

NO:

IN THE
SUPREME COURT OF THE UNITED STATES

PATRICK JACQUES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, in view of the important effect of prosecutorial misconduct in a criminal case, a trial court should instruct a jury on the permissible adverse inferences to be drawn from the government's destruction of critical relevant evidence—in petitioner's case, gunshot residue evidence that would have conclusively established whether he fired a gun, and DNA evidence that would have shown if he possessed the gun, where petitioner denied having possessed the gun and the government's case otherwise rested on circumstantial evidence and the credibility of its investigation.

2. Whether the Eleventh Circuit, in holding that a trial court does not abuse its discretion when it denies a jury instruction request if no prior precedent of that circuit had addressed whether the instruction was required, unduly restricts review of instructional error.

INTERESTED PARTIES

The only parties interested in the proceeding other than those named in the caption of the appellate decision.

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PETITION FOR WRIT OF CERTIORARI

Patrick Jacques respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit, entered in case number 16-10254 in that court on December 1, 2017, *United States v. Jacques*.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit is contained in the Appendix (1a).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on December 1, 2017. This petition is timely filed pursuant to SUP. CT. R. 13.1.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provision:

U.S. Const. amend. V (Due Process Clause):

No person shall ... be deprived of life, liberty, or property, without due process of law

U.S. Const. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been

previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioner was tried on three counts: (1) being a felon in possession of a firearm (in violation of 18 U.S.C. § 922(g)); (2) possessing marijuana and cocaine with intent to distribute (in violation of 21 U.S.C. § 841(a)); and (3) possessing a firearm in furtherance of drug trafficking offense (in violation of 18 U.S.C. § 924(c)). The trial court denied petitioner's request for a jury instruction stating that the government's destruction of evidence could provide a basis for making a finding adverse to the government. After detaining petitioner shortly after a woman claimed he had fired a gun, the government tested petitioner's hands for gun shot residue (GSR) and swabbed a gun for DNA samples. This evidence was intentionally destroyed prior to trial, while in the constructive possession of a government agent. Petitioner requested a jury instruction on spoliation of evidence. The instruction would have allowed the jury to assume the destroyed evidence would have been unfavorable to the government, if the jury found the prosecution or its agents destroyed the evidence or caused its destruction either negligently or in bad faith.

The district court refused to give the requested instruction based on its understanding that a spoliation instruction could be given only if the government's bad faith was responsible for the destruction of the GSR and DNA evidence. The district court's ruling prejudiced petitioner, because if the jury had applied an inference

adverse to the government, the evidence of petitioner's gun possession would have been severely undermined.

At the time of arrest, petitioner was questioned at length regarding his possession of a firearm and its use in drug crimes. During the questioning, law enforcement agents requested that petitioner submit to a Gunshot Residue test ("GSR"), to which he agreed, and also collected DNA from the weapon, which was inside of a vehicle where petitioner was riding as a passenger at the time of his arrest. However, prior to trial, both the GSR testing and the DNA swabs were destroyed by law enforcement agents.

Ultimately, petitioner exercised his constitutional right to a trial by jury on each count of the indictment. To prove that the gun related to charges at trial, in Counts (1) and (3), the government presented only *hearsay*, combined with very thin circumstantial evidence. Officer Edgar Rivera, of the Miami Police Department ("Officer Rivera"), testified that on September 24, 2014 he was dispatched to Little Haiti to investigate a possible "assault." Upon arrival, he spoke to "a woman" who told him that she had been assaulted. Officer Rivera then left the scene and drove a short distance away to write his report. Minutes later, Officer Rivera was called back to the same address in reference to "shots fired."

The same woman approached Officer Rivera and informed him that a black male, accompanied by a black female, drove to her location in a gray Nissan and fired *several rounds* in her direction before driving off. Law enforcement officers were not able to recover *any shell casings*, even though the woman did not make mention of the

shooter “cleaning up” after the incident. In addition, law enforcement officers could not locate any witness that could corroborate *hearing* any shots fired around the time of the alleged assault, even though officers spoke to *multiple* witnesses.

A short time later, law enforcement officers stopped petitioner, who was riding as a passenger in a gray Nissan. Officers ordered petitioner out of the vehicle at gun point and searched the car. In a show up at the scene of arrest, the woman who had originally reported the assault identified petitioner as the person who had fired at her. However, petitioner was never found in *actual* possession of the vehicle or the gun that was found in the front seat door compartment. Further, in a post-*Miranda* statement, petitioner denied ever possessing the gun, or firing the weapon. What is more, it was determined that the vehicle in which petitioner was riding actually belonged to petitioner’s girlfriend, who had been allowing her adult son to use the vehicle only hours before the stop.

Petitioner appealed the denial of the spoliation instruction, along with other issues, and the Eleventh Circuit affirmed the convictions, App. 1a. The court of appeals concluded that “the district court did not abuse its discretion in refusing to give a spoliation jury instruction, because we have yet to recognize whether a spoliation jury instruction is applicable in a criminal context and decline to do so here.” App. 6a–7a.

REASONS FOR GRANTING THE WRIT

1. **Because of the importance to the defense of appropriately challenging the integrity and completeness of a law enforcement investigation, due process requires that a spoliation inference jury instruction be permitted in criminal cases, in the exercise of the trial court's discretion, where the government has destroyed crucially relevant evidence.**

Decisions rendered by courts in four circuits have held that a spoliation jury instruction may be proper in a criminal case, even absent a showing of bad faith, when the government has destroyed evidence, rendering it unavailable for use by the defense at trial. Also, one circuit has determined that while a spoliation instruction may be proper, bad faith conduct is necessary, as in a civil case, to warrant such an instruction. The Eleventh Circuit ruled in petitioner's case that in the absence of any prior Eleventh Circuit decision on the issue, the district court could not have erred in refusing petitioner's requested instruction. The need for resolution of the circuit conflict on the giving of a spoliation instruction is strong. Petitioner asserts that, of the conflicting views of the circuits, the test articulated by courts in the First, Second, Sixth, and Ninth Circuits, which does not require proof of bad faith conduct by the government, is the just and constitutionally permissible test which the Court should adopt.¹

¹ Certiorari is warranted where there are conflicting decisions, on the same point of law, across different circuit courts of appeal. *See generally Yee v. Cty of Escondido, Cal.*, 503 U.S. 519, 538 (1992).

The Second Circuit

In *United States v. Garcia*, the Second Circuit Court of Appeals addressed the question of whether a criminal defendant is entitled to a jury instruction regarding “spoliation” of evidence where the government destroyed evidence associated with the case. 596 Fed.Appx. 24, 26 (2d Cir. 2015)(unpublished summary order), *cert. denied*, 136 S. Ct. 1532 (2016). The *Garcia* Court enumerated a three-pronged test, stating:

A party seeking an adverse inference instruction based on the destruction of evidence must establish (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Id. (“bad faith ‘need not be shown to justify an inference of spoliation’”; “an adverse inference instruction ‘may be appropriate in some cases involving the negligent destruction of evidence’”). Further, the Court stated that the “culpable mind” need not be intentional or bad faith conduct and may be appropriate in cases of “negligent destruction” of evidence. *Id.*

The Ninth Circuit

The Ninth Circuit addressed a similar issue in *United States v. Sivilla*, 714 F.3d 1168 (9th Cir. 2013), holding that while bad faith is required for the dismissal of an indictment based on the government’s destruction of evidence before trial, a remedial jury instruction may be warranted in the absence of bad faith. *Id.* at 1173 (“Bad faith is the wrong legal standard for a remedial jury instruction.”). In *Sivilla*, the defendant

asserted that the government violated his right to due process by failing to preserve potentially exculpatory evidence, which required the dismissal of the indictment, or alternatively, *required a corrective instruction regarding spoliation* of evidence to be given to the jury at trial. *Id.* at 1172. In determining whether to give an instruction on the spoliation of evidence, the Ninth Circuit employed a balancing test stating:

[O]ur principal concern is to provide the accused an opportunity to produce and examine all relevant evidence to insure a fair trial. [As such] Courts must *balance the quality of the Government's conduct against the degree of prejudice to the accused*, where the government bears the burden of justifying its conduct and the accused of demonstrating prejudice.

Id. at 1173. The Ninth Circuit continued to say that in *evaluating the government's conduct*, a reviewing court should inquire as to:

[W]hether the evidence was lost or destroyed while in its custody, whether the Government acted in disregard for the interests of the accused, whether it was *negligent* in failing to adhere to established and reasonable standards of care for police and prosecutorial functions, and, if the acts were deliberate, whether they were taken in good faith or with reasonable justification. It is relevant also to inquire whether the government attorneys prosecuting the case have participated in the events leading to loss or destruction of the evidence, for prosecutorial action may bear upon existence of a motive to harm the accused.

Id. Accordingly, no bad faith or intentional destruction is required under the balancing test in order to show entitlement to a jury instruction on spoliation. *Id.* at 1173–74.

Further, the important policy considerations that militate in favor of a spoliation instruction were articulated in *United States v. Loud Hawk*, 628 F.2d 1139, 1151 (9th Cir. 1979) (*en banc*) (Kennedy, J., concurring, joined by a majority of the *en banc* court) (“When criminal evidence is lost or destroyed, the court must protect a complex of

interests, some conflicting. Our principal concern is to provide the accused an opportunity to produce and examine all relevant evidence, to insure a fair trial Other considerations which bear upon the right to a fair trial are also present if intentional or culpable government action has caused the loss or destruction. The significant interest in such cases is to avoid the impairment of judicial integrity that would occur if the prosecution were allowed to manipulate court processes, and protective rulings or sanctions may be required both to insure a fair trial in a specific case and to deter future violations.”).

The Sixth Circuit

Likewise, the Sixth Circuit addressed this issue in *Stocker v. United States*, 705 F.3d 225 (6th Cir. 2013), concluding:

[A] party seeking an adverse inference instruction based on the destruction of evidence must establish (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to a party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Id. at 235. While *Stocker* was a civil case, the standard articulated by the Sixth Circuit in *Stocker* would appear to apply equally in a criminal context, where the policy considerations are at least as compelling as in civil proceedings. *Cf. United States v. Wright*, 260 F.3d 568, 571 (6th Cir. 2001) (addressing bad-faith standard applicable to a due process challenge seeking dismissal of an indictment for evidentiary destruction—relief far beyond the denial of a jury instruction at issue in *Stocker* and

in petitioner's case here). Thus, in determining what the "culpable state of mind" would be, the Court in *Stocker* explained: "The requisite 'culpable state of mind' may be established through a 'showing that the evidence was destroyed knowingly, even if without intent to breach a duty to preserve it,' but even *negligent* conduct may suffice to warrant spoliation sanctions under the appropriate circumstances." *Id.* (emphasis added). Similar to the three-pronged inquiry enumerated in *Garcia*, the *Stocker* Court requires that each element of the test be met, but not necessarily by proof of willful, or bad faith, conduct in connection with the alleged destruction. *Id.*; *see also Garcia*, 596 Fed.Appx. at 26.

The First Circuit

The First Circuit has addressed this issue in *United States v. Flores-Rivera*, 787 F.3d 1, 19 n. 13 (1st Cir. 2015). The court explained that the defendant would have been entitled to a "spoliation" jury instruction "allowing the jury to make an adverse inference that the destroyed evidence [at issue] was favorable to the defense." *Id.* The court came to this conclusion in considering whether the prosecution's failure to preserve an exculpatory letter constituted a violation of due process so great as to warrant dismissal of the indictment. *Id.* The court intimated that bad faith conduct was not required for the spoliation charge to be given, stating that although "the district court's finding of no bad faith prevented a new trial based on the destruction of evidence rationale alone, the [defendants] likely would have been entitled to a spoliation instruction." *Id.* The rationale expressed by the First Circuit in *Flores-*

Rivera is in accord with the decisions issued in courts in the Ninth, Second, and Sixth Circuits, stated above.

The Eleventh Circuit

The Eleventh Circuit declined to address whether bad faith conduct would be necessary to warrant an instruction on spoliation in a criminal case where the defense alleged that the government destroyed evidence. App. 7a. The Eleventh Circuit concluded: “[T]he district court did not abuse its discretion in refusing to give a spoliation jury instruction, ***because we have yet to recognize whether a spoliation jury instruction is applicable in a criminal context and decline to do so here.***” App. 6a–7a (emphasis added). Notably, in the context of reviewing a summary judgment granted in a civil case, the Eleventh Circuit held in *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997), that “an adverse inference is drawn from a party’s failure to preserve evidence only when the absence of that evidence is predicated on bad faith.” But the Eleventh Circuit found that none of its precedents required such analysis in the context of criminal jury instructions. App. 6a–7a.²

² At least one district judge in the trial court that rendered judgment in petitioner’s case, the district court for the Southern District of Florida, has relied on civil cases to conclude that a defendant was *not* entitled to a spoliation instruction in a criminal case because the defendant had failed to make a showing of *bad faith* destruction of the evidence. *United States v. Lanzon*, No. 06-20783-CR, 2009 WL 1270208 *2 (S.D. Fla. May 6, 2009). This rationale conflicts with other circuits because it requires bad faith and suggests that spoliation instructions in the criminal context are otherwise improper. On review in *United States v. Lanzon*, 639 F.3d 1293, 1302 (11th Cir. 2011), the Eleventh Circuit assumed, but did not hold, that a bad faith requirement would apply if a criminal defendant requested a jury instruction on spoliation.

The Fifth Circuit

The Fifth Circuit has also addressed the issue of whether a spoliation instruction is warranted in a criminal case, where the defendant asserts destruction of evidence by the government. *See United States v. Wise*, 221 F.3d 140, 155–56 (5th Cir. 2000). However, the Fifth Circuit adopted a ***contrary*** and ***conflicting*** test when compared to those of courts in the Sixth, Second, First, and Ninth Circuits discussed above. In *Wise*, the Fifth Circuit concluded that while a spoliation jury instruction could be proper in a criminal case, the defendant, as a threshold, matter had to first prove “evidence of bad faith” in the destruction of the evidence. *Id.* A requirement of bad faith is in conflict with the decisions of other circuits and, at the very least, warrants certiorari review. *See generally Yee*, 503 U.S. at 538 (1992) (“[Circuits] have reached conflicting results over whether such ordinances cause physical takings; such a conflict is, of course, a substantial reason for granting certiorari under this Court’s [discretionary power].”). *Cf. United States v. Miell*, 661 F.3d 995 (8th Cir. 2011) (noting that while the spoliation doctrine has been applied widely in civil cases, the issue as to whether the evidentiary doctrine of spoliation applies to criminal cases has not been determined); *Stepnes v. Ritschel*, 663 F.3d 952, 965 (8th Cir. 2011) (assuming that the spoliation inference could be applied to criminal cases, “[s]evere spoliation sanctions, such as an adverse inference instruction, are only appropriate upon a showing of bad faith”).

State Standards

In several of the states, a permissible spoliation inference may be invoked by the defendant against the prosecution, representing a recognition of the defendant's right to jury consideration of evidence that casts doubt on the prosecution's case. *See Thorne v. Department of Public Safety*, 774 P.2d 1326, 1331 (Alaska 1989); *State v. Willits*, 96 Ariz. 184, 191, 393 P.2d 274, 276 (Ariz. 1964) (establishing rule requiring the trial judge to give the following instruction if the prosecution destroys evidence: "If you find that the plaintiff, the State of Arizona, has destroyed, caused to be destroyed, or allowed to be destroyed any evidence whose contents or quality are in issue, you may infer that the true fact is against their interest."); *State v. Fain*, 116 Idaho 82, 774 P.2d 252, 266 (Idaho 1989); *People v. Wedgeworth*, 548 N.Y.S.2d 790 (N.Y. App. Div. 1989); *State v. Hartsfield*, 681 N.W.2d 626 (Iowa 2004) (spoliation instruction warranted where destruction was intentional); *State v. Dabas*, 71 A.3d 814, 830 (N.J. 2013) (trial court erred in denying adverse inference charge, because the prosecutor's office intentionally destroyed the interview notes when required to provide the notes to the defense; failure to give charge was clearly capable of producing an unjust result). *But see State v. Watley*, 109 N.M. 619, 788 P.2d 375 (N.M. Ct. App. 1989) (failure to give spoliation instruction not error because of general policy to leave weight of evidence to finder of fact).

The Better View in Light of Due Process Concerns

Petitioner asserts that the test articulated by courts in the Second and the Sixth Circuits is the correct and constitutionally permissible test, because it adequately accounts for the gravity of the constitutional rights at issue, with fairness to the judicial process.

As an initial matter, civil case law, which in some instances requires bad faith in order to warrant a spoliation instruction, does not account for the vast differences in the constitutional rights at issue in each proceeding as well as the process and general position of the litigants in each context respectively. As such, such civil case law is insufficient to govern spoliation situations which occur in the criminal context.

Specifically, decisions in civil cases interpreting the issue of spoliation fail to account for a multitude of differences between civil and criminal cases, for instance: (1) what is at stake in each type of litigation (liberty versus monetary harm); (2) the burden of proof (preponderance versus beyond a reasonable doubt); (3) the *position* of the litigants (two individuals of usually equal bargaining power and knowledge versus the power of the state against the individual); (4) the Sixth Amendment right of confrontation and to present evidence, which apply only in the criminal realm (present in criminal cases and not in civil cases); (5) the discovery process and the difficulty that the accused may have in discovering “bad faith” or “misconduct”; and (6) the government’s ethical and constitutional discovery obligations in the criminal context.

As to the first difference, liberty and potentially life are at stake in a criminal case, whereas a civil case could subject the losing party only to monetary strife. The Court has repeatedly discussed the importance of a stringent burden of proof in criminal matters, due to the magnitude of the rights at stake in such proceedings. In fact,

Mr. Justice Frankfurter stated that “it [is] the duty of the Government to establish guilt beyond a reasonable doubt [and] [t]his notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of due process.”

In re Winship, 397 U.S. 358, 362 (1970). The Court has also stated that these rules (requiring proof beyond a reasonable doubt) “are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty, and property.” *Id.* Clearly, the stakes in a criminal case are far removed from those at issue in a civil arena, and the standard for obtaining a spoliation instruction at trial should reflect this well-established principle.

Further, the litigants in a civil case generally stand on at least semi-equal footing; this is not the situation in a criminal context, where the full force of the government and all of its many resources have been unleashed upon an individual citizen. *See, e.g., Wardius v. Oregon*, 412 U.S. 470, 176–77 (1973) (recognizing the relative “balance of forces between the accused and his accuser” in a criminal case discussing the necessity of reciprocal discovery); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989) (recognizing that the government stands in a

position of power, relative to the accused, in a criminal proceeding); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (recognizing that the government is in a much more advantageous and knowledgeable position in litigation with a criminal defendant); *Luis v. United States*, 136 S. Ct. 1083, 1088–89 (2016) (explaining that the Sixth Amendment right to counsel is regarded as “a great engine by which an innocent man can make the truth of his innocence visible” because of the power discrepancy between the government and the accused).

Although the citizen has a right to counsel to assist him or her with a defense, the accused and his or her counsel are still at a disadvantage in discovering misconduct due to the *volume* of government agents at work in a criminal proceeding. The instant case is a clear example of such difficulties: The evidence at issue was not directly in the hand of the prosecutor when it was destroyed; instead, the evidence was *constructively* in the hands of the federal agent who had involvement with the original case. Even here there is difficulty, because the item destroyed was not technically *in the hands* of that agent; rather, it was in the hands of a locker or evidence room which was under the control of the government. The number of individuals that the defense would need to interview or depose in order to discover misconduct at any one of the many bureaucratic levels of the government would be almost insurmountable (particularly in light of the criminal defendant’s right to have a speedy trial). Requiring the criminal defendant to show misconduct would be in most instances

nearly impossible, simply due to the difficulty of locating the actual *individual person* who was *responsible* for the destruction to begin with.

In addition, the test for spoliation in the civil context is simply insufficient in a criminal trial because the right of confrontation is not applicable in a civil case. *See Carty v. Nelson*, 426 F.3d 1064 (9th Cir. 2005) (finding that the Sixth Amendment right to confrontation does not attach in *any* civil proceedings, even if those proceedings could result in the loss of liberty); *Peretti v. Nat'l Transp. Safety Board, F.A.A.*, 999 F.2d 548, *1 (10th Cir. 1993)(unpublished) (“By its own unequivocal terms, the constitutional right of confrontation applies only ‘[i]n all *criminal* proceedings.’”). The right of a defendant to confront the evidence against him or her, as well as his or her accuser, requires access to all of that evidence which was collected by the government with a purpose of use in litigation.

Moreover, a civil test requiring bad faith fails to account for the fact that the government in a criminal case is under both ethical and constitutional obligations to disclose *any potentially exculpatory evidence* to the accused during discovery. *See Brady v. Maryland*, 373 U.S. 83, 89–91 (1963). In the civil context, discovery is limited to what a party requests from the opposing litigant, as well as what the litigant *intends to use at trial*. *See* Fed. R. Civ. P. 26. Indeed, “[t]he prosecution’s affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation.” *Kyles v. Whitley*, 514 U.S. 419, 432 (1995). There is no consideration of the good or bad faith of the government when

considering whether the evidence was withheld under *Brady* and its progeny. *Id.* 432–33. Likewise, the consideration of *destruction* of evidence, which *necessarily* cannot be disclosed after its destruction, should not assess the good or bad faith of government agents, but instead should focus only on the right of the accused to have access to that relevant evidence. The Court has recognized the importance of negligence in a police investigation as a factor in the presentation of the defense. *Kyles v. Whitley*, 514 U.S. at 447, 449 (citing the utility to the defense of a “vigorous argument that the police had been guilty of negligence” and these investigative failures could then be “used to cap an attack on the integrity of the investigation”).

Finally, *bad faith conduct* which leads to destruction of evidence in a criminal context justifies ***dismissal of the indictment altogether***, rendering the necessity of a jury instruction on spoliation a nullity (as the case should not proceed to trial). In *Arizona v. Youngblood*, the Court explained that due process is offended where law enforcement fails to preserve useful evidence ***in bad faith***. 488 U.S. 51, 57–58 (1988). The Court propounded a dual rationale for imposing a *bad faith* requirement in this context, recognizing, first, the harsh consequence of dismissing an indictment upon a successful claim of destruction, and, second, the difficulty in requiring law enforcement to preserve every piece of evidence that they collect. *Id.* Accordingly, if the Court were to impose an obligation to show *bad faith conduct*, it would in essence render the test a nullity, since bad faith conduct leading to destruction of the evidence already warrants *dismissal of the case* under well-established precedent. Allowing a spoliation

instruction, which is a less harsh remedy than dismissal, for *less culpable* (negligent) destruction is actually in accord with prior precedent of this Court.

Based on all of these considerations, a bad faith requirement in determining entitlement to a spoliation instruction at trial is simply insufficient and inadequate to protect the constitutional rights of a criminal defendant. Although such a requirement may be just in the civil arena, the plethora of differences between criminal and civil litigation, and their litigants, necessitates a test which does not account for the bad faith or good intentions of the government in destroying *relevant* evidence. Accordingly, this Court should adopt the test enumerated by courts in the Second and Sixth Circuits, focusing on the government's obligation to preserve evidence at the time it was destroyed, the culpable state of mind, and the relevance of the destroyed evidence to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Petitioner's case presents a conflict between the circuits on the same point of law: namely, the requirement of a spoliation instruction in a criminal case where the defendant alleges destruction of evidence and the culpability required for recitation of the spoliation charge. The narrow spoliation rule applied in some civil cases should not be applied in criminal cases to require a showing of bad faith. Unlike a civil case, where evidence might be lost or destroyed before a litigant is aware of its import in future litigation, evidence held by the government in a criminal case has been collected for the exclusive purpose of supporting a prosecution. The government should be held

to a higher standard regarding preservation of the evidence. The loss or destruction of evidence by the government in a criminal case implicates constitutional due process protections. A requested adverse inference instruction is warranted in a criminal case when the government negligently destroys evidence. Under that standard, the instruction should have been given in petitioner's case.

At the time the decision was made to destroy the GSR and DNA evidence, it was in the constructive possession of federal law enforcement agents. ATF agents were involved in investigating this case from the very beginning, in cooperation with local police officers. ATF Special Agents Jennifer Meehan and Mark Haddad participated in a lengthy interview of petitioner shortly after his arrest. While the evidence was housed at the City of Miami Police Department, Agent Meehan had the authority to assert control over the evidence, as established by her May 5, 2015 email and May 15, 2015 letter asserting her intention to exercise dominion and control over the evidence. *Cf. United States v. Hill*, 799 F.3d 1318, 1321 (11th Cir. 2015) ("A defendant is in constructive possession of [an item] when the defendant does not actually possess the [item] but instead knowingly has the power or right, and intention to exercise dominion and control over the [item]" (internal quotation marks omitted)).

Although Agent Meehan had constructive possession of the GSR and DNA evidence, she failed to take effective measures to ensure that it was retained. Upon learning that state authorities might have decided not to pursue charges against petitioner, Agent Meehan made an informal request on May 5, 2015, for a temporary

hold on the evidence, until she could make a more formal request on letterhead. Agent Meehan failed to make that formal request even after the federal indictment was returned on August 10, 2015. The evidence was targeted for destruction only after Agent Meehan failed for nearly five months to follow up her email with a formal request for long-term retention of the evidence.

Further, there can be no doubt that the evidence was destroyed intentionally. The government reported the evidence was moved to a warehouse on September 25, 2015; moved to a “General Destroy Area” on October 5, 2015; and destroyed on October 19, 2015. Although Agent Meehan requested testing of the GSR kit on October 15, 2015, that request came too late. The evidence already had been designated for destruction and moved to an area used to store evidence targeted for destruction, and the police department mistakenly reported that it already had been destroyed.

Petitioner was prejudiced by the district court’s refusal to instruct the jury that the government’s intentional destruction of the evidence could support an inference adverse to the government. The jury was presented with two possible bases for finding petitioner possessed a firearm: the hearsay account of the woman who told Officer Rivera that petitioner had fired a gun, and petitioner’s rambling and confusing post-arrest statement. The jury may well have disregarded the post-arrest statement, given petitioner’s clear struggles to communicate in English, and the difficulty in following what he was saying. The jury’s verdict would then have been dependent on the hearsay declarant’s claim that petitioner fired a gun. Proof that the GSR test

exonerated petitioner of the gun discharge accusation would have disproved the woman's hearsay statement. Evidence that petitioner's DNA was not on the gun also would have weakened the impact of the woman's testimony. If the woman's testimony were discredited, petitioner may well have been acquitted of the gun possession offenses charged in Counts 1 and 3.

"[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

Because the government intentionally destroyed GSR and DNA evidence, petitioner was entitled to a jury instruction stating the destruction of evidence could provide a basis for an adverse finding against the government.

- 2. The resolution of an instructional error on the categorical basis that a district court does not err in denying an instruction absent prior binding precedent requiring the instruction unduly constricts the right of appellate review.**

"Certiorari jurisdiction exists to clarify the law, [and] its exercise is not a matter of right, but of judicial discretion." *Cty & Cnty of San Francisco, Cal. v. Sheehan*, 135 S. Ct. 1765, 1774 (2015). *See also Rogers v. United States*, 522 U.S. 252, 259 (1998) (O'Connor, J., concurring) ("[W]e grant certiorari to address [] important issue[s] of constitutional law."). Further, certiorari review is appropriate where *special and important reasons exist*, which warrant the exercise of the (Brennan, J., dissenting).

Generally, the district court's decision to give, or refrain from giving, a requested jury instruction is reviewed under a mixed standard. The jury instructions as a whole are reviewed *de novo* to ensure that they adequately and correctly state the governing law; the district court's decision to refuse to give a *particular* instruction, however, is reviewed for abuse of discretion. *See United States v. Bradshaw*, 580 F. 3d 1129, 1134–35 (10th Cir. 2009). Where counsel fails to request a specific instruction or to object to the instructions as given, the district court's failure to include the stated instruction is reviewed under a plain error standard. *See United States v. Bear*, 439 F. 3d 565 (9th Cir. 2006) (citing *Johnson v. United States*, 520 U.S. 461 (1997)). *See also United States v. Bedford*, 536 F. 3d 1148, 1152 (10th Cir. 2008) (explaining that failure to object to an instruction, or request it, is reviewed for plain error).

This has been the standard which governs review of *all cases* in which the defendant asserts that the district court erred by failing to give a requested jury instruction. It is also well recognized, and critical to our system of justice, that a defendant in a criminal case has an absolute constitutional right to present a defense, including his theory of defense, and is *entitled* to a jury instruction regarding that theory. *See Bedford*, 536 F. 3d at 1154 (“A defendant is entitled to a theory of defense instruction if it is a correct statement of the law, and if he [or she] has offered sufficient evidence for the jury to find in his [or her] favor.”); *Bradshaw*, 580 F. 3d at 1135 (“It is axiomatic (and important) that a defendant is entitled to an instruction stating the law on his theory of the case.”).

In considering whether to give a proposed instruction, “the relevant inquiry is whether the instructions as a whole are misleading or inadequate to guide the jury’s deliberation.” *United States v. Anderson*, 741 F. 3d 938, 947 (9th Cir. 2013). Where the proposed instruction is not misleading or inadequate, the instruction should be given, and failure to do so constitutes an abuse of discretion. *Id.*; see also *McCarthy v. Kunicki*, 823 N.E.2d 1088, 1099–1100 (Ill. App. Ct. 2005) (“Each party has the right to have the jury clearly and fairly instructed upon each theory which was supported by the evidence. The test in determining the propriety of tendered instructions is whether the jury was fairly, fully, and comprehensively informed as to the relevant principles, considering the instructions in their entirety. The decision to give or deny a jury instruction is within the discretion of the circuit court, and a new trial should be granted only if a party’s right to a fair trial has been prejudiced seriously.”).

Further, the abuse of discretion analysis requires the reviewing court to determine whether the court’s exclusion of a requested instruction was either illogical, implausible, or without support from the record. See *United States v. Sivilla*, 714 F. 3d 1168, 1173 (9th Cir. 2013).

The Eleventh Circuit ratified the district court’s refusal to instruct petitioner’s jury as to a spoliation defense, not as an exercise of sound *discretion*, and not by reviewing whether such decision was *logical*, *plausible* and *supported by the record*, but rather on the categorical basis that no existing *law of the circuit* required that the instruction be given. The review standard the Eleventh Circuit endorsed flies in the

face of well-settled precedent, and further, denies a criminal defendant of an adequate review of the instructional error.

The Eleventh Circuit, under its categorical “law require” standard, ignores the established relevant questions and inquiry for abuse of discretion analysis. Further, finding no abuse of discretion merely because no circuit decision requires the charge to the jury impermissibly broadens the trial court’s discretion to deny virtually all proposed defense instructions unless a prior decision had resolved their applicability in other cases. Arguably, a *majority* of defense requested instructions are not categorically *required* and are merely permissive within the sound discretion of the trial court in criminal cases.

Under a rule that allows a trial court’s refusal to give instruction because such instructions are permissive rather than mandatory would confer on the trial courts the authority to *carte blanche* deny a substantial majority of proposed defense instructions. Such a rule has a strongly adverse impact on the Sixth Amendment right of a criminal defendant to present a defense, and to a fair trial.

In addition, the “law requires” standard seemingly conflates the review standard of discretionary instructions and mandatory instructions—the former being instructions on law in the case, and the latter being any instruction which directly implicates the theory of the case. Finding no abuse of discretion where the proposed instruction is not *required* by prior on-point circuit decision (and is, accordingly, discretionary) eliminates the discretionary giving of instructions altogether. All

proposed criminal instructions would become either mandatory and required, or not required. No further analysis would be permissible where the trial court denied an instruction that is not mandatory under the law; and the trial court would be free to arbitrarily and capriciously refuse to give requested instructions on a whim and be completely justified in situations such as petitioner's, where no binding case law in the Eleventh Circuit directly *requires* the jury charge requested.

Accordingly, this issue is of great importance and has a profound impact on the Fifth and Sixth Amendment rights of petitioner and all criminal defendants, and petitioner seeks certiorari review of the enumerated new "law requires" standard, articulated by the Eleventh Circuit below.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

JACQUELINE E. SHAPIRO, ESQ.

Counsel for Petitioner

Miami, Florida

March 2018

APPENDIX

APPENDIX

Decision of the Court of Appeals for the Eleventh Circuit, <i>United States</i> <i>v. Jacques</i> , No. 16-10254 (Dec. 1, 2017)	1a
Judgment of Conviction, United States District Court, S.D. Fla., <i>United</i> <i>States v. Jacques</i> , No. 15-cr-20613-DMM (Jan. 20, 2016)	8a

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-10254

D.C. Docket No. 1:15-cr-20613-DMM-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

PATRICK JACQUES,

Defendant - Appellant.

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

(December 1, 2017)

Before WILSON and ROSENBAUM, Circuit Judges, and TITUS,* District Judge.

PER CURIAM:

* Honorable Roger W. Titus, United States District Judge for the District of Maryland, sitting by designation.

Patrick Jacques appeals his below-the-guidelines range sentence, imposed after he was convicted by a jury for (1) possession of a firearm and ammunition by a felon, (2) possession of a firearm in furtherance of a drug trafficking crime, and (3) possession of a controlled substance with the intent to distribute. On appeal, Jacques argues that his trial was plagued by several errors: insufficient evidence, improperly admitted testimony, prosecutorial misconduct, and erroneous jury instructions. Although he contends that any of these errors alone warrants relief, Jacques claims that the multiple errors worked together, causing his trial to be fundamentally unfair. Jacques also argues that the district court made a sentencing error in designating him as a career offender. After a careful review of the parties' briefs, the record, and with the benefit of oral argument, we affirm.

On September 24, 2014, Patrol Officer Edgar Rivera of the Miami Police Department was on duty in the "Little Haiti" neighborhood of Miami when he received an assault call. At the scene, he spoke to a woman who gave him a description of her assailants. Officer Rivera was parked just a few blocks away writing up his incident report when he received another assault call from the same address; this time for shots fired. He drove the short distance back to the scene and again spoke to the same woman, who now reported that a couple in a gray Nissan with paper license plates had approached her and fired a gun at her. The woman provided a description of the couple and a partial license plate number. Officer

Rivera responded by issuing a “be on the lookout” (BOLO) notice for the alleged assailants, the car, and the partial license plate number.

Nearby, Patrol Officer Reynold Philippe, who was also on duty in Little Haiti, spotted a car and a couple matching the description of Officer Rivera’s BOLO—a gray Nissan Altima with a female driver and a male passenger. Officer Philippe, with the assistance of other officers, pursued the car and ordered its occupants out. The female driver was identified as Marlene Phanor and the male passenger was identified as Patrick Jacques. The car, which belonged to Phanor, was searched at the scene. From it, the police recovered a small .32 caliber handgun, 37 individual baggies of marijuana, and a pill bottle containing 10 rocks of crack cocaine, all concealed in the trunk. Both Jacques and Phanor were arrested and transported to the police station in separate vehicles.

At the station, Jacques was interrogated by Officer Philippe and two Bureau of Alcohol, Tobacco, and Firearms (ATF) agents. During the interrogation, and after waiving his rights, Jacques made several incriminating admissions and statements. He admitted to being near or at the address where the incidents occurred. He claimed that he was there arguing with a man whom he identified only as “Peterson,” and Peterson’s girlfriend. Jacques said that Peterson shot at him—not the other way around, as was reported by the woman that spoke to Officer Rivera. Jacques also disclosed that he had been smoking marijuana that

day and that he had some marijuana in the ashtray of the car, or on his person. But he denied selling marijuana that day and he denied having ever sold crack cocaine. Jacques, however, indicated that he had sold marijuana in the past and expressed that, on that day, he had “at least like 175 weed.” Jacques also revealed that he had knowledge of what he described as a “bomb” in the car. Moreover, while Jacques initially denied knowing about the gun, he eventually divulged that he was the one that put the gun in the trunk; he has always denied firing it.

At trial, no gunshot residue (GSR) or DNA evidence was presented because the evidence had been destroyed. Officer Philippe testified as a lay witness regarding the interrogation and Detective Wayne Tillman testified as an expert based on his experience as an undercover narcotics officer. Detective Tillman testified as to the street value of the crack cocaine and marijuana, as well as to the packaging of the marijuana that was found in the car, opining that the substances were intended for distribution. More specifically, Detective Tillman testified that the 37 individual bags of marijuana recovered from the car were packaged in small zip-lock baggies and that each bag would likely sell for \$5 on the street—meaning the amount of marijuana in the car was worth approximately \$185.00. Detective Tillman also testified to the meaning of the term “bomb,” explaining that it means a container or bag with smaller amounts of drugs in it. Finally, Detective Tillman

testified that the gun found in the car was frequently used by drug dealers because it was small and easy to conceal.

Jacques was convicted. At sentencing, Jacques objected to his career offender designation. His objection was overruled, and he was sentenced to 120 months' imprisonment. He timely appealed.

Jacques' various trial-related arguments fail because there were either no errors at all or only harmless ones; and none of them worked together to create the kind of fundamental unfairness needed to raise a cumulative effect of errors claim. There also was no error in Jacques' classification as a career offender. We briefly discuss each argument in turn.

First, there was sufficient evidence to support Jacques' conviction. His own statement not only establishes that he had marijuana on the day that he was arrested and that he frequently sold it, but it also places the gun in his possession. Vacating a jury's guilty verdict is appropriate only when no "reasonable construction of the evidence" points to guilt beyond a reasonable doubt. *United States v. Wilson*, 788 F.3d 1298, 1308 (11th Cir. 2015) (internal quotation marks omitted). Given the evidence, the jury was not unreasonable in finding that Jacques was guilty.

Second, the testimony by Officer Philippe regarding Jacques' interrogation was admissible. But even if some of it was admitted in error, it was harmless

because Jacques was not prejudiced. Officer Philippe’s testimony was based on his own personal perceptions from his participation in the interrogation. It was also helpful to the jury. We have held that lay opinion testimony is admissible when it is based on the witness’s personal knowledge or perceptions and is helpful to the jury in determining an issue of fact. *United States v. Rivera*, 780 F.3d 1084, 1094 (11th Cir. 2015); *United States v. Moran*, 778 F.3d 942, 967 (11th Cir. 2015). All the same, Officer Philippe’s testimony was duplicative of Detective Tillman’s testimony; thus, if there was any error in admitting it, such error was harmless.

Third, Jacques challenges the prosecutor’s remarks during closing arguments. While the prosecutor’s remark implying that the police only arrest criminals was improper, it did not warrant reversal given that Jacques’ substantial rights were not prejudiced. *United States v. Lopez*, 590 F.3d 1238, 1256–57 (11th Cir. 2009) (explaining that a “reasonable probability [] that, but for the remarks, the outcome of the trial would have been different” is necessary for reversal) (internal quotation marks omitted). It was only one stray remark in a lengthy closing argument and the jury likely would have convicted Jacques irrespective of the remark. Jacques’ own statements made up the other evidence against him, which was strong proof of his guilt.

Fourth, the district court did not abuse its discretion in refusing to give a spoliation jury instruction, because we have yet to recognize whether a spoliation

jury instruction is applicable in a criminal context and decline to do so here.

Because the law is unclear, there is no way to establish that Jacques' instruction was a correct statement of the law, meaning that the district court was not required to give the instruction. *United States v. Lanzon*, 639 F.3d 1293, 1302 (11th Cir. 2011).

Finally, Jacques' career offender designation was not erroneous. Regardless of whether Florida burglary of an occupied dwelling is a crime of violence under the enumerated clause, it is so under the residual clause. *Beckles v. United States*, 580 U.S. ___, ___, 137 S. Ct. 886, 890 (2017).

AFFIRMED.

UNITED STATES DISTRICT COURT
Southern District of Florida
Miami Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

Case Number: **15-20613-CR-MIDDLEBROOKS****PATRICK JACQUES**USM Number: **06302-104**

Counsel For Defendant: **Ayuban Antonio Tomas**
 Counsel For The United States: **Ilham A. Hosseini**
 Court Reporter: **Carleen Horenkamp**

The defendant was found guilty on counts 1, 2 and 3 of the Indictment.

The defendant is adjudicated guilty of these offenses:

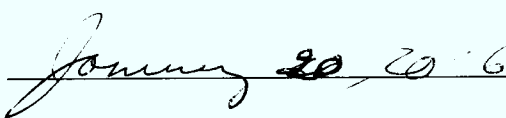
<u>TITLE & SECTION</u>	<u>NATURE OF OFFENSE</u>	<u>OFFENSE ENDED</u>	<u>COUNT</u>
18 U.S.C. 922(g)(1)	Possession of a Firearm and Ammunition by a Convicted Felon	09/24/2014	1
18 U.S.C. 841(a)(1)	Possession With Intent to Distribute a Controlled Substance	09/24/2014	2
18 U.S.C. 924(c)(1)(A)	Possession of a Firearm in Furtherance of a Drug Trafficking Crime	09/24/2014	3

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

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

Date of Imposition of Sentence: **1/14/2016**


Paul C. Huck
United States Senior District Judge

Date: 

DEFENDANT: **PATRICK JACQUES**
CASE NUMBER: **15-20613-CR-MIDDLEBROOKS**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **120 Months. This Term consist of 60 Months as to Count 1 and 60 Months as to Count 2 to run Concurrent, and 60 Months as to Count 3, to run consecutive to Count 1 and 2.**

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

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

DEPUTY UNITED STATES MARSHAL

DEFENDANT: **PATRICK JACQUES**
CASE NUMBER: **15-20613-CR-MIDDLEBROOKS**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years as to Counts 1 and 2 to run concurrent and 5 years as to Count 3 also to run concurrent.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first fifteen days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: PATRICK JACQUES
CASE NUMBER: 15-20613-CR-MIDDLEBROOKS

SPECIAL CONDITIONS OF SUPERVISION

Mental Health Treatment - The defendant shall participate in an approved inpatient/outpatient mental health treatment program. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Permissible Search - The defendant shall submit to a search of his person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Substance Abuse Treatment - The defendant shall participate in an approved treatment program for drug and/or alcohol abuse and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

Surrendering to Immigration for Removal After Imprisonment - At the completion of the defendant's term of imprisonment, the defendant shall be surrendered to the custody of the U.S. Immigration and Customs Enforcement for removal proceedings consistent with the Immigration and Nationality Act. If removed, the defendant shall not reenter the United States without the prior written permission of the Undersecretary for Border and Transportation Security. The term of supervised release shall be non-reporting while the defendant is residing outside the United States. If the defendant reenters the United States within the term of supervised release, the defendant is to report to the nearest U.S. Probation Office within 72 hours of the defendant's arrival.

Home Detention with Electronic Monitoring - The Defendant shall be placed on the Home Confinement Program until he is removed. During this time, the Defendant shall remain at his place of residence except for employment and other activities approved in advance, and provide the U.S. Probation Officer with requested documentation. The Defendant shall maintain a telephone at his place of residence without 'call forwarding,' 'call waiting,' a modem, 'caller ID,' or 'call back/call block' services for the above period. The Defendant shall wear an electronic monitoring device and follow the electronic monitoring procedures as instructed by the U.S. Probation Officer. The Defendant shall pay for the electronic monitoring equipment at the prevailing rate or in accordance with ability to pay. After Six (6) months of home detention, and if the Defendant is in full compliance with all of the terms of his supervised release, the Defendant may file a motion to modify the terms and conditions of the supervised release, which the Court will consider at that time.

DEFENDANT: **PATRICK JACQUES**
CASE NUMBER: **15-20613-CR-MIDDLEBROOKS**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$300.00	\$0.00	\$0.00

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

<u>NAME OF PAYEE</u>	<u>TOTAL LOSS*</u>	<u>RESTITUTION ORDERED</u>	<u>PRIORITY OR PERCENTAGE</u>
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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

**Assessment due immediately unless otherwise ordered by the Court.

DEFENDANT: **PATRICK JACQUES**
CASE NUMBER: **15-20613-CR-MIDDLEBROOKS**

SCHEDULE OF PAYMENTS

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

A. Lump sum payment of \$300.00 due immediately.

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

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

This assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 08N09
MIAMI, FLORIDA 33128-7716

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

<u>CASE NUMBER</u>	<u>TOTAL AMOUNT</u>	<u>JOINT AND SEVERAL AMOUNT</u>
<u>DEFENDANT AND CO-DEFENDANT NAMES (INCLUDING DEFENDANT NUMBER)</u>		

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