No. 15-2025

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

MIGUEL BUSTAMANTE-CONCHAS,
Defendant/Appellant.

On appeal from the United States District Court for the District of New Mexico,
No. 13-CR-02028-JAP-2, Hon. James A. Parker

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANT/APPELLANT AND REVERSAL

Barbara E. Bergman
UNIVERSITY OF ARIZONA, JAMES E. ROGERS COLLEGE OF LAW
1201 East Speedway Boulevard
Tucson, AZ 85721
(520) 621-3984
bbergman@email.arizona.edu

Paul W. Hughes
Michael B. Kimberly
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

Norman R. Mueller
HADDON, MORGAN & FOREMAN, P.C.
150 East 10th Avenue
Denver, CO 80203
(303) 831-7364
nmueller@hmflaw.com

Attorneys for Amicus Curiae
The National Association of Criminal Defense Lawyers

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TABLE OF CONTENTS

Page

Table of Authorities iii

Interest of the *Amicus Curiae* 1

Introduction 1

Argument 2

I. Allocution Affects Sentencing In Significant, Unpredictable Ways 2

II. Complete Denial Of The Right To Allocute Necessitates Reversal Of The Sentence 6

A. Complete denial of the allocution right satisfies the third and fourth prongs of the plain error test. 6

B. The exceptions to this rule are highly limited. 10

C. No proffer is required. 10

Conclusion 11

TABLE OF AUTHORITIES

Page(s)

Cases

Anonymous, 3 Mod. 265; 87 Eng. Rep. 175 (K.B.) 1

Green v. United States,
365 U.S. 301 (1961) 1, 2

Hill v. United States,
368 U.S. 424 (1962) 6

Molina-Martinez v. United States,
136 S. Ct. 1338 (2016) 7, 9

United States v. Adams,
252 F.3d 276 (3d Cir. 2001) 8, 9

United States v. Adams,
No. 99-CR-708 (E.D. Pa. 2001) 4, 5

United States v. Barnes,
948 F.2d 325 (7th Cir. 1991) 10

United States v. Behrens,
375 U.S. 162 (1963) 1

United States v. Bryant,
No. 07-CR-10067 (D. Mass. 2011) 4

United States v. Cole,
27 F.3d 996 (4th Cir. 1994) 9

United States v. Cooper,
No. 11-CR-417 (N.D. Ala. 2013) 3

United States v. Daniels,
760 F.3d 920 (9th Cir. 2014) 8, 9

United States v. Dimmick,
No. 14-CR-3041 (N.D. Iowa 2015) 3

United States v. Edwards,
595 F.3d 1004 (9th Cir. 2010) 3, 6

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Fleetwood,
794 F.3d 1004 (8th Cir. 2015) 10

United States v. Frost,
684 F.3d 963 (10th Cir. 2012) 7

United States v. Garcia-Robles,
No. 07-CR-20165 (E.D. Mich. 2011) 4

United States v. Gonzalez-Lopez,
548 U.S. 140 (2006) 7

United States v. Gonzalez-Melendez,
594 F.3d 28 (1st Cir. 2010) 8

United States v. Gonzalez-Melendez,
No. 07-CR-315 (D.P.R. 2010) 4

United States v. Griffin,
No. 04-CR-105 (N.D. Ind. 2008) 4

United States v. Haygood,
549 F.3d 1049 (6th Cir. 2008) 8

United States v. Haygood,
No. 05-CR-80437 (E.D. Mich. 2009) 4

United States v. Landeros-Lopez,
615 F.3d 1260 (10th Cir. 2010) 7, 10

United States v. Landeros-Lopez,
No. 08-CR-105 (D. Wyo. 2011) 4

United States v. Locklear,
No. 04-CR-80170 (E.D. Mich. 2011) 4

United States v. Luepke,
495 F.3d 443 (7th Cir. 2007) 8, 9, 11

United States v. Luepke,
No. 06-CR-91 (W.D. Wis. 2007) 4

TABLE OF AUTHORITIES
(continued)

Page(s)

United States v. Mendez,
No. 10-CR-4731 (S.D. Cal. 2013) 4

United States v. Muhammad,
478 F.3d 247 (4th Cir. 2007) 8

United States v. Noel,
581 F.3d 490 (7th Cir. 2009) 5

United States v. Olano,
507 U.S. 725 (1993) 6, 7, 8

United States v. Paladino,
769 F.3d 197 (3d Cir. 2014) 11

United States v. Perez,
661 F.3d 568 (11th Cir. 2011) 8, 9

United States v. Perez,
No. 07-CR-20714 (S.D. Fla. 2012) 4

United States v. Pitre,
504 F.3d 657 (7th Cir. 2007) 10

United States v. Prouty,
303 F.3d 1249 (11th Cir. 2002) 9

United States v. Prouty,
No. 01-CR-54 (S.D. Fla. 2002) 4

United States v. Reyna,
358 F.3d 344 (5th Cir. 2004) 8, 9, 10

United States v. Varela,
406 F. App'x 827 (5th Cir. 2010) 6

Van Hook v. United States,
365 U.S. 609 (1961) 6

TABLE OF AUTHORITIES
(continued)

Page(s)

Rules

Fed. R. Crim. P. 32 6

Other Authorities

Mark W. Bennett & Ira P. Robbins, *Last Words: A Survey and Analysis of Federal Judges' Views on Allocution in Sentencing*, 65 Ala. L. Rev. 735 (2014) 3

Alan Ellis, *Views from the Bench on Sentencing Representation: Part 5* (June 15, 2016) 4, 5

D. Brock Hornby, *Speaking in Sentences*, 14 Green Bag 2d 147 (2011) 4, 5

Rocksheng Zhong, et al., *So You're Sorry? The Role of Remorse in Criminal Law*, 42 J. Am. Acad. Psychiatry & L. 39 (2014) 5

INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association working on behalf of criminal defense attorneys to promote justice and due process for those accused of crime or misconduct.[1] NACDL was founded in 1958. It has many thousands of direct members in 28 countries, and its 90 affiliated state, provincial, and local organizations consist of up to 40,000 attorneys, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL files numerous amicus briefs each year in the Supreme Court, the federal courts of appeals, and state high courts. NACDL's mission is to provide amicus assistance in cases that present issues of broad importance to criminal defendants, as well as the justice system as a whole.

INTRODUCTION

Allocution—the right of a convicted criminal defendant to personally address the court before being sentenced—is "ancient in the law." *United States v. Behrens*, 375 U.S. 162, 165 (1963). "As early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal." *Green v. United States*, 365 U.S. 301, 304 (1961) (plurality) (citing *Anonymous*, 3 Mod. 265, 266; 87 Eng. Rep. 175 (K.B.)). And, despite changes in the criminal justice system,

[1] This brief is accompanied by a motion for leave to file. No party or counsel for a party in the pending appeal authored the brief in whole or in part. No person or entity made a monetary contribution intended to fund the preparation or submission of this brief, other than the *amicus curiae*, its members, and its counsel.

nothing has "lessen[ed] the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation." *Id*. at 304.

Hundreds of judges across the country have acknowledged the substantial importance of sentencing allocutions, and empirical evidence reveals that allocution affects sentencing. Because judges are often most swayed by a defendant's genuine expression of remorse and sincere acceptance of responsibility, judges repeatedly report that a defendant's tone, body language, and mannerisms reveal far more than the defendant's words alone. The right to be heard at sentencing, accordingly, cannot be divorced from the in-person interaction between defendant and judge.

Denial of this right requires reversal. Prejudice must be presumed, and denial of a defendant's right to allocute affects the fairness, integrity, and public reputation of judicial proceedings. Exceptions are highly limited, and no written proffer is required.

ARGUMENT

I. Allocution Affects Sentencing In Significant, Unpredictable Ways.

Decades ago, the Supreme Court observed that "[t]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." *Green*, 365 U.S. at 304. That is confirmed daily in district courts across the country.

Take, for example, Duncan Edwards, who was convicted of fraud. Although the sentencing range was twenty-seven to thirty-three months' incarceration, the court sentenced Edwards to five years' probation and a fine. Following Edwards' allocution, the district court stated:

> I should note also that his allocution – I've been doing this long enough that I can tell, I think, when people are genuine by their mannerisms, by their ability to look at me, by the manner in which they conduct themselves, their body language. And I find … his statement, his allocution, to be very credible. I don't think there's a chance in hell that he's going to engage in this again [in] the future.

Second Cross-Appeal Brief at 11, *United States v. Edwards*, 595 F.3d 1004 (9th Cir. 2010) (No. 08-30055). It was not simply the words Edwards spoke, it was *how* he spoke them—his "mannerisms" and his "body language."

Similarly, the district judge who sentenced Dustin Dimmick was persuaded by his allocution to impose concurrent, rather than consecutive, sentences:

> [E]ven though there are some pretty good reasons to run it consecutive, you're awful young. If you're going to get your life turned around, you need some kind of a break. *I thought your comments to me were very thoughtful.* You're taking efforts to turn your life around.

Transcript of Sentencing Hearing at 10, *United States v. Dimmick*, No. 14-CR-3041 (N.D. Iowa 2015), ECF No. 55. It was the thoughtfulness behind the comments, potentially invisible on paper, that made the difference.

Judge Mark W. Bennett surveyed district court judges as to how allocution affects their sentencing determinations. More than 80% of the judges who responded—408 federal district court judges in all—indicated that allocution is, in their view, important. Mark W. Bennett & Ira P. Robbins, *Last Words: A Survey and Analysis of Federal Judges' Views on Allocution in Sentencing*, 65 Ala. L. Rev. 735, 757 (2014).

This has proven true time and again. In numerous cases where a defendant was resentenced after an initial denial of the right to be heard, the district court imposed a lower sentence after hearing the defendant speak. *See United States v. Cooper*, No. 11-

CR-417 (N.D. Ala. 2013), ECF No. 33 (sentence reduced from 60 to 36 months); *United States v. Mendez*, No. 10-CR-4731 (S.D. Cal. 2013), ECF No. 100 (180 to 151 months); *United States v. Perez*, No. 07-CR-20714-2 (S.D. Fla. 2012), ECF No. 730 (140 to 131 months); *United States v. Landeros-Lopez*, No. 08-CR-105-21 (D. Wyo. 2011), ECF No. 1143 (115 to 100 months); *United States v. Bryant*, No. 07-CR-10067 (D. Mass. 2011), ECF No. 65 (90 to 72 months); *United States v. Garcia-Robles*, No. 07-CR-20165 (E.D. Mich. 2011), ECF No. 32 (96 to 78 months); *United States v. Locklear*, No. 04-CR-80170 (E.D. Mich. 2011), ECF No. 112 (292 to 204 months); *United States v. Gonzalez-Melendez*, No. 07-CR-315 (D.P.R. 2010), ECF No. 141 (121 to 72 months); *United States v. Haygood*, No. 05-CR-80437-1 (E.D. Mich. 2009), ECF No. 95 (66 months to 60 months and one day); *United States v. Griffin*, No. 3:04-CR-105 (N.D. Ind. 2008), ECF No. 76 (146 to 132 months); *United States v. Luepke*, No. 06-CR-91 (W.D. Wis. 2007), ECF No. 35 (240 to 220 months); *United States v. Prouty*, No. 01-CR-54-1 (S.D. Fla. 2002), ECF No. 74 (46 to 45 months); *United States v. Adams*, No. 99-CR-708 (E.D. Pa. 2001), ECF No. 37 (105 to 85 months).

Judges broadly acknowledge that allocution impacts sentencing:

- "As a judge, I want desperately to hear defendants speak. … Failure to speak is an irretrievably missed opportunity."

  - Judge D. Brock Hornby, *Speaking in Sentences*, 14 Green Bag 2d 147, 155 (2011).

- "I come out on the bench with a tentative range of sentence in mind, but a good allocution can cause me to impose a lower sentence."

  - Judge Walter H. Rice, quoted in Alan Ellis, *Views from the Bench on Sentencing Representation: Part 5*, Law360 (June 15, 2016).

- "A defendant's allocution is generally more important than what a lawyer says at sentencing."

  - Judge John R. Adams, *id.*

Against this backdrop, a written allocution—inanimate words on a lifeless page—is no substitute for the real thing. In Judge Bennett's survey, the respondents identified the top five most impactful attributes of a defendant's allocution as "genuine remorse," "sincerity," "realistic and concrete plans for the future," "acknowledgement of and sincere apology to the victims," and "understanding of the seriousness of the offense." Bennett, *supra*, at 752. Given that these attributes turn on assessments of the defendant's character, it is little surprise that one judge responded that "[i]t isn't what they say, it's how it is said. Honesty, sincerity and genuine remorse count for a lot." *Id*. at 753. Another judge explained that "[w]hat they say about themselves is important and, even more important, is how they say it." *Id*.

Additional academic literature tells the same story. One study of Connecticut trial-court judges concluded that a defendant's remorse is "a relevant and even essential factor in [the judges'] decisions about sentencing." Rocksheng Zhong, et al., *So You're Sorry? The Role of Remorse in Criminal Law*, 42 J. Am. Acad. Psychiatry & L. 39, 47 (2014). The judges found attitude, demeanor, and nonverbal cues—the kinds of things that can only be evaluated in person—critical in assessing remorse, a task which is "more of an art than a science." *Id.* at 43-44.

The Seventh Circuit was thus correct to observe that "it is not only the content of the defendant's words that can influence a court, but also the way he says them." *United*

States v. Noel, 581 F.3d 490, 503 (7th Cir. 2009). This is in no small part why courts of appeals defer to the district court's sentencing discretion—"the district court was in the best position to assess [defendant's] sincerity in his allocution." *United States v. Varela*, 406 F. App'x 827, 828 (5th Cir. 2010). Only the district court can assess the defendant's "demeanor and mannerisms." *Edwards*, 595 F.3d at 1015.

Allocution is critical to the district judge's task of handing down an appropriate, individualized sentence. If that opportunity for face-to-face evaluation is denied, attempts to reconstruct what effect it might have had are nothing more than speculation.

II. Complete Denial Of The Right To Be Heard At Sentencing Necessitates Reversal Of The Sentence.

When a defendant is not offered *any* chance to speak on his own behalf at his sentencing hearing, the plain error test is presumptively satisfied.

A. Complete denial of the allocution right satisfies the third and fourth prongs of the plain error test.

A court of appeals should correct a plain error when it "affect[s] substantial rights" and "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 725, 736 (1993). These two requirements are generally satisfied when a defendant is not offered any chance to speak at his sentencing.

Indeed, in *Hill v. United States*, 368 U.S. 424, 429 n.6 (1962), the Supreme Court identified "the relief afforded on direct appeal in a case where the sentencing judge disregarded the mandate of Rule 32(a)"—it is reversal and remand "for resentencing in compliance with Rule 32." *Van Hook v. United States*, 365 U.S. 609, 609 (1961).

1. A district court's complete failure to permit a defendant to allocute is an inherently prejudicial error. *Olano* recognized that some errors "should be presumed prejudicial if the defendant cannot make a specific showing of prejudice." 507 U.S. at 735. Denial of the right to allocute is akin to structural error because the "consequences … are necessarily unquantifiable and indeterminate." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (denial of the right to choose counsel is structural error). The impact on the sentence "is impossible … to quantify." *Id*.

In *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), the Supreme Court recently applied plain error to an erroneous calculation of a defendant's Guidelines range. Requiring independent evidence of prejudice is often impossible, as defendants typically lack "evidence of the Guidelines' influence beyond the sentence itself." *Id*. at 1347. Thus, "in the ordinary case" and "[a]bsent unusual circumstances," "a defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder." *Id*.

This is analogous to a district court's failure to permit allocution. Like the Guidelines range (*id*. at 1346), empirical evidence proves that allocution affects sentencing. *See*, *supra*, 3-5. And, like a Guidelines error, it is generally impossible for a defendant to offer independent evidence proving this effect.

For these reasons, this Court has repeatedly held that "allocution errors are not subject to harmless-error analysis, because it is difficult for defendants to establish that proper allocution would have resulted in a lower sentence." *United States v. Frost*, 684

F.3d 963, 979 (10th Cir. 2012); *see United States v. Landeros-Lopez*, 615 F.3d 1260, 1264 & n.4 (10th Cir. 2010).

At least six other circuits agree. In *United States v. Luepke*, 495 F.3d 443, 451 (7th Cir. 2007), the Seventh Circuit expressly concurred with its "colleagues in the Third and Fifth Circuits," holding that "when there has been a violation of the right to allocute, a reviewing court should presume prejudice when there is any possibility that the defendant would have received a lesser sentence had the district court heard from him before imposing sentence." Not only does "[t]his approach acknowledge[] the immense practical difficulty facing a defendant who otherwise would have to attempt to prove that a violation affected a specific sentence," but "it also avoids [judicial] speculation about what the defendant might have said had the right been properly afforded him." *Id*.[2]

In considering harmlessness, two additional circuits likewise presume that denial of allocution is prejudicial. *See United States v. Gonzalez-Melendez*, 594 F.3d 28, 38 (1st Cir. 2010) ("[T]his error irremediably poisons the sentence and requires that the proceedings be held afresh."); *United States v. Haygood*, 549 F.3d 1049, 1055 (6th Cir. 2008) ("[T]his court has noted that prejudice is effectively presumed when allocution is overlooked because of the 'difficulty in establishing that the allocution error affected the outcome of the district court proceedings.'").

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[2] *See United States v. Daniels*, 760 F.3d 920, 925 (9th Cir. 2014); *United States v. Perez*, 661 F.3d 568, 586 (11th Cir. 2011); *United States v. Muhammad*, 478 F.3d 247, 251 (4th Cir. 2007); *United States v. Reyna*, 358 F.3d 344, 351-52 (5th Cir. 2004); *United States v. Adams*, 252 F.3d 276, 287 (3d Cir. 2001).

2. A district court's complete failure to permit allocution also "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736. *Molina-Martinez* demonstrates that an error at the core of sentencing readily satisfies this standard; there, after concluding that a defendant need not show independent evidence to prove that an error in a Guidelines calculation was prejudicial, the Court reversed. 136 S. Ct. at 1349. The Court dispensed with any extended discussion of the fourth prong of plain error. *Id*.

Again, at least six circuits agree. The Eleventh Circuit held that "failing to give a defendant the opportunity to speak to the court directly when it might affect his sentence is manifestly unjust." *United States v. Prouty*, 303 F.3d 1249, 1253 (11th Cir. 2002). Adopting the Third Circuit's view, it explained that "the right of allocution is 'the type of important safeguard that helps assure the fairness, and hence legitimacy, of the sentencing process.'" *Id*. (quoting *Adams,* 252 F.3d at 288 (3d Cir.)). This conclusion follows from the fact that "denying [the defendant] his right of allocution was tantamount to denying him his most persuasive and eloquent advocate." *Adams,* 252 F.3d at 288. Years earlier, the Fourth Circuit was "of the firm opinion that fairness and integrity of the court proceedings would be brought into serious disrepute" should an allocution error be allowed "to stand." *United States v. Cole*, 27 F.3d 996, 999 (4th Cir. 1994).[3]

[3] *See Daniels*, 760 F.3d at 926 (9th Cir.); *Perez*, 661 F.3d at 586; *Luepke*, 495 F.3d at 451 (7th Cir.) ("in the vast majority of cases, the denial of the right to allocution is the kind of error that undermines the fairness of the judicial process"); *Reyna*, 358 F.3d at 353 (5th Cir.).

Complete failure to permit allocution also damages the public reputation of sentencing. "In an age of staggering crime rates and an overburdened justice system, courts must continue to be cautious to avoid the appearance of dispensing assembly-line justice." *United States v. Barnes*, 948 F.2d 325, 331 (7th Cir. 1991). In sum, "[p]roviding a defendant with a meaningful opportunity to speak on his own behalf advances the public perception of fairness." *Landeros-Lopez*, 615 F.3d at 1267.

B. Exceptions to this rule are highly limited.

Although a complete failure to permit allocution is presumptively prejudicial and generally affects the integrity of the judicial proceeding, there are limited exceptions.

First, if the court imposes a statutory mandatory minimum, the court lacks discretion to issue a lower sentence. Any allocution error is non-prejudicial.

Second, if the court imposes the sentence that the defendant himself requested, it will be difficult for a defendant to impugn the integrity or fairness of the proceeding. That was the case in *United States v. Fleetwood*, 794 F.3d 1004, 1007 (8th Cir. 2015), where the defendant "essentially received the sentence he requested." This also occurs when a judge resentences a defendant to a previously agreed-upon sentence in connection with a violation of the conditions of supervised release. *See, e.g.*, *Reyna*, 358 F.3d at 352-53; *Rausch*, 638 F.3d at 1301; *United States v. Pitre*, 504 F.3d 657, 663 (7th Cir. 2007).

C. No proffer is required.

Because a failure to let a defendant speak at sentencing is presumptively prejudicial, there can be no need for a proffer to independently show prejudice. That is the point of a presumption.

Nor would a proffer requirement be useful. A written proffer—inevitably drafted by defense counsel—will shed no light on the counterfactual question of how a defendant's allocution would have affected the sentencing court. During allocution, judges evaluate whether the defendant expresses sincere remorse and genuine acceptance of responsibility. *See*, *supra*, 4-5. This *requires* an in-person assessment of the defendant, as body language, tone, and mannerisms are typically more important than the words uttered. A written proffer would strip the essential humanity from sentencing.

As the Seventh Circuit explained, "[i]t would be almost impossible to determine whether, in the context of the advisory guidelines and the court's balancing of the statutory sentencing factors, a defendant's statement, that was never made, would have altered the conclusions of the sentencing court." *Luepke*, 495 F.3d at 451. Likewise, the Third Circuit held that "requiring the defendant to point to statements that he would have made at sentencing, and somehow show that these statements would have changed the sentence imposed by the District Court, would place an onerous burden on the defendant." *United States v. Paladino*, 769 F.3d 197, 201 n.4 (3d Cir. 2014).

CONCLUSION

The judgment of the district court should be vacated and the case remanded for resentencing.

Dated: November 7, 2016

Respectfully submitted,

/s/Paul W. Hughes
Paul W. Hughes
Michael B. Kimberly
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

Barbara E. Bergman
UNIVERSITY OF ARIZONA, JAMES E. ROGERS COLLEGE OF LAW
1201 East Speedway Boulevard
Tucson, AZ 85721
(520) 621-3984
bbergman@email.arizona.edu

Norman R. Mueller
HADDON, MORGAN & FOREMAN, P.C.
150 East 10th Avenue
Denver, CO 80203
(303) 831-7364
nmueller@hmflaw.com

Attorneys for Amicus Curiae *the National Association of Criminal Defense Lawyers*

CERTIFICATE OF COMPLIANCE
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I hereby certify that the attached brief is proportionally spaced, has a typeface of 13 points, and contains 2,996 words.

Dated: November 7, 2016

MAYER BROWN LLP

/s/ Paul W. Hughes
Paul W. Hughes
Attorney for Amicus Curiae *the National Association of Criminal Defense Lawyers*

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I further certify that all participants in the case are registered CM/ECF users, who will be served by the appellate CM/ECF system.

Dated: November 7, 2016

MAYER BROWN LLP

/s/ Paul W. Hughes
Paul W. Hughes
Attorney for Amicus Curiae *the National Association of Criminal Defense Lawyers*

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I hereby certify that with respect to the foregoing:

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Dated: November 7, 2016

MAYER BROWN LLP

/s/ Paul W. Hughes
Paul W. Hughes
Attorney for Amicus Curiae *the National Association of Criminal Defense Lawyers*