Nos. 12-218, 12-5847

In The Supreme Court of the United States

JAMES BROOKS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

WESLEY C. WALTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

JEFFREY T. GREEN
Co-Chair, Amicus Committee
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
1660 L St., N.W.
Washington, DC 20036
(202) 872-8600

JOHN D. CLINE
Counsel of Record
LAW OFFICE OF JOHN D. CLINE
235 Montgomery St.
Suite 1070
San Francisco, CA 94104
(415) 322-8319
cline@johndclinelaw.com
Counsel for Amicus Curiae National Association of Criminal Defense Lawyers

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Under what circumstances may a trial court grant, or compel the prosecution to grant, use immunity to a witness who has essential exculpatory evidence unavailable from other sources but who invokes his Fifth Amendment privilege against self-incrimination?

2. Given the requirements of *Global-Tech Appliances, Inc. v. SAB, S.A.*, 131 S. Ct. 2060 (2011), how should the jury be instructed on willful blindness in a criminal case?

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INTEREST OF AMICUS CURIAE[1]

Amicus National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL files numerous amicus briefs each year in this Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. These petitions present two such issues: the recurring question of the circumstances

[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties received timely notice of amicus' intent to file this brief under Sup. Ct. R. 37.2(a). Letters of consent to the filing of this brief have been lodged with the Clerk of the Court.

under which potential defense witnesses who intend to assert their Fifth Amendment rights must be granted immunity from prosecution, and the content of a willful blindness instruction in criminal cases following this Court's decision in *Global-Tech Appliances, Inc. v. SAB, S.A.*, 131 S. Ct. 2060 (2011). NACDL believes that its views on these important criminal justice questions will be of value to the Court.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE SPLIT IN THE CIRCUITS CONCERNING DEFENSE WITNESS IMMUNITY AND TO PROTECT THE CRIMINAL DEFENDANT'S RIGHT TO PRESENT A DEFENSE.

The defense witness immunity question presented in Walton's petition raises a recurring problem in federal criminal cases that requires this Court's intervention. The problem typically arises as follows: Federal prosecutors and agents begin investigating a potential offense. The investigation reveals persons who were involved in culpable conduct but are more valuable as witnesses than as targets of prosecution. The prosecutor grants these persons immunity, under which the prosecutor and agents interview them pretrial.[2] Some of the

[2] Immunity may be either informal "letter" immunity or obtained through court order under 18 U.S.C. § 6002. This example assumes informal immunity, the more common variety. As an alternative to formal or informal immunity, the prosecutor may obtain a guilty plea from the person under a

immunized persons provide information that inculpates the targets of the investigation. Others provide exculpatory information.

The investigation eventually produces an indictment. The case proceeds to trial. The prosecutor chooses as trial witnesses the immunized persons with the most powerfully inculpatory testimony. The prosecutor extends the immunity to include those persons' trial testimony. The witnesses appear in the prosecution's case-in-chief and give testimony that inculpates the defendant. The prosecutor does not call as witnesses the persons who have information that exculpates the defendant.

The defense subpoenas those persons to testify in the defense case. But the prosecutor refuses to extend the immunity to include the potential witnesses' trial testimony. The prosecutor may even tell the potential witnesses (or their counsel) that he views their exculpatory information as false and will consider charging them if they give exculpatory testimony at trial.

The witnesses assert their Fifth Amendment rights and decline to testify when called by the defense. The defendant asks the district court either

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(continued…)

cooperation agreement and delay his sentencing until after the main target's trial. That is what happened here with potential defense witness Don Guilbault. Pet. App., Appendix A, at 11. The two principal fact patterns--immunized witnesses and guilty-pleading cooperating witnesses--are largely indistinguishable for purposes of the issue presented here.

to grant the witnesses use immunity or to order the prosecutor to do so. This request requires the trial judge to consider three interests: the interest of the executive branch in deciding whom to prosecute (and thus whom to immunize); the witnesses' Fifth Amendment right to avoid compelled self-incrimination; and the defendant's Fifth and Sixth Amendment right to present a defense.

As the Walton petition outlines, the courts of appeals have adopted divergent and conflicting positions on how to reconcile these interests. Some circuits--including the Fifth--require proof of "government abuse" before a defense witness can be immunized.[3] The Third Circuit requires a showing that the witness has essential exculpatory testimony and there is no strong countervailing government interest.[4] The Ninth Circuit holds that the district court can grant immunity if the defense witness' proposed testimony contradicts an immunized prosecution witness and the absence of the testimony would distort the factfinding process.[5]

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[3] *E.g.*, Walton Pet. App., Appendix A, at 24-25. The Eleventh Circuit appears to go even farther and flatly ban any defense witness immunity. *See United States v. Merrill*, 685 F.3d 1002, 1015 (11th Cir. 2012) (federal courts "have no authority to grant witnesses use immunity. Congress has placed the power to grant use immunity exclusively in the Executive Branch.") (quotation and ellipsis omitted).

[4] *See, e.g., Government of Virgin Islands v. Smith*, 615 F.2d 964, 973 (3d Cir. 1980).

[5] *See, e.g., United States v. Straub*, 538 F.3d 1147, 1160-62 (9th Cir. 2008).

The circuits thus disagree along two principal lines: whether a federal court can grant defense witness immunity (or order the prosecutor to grant it) *at all* and, if so, whether the court can do so only on a showing of abuse or misconduct by the prosecution. This conflict among the circuits has lasted for decades, *see, e.g., United States v. Thevis*, 665 F.2d 616, 639 (5th Cir. 1982) (noting "widely divergent opinions" on the issue), and shows no sign of abating. No amount of further consideration by the courts of appeals will resolve it.

The Fifth Circuit's position--requiring a showing of government "abuse"--gives too much weight to the executive's control of prosecutions and dramatically undervalues the defendant's Fifth and Sixth Amendment right to present a defense. *See, e.g., Holmes v. South Carolina*, 547 U.S. 319, 324 (2006); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). As a practical matter, courts never find that the prosecutor engages in abuse merely by immunizing witnesses with inculpatory evidence and refusing to immunize those with exculpatory testimony. Nor will abuse be found even when the prosecutor pointedly cautions the witness or his counsel that the prosecutor views the potential exculpatory defense testimony as false and the witness then decides to assert his Fifth Amendment privilege.

The Fifth Circuit's standard for defense witness immunity gives the prosecution extraordinary power to skew the information presented to the jury and thus to distort the factfinding process.

As in the example above, the prosecutor can compel inculpatory testimony through immunity grants while effectively barring exculpatory defense testimony by withholding immunity and, if necessary, issuing thinly-veiled threats to potential defense witnesses.

That is what happened here. Two potential witnesses--both physical natural gas traders for El Paso Corp.--pleaded guilty, signed cooperation agreements, and provided information concerning petitioner Walton. One witness--Dallas Dean--inculpated Walton. The other witness--Don Guilbault--exculpated Walton. The prosecution presented Dean's testimony in its case-in-chief. But it withheld immunity from Guilbault and warned his counsel the night before he was to testify for the defense that it had concerns about his veracity. Guilbault got the message and asserted his Fifth Amendment rights. *Cf. Webb v. Texas*, 409 U.S. 95, 97 (1972) (finding due process violation where trial judge pointedly admonished defense witness on dangers of perjury and witness declined to testify). The district court refused to grant Guilbault immunity. As a consequence, the jury only heard half the story--the prosecution's half. The Fifth Circuit found no government "abuse" and thus affirmed. Walton Pet. App., Appendix A, at 24-25.

The Fifth Circuit's rule violates the defendant's Fifth and Sixth Amendment right to a "meaningful opportunity to present a complete defense." *Holmes*, 547 U.S. at 324 (quotation omitted). It also stands in tension with this Court's

cases, in a variety of contexts, barring the government from suppressing important exculpatory evidence in criminal cases. *E.g., Brady v. Maryland*, 373 U.S. 83 (1963) (prosecutor's duty to disclose material exculpatory evidence); *Jencks v. United States*, 353 U.S. 657 (1957) (requiring production of prior statements of prosecution witnesses); *Roviaro v. United States*, 353 U.S. 53 (1957) (requiring disclosure of informant's name where name was "relevant and helpful to the defense of an accused" or "essential to a fair determination of a cause"). And the Fifth Circuit rule undermines the Court's insistence on preserving the "balance of forces" between the prosecution and defense as a matter of due process. *Wardius v. Oregon*, 412 U.S. 470, 474 (1973).

The circumstances under which the criminal defendant can obtain immunity for a vital witness who properly invokes his Fifth Amendment rights presents an issue of surpassing importance. It arises every day in the federal trial courts. It has hopelessly divided the courts of appeals. The Court should grant the writ both to protect the fundamental right of a criminal defendant to present a defense and to establish a uniform national rule for defense witness immunity.

II. THE COURT SHOULD GRANT THE WRIT TO ENSURE THAT THE LOWER FEDERAL COURTS APPLY *GLOBAL-TECH* FAITHFULLY IN CRIMINAL CASES.

The petitions present a second question that merits this Court's attention: the standard for giving a "willful blindness" instruction in a criminal case following this Court's decision in *Global-Tech Appliances, Inc. v. SAB, S.A.*, 131 S. Ct. 2060 (2011). The willful blindness instruction, once given "rarely,"[6] now appears routinely in cases where knowledge is an element of the offense.[7] *Global-Tech* holds, in a civil patent case, that willful blindness requires "deliberate actions to avoid learning" the fact at issue and that even recklessness does not suffice. 131 S. Ct. at 2070.

Following *Global-Tech*, the courts of appeals have taken inconsistent positions on the propriety and content of the willful blindness instruction in criminal cases. Two circuits--the Third and the Eighth--have revised their model criminal instructions to reflect the *Global-Tech* requirements.[8] The Fourth Circuit has embraced those requirements as

[6] *United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990); *see, e.g.,* Wayne R. LaFave, *Criminal Law* §5.2(c), at 248 n.27 (4th ed. 2003).

[7] *E.g., United States v. Heredia*, 483 F.3d 913, 924 n.16 (9th Cir. 2007) (en banc) (disavowing statements in past cases that conscious avoidance instruction should rarely be given).

[8] Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction 7.04 (2012); Third Circuit Model Criminal Instructions, Instruction 5.06 (2011).

well.[9] But several other courts, including the Fifth Circuit here, have declined to conform their willful blindness instructions to *Global-Tech* in criminal cases.

The disarray in the courts of appeals may stem from the fact that *Global-Tech* is a civil case. The decision thus does not directly address the considerations that counsel prudence in the use of the willful blindness instruction in a criminal case. Nor does *Global-Tech* squarely determine the content of the instruction in the criminal context. This case affords an opportunity to make clear that the strict *Global-Tech* willful blindness formulation controls in criminal cases such as this.

A. The Shaky Foundation of Willful Blindness in Federal Criminal Law.

United States v. Jewell, 532 F.2d 697 (9th Cir. 1976) (en banc), the seminal willful blindness case in federal criminal law, has been cited scores of times in legal literature and case law. *See, e.g.*, Wayne R. LaFave, *Criminal Law* § 5.2 (4th ed. 2003) (cited in text and in five footnotes). Then-Judge Anthony Kennedy wrote the *Jewell* dissent. His opinion pointed out serious difficulties with a jury instruction that risks converting the mens rea element of "knowledge" into something less, such as recklessness or even negligence. *See Jewell*, 532 F.2d at 705-08 (Kennedy, J., dissenting). Justice Kennedy reiterated those concerns thirty-five years

[9] *See United States v. Jinwright*, 683 F.3d 671, 480-81 (4th Cir. 2012).

later, in his *Global-Tech* dissent. *See* 131 S. Ct. at 2072-73 (Kennedy, J., dissenting). Professor Ira Robbins, in a leading article, raises a similar criticism. Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. Crim. L. & Criminology 191 (1990).

Justice Kennedy's *Jewell* and *Global-Tech* dissents make two points that highlight the need for certiorari review in the criminal law context.

First, while English courts have approved the willful blindness concept, they seem to regard it as a separate category of mens rea from actual knowledge. Federal courts in this country do not have the power to create such a category. Since 1812, this Court has recognized that all federal crimes are statutory; there is no federal common law power to create criminal offenses. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812). The English courts, by contrast, retain the power to define common law crimes. *See, e.g., Shaw v. Director of Public Prosecutions* [1962] A.C. 220.

The federal criminal code contains no general willful blindness concept, either as an alternative to or as a variant of actual knowledge. The Model Penal Code, by contrast, does contain a version of the willful blindness concept. Model Penal Code § 2.02.[10] This Court cites and discusses that section

[10] The Model Penal Code is a useful source in defining mental states when a federal criminal statute fails to specify one, or when the statutory mental element is unclear. This use of the MPC has become routine in this Court's decisions. *See generally* Michael E. Tigar, "*Willfulness" and "Ignorance" in*

in *Global-Tech*. But however useful the MPC may be in other contexts, federal judges have no power to engraft it upon the unambiguous "knowledge" element of many federal criminal statutes.[11] Such judicial legislation is particularly inappropriate because Congress has, in at least one regulatory criminal statute--the Foreign Corrupt Practices Act--included a willful blindness provision in the statutory text. *See* 15 U.S.C. § 78dd-2(h)(3)(B); *see also* 31 U.S.C. § 3729(b)(1)(A)(ii) (civil False Claims Act). Thus, the branch of the federal government entrusted with making criminal law knows how to use its power to define willful blindness and when its use is appropriate. The fact that there is no general federal statutory willful blindness provision should at the very least counsel caution and precision in permitting the lower courts to use that concept as a substitute for knowledge.

Second, if willful blindness is not impermissble judicial legislation, then it must be a way of telling the jury how to approach the mental state of knowledge, and the requirement that the government prove knowledge beyond a reasonable doubt. The *Jewell* dissenters were not alone in perceiving the risk that jurors will interpret the instruction as an invitation to dispense with the

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Federal Criminal Law, 37 Cleveland-Marshall L. Rev. 525, 539-41 (1989) (discussing the approach taken in *Liparota v. United States*, 471 U.S. 419 (1985)).

[11] Indeed, Professor Robbins argues that the MPC formulation should be rejected. 81 J. Crim. L. & Criminology at 231.

stricter standard in favor of a far more lenient one. After all, as the Court pointed out in *Griffin v. United States*, 502 U.S. 46 (1991): "Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law--whether, for example, the action in question . . . fails to come within the statutory definition of the crime." *Id*. at 59. The risk to which then-Judge Kennedy referred in *Jewell* has come to fruition, as evidenced by the disarray in which the courts of appeals have fallen in the wake of *Global-Tech*, and the relative ease with which this formerly "rare" instruction is now given.

B. The Importance of "Knowledge" As An Element of Federal Crimes.

There are varieties of knowledge in federal criminal statutes. In *Jewell*, the issue was whether the defendant "knew" the *fact* that there was marijuana in the car. In *Liparota v. United States*, 471 U.S. 419 (1985), however, the knowledge was not connected to a fact, but to the existence of a legal rule. The defendant, a restaurant owner, bought food stamps from an undercover Department of Agriculture officer. The statute provided "whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations" is guilty of a felony if the value involved is $100 or more. This Court held that "knowingly" modified "not authorized," thus making knowledge of illegality a part of the offense. *See id*. at 433-34.

In *Ratzlaf v. United States*, 510 U.S. 135 (1994), the Court used the knowledge element in a related way. Faced with the chameleon mental element of "willful," the Court held that the government must prove that the defendant "acted with knowledge that his conduct was unlawful." *Id.* at 137.

This Court used the knowledge element to protect lawful firearm ownership in *Staples v. United States*, 511 U.S. 600 (1994). The defendant could not be guilty of failing to register a "machinegun" if he was not proved beyond a reasonable doubt to have known that his weapon had been modified to allow for automatic firing. The knowledge element served to protect "law abiding well intentioned citizens." *Id.* at 615.

Staples relies upon the iconic discussion in *Morissette v. United States*, 342 U.S. 246 (1952), and upon this Court's analysis of "knowledge" in the Sherman Act price-fixing case, *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). In *Gypsum*, the Court noted that sharing price information might have a pro-competitive purpose and effect, as well as the opposite. *See id.* at 437-48. In order to insulate beneficial conduct from prosecution, the prosecution must prove knowledge of probable harm.

As these cases show, this Court deploys the knowledge element to insulate beneficial and even arguably protected behavior from the criminal sanction. The willful blindness instruction threatens

to undermine this carefully built protective structure. The risk of an improvident willful blindness instruction is that it may put a duty on the defendant to take active steps to gain the knowledge that will convict him, rather than requiring the government to prove that he acted to forestall learning the truth.

C. The Court Should Grant the Writ To Ensure That the Courts of Appeals Apply the Strict *Global-Tech* Willful Blindness Standard in Criminal Cases.

Global-Tech acknowledges the dangers, even in the civil context, of using willful blindness as a proxy for actual knowledge. To guard against those dangers, the decision identifies two elements that must be established for willful blindness to apply: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." 131 S. Ct. at 2070. The decision holds that even recklessness does not suffice to establish willful blindness. In the Court's words, willful blindness "surpasses recklessness and negligence." *Id*.

After *Global-Tech*, it is not enough to warrant a willful blindness instruction that the defendant decides not to acquire knowledge of a fact he suspects exists. Rather, it must be shown that the defendant made "active efforts" to prevent himself from acquiring the knowledge. *Id*. at 2071. In other

words, *Global-Tech* holds that the defendant must do more than decide not to look; he must act to cover his eyes. Judge Posner has provided important insight on this point:

> The most powerful criticism of the ostrich instruction is, precisely, that its tendency is to allow juries to convict upon a finding of negligence for crimes that require intent. . . . The criticism can be deflected by thinking carefully about just what it is that real ostriches do (or at least are popularly supposed to do). They do not just fail to follow through on their suspicions of bad things. They are not merely *careless* birds. They bury their heads in the sand so that they will not see or hear bad things. They *deliberately* avoid acquiring unpleasant knowledge. The ostrich instruction is designed for cases in which there is evidence that the defendant, knowing or strongly suspecting that he is involved in shady dealings, takes steps to make sure that he does not acquire full or exact knowledge of the nature and extent of those dealings.

United States v. Giovanetti, 919 F.2d 1223, 1227-28 (7th Cir. 1990) (emphasis in original).

Two aspects of *Global-Tech* mark a departure from the practice of some courts of appeals

(including the Fifth Circuit here) in criminal cases: the requirement that the defendant take "deliberate actions" (or make "active efforts") to avoid knowledge, and the admonition that even recklessness concerning the fact at issue does not suffice.[12]

The disarray in the circuits on these points can be seen by comparing the instruction upheld by the Fifth Circuit in this case with the pattern instruction the Third Circuit recently adopted in the wake of *Global-Tech*. The instruction in this case permitted an inference of knowledge if "the defendant deliberately closed his eyes to what would otherwise have been obvious to him." Walton Pet. App., Appendix C, at 12. The instruction did not require proof of "deliberate actions" or "active efforts" to avoid knowledge. Although the instruction cautioned that knowledge could not be inferred "merely by demonstrating that the defendant was negligent, careless, or foolish," it did not admonish the jury that even the more culpable mental state of recklessness was insufficient. *Id.* The defective instruction that the court of appeals approved here is typical of willful blindness instructions that other courts of appeals have approved since *Global-Tech*. *See, e.g., United States v. Denson*, 2012 U.S. App. LEXIS 16027, at *7 n.4 (1st Cir. Aug. 2, 2012); *United States v. Kozeny*, 667 F.3d 122, 132-34 (2d Cir. 2011).

[12] The Court's stated assumption that all the courts of appeals agree on this standard, *see* 131 S. Ct. at 2070 & n.9, seems to represent a triumph of hope over experience, as the present petitions argue.

By contrast, the revised Third Circuit charge contains both of the key *Global-Tech* protections. The new instruction warns: "It is not enough that (name) may have been reckless or stupid or foolish, or may have acted out of inadvertence or accident." And it provides:

> No one can avoid responsibility for a crime by deliberately ignoring what is obvious. Thus, you may find that (name) knew (state the fact or circumstance, knowledge of which is required for the offense charged) based on evidence which proves that: (1) (name) (himself) (herself) [actually,] subjectively believed that there was a high probability that this (fact) (circumstance) existed, and (2) (name) consciously took deliberate actions to avoid learning [used deliberate efforts to avoid knowing] about the existence of this (fact) (circumstance).

Third Circuit Model Criminal Instructions, Instruction 5.06 (2011) (bold face and italics omitted) (available on Third Circuit website).[13]

The stark contrast between the inadequate Fifth Circuit instruction and the robust Third

[13] The revised Eighth Circuit model instruction includes the crucial "deliberate actions" requirement, but inexplicably omits the admonition that recklessness does not suffice. *See* Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit, Instruction 7.04 (2012) (available on Eighth Circuit website).

Circuit instruction highlights the need for this Court's intervention. The Fifth Circuit instruction does not adequately safeguard the critical knowledge element of the criminal offenses at issue; the Third Circuit instruction does, to the extent possible with any willful blindness instruction. The Court should grant the writ to ensure that the courts of appeals apply *Global-Tech* faithfully and uniformly in the criminal context.[14]

CONCLUSION

The writ of certiorari should be granted.

[14] There is a threshold issue: Should the willful blindness instruction ever be given in criminal cases, absent a specific statutory basis? Justice Kennedy raised this point in *Jewell*, and again in dissent in *Global-Tech*. *See* 131 S. Ct. at 2072-73 (Kennedy, J., dissenting). It is not presented in the petition, and we do not address it. Amicus believes, however, that this is a fair question, and worthy of certiorari in an appropriate case.

Respectfully submitted,

JOHN D. CLINE
Counsel of Record
LAW OFFICE OF
JOHN D. CLINE
235 Montgomery St.
Suite 1070
San Francisco, CA 94104
(415) 322-8319

JEFFREY T. GREEN
CO-CHAIR, AMICUS
COMMITTEE
NAT'L ASS'N OF
CRIMINAL DEFENSE
LAWYERS
1660 L ST., N.W.
Washington, DC 20036
(202) 872-8600

Counsel for Amicus Curiae
National Association of
Criminal Defense Lawyers

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