was a question of law, properly decided by the judge. Still, we recognize that this panel is without authority to overrule or refuse to follow these cases. However, to the extent these cases may be inconsistent with our holding today we believe intervening Supreme Court authority creates a climate that substantially limits their impact and further justifies the result reached here.

The difficulty in relying on the purported distinction between questions of law and questions of fact to decide whether a judge or jury should determine whether an essential element of a crime has been proved was considered by the Fifth Circuit Court of Appeals in *United States v. Johnson,* 718 F.2d 1317 (5th Cir.1983) (en banc). The court considered whether the trial court could conclude as a matter of law—thus depriving the jury from deciding an essential element for conviction—that a particular document was a "security." The court first rejected the government's argument that the propriety of the trial court's action rests on a distinction between questions of law and questions of fact, "for in every case application of a legal principle turns on the presence of particular facts." *Id.* at 1321. The issue rests not on a distinction between questions of law and questions of fact, but rather "[t]he issue is the role of the jury in the trial guaranteed to the accused." *Id.* In concluding that the judge's province is limited to instructing the jury on the law, the court stated:

> Thus the jury may not be relegated to deciding only questions that the judge thinks to be "factual". Federal judges instruct the jury on the law applicable to the issues raised at trial. Fed.R.Crim.P. 30 permits any party to ask that the court "instruct the jury on the

> law as set forth in [written] requests." But the judge's role is simply to instruct the jury "on the law."

Id. at 1322.

We agree that the trial judge's role, as it relates to determining whether the elements essential to a criminal conviction have been established, is extremely limited; he instructs the jury on the law applicable to the issues raised at trial. The next two steps are for the jury. The jury first *determines* the facts, then it *applies* the law to those facts. *United States v. Gleason,* 726 F.2d 385, 388 (8th Cir.1984). *See generally* 2 C. Wright, *Federal Practice & Procedure* § 485, at 711 (1982) ("The purpose of a charge is to inform the jury of its function, which is the independent determination of the facts, and the application of the law, as given by the court, to the facts found by the jury."). Thus, when the judge is no longer deciding the law that applies to the evidence, but rather is applying the law to the facts—facts that are determined after assessing the probative value of evidence introduced at trial—the judge has invaded the jury's province.

The trial judge invaded the jury's domain by declaring in his instructions to the jury that, as a matter of law, the Telephone Authority constituted an Indian tribal organization under 18 U.S.C. § 1163. The judge based his determination on section 1163's definition of Indian tribal organization as interpreted in *United States v. Logan,* 641 F.2d at 860, *United States v. Crossland,* 642 F.2d at 1113, and *United States v. Brame,* 657 F.2d at 1090. These cases support the conclusion that the Telephone Authority constituted an Indian tribal organization if there was a sufficient nexus between the Tribe and the Telephone Authority. The only way the judge could have determined this nexus existed is by weighing certain evidence introduced at trial. This evidence was introduced primarily in the form of witness testimony. The judge was thus forced to evaluate the probative value of this evidence, even if it was undisputed, to reach his conclusion. He did just that when he stated that because there was not "any real dispute about the facts which have to be considered," the Telephone Authority constituted an Indian tribal

> organization as a matter of law. Trial Transcript at 238. By weighing the merits of evidence introduced through testimony, the judge invaded the jury's province and deprived the jury of deciding whether facts essential to appellants' convictions were established beyond a reasonable doubt. *Cf. United States v. Reeves,* 730 F.2d 1189, 1195 (8th Cir.1984) (evaluation of credibility and demeanor of witnesses is peculiarly within the factfinder's province); *United States v. Waterman,* 704 F.2d 1014, 1017 (8th Cir.1983) (determining witness' credibility is primarily the function of the jury); *United States v. Scott,* 668 F.2d 384, 388 (8th Cir.1981) (well settled that the credibility of witnesses is exclusively for the jury).

White Horse, at 1429–31(footnotes omitted). The foregoing principles apply with equal force to a court's instruction concerning the interstate commerce element of an offense. *See*, *Voss*, 787 F.2d 393.

More specifically, in *Voss*, the defendants appealed their convictions of attempted arson, in violation of 18 U.S.C. § 844(i), arguing that that the jury instruction on the interstate commerce element of the arson charge was erroneous, because "[t]he jury was instructed to conclude that the property to be burned, a vacant St. Louis residence, was used in an activity affecting interstate commerce, if it found that the house was owned by Voss Associates, Inc., and that Voss Associates, Inc. had purchased insurance from a carrier doing business in more than one state." *United States v. Voss*, 787 F.2d 393, 395 (8th Cir. 1986). The court ultimately concluded that the court erred, as "[s]howing that a corporate property owner purchased insurance from a carrier doing business in more than one state, without showing more, is inadequate as a matter of law to demonstrate sufficient effect on interstate commerce to satisfy the *de minimus* standard." *Voss*, 787 F.2d at 397. The court further

observed that it was not enough that a court would be satisfied that a corporate property owner purchased insurance from a carrier doing business in more than one state satisfied the interstate commerce element, as that was a question for the jury, not the court to decide. *See, Voss*, 787 F.2d at 398–99.

Here, the court's instruction removed the jury question of whether Mr. Kuykendall had used any facility or means of interstate or foreign commerce, and replaced it with the question of whether he had used a cellular telephone or the internet, which the court itself had determined fulfilled the government's burden of proving Mr. Kuykendall used any facility or means of interstate or foreign commerce. By deciding the question of whether Mr. Kuykendall's use of a phone or the internet satisfied the government's burden of proving he used a facility or means of interstate or foreign commerce, the court invaded the province of the jury to determine his guilt or innocence on that element of the offense he was charged with. *See*, *White Horse*, at 1429–31; *Voss*, 787 F.2d at 398–99.

Mr. Kuykendall submits that based on the well-reasoned decisions in *White Horse* and *Voss*, and this Court's prior precedent in *Gaudin*, this Court should grant review and establish that a district court cannot direct a finding on an element of a charged offense as a matter of law, and find that the district court therefore erred by deciding the question of whether Mr. Kuykendall's use of a phone or the internet satisfied the government's burden of proving he used a facility or means of interstate or foreign commerce for the jury. After establishing the foregoing, this Court should

reverse Mr. Kuykendall's Judgment and Sentence, and remand his case for a new trial. *See*, *White Horse*, at 1429–31; *Voss*, 787 F.2d at 398–99.

2. The invited error doctrine does not foreclose review where the defendant was not aware of the error and/or where the government is equally at fault for causing the error.

This Court has previously explained that "[w]hereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733, 113 S. Ct. 1770, 1777, 123 L. Ed. 2d 508 (1993)(citations and quotations omitted). This Court should now grant review and establish that the invited error doctrine does not foreclose review where the defendant was not aware of the error and/or where the government is equally at fault for causing the error.

In *United States v. Perez*, 116 F.3d 840 (9th Cir. 1997), the Court examined the contours of the invited error doctrine as follows:

> We have held repeatedly that where the defendant himself proposes allegedly flawed jury instructions, we deny review under the invited error doctrine. *See, e.g., United States v. Butler,* 74 F.3d 916, 918 n. 1 (9th Cir.1996); *United States v. Staufer,* 38 F.3d 1103, 1109 n. 4 (9th Cir.1994); *United States v. Baldwin,* 987 F.2d 1432, 1437 (9th Cir.), *cert. denied,* 508 U.S. 967, 113 S.Ct. 2948, 124 L.Ed.2d 696 (1993); *United States v. Guthrie,* 931 F.2d 564, 567 (9th Cir.1991). The doctrine reflects the policy that invited errors "are less worthy of consideration than those where the defendant merely fails to object." *Guam v. Alvarez,* 763 F.2d 1036, 1037 (9th Cir.1985). In the past, we have corrected invited errors only in extraordinary circumstances, such as "when the integrity of the judicial process itself would otherwise suffer." *Id.* (quoting *Marshall v. United States,* 409 F.2d 925, 927 (9th Cir.1969)); *but see, United States v. Freeman,* 6 F.3d 586, 600 (9th Cir.1993) (conducting a plain error review of the

omission of an entrapment instruction, even though the defendant had voluntarily withdrawn such an instruction at trial). The government argues that under our invited error doctrine, we may not review the error because Cruz and Perez both proposed the faulty instructions to the court.

By contrast, Cruz and Perez argue that we may review the error under Rule 52(b), which provides:

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Fed.R.Crim.P. 52(b). Until now, we have undertaken a plain error review when the defendant merely failed to object to faulty instructions, as opposed to actually proposing or agreeing to faulty instructions. *Baldwin,* 987 F.2d at 1437.

In [*United States v. Olano,* 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)], the Court provides an extensive framework for plain error review. 507 U.S. at 731–37, 113 S.Ct. at 1776–80. *Olano* does not, however, specifically address the concept of invited error. From this omission, the panel concluded that plain error review is appropriate for invited errors:

Olano lays out a framework to be applied to all instances where defendant's counsel has failed to properly preserve error for appeal. *Olano* does not distinguish between errors counsel fails to object to and errors that counsel invites affirmatively. Rule 52(b) does not make this distinction either.

Perez, 67 F.3d at 1385 n. 13. Although *Olano* does not directly address so-called "invited error," it certainly addresses the difference between forfeited and waived rights. 507 U.S. at 732–34, 113 S.Ct. at 1776–78. Accordingly, we cannot agree that *Olano* completely overruled our invited error doctrine. Instead, we must reformulate that doctrine to conform to *Olano*'s discussion of waiver and forfeiture.

Forfeiture is the failure to make a timely assertion of a right, whereas waiver is the "intentional relinquishment or abandonment of a known right." *Olano,* 507 U.S. at 733, 113 S.Ct. at 1777 (quoting *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938)). Forfeited rights are reviewable for plain error, while waived rights are not. *Id.* "If a legal rule was violated during the District Court proceedings, and if the defendant did not waive the rule, then there has been an 'error' within the meaning of Rule 52(b) despite the absence of a timely objection." *Id.* at 733–34, 113 S.Ct. at 1777.

Until now, our invited error doctrine has focused solely on whether the defendant induced or caused the error. *See Baldwin,* 987 F.2d at 1437 (citing *United States v. Montecalvo,* 545 F.2d 684, 685 (9th Cir.1976), and *Guthrie,* 931 F.2d at 567). We now recognize, however, that we must also consider whether the defendant intentionally relinquished or abandoned a known right. *Olano,* 507 U.S. at 733, 113 S.Ct. at 1777. If the defendant has both invited the error, and relinquished a known right, then the error is waived and therefore unreviewable.

We do not mean to suggest that a defendant may have jury instructions reviewed for plain error merely by claiming he did not know the instructions were flawed. What we are concerned with is evidence in the record that the defendant was aware of, *i.e.,* knew of, the relinquished or abandoned right. For example, in *Baldwin,* the defendant was charged with conspiracy to distribute cocaine. 987 F.2d at 1436. The court's proposed instructions left out "overt act" as an element of the crime. *Id.* The government excepted to the instructions because they omitted this requirement. *Id.* at 1437. The defendant's attorney indicated that he did not believe it was necessary to instruct on the overt act requirement. *Id.* This scenario is an example of waiver because the record reflects that the defendant was aware of the omitted element and yet relinquished his right to have it submitted to the jury. *Accord Staufer,* 38 F.3d at 1103, 1109 n. 4 (waiver of error occurred because trial attorney modified model jury instructions to conform to most recent Supreme Court decision); *Guthrie,* 931 F.2d at 567 (refusal to review jury instructions under invited error doctrine, because trial court had offered to give omitted

> instruction, and defendant's attorney objected). Waiver occurred in each of these cases because the defendant considered the controlling law, or omitted element, and, in spite of being aware of the applicable law, proposed or accepted a flawed instruction.
>
> Here, however, the record reveals that neither defendants, the government, nor the court was aware of *Mendoza*'s requirement that the "in relation to" element be submitted to the jury. 11 F.3d at 128. Although Cruz and Perez did submit erroneous instructions, there is no evidence that they affirmatively acted to relinquish a known right. That is, there is no evidence that Cruz and Perez considered submitting the "in relation to" element to the jury, but then, for some tactical or other reason, rejected the idea. Thus, it cannot be said that Cruz and Perez waived their right to have this element submitted to the jury; waiver occurs only when a defendant relinquishes or abandons a "known right." *Olano,* 507 U.S. at 733, 113 S.Ct. at 1777.
>
> To the contrary, the failure to propose the "in relation to" element was forfeited error: error that is not objected to during trial because the defendant is unaware of a right that is being violated. Here, because neither Cruz nor Perez knew of the right to have the omitted element submitted to the jury, we must treat the right as forfeited, as opposed to waived. Accordingly, we review the error under Rule 52(b) for plain error. *See Johnson v. United States,* 520 U.S. 461, ——, 117 S.Ct. 1544, 1548, 137 L.Ed.2d 718, —— (1997) (forfeited right reviewed for plain error).

Perez, 116 F.3d at 844–46 (footnotes omitted).

In *United States v. Long*, 997 F.3d 342 (D.C. Cir. 2021), the Court likewise explained:

> The government argues that Long is not even entitled to plain error review because he invited the district court to apply U.S.S.G. § 1B1.13 to his case. The government misunderstands the scope of the invited error doctrine.

> It is settled that a defendant "may not complain about invited error" on appeal. *United States v. Brown*, 892 F.3d 385, 393 (D.C. Cir. 2018). "Invited error occurs when defense counsel induces the error" through their litigation conduct before the district court. *United States v. Lawrence*, 662 F.3d 551, 557 (D.C. Cir. 2011).
>
> But not every mistake by defense counsel is an invited error. The invited error doctrine is an equitable doctrine that "seeks to avoid rewarding mistakes stemming from a defendant's own *intelligent, deliberate course of conduct* in pursuing his defense." *United States v. Bastian*, 770 F.3d 212, 218 (2d Cir. 2014) (emphasis added; formatting modified). Said another way, " '[s]tatements amounting to invited error are a species of waiver' and generally evince an 'intent' by the speaker to convince 'the district court to do [something that] it would not otherwise have done.' " *United States v. Lerma*, 877 F.3d 628, 632 (5th Cir. 2017) (second alteration in original) (quoting *United States v. Rodebaugh*, 798 F.3d 1281, 1304 (10th Cir. 2015)).
>
> Invited error, then, involves intentional "strategic gambit[s]" designed to induce the trial court to take a desired action. *Bastian*, 770 F.3d at 219. It does not extend to every unintentional "oversight" or innocent mistake that counsel might make. *Id.*; *see also United States v. Coffelt*, 529 F. App'x 636, 639 n.2 (6th Cir. 2013) ("[T]his case is a far cry from a case of gamesmanship or a tactical decision gone wrong, which is the typical factual scenario when the invited-error doctrine is applied.").

Long, 997 F.3d at 353.

Additionally, in *Fryman v. Fed. Crop Ins. Corp.*, 936 F.2d 244 (6th Cir. 1991), the Court explained that the invited error doctrine "is an equitable doctrine." *Fryman*, 936 F.2d at 251 (citations omitted). "The courts will not allow a party with unclean hands to prevail on an equitable argument." *Id.* (citing, *Cleveland Newspaper Guild, Local 1, v. The Plain Dealer Publishing Co.,* 839 F.2d 1147, 1154–55 (6th Cir.) (en banc), *cert. denied,* 488 U.S. 899, 109 S.Ct. 245, 102 L.Ed.2d 234 (1988)). In

Fryman the Court declined to apply the invited error doctrine because the "[p]laintiffs were as much at fault in inviting the error in this case as defendants since all the parties asked for the equivalent of instruction 8." *Fryman*, 936 F.2d at 251; *See also*, *United States v. Barrow*, 118 F.3d 482, 491 (6th Cir. 1997) (concluding that "the government was as much at fault for inviting the error as the defendant since the parties stipulated to the same instructions").

Here, like *Perez*, there is no evidence in the record which suggests that the defense, the prosecution, or the judge were aware of the error. Furthermore, like *Fryman*, the error was as much the government's fault as it was Mr. Kuykendall's, as the instruction was jointly proposed. In these circumstances the error is not invited nor waived. *See*, *Perez,* 116 F.3d at 844–46*; Fryman,* 936 F.2d at 251; *Long*, 997 F.3d at 353.

Mr. Kuykendall submits that based on the well-reasoned decisions in *Perez, Long,* and *Fryman*, and this Court's prior precedent in *Olano*, this Court should grant review and establish that the invited error doctrine does not foreclose review where the defendant was not aware of the error and/or where the government is equally at fault for causing the error, and find that the circuit court therefore erred by finding the district court's instructional error was waived under the invited error doctrine. After establishing the foregoing, this Court should reverse Mr. Kuykendall's Judgment and Sentence, and remand his case for a new trial. *See*, *Perez,* 116 F.3d at 844–46*; Fryman,* 936 F.2d at 251; *Long*, 997 F.3d at 353; *White Horse*, at 1429–31; *Voss*, 787 F.2d at 398–99.

CONCLUSION

The petition for a writ of certiorari should be granted, the decision below should be reversed, and Mr. Kuykendall's case should be remanded for a new trial.

Respectfully Submitted,

Dane K. Chase, Esq.
Florida Bar No. 0076448
Chase Law Florida, P.A.
111 2nd Ave Ne
Suite 334
Direct: (727) 350-0361
Email: dane@chaselawfloridapa.com
CJA Counsel for Petitioner

INDEX TO APPENDIX

Decision of the 11th Circuit Court of Appeal..... Appendix A

Order Denying Petition for Panel Rehearing ..... Appendix B

APPENDIX A

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-13076

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JONATHAN HOWARD KUYKENDALL,
a.k.a. Jonathan H. Kuykendall,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:22-cr-00247-CEH-AEP-1

Before LAGOA, ABUDU, and ANDERSON, Circuit Judges.

PER CURIAM:

Jonathan Kuykendall appeals his conviction for attempting to entice a minor to engage in sexual activity, in violation of 18 U.S.C. § 2422(b). He argues that the district court erred by instructing the jury that cellular telephones and the Internet are facilities of interstate commerce and that the jury only needed to find that he used one or the other in order to convict him.

We ordinarily review *de novo* the legal correctness of jury instructions but review the district court's phrasing for abuse of discretion. *United States v. Seabrooks*, 839 F.3d 1326, 1332 (11th Cir. 2016). Jury instructions are subject to harmless error review. *Neder v. United States*, 527 U.S. 1, 8-9 (1999). Therefore, we will not reverse a conviction based on a jury instructions challenge unless there is a "substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." *Seabrooks*, 839 F.3d at 1333 (quotation marks omitted).

However, if the party challenging the jury instructions failed to object to their language at trial, we review only for plain error. *United States v. Maradiaga*, 987 F.3d 1315, 1323 (11th Cir. 2021). For plain error to exist, there must: "(1) be an error (2) that is plain (3) that affects the defendant's substantial rights and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Madden*, 733 F.3d 1314, 1321 (11th Cir. 2013). "A plain error is an error that is obvious and is clear

under current law." *United States v. Humphrey*, 164 F.3d 585, 588 (11th Cir. 1999) (quotation marks omitted).

Where invited error exists, however, we are precluded from invoking plain error and reversing. *United States v. Silvestri*, 409 F.3d 1311, 1327 (11th Cir. 2005). "[P]roposing the language of a jury instruction is a textbook case of invited error." *United States v. Duldulao*, 87 F.4th 1239, 1254 (11th Cir. 2023) (quotation marks omitted). Consequently, we have declined to review challenges to jury instructions where the defendant not only failed to object to the jury instructions at trial but actually proposed the very instruction that he challenged on appeal. *Maradiaga*, 987 F.3d at 1322. Furthermore, we have declined to review a jury-instructions challenge even where the instructions were proposed jointly by the defendant and the government. *United States v. Bird*, 79 F.4th 1344, 1353 (11th Cir. 2023). Under the prior precedent rule, we are bound to follow a prior binding precedent unless and until it is overruled by this Court sitting *en banc* or by the Supreme Court. *United States v. Vega-Castillo*, 540 F.3d 1235, 1236 (11th Cir. 2008).

Section 2422(b) imposes criminal penalties on a person who uses any facility or means of interstate commerce and "knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years[] to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so." 18 U.S.C. § 2422(b). We have held that "[t]elephones and cellular telephones are instrumentalities of interstate commerce." *United States v. Evans*, 476 F.3d 1176, 1180

(11th Cir. 2007). Further, we have held that the "internet is an instrumentality of interstate commerce." *United States v. Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004).

A trial court does not err when its jury instructions accurately define a term in a statute as a matter of law. *United States v. Hastie*, 854 F.3d 1298, 1305-06 (11th Cir. 2017). There is a distinction between a court improperly directing a verdict on an element of an offense, as opposed to properly instructing the jury about the definition of that element. *Id.* at 1306.

Here, Kuykendall invited any error because he proposed the very language in the jury instructions that he now seeks to challenge. *Duldulao*, 87 F.4th at 1254. Additionally, the district court did not invade the province of the jury when it instructed that the internet and cell phones are facilities of interstate commerce—as we have held in *Evans* and *Hornaday* and as Kuykendall invited the district court to instruct; the district court did not determine the factual issue of whether Kuykendall actually used a cell phone or the internet, but simply defined the term "facilities of interstate commerce." Finally, even if we were to review the claim for plain error, the district court did not plainly err because cell phones and the Internet are facilities of interstate commerce as a matter of law. *See Evans*, 476 F.3d at 1180; *Hornaday*, 392 F.3d at 1311. Moreover, even if there were some question about that—which there is not in this Circuit—any error in that regard would not be plain error because there is no Supreme Court or Eleventh Circuit case holding that a district court errs by instructing that cell phones and the

internet are facilities of interstate commerce. Accordingly, we affirm.

AFFIRMED.

APPENDIX B

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-13076

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JONATHAN HOWARD KUYKENDALL,
a.k.a. Jonathan H. Kuykendall,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:22-cr-00247-CEH-AEP-1

Before LAGOA, ABUDU, and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by the Appellant is DENIED.