

No. _____

In the Supreme Court of the United States

ALLEN HOUSTON JAMES, *PETITIONER*,

v.

UNITED STATES OF AMERICA, *RESPONDENT*

**PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT**

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QUESTIONS PRESENTED FOR REVIEW

Courts of appeals broadly recognize that the invited-error doctrine precludes a party from challenging on appeal an action that he invited the district court to take. Some courts treat the invited error as waiver itself, regardless of whether the party intentionally relinquished a known right. These courts preclude appellate review entirely or allow it only in extreme circumstances, such as to avoid manifest injustice. Other courts require the invited error to also be deliberate or a knowing waiver before barring appellate review. These courts permit plain error review of a party's innocent mistakes.

The questions presented are:

1. When a criminal defendant invites the district court to commit an error, is that error reviewable for plain error if the defendant did not intentionally relinquish a known right when he invited the court's action?
2. If a criminal defendant mistakenly proposes an incorrect jury instruction, does plain error review apply to the requested instruction?

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Petitioner Allen Houston James asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on June 2, 2026.

PARTIES TO THE PROCEEDING

Pursuant to Sup. Ct. R. 14.1(b)(i), the parties to the proceedings in the court whose judgment is sought to be reviewed are:

Petitioner Allen Houston James, the defendant in the district court and appellant below.

Respondent United States of America, the plaintiff in the district court and appellee below.

RELATED PROCEEDINGS

All proceedings directly related to the case are as follows:

- *United States v. James*, No. 6:21-CR-106-1 (W.D. Tex. July 15, 2026) (judgment)
- *United States v. James*, No. 25-50144 (5th Cir. June 2, 2026) (published opinion)
- *United States v. James*, No. 6:21-CR-106-1 (W.D. Tex. Sept. 2, 2026) (amended judgment)

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INTRODUCTION

The courts of appeals are divided over whether appellate review is permitted when a party invites the district court to commit an error by innocent mistake, and not as a tactical strategy or an intentional relinquishment of a known right. At one extreme, some circuits strictly apply the invited-error doctrine and bar any appellate review; the party cannot receive review even under the rigorous plain error standard. At the other extreme, some circuits require a showing of waiver before barring review of the invited error. And still other circuits permit review of invited errors but only for manifest injustice, which they define differently.

All circuits apply their different versions of the invited-error doctrine to requested jury instructions. So, instead of requiring the district court to instruct the jury on “what the law is,” a court’s erroneous instruction evades appellate review in some circuits simply because the appealing party requested it. *Marbury v. Madison*, 5 U.S. 137, 177 (1803); *see, e.g.*, Pet. App. 16a. Consequently, a verdict based on incorrect jury instructions stands without having to survive the plain error review otherwise applied to forfeited errors. Pet. App. 16a–17a.

The Court should grant certiorari to aid uniform application of the law and address the tension between the invited-error doctrine

and this Court's jurisprudence and the Federal Rules of Criminal Procedure. At minimum, the Court should clarify that a requested jury instruction does not bar review absent the intentional relinquishment of a known right. Permitting such review will safeguard the Sixth Amendment's jury trial guarantee by incentivizing the parties and the court to correctly instruct juries on the elements of the offense, thereby ensuring that the jury must find the necessary facts for guilt beyond a reasonable doubt.

James's case is an ideal vehicle to resolve these issues. Charged solely with attempted murder, James mistakenly requested an instruction that *decreased* the government's burden of proof: it allowed the government to convict either based on specific intent to kill or wanton disregard for human life. Attempted murder, however, requires specific intent to kill; wanton disregard is insufficient.

Requesting the incorrect instruction served no tactical advantage. It was simply an innocent mistake, one that neither the government nor the district court corrected despite having ample opportunity to do so.

Application of the invited-error doctrine to such a jury instruction, absent an intentional relinquishment of a known right, does not serve the purpose of the invited-error doctrine, infringes upon

constitutional rights, and is inconsistent with this Court’s jurisprudence and Federal Rules of Criminal Procedure 30 and 52(b).

The Court should grant certiorari to unify the circuits’ approach to this important, recurring issue.

OPINION BELOW

The Fifth Circuit’s opinion is reported at 177 F.4th 642 and is reproduced at Pet. App. 1a–19a.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 2, 2026. Justice Alito granted James’s motion to extend time for filing a petition for writ of certiorari to September 30, 2026. *See James v. United States*, No. 26A131; Sup. Ct. R. 13.5. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, § 2, cl. 3, of the Constitution provides: “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury....”

The Fifth Amendment of the U.S. Constitution provides in part that “[n]o person shall be ... deprived of life, liberty, or property, without due process of law[.]”

The Sixth Amendment of the U.S. Constitution provides in part that “[i]n all criminal prosecutions, the accused shall enjoy the right to a ... trial[] by an impartial jury[.]”

FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

Federal Rule of Criminal Procedure 30 is reproduced in Appendix B. Rule 30(d) provides in part that “[f]ailure to object [to jury instructions] in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).”

Federal Rule of Criminal Procedure 52(b) states: “A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”

STATEMENT

1. A jury found Petitioner Allen Houston James guilty of one count: attempted murder. C.A. ROA 340, 2097; *see* 18 U.S.C. § 1113. The offense—a violent stabbing during a sexual assault in

Army barracks—occurred in 2000 but remained unsolved for decades. DNA evidence and forensic genealogy eventually led investigators to accuse James of being the attacker, a charge he refutes to this day.

a. At trial, the government introduced evidence that a man entered the victim’s room and attempted to rape her. C.A. ROA 1838–47, 3087–88. When she tried to resist his advances, he stabbed her to force acquiescence. *Id.* at 1845–51. He left her severely injured and her mattress covered with blood. *Id.* She survived, counting to 10 after the attacker left before she sought help. *Id.* But she could never identify the attacker. *Id.* at 2223–24, 2265, 3087–88.

The government’s key evidence at trial was the DNA. *See* C.A. ROA 1445. Army officers who collected evidence from the victim’s room within hours of the attack described a “wet” or “fresh” stain on the mattress cover. *Id.* at 1518. A forensic scientist testified that DNA from that wet stain was a statistical “match” for James. *Id.* at 1959. James also could not be excluded as matching the DNA taken from the victim’s rectal swab. *Id.* at 1966. The victim testified that she had not had sexual relations with anyone else in her room in the days before the attack and that she did not know the person who attacked her or ever have consensual sex with him. *Id.*

at 1859–60. The government argued this evidence showed that the semen was left during the offense, meaning that James was the attacker. *See id.* at 2044–45.

James did not testify, but the government presented short video clips from his 2021 interrogation. *See* C.A. ROA 2000–01. In those clips, James is shown a picture of the victim and says he does not recognize her. *Id.*; *see* C.A. ROA Gov’t Ex. 180. He also denies ever having sex in barracks rooms and says his DNA will not be found in her room. C.A. ROA Gov’t Exs. 182, 183.

b. Before trial, the district court asked the parties to submit their proposed jury instructions by a certain date. C.A. ROA 424–25. Only James submitted instructions. *Id.* at 2023–24. The district court’s “attempted murder” instruction materially mirrored the one James had proposed. *See id.* at 564–65; Pet. App. 13a–14a. It instructed the jury that, to find James guilty of attempted murder, it must find that he “intended to commit murder” and completed a substantial step towards committing murder. C.A. ROA 565, 2085.

The district court’s instructions defined “murder” as unlawfully killing another human being “with malice aforethought.” C.A. ROA 564, 2084. “To kill ‘with malice aforethought’ means either to kill

another person deliberately and intentionally, or to act with callous and wanton disregard for human life.” *Id.* at 564, 2084. The court defined “knowingly” as meaning “that the act was done voluntarily and intentionally, not because of mistake or accident.” *Id.* at 565, 2086. Thus, the instructions allowed the jury to find Mr. James guilty if he intended to act with callous and wanton disregard for human life.

Neither James nor the government objected to the “attempted murder” instruction. C.A. ROA 2023–24.

c. In closing, the government argued that James “intended to commit murder” but never argued that he intended to kill the victim. C.A. ROA 2042–43. The defense’s closing argument challenged the government’s theory that the DNA evidence meant James was the person who committed the offense. *Id.* at 2046–56.

d. The jury found James guilty, and the district court sentenced him to 200 months’ imprisonment. C.A. ROA 857–58.

2. On appeal, James challenged the “attempted murder” jury instruction.¹ He argued that the district court plainly erred by failing to instruct the jury that, to convict him of attempted murder, they needed to find that he intended to kill the victim. Instead, the

¹ James also challenged the sufficiency of the evidence and his Sentencing Guidelines calculation.

instruction permitted conviction for intent to “commit murder,” which was defined as *either* specifically intending to kill the victim or acting with wanton and callous disregard for human life.

The government agreed that the mens rea for attempted murder is the specific intent to kill. But the government argued James could not raise this challenge on appeal because he had invited the error with his proposed jury instruction. The government also argued that the instructions, as a whole, did not mislead the jury or seriously affect his rights or warrant reversal.

James countered that the court of appeals could still address the merits of his instructional challenge because he did not invite the error knowingly or intentionally for some tactical advantage. Instructing the jury that it could convict James of a *lower* mens rea than applicable did not advance his case in anyway. It was a mistake that the government permissively joined and that the district court adopted.

The court of appeals affirmed James’s conviction.² Pet. App. 1a–19a. In a published decision, the court held that the invited-error doctrine barred review of James’s instructional challenge. *Id.* at 13a. The court acknowledged that some circuits require waiver to bar review of an invited error, but Fifth Circuit precedent does not. *Id.* at 14a. Rather, the Fifth Circuit recognizes invited errors as a third category separate from forfeited errors (reviewed for plain error) and waived errors (unreviewable). *Id.* at 15a. “[I]nvited errors are subject to a standard somewhere in-between: ‘manifest injustice.’” *Id.* James did not show manifest injustice because, even though the “instruction was imperfect,” “imperfection is not manifest injustice.” *Id.* at 16a. “[A]ssuming the instruction misstated the law,” the court “doubt[ed]” James’s claim that it “meant the difference between acquittal and conviction.” *Id.* Even though the instructions may have been plainly erroneous, “they were materially the instructions James requested, and they did not produce a manifest injustice.” *Id.* at 17a.

² The court of appeals rejected James’s sufficiency-of-the-evidence argument but remanded for resentencing under the correct Sentencing Guidelines. Pet. App. 17a–19a. James was later resentenced to the same sentence: 200 months’ imprisonment. Amended Judgment, *United States v. James*, No. 6:21-CR-00106 (W.D. Tex. Sept. 2, 2026). His appeal from that judgment is pending. See Docket, *United States v. James*, No. 26-50804 (5th Cir.).

REASONS FOR GRANTING THE WRIT

- I. **The courts of appeals are deeply divided over whether the invited-error doctrine bars appellate review for mistakes that are not intentional relinquishments of known rights.**

Courts of appeals recognize that the invited-error doctrine generally provides “that a party may not complain on appeal of errors that he himself invited or provoked the [district] court ... to commit.” *United States v. Wells*, 519 U.S. 482, 488 (1997) (quoting *United States v. Sharpe*, 996 F.2d 125, 129 (6th Cir. 1993)). Courts describe it as 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. Long*, 997 F.3d 342, 353 (D.C. Cir. 2021) (quoting *United States v. Bastian*, 770 F.3d 212, 218 (2d Cir. 2014) (emphasis added)).

Application of the doctrine varies across the courts of appeals and sometimes within a circuit. *See* Wayne R. LaFave et al., 7 *Crim. Proc.* § 27.5(c) (4th ed., Nov. 2025) (describing fracture); Stephen E. Arther & Robert S. Hunter, 1 *Federal Trial Handbook: Criminal* § 2:35 (2025-2026 Edition) (same); *see, e.g., United States v. Mariano*, 729 F.3d 874, 882 (8th Cir. 2013) (describing the Third Circuit’s inconsistent application of the invited-error doctrine).

The fracture falls into three general categories.³

1. The Seventh, Eighth, Tenth, and Eleventh Circuits strictly apply the invited-error doctrine without requiring waiver. *See United States v. Krahenbuhl*, 88 F.4th 678, 686 (7th Cir. 2023); *Mariano*, 729 F.3d at 882; *United States v. Teerlink*, 141 F.4th 1126, 1128 (10th Cir. 2025); *United States v. Maradiaga*, 987 F.3d 1315, 1322 (11th Cir. 2021).

Even though these circuits recognize that the purpose of the doctrine is to prevent “litigants from sandbagging district courts by introducing error at trial with the intention of creating grounds for reversal on appeal,” they do not require that the error be invited deliberately. *Duldulao*, 87 F.4th at 1255 (cleaned up). They treat the invitation for court action as a complete bar to appellate review, even absent indication that the party knew it was asking the court to commit an error. *See, e.g., Teerlink*, 141 F.4th at 1133 (“When conducting our subjective inquiry of waiver, we may infer from a party’s submission of an instruction and subsequent failure to object that the party knowingly and intelligently relinquished

³ Several circuits also “recognize an exception where the ‘error’ invited by a party ‘relied on settled law that changed while the case was on appeal.’” *United States v. Duldulao*, 87 F.4th 1239, 1255 (11th Cir. 2023) (quoting *United States v. Titties*, 852 F.3d 1257, 1264 n.5 (10th Cir. 2017)); *see also United States v. Andrews*, 681 F.3d 509, 517 n.4 (3d Cir. 2012). That circumstance does not apply in James’s case.

future challenges regarding the instruction.”); *Maradiaga*, 987 F.3d at 1322–23 (“proposing the exact language that the district court adopted” in the jury instructions “is a textbook case of invited error”). Or, even if requesting a jury instruction does not automatically amount to waiver, it categorically does not result in a miscarriage of justice. *Mariano*, 729 F.3d at 881.

2. At the other extreme, the spectrum, the Second and Ninth Circuits, and sometimes the District of Columbia and Third Circuits, allow appellate review provided that the invited error was not deliberate or did not rise to waiver. *See United States v. Long*, 997 F.3d 342, 353–54 (D.C. Cir. 2021); *United States v. Bastian*, 770 F.3d 212, 218 (2d Cir. 2014); *United States v. Epps*, __ F.4th __, No. 24-2542, 2026 WL 2451703, at *4 (3d Cir. Aug. 21, 2026); *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc). In other words, appellate review exists for innocent mistakes.

a. The District of Columbia and Second Circuits recognize that the invited-error doctrine does not serve its equitable purpose when applied to innocent mistakes. *Long*, 997 F.3d at 353 (quoting *Bastian*, 770 F.3d at 218). For instance, when a defendant agreed to plea to possessing a different firearm than the one in the indictment, he “neither sought nor gained any tactical advantage from giving up his right to indictment.” *Bastian*, 770 F.3d at 219. His

failure to “avail himself of his right to a superseding indictment” was “less a strategic gambit than simply ... a matter of oversight.” *Id.* (cleaned up). So the claim was reviewable for plain error.

And when defense counsel incorrectly represented that his client was connected to seven kilograms of drugs instead of the correct smaller number of four kilograms, “defense counsel’s blunder did not amount to invited error because ‘it [was] not as if counsel made a strategic decision’ in telling the court that seven kilograms was the relevant number.” *Long*, 997 F.3d at 354 (quoting *In re Sealed Case*, 108 F.3d 372 (D.C. Cir. 1997)). But the D.C. Circuit has applied the invited-error doctrine to jointly proposed jury instruction treating the request as a “tactical decision” not a blunder. See *United States v. Burke*, __ F.4th __, No. 25-3104, 2026 WL 2794723, at *10 (D.C. Cir. Sept. 18, 2026) (applying invited-error doctrine to jointly proposed jury instruction); *United States v. Benton*, 98 F.4th 1119, 1130 (D.C. Cir. 2024).

b. The Third Circuit recognizes that “the invited error doctrine only bars appellate review of a jury instruction where a party ‘specifically assented to the jury instruction at issue, an instruction that had been the subject of litigation.’” *Epps*, 2026 WL 2451703, at *4 (quoting *United States v. Henderson*, 64 F.4th 111, 116 (3d Cir. 2023)). “It does not apply when a party ‘simply acquiesced’ to

‘an error that was never in dispute.’” *Id.* (quoting *Henderson*, 64 F.4th at 116). This suggests that a requested instruction that was not challenged, discussed, or litigated in any meaningful way—as happened here, *supra* 6–7—would fall into the forfeiture category because the correctness of the instruction was never in dispute.

c. The Ninth Circuit bars appellate review only upon a separate showing of waiver. *Perez*, 116 F.3d at 845. The court reconsidered its invited-error doctrine after this Court clarified the difference between forfeiture and waiver in *United States v. Olano*, 507 U.S. 725 (1993). *Perez*, 116 F.3d at 842. The court held that, to apply the invited-error doctrine to bar appellate review, it “must also consider whether the defendant intentionally relinquished or abandoned a known right.” *Id.* at 845. “If the defendant has both invited the error, and relinquished a known right, then the error is waived and therefore unreviewable.” *Id.*

3. At various points between the two extreme positions, the First, Fourth, Fifth, and Sixth Circuits generally bar review of an invited error but allow for exceptions, such as to avoid “manifest injustice.” See *United States v. Serrano-Delgado*, 29 F.4th 16, 29 (1st Cir. 2022) (“Absent extreme circumstances not present here, a defendant cannot ask a trial court to follow a certain procedure and then be heard to complain only later on appeal that the trial court

did as requested.”); *United States v. Herrera*, 23 F.3d 74, 76 (4th Cir. 1994) (barring review of instruction requested by defendant “reasonably designed to benefit Herrera” that did not cause a “miscarriage of justice”); *United States v. Taylor*, 973 F.3d 414, 418 (5th Cir. 2020); *United States v. Akridge*, 62 F.4th 258, 263 (6th Cir. 2023).

But what qualifies as “manifest injustice” differs amongst those circuits. In the Fifth Circuit, “[m]anifest injustice occurs when the district court’s error was so patent as to have seriously jeopardized the rights of the appellant.” *Taylor*, 973 F.3d at 418. The Fifth Circuit has applied the exception only once, in a case where the district court expressed an intention to reduce the sentence by six months but the language in the judgment did not effectuate that intent. *Id.* at 418–19.

The Sixth Circuit, by contrast, applies the exception more liberally. See *United States v. Montgomery*, 998 F.3d 693, 699 (6th Cir. 2021) (reviewing an invited Guidelines calculation error for plain error). For example, the Sixth Circuit recently exercised its discretion to review a jury instruction because “the government jointly submitted the now-challenged instruction,” so “it is as much at

fault as Defendant for inviting any error.” *United States v. Stafford*, __ F.4th __, No. 24-1612, 2026 WL 2676556, at *5 (6th Cir. Sept. 11, 2026).

James’s claim would likely have been reviewable for plain error in the Sixth Circuit because the government did not submit its own instruction and did not object to the one James proposed. *See id.*; *see also Montgomery*, 998 F.3d at 669 (reviewing error in part because “Montgomery was no more culpable for the error than the government”). But review was barred in the Fifth Circuit. Pet. App. 14a.

The Fifth Circuit did not consider the government’s complicity when it decided to bar review of James’s argument. *See* Pet. App. 14a–17a. Instead, the Fifth Circuit decided that the “imperfect” instruction was not manifest injustice and that it “doubt[ed]” the instruction meant the difference between acquittal and conviction. *Id.* at 16a. James would have received a more favorable standard of review under plain error, which would have asked if there was a reasonable probability that but for the instructional error he would have been acquitted. *See United States v. Perez*, 43 F.3d 1131, 1139–40 (7th Cir. 1994) (reversing under plain error review due to a similar instructional error). But the Fifth Circuit cut off that review due to its application of the invited-error doctrine.

4. Thus, the courts of appeals are fractured in their application of the invited-error doctrine. Yet “[l]ayering of a separate set of rules for ‘invited error’ on top of a jurisdiction’s plain error analysis is arguably unnecessary.” 7 Crim. Proc. § 27.5(c). That is because precluding review based on waiver already serves the purpose of the invited-error doctrine, to prevent a party “from inducing an erroneous ruling and later seeking to profit from the legal consequences of having the ruling set aside.” *Id.* (quoting *United States v. Demmler*, 655 F.3d 451, 458–59 (6th Cir. 2011)). And even if such sandbagging survives the waiver inquiry,⁴ plain error review “leaves the decision to correct the forfeited error within the sound discretion of the court of appeals. *Olano*, 507 U.S. at 732. So the concerns underlying the invited-error doctrine are sufficiently addressed by the waiver and plain error inquiries.

II. This Court’s jurisprudence and Federal Rule of Criminal Procedure 52(b) support reviewing mistaken “invited errors” for plain error.

The strict bar that roughly half the courts of appeals apply to reviewing invited errors is out of sync with this Court’s approach

⁴ That is, assuming such sandbagging occurs. “If there is a lawyer who would deliberately forgo objection now because he perceives some slightly expanded chance to argue for ‘plain error’ later, we suspect that, like the unicorn, he finds his home in the imagination, not the courtroom.” *Henderson v. United States*, 568 U.S. 266, 276 (2013).

to appellate review in criminal cases. The Court has refused to review instructional error but only in the context of a deliberate, tactical decision. *See Johnson v. United States*, 318 U.S. 189, 200 (1943). The Court and the Federal Rules of Criminal Procedure have clarified that jury instruction errors not subject to an objection can be reviewed for plain error. And the Court has crystalized the distinction between forfeiture and waiver in the context of Rule 52. *See Olano*, 507 U.S. at 733. Rule 52 does not have a separate provision for invited errors, so that equitable doctrine must give way to the Rule, which permits review of forfeited errors for plain error.

1. In *Johnson*, this Court refused to review the instructional error because it was “*not* dealing ... with inadvertence or oversight.” 318 U.S. at 200 (emphasis added). There, “counsel consciously and *intentionally* failed to save the point [which he had raised earlier] and led the trial judge to understand that counsel was satisfied.” *Id.* (emphasis added). In other words, this Court applied the invited-error doctrine to criminal jury instructions when the issue had been joined and defense counsel intentionally acquiesced to the instruction later challenged on appeal.

2. The Court’s subsequent decisions regarding appellate review also cast doubt on applying the invited-error doctrine to jury

instructions without requiring intentional waiver of a known right. In the 1990s, this Court clarified that “[w]aiver is different from forfeiture.” *Olano*, 507 U.S. at 732. “Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the ‘intentional relinquishment or abandonment of a known right.’” *Id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Whether a particular right is waivable, “and whether the defendant’s choice must be particularly informed or voluntary, all depend on the right at stake.” *Id.* Though *Olano* did not specifically address the invited-error doctrine or instructional error, it made clear that, absent waiver, a forfeited error was still reviewable under Federal Rule of Criminal Procedure 52(b). *Id.* at 734.

3. A few years later, the Court held that an appellate court may conduct a limited review for plain error of a jury instruction, even if Federal Rule of Criminal Procedure 30, at that time, “could be read literally to bar any review of petitioner’s claim of error.” *Jones v. United States*, 527 U.S. 373, 388 (1999); see *Johnson v. United States*, 520 U.S. 461, 466–67 (1997) (reviewing unpreserved instructional error under plain error review).

Rule 30 was later amended to make clear that forfeited jury instruction errors could be reviewed for plain error. Fed. R. Crim. P. 30(d) & 2002 Amendments . But whether a challenge makes it

to that review, when the defendant requested the incorrect instruction below, depends on which circuit he is in. *Supra* Section I.

The invited-error doctrine, however, should not play a role in whether an instructional error is reviewed. Courts do not have “the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure.” *Carlisle v. United States*, 517 U.S. 416, 425–26 (1996); see *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254–55 (1988) (“[F]ederal courts have no more discretion to disregard [Rule 52(a)’s] mandate than they do to disregard constitutional or statutory provisions.”). And Rule 30(d) states that errors not objected to are reviewed for plain error. So the analysis should simply be whether, as *Olano* describes, the error was waived or forfeited.

Waiver is not simply asking for a particular jury instruction. That request does not demonstrate an intentional relinquishment of a known right to a different instruction, particularly when neither the other party nor the court questions the requested instruction.

III. Barring review of jury instructions without requiring waiver causes constitutional concerns and impugns the integrity of the judicial system.

The fractured application across the courts of appeals of the invited-error doctrine is especially concerning when the errors involved touch upon constitutional rights and depend on court administration and involvement. Jury instructions are such errors.

The U.S. Constitution guarantees the right to be tried by jury in criminal cases. U.S. Const. Art. III, § 2, cl. 3; amend. VI. This right “obviously means the right to have a jury determine whether the defendant has been proved guilty of the crime charged,” meaning a right to have the jury determine “that *all elements* were proved.” *Neder v. United States*, 527 U.S. 1, 31 (1999) (Scalia, J., concurring in part and dissenting in part) (emphasis in original). Those elements must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). The “reasonable-doubt standard plays a vital role in the American scheme of criminal procedure.” *Id.* at 361. It “provides concrete substance for the presumption of innocence—that bedrock ‘axiomatic and elementary’” principle whose “enforcement lies at the foundation of the administration of our criminal law.” *Id.* at 361 (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).

While an erroneous jury instruction does not automatically require reversal of the conviction, it nonetheless “violates the Sixth Amendment’s jury trial guarantee.” *Neder*, 527 U.S. at 13 (applying harmless-error review to an instruction that omitted an element of the crime). If the jury is incorrectly instructed about the elements of the offense in a way that made the offense broader and easier to prove, then the guilty verdict is not based “upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *Winship*, 397 U.S. at 364.

Surely waiver of such rights requires more process than an unchallenged jury instruction. *See Olano*, 507 U.S. at 732 (noting the process necessary to waive a right depends on the right at stake). “Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.” *United States v. Newell*, 315 F.3d 510, 519 (5th Cir. 2002) (cleaned up).

Even if an invited error might warrant barring appeal in some instances without a showing of waiver, jury instructions are different. Parties cannot simply agree to an offense having different elements. *See Musacchio v. United States*, 577 U.S. 237, 243 (2016) (reviewing for sufficiency of the evidence “against the elements of

the charged crime, not against the erroneously heightened command in the jury instruction”). Appellate review is particularly warranted in a case such as this, where the error made the government’s case *easier* to prove. *See Winship*, 397 U.S. at 364.

Nor should a district court’s instructions be shielded from review simply because a party requested them. The district court plays a pivotal role in crafting jury instructions and ultimately telling the jury what the law is. *See Fed. R. Crim. P. 30; cf. Hunter v. United States*, 608 U.S. 713, 725 (2026) (adopting miscarriage of justice exception to appeal waivers because of “the special, and indeed pivotal, role of the judiciary in approving and implementing appeal waiver”). Even if parties propose jury instructions, the court still has a duty to assess whether those instructions are legally correct. Indeed, permitting plain error review for innocent invited errors would incentivize the parties and the district court to correctly instruct the jury, thereby safeguarding the Sixth Amendment right.

IV. This case is an excellent vehicle for resolving the questions presented.

This case is an excellent vehicle for resolving the role, if any, that the invited-error doctrine should play in appellate review.

Here, there is no evidence that James “considered the controlling law ... and, in spite of being aware of the applicable law, proposed or accepted a flawed instruction.” *Perez*, 116 F.3d at 845. Neither the government nor the district court pointed to the other circuits’ jury instructions for attempted murder or case law to provide the correct mens rea. *See* C.A. ROA 2022–24; *Braxton v. United States*, 500 U.S. 344, 351 & n.* (1991); 9th Cir. Model Crim. Jury Instr. § 16.5 (2024); 11th Cir. Pattern Jury Instr. § O47 (2024). The government did not even propose its own instructions. It simply acquiesced to the legally incorrect ones James and the court drafted, silently allowing the jury to be instructed on a substantially lower mens rea than the government legally had to prove. Neither James, “the prosecution, nor the court apparently was aware of the correct law.” *Perez*, 116 F.3d at 842. Everyone missed the legal error. “Given these circumstances, the error cannot be deemed waived, but merely forfeited.” *Id.*

And here, the error was important. It allowed the jury to convict James without unanimously concluding that he acted with specific intent to kill. Based on the instructions, any number of the jurors could have agreed with guilt based on him instead acting with callous and wanton disregard for human life. But that mens rea is insufficient for attempted murder. Pet. App. 8a; *Braxton*, 500

U.S. at 351. Given the circumstances of this case, there is a reasonably probability that the jury would have acquitted had it been required to unanimously find James acted with a specific intent to kill her. James should have the opportunity to run the gauntlet of plain error review rather than be barred due to his counsel's innocent mistake.

CONCLUSION

FOR THESE REASONS, James asks that this Honorable Court grant a writ of certiorari.

Respectfully submitted.

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