No. 14-5227

IN THE SUPREME COURT OF THE UNITED STATES

DANIEL ARROYO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record

LESLIE R. CALDWELL
Assistant Attorney General

SCOTT A.C. MEISLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Florida offense of battery of a law enforcement officer, Fla. Stat. Ann. § 784.07(2), qualifies as a violent felony under the residual clause of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii).

2. Whether petitioner's conviction for discharging a firearm from a vehicle within 1000 feet of a person, Fla. Stat. Ann. § 790.15(2) (West 1994), qualifies as a violent felony under the residual clause of the ACCA.

3. Whether this Court's decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998), should be overruled.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is unreported but is available at 562 Fed. Appx. 889.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2014. The petition for a writ of certiorari was filed on July 8, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Florida, petitioner was convicted on

one count of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. 922(g)(1). Pet. App. A2. The district court sentenced him under 18 U.S.C. 924(e) to 188 months of imprisonment, to be followed by four years of supervised release. 8/7/13 Tr. 65-66. The court of appeals vacated petitioner's sentence and remanded for resentencing. Pet. App. A1-A5.

1. On August 8, 2011, petitioner stopped for gas while driving two others (Lorenzo DeJesus and Pricilla Perez) to Perez's apartment. DeJesus, who was carrying a semiautomatic handgun, left the gun in the car when he went inside the gas station to pay for a portion of the gas. The gun was missing when he returned to the car. When DeJesus was still unable to find the gun at Perez's apartment, he called the police to report it stolen. An officer investigating the gun theft interviewed petitioner, who admitted that he had stolen the gun from the car and buried it at an abandoned house. Petitioner also admitted that he had intended to retrieve the gun at a later date and sell it. Presentence Investigation Report (PSR) paras. 8-9.

2. A federal grand jury in the Middle District of Florida returned an indictment charging petitioner with one count of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. 922(g). To establish that petitioner was

a convicted felon, the indictment listed a 1994 Florida conviction for attempted murder in the first-degree, a 1994 Florida conviction for discharge of a firearm from a vehicle, and a 2007 Florida conviction for battery on a law enforcement officer. 8:11-cr-00530 Docket entry No. (Dkt. No.) 1, at 1 (Oct. 13, 2011).[1]

In February 2013, petitioner pleaded guilty, without a plea agreement, to the single count of the indictment. Petitioner entered his plea after a colloquy in which a magistrate judge informed him that he would be subject to a mandatory minimum term of imprisonment if the district court determined at sentencing that he had three or more qualifying convictions under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). 2/20/13 Tr. 15-17. Under the ACCA, a defendant with "three previous convictions * * * for a violent felony or a serious drug offense, or both, committed on occasions different from one another" is subject to a term of imprisonment of 15 years to life. 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" as:

> any crime punishable by imprisonment for a term exceeding one year * * * that —

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[1] Petitioner's battery conviction was based on an April 2007 incident in which, while incarcerated, petitioner struck a corrections officer in the face and then attempted to choke the officer with the chain of the handcuffs that bound petitioner's hands. PSR para. 34.

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. 924(e)(2)(B). The final clause of that definition (beginning with "or otherwise") is referred to as the ACCA's "residual clause."

3. The PSR prepared by the Probation Office determined that petitioner had four prior Florida convictions that qualified as violent felonies under the ACCA: the 1994 conviction for attempted first-degree murder, a conviction for a robbery committed on the same day (February 27, 1994), the 1994 conviction for discharging a firearm from a vehicle, and the 2007 conviction for battery on a law enforcement officer. PSR para. 23. Petitioner was therefore subject to a statutory minimum sentence of 15 years (180 months) of imprisonment, 18 U.S.C. 924(e)(1), and his offense level under the advisory Sentencing Guidelines was elevated to 33. PSR paras. 24, 74. The Probation Office calculated a criminal history category of V. PSR para. 37. In light of the statutory minimum, the Probation Office determined that petitioner's advisory range under the Sentencing Guidelines was 180 to 188 months. PSR para. 75.

Petitioner did not file objections to the PSR. See PSR Addendum. At the sentencing hearing on August 1, 2013, however, petitioner objected to the Probation Office's determination that he qualified as an armed career criminal. 8/1/13 Tr. 5-7. He contended at the hearing that his 1994 attempted-murder and robbery convictions should count as only one predicate conviction because the government had not proved, through documents subject to judicial notice under Shepard v. United States, 544 U.S. 13 (2005), that the crimes were committed on separate occasions, see 18 U.S.C. 924(e)(1); that his 2007 conviction for battery on a law enforcement officer was not a violent felony under recent case law applying the residual clause; and that the government had not proved that his conviction for discharging a firearm from a vehicle presented "a serious risk of injury or harm to * * * another individual." 8/1/13 Tr. 6-7. Petitioner acknowledged in a subsequent sentencing memorandum that his challenges to the battery and firearm-discharge convictions were foreclosed by the Eleventh Circuit's decisions in Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328, cert. denied, 133 S. Ct. 2873 (2013), and United States v. Alexander, 609 F.3d 1250 (2010), cert. denied, 131 S. Ct. 1783 (2011), respectively, but he sought to "preserve[] his objection for the purposes of further review." Dkt. No. 60, at 4 (Aug. 2, 2013).

On August 7, 2013, the district court sentenced petitioner to 188 months of imprisonment, to be followed by four years of supervised release. 8/7/13 Tr. 65-66. The court agreed with petitioner that his attempted-murder and robbery convictions could be counted as only one predicate because the government had not proved, via Shepard-approved documents, that the crimes were committed on separate occasions. Id. at 19-20; see 18 U.S.C. 924(e)(1). But the court further concluded that, under circuit precedent, petitioner's prior convictions for battery on a law enforcement officer and discharging a firearm from a vehicle qualified as violent felonies, giving him three ACCA-qualifying convictions. 8/7/13 Tr. 20-21. After hearing argument from counsel and witness testimony relevant to the sentencing considerations set forth in 18 U.S.C. 3553(a), the court emphasized the need "to make certain the community's protected," and it imposed a sentence of 188 months, the high end of the Guidelines range. 8/7/13 Tr. 69.

4. In an unpublished per curiam opinion, the court of appeals vacated petitioner's sentence and remanded for resentencing under a lower advisory Guidelines range. Pet. App. A1-A5. Petitioner acknowledged that, under circuit precedent, his prior Florida convictions for battery on a law enforcement officer and discharging a firearm from a vehicle qualified as violent felonies under the ACCA's residual clause. He argued,

however, that he should be resentenced because the district court had committed plain error in determining his criminal history category under the Sentencing Guidelines by including a 2008 Florida conviction for loitering. He also argued that his sentence was substantively unreasonable. Pet. C.A. Br. 11-23.

The court of appeals concluded, as petitioner had conceded, that its prior decisions in Turner and Alexander, supra, foreclosed petitioner's challenges to his sentence under the ACCA. Pet. App. A2. But the court also agreed with the parties that the district court had plainly erred in counting petitioner's loitering conviction for purposes of determining his criminal history score under the Guidelines. Id. at A4; see Gov't C.A. Br. 11-12 (conceding that remand was warranted). The court therefore vacated petitioner's sentence and remanded for resentencing under a lower advisory Guidelines range equal to the minimum sentence of 180 months required under the ACCA. Pet. App. A5. Petitioner's resentencing is currently scheduled for November 6, 2014. Dkt. No. 84 (Sept. 9, 2014).

ARGUMENT

Petitioner contends (Pet. 5-12) that his prior Florida conviction for battery of a law enforcement officer does not qualify as a violent felony under the ACCA's residual clause, 18

U.S.C. 924(e)(2)(B)(ii).[2] Although the courts of appeals have taken different positions on that issue, the court of appeals' decision is correct, the conflict is shallow, and review is inappropriate given the interlocutory posture of petitioner's case. Petitioner further contends (Pet. 12-13) that his prior Florida conviction for discharging a firearm from a car within 1000 feet of a person does not qualify as a violent felony under the ACCA's residual clause. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. Finally, petitioner contends (Pet. 13-14) that the Court should overrule its decision in Almendarez-Torres v. United States, 523 U.S. 224 (1998), which is an issue this Court has repeatedly and recently declined to consider. The petition should therefore be denied.

1. The court of appeals correctly held (Pet. App. A2) that petitioner's prior Florida conviction for battery of a law enforcement officer qualifies as a "violent felony" under the ACCA's residual clause.

a. To determine whether a prior conviction is a violent felony under the residual clause, courts employ a categorical

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[2] The same question is presented by the petitions in Kilgore v. United States, petition for cert. pending, No. 13-8034 (filed Dec. 26, 2013), and Anderson v. United States, petition for cert. pending, No. 14-5229 (filed July 12, 2014).

approach, asking "whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." James v. United States, 550 U.S. 192, 208 (2007); see Descamps v. United States, 133 S. Ct. 2276, 2281 (2013); Sykes v. United States, 131 S. Ct. 2267, 2273 (2011). The court of appeals correctly concluded that petitioner's conviction for battery of a law enforcement officer satisfies that standard.

In Johnson v. United States, 559 U.S. 133 (2010), the Court held that the Florida felony offense of battery does not qualify as a violent felony under the ACCA's "elements clause" because it does not "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. 924(e)(2)(B)(i); Johnson, 559 U.S. at 140-142. The Court, however, declined to consider whether the same offense is a violent felony under the residual clause. Id. at 145.

Before petitioner's appeal, the court of appeals had held that the Florida felony offense of simple battery of a law enforcement officer is a violent felony. See Rozier v. United States, 701 F.3d 681, 682 (11th Cir. 2012) ("Although the battery * * * may be committed without actual violence, in committing the unlawful touching the offender creates the potential for violence to the officer, a violent response on the officer's part, and a risk of harm to bystanders."), cert.

denied, 133 S. Ct. 1740 (2013). In Turner v. Warden Coleman FCI (Medium), 709 F.3d 1328 (11th Cir.), cert. denied, 133 S. Ct. 2873 (2013), the court of appeals elaborated on that holding, explaining that "few crimes present a greater 'potential risk of physical injury to another' than battery on a law enforcement officer, which necessarily involves an unwanted touching of -- and physical confrontation with -- an officer of the law." Id. at 1340 (quoting 18 U.S.C. 924(e). The court explained that "[t]he charged environment created when a citizen physically confronts the police is a verifiable powder keg, laden with danger to the officer, the defendant, and innocent bystanders alike," and "[t]hat is especially so given that the use of force is an expected, necessary part of a law enforcement officer's task of subduing and securing individuals suspected of committing crimes." Id. at 1340-1341 (internal quotation marks and citation omitted).

Other courts of appeals likewise have concluded that battery of a law enforcement officer is a violent felony under the ACCA (or a crime of violence under the Sentencing Guidelines) because "[s]uch battery involves an overt act against the police officer -- thereby not only initiating a confrontation, but risking a serious escalation in violence." United States v. Williams, 559 F.3d 1143, 1149 (10th Cir. 2009) (emphasis omitted); see United States v. Dancy, 640 F.3d 455,

469-470 (1st Cir.) (Massachusetts offense of assault and battery of a police officer is an ACCA violent felony because it "nearly always poses a serious risk of actual or potential physical force and the likelihood of physical injury" and because the serious risk of injury is heightened by the fact that "law enforcement officers usually carry weapons when on duty"), cert. denied, 132 S. Ct. 564 (2011) (citation omitted); cf. United States v. Anderson, 745 F.3d 593, 597 (1st Cir. 2014) (Massachusetts offense of assault and battery of a court officer is a violent felony under the ACCA's residual clause), petition for cert. pending, No. 14-5229 (filed July 12, 2014); United States v. Jones, 700 F.3d 615, 626-627 (1st Cir. 2012) (Massachusetts offense of assault and battery of a police officer is a crime of violence under the Sentencing Guidelines), cert. denied, 133 S. Ct. 1619 (2013).[3]

As petitioner points out (Pet. 8-9), the Fourth Circuit recently concluded that the Virginia offense of assault and battery of a police officer is not a "crime of violence" under Sentencing Guidelines § 4B1.1. United States v. Carthorne, 726 F.3d 503, 513-515 (4th Cir. 2013), cert. denied, 134 S. Ct. 1326

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[3] In light of the substantial similarity between the definition of "violent felony" in the ACCA and "crime of violence" in Sentencing Guidelines § 4B1.2(a), decisions interpreting one phrase inform what constitutes a qualifying conviction under the other. See, e.g., United States v. Alexander, 609 F.3d 1250, 1253 (11th Cir. 2010), cert. denied, 131 S. Ct. 1783 (2011).

(2014). The court concluded that "because the elements of the crime * * * can be satisfied in widely diverging contexts, including the use of a poking finger or the incidence of other minimal physical contact," the offense "does not constitute an offense that ordinarily induces an escalated response from the officer that puts the officer and others at a similar serious risk of injury." Id. at 515 (internal quotation marks and citation omitted). The defendant in Carthorne, however, did not challenge the status of his assault-and-battery conviction at sentencing, and the court of appeals therefore reviewed the claim for plain error. The court of appeals concluded that the district court had not plainly erred by concluding that the defendant's Virginia conviction for assault and battery of a police officer was a violent felony, given the lack of controlling authority. Id. at 516-517; see United States v. Olano, 507 U.S. 725, 734 (1993). Because the court held that the district court had not plainly erred, its judgment does not conflict with the decision below.

Petitioner also correctly notes (Pet. 9) that the Seventh Circuit has held that the Illinois offense of "making insulting or provoking contact with a peace officer" is not a violent felony under the ACCA's residual clause. United States v. Hampton, 675 F.3d 720, 729-731 (2012). The court in Hampton stated that "the insulting-or-provoking-contact offense, though

it may require a certain bravado in the face of authority, does not entail resistance of the sort that ordinarily induces an escalated response from the officer that puts the officer or others at a similar serious risk of injury." Id. at 731.

b. Although the Fourth and Seventh Circuits have viewed the ACCA and Guidelines residual clauses as not encompassing state laws similar to the Florida statute at issue here, this Court's review is not warranted for several reasons.

First, the disagreement among the circuits is shallow and of recent origin. Further consideration in the lower courts would be appropriate before the Court intervenes. This Court recently denied certiorari in a case raising a similar question, see Bargman v. United States, 134 S. Ct. 907 (2014) (No. 13-6776), and the same result is warranted here.

Second, the court of appeals vacated petitioner's sentence based on an error in determining petitioner's criminal history category and remanded the case to the district court for resentencing. Pet. App. A5. Its decision is therefore interlocutory, a posture that "of itself alone furnishe[s] sufficient ground" for denying certiorari. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); ibid. ("[E]xcept in extraordinary cases, the writ is not issued until final decree."); accord Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam);

American Constr. Co. v. Jacksonville, Tampa & Key W. Ry., 148 U.S. 372, 384 (1893); see Virginia Military Inst. v. United States, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for a writ of certiorari).

Third, to the extent that petitioner claims (Pet. 11-12) that "[t]his Court's further guidance * * * on the ACCA's residual clause" is warranted as a general manner, that request does not justify review of the question presented in the petition. As petitioner acknowledges (Pet. 6, 12), this Court is already considering application of the ACCA's residual clause in Johnson v. United States, cert. granted, No. 13-7120 (oral argument scheduled for November 5, 2014), which presents the question whether a conviction for possessing a sawed-off shotgun qualifies as a violent felony under that clause. Plenary review of the distinct issue in this case is unwarranted.

2. Petitioner further contends (Pet. 12-13) that the court of appeals erred in treating his 1994 Florida conviction for knowingly and willfully discharging a firearm from a vehicle within 1000 feet of another person as a violent felony.[4] The court of appeals' decision, however, is correct and does not

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[4] The relevant Florida statute made it a second-degree felony for "[a]ny occupant of any vehicle [to] knowingly and willfully discharge[] any firearm from the vehicle within 1,000 feet of any person." Fla. Stat. Ann. § 790.15(2) (West 1994).

conflict with any decision of this Court or another court of appeals.

The court of appeals correctly determined that, "as a categorical matter," violation of the Florida statute "presents a serious potential risk of physical injury to another." Sykes, 131 S. Ct. at 2273; see Pet. App. A2. As the court of appeals explained in Alexander (the decision that bound the panel in petitioner's case), "the firing of a weapon poses a risk that a bystander will be injured by a stray bullet," and "[t]his risk increases substantially when the firearm is discharged from a vehicle," because "[n]ot only is the shooter's range of vision diminished, but vehicles are commonly located on roads and parking areas, which are often adjacent to inhabited buildings and populated by drivers of other vehicles, their passengers, or pedestrians." 609 F.3d at 1257. Petitioner's only rejoinder (Pet. 12) is that the "offense does not require knowledge of the other person's presence." But as the court in Alexander explained, the focus is on the risk of harm to third parties, and an offender's belief that no "bystanders" are present does not eliminate the substantial risk that a bullet intentionally fired from a car "will stray from its target and injure another person." 609 F.3d at 1257; cf. United States v. Ruvalcaba, 627 F.3d 218, 223 (6th Cir. 2010) ("[E]ven if the defendant knows a structure is unoccupied, firing a gun at it still poses a real

risk to bystanders and others in the vicinity."), cert. denied, 131 S. Ct. 2133 (2011).

As petitioner acknowledges (Pet. 12-13 & n.9), the court of appeals' decision in Alexander is consistent with those of other courts of appeals, which have similarly held that convictions under statutes criminalizing the knowing discharge of a firearm in the direction of a person or a potentially occupied structure qualify as violent felonies (or as crimes of violence under the similarly worded residual clause in the Sentencing Guidelines). See Ruvalcaba, 627 F.3d at 223 (so holding with respect to Ohio statute, and collecting cases from two other circuits); United States v. Ford, 613 F.3d 1263, 1272-1273 (10th Cir. 2010) (Kansas statute).

Those cases do not, as petitioner suggests (Pet. 12-13), conflict with United States v. Coronado, 603 F.3d 706 (9th Cir. 2010). The California statute at issue in Coronado proscribed discharging a firearm with a mental state of gross negligence. Id. at 710. The Ninth Circuit held that an offense committed with that mental state did not entail the kind of "purposeful" conduct necessary to qualify as a crime of violence under this Court's decision in Begay v. United States, 553 U.S. 137 (2008). Coronado, 603 F.3d at 710; see United States v. Crews, 621 F.3d 849, 857 (9th Cir. 2010) (explaining that the result in Coronado turned on mental state of gross negligence in California

statute). The Florida statute in this case, by contrast, "has a stringent mens rea requirement," Sykes, 131 S. Ct at 2275, requiring that the offender discharge the firearm "knowingly and willfully." See Fla. Stat. Ann. § 790.15(2) (West 1994); Alexander, 609 F.3d at 1258 ("Knowingly and willfully discharging a firearm from a vehicle is, without question, 'purposeful' conduct."). A conviction under that statute would therefore qualify as a predicate offense in the Ninth Circuit. Crews, 621 F.3d at 857.

3. Finally, petitioner contends (Pet. 13-14) that this Court should overrule its decision in Almendarez-Torres, supra, which held that the fact of a prior conviction used to increase the maximum term of imprisonment that may be imposed on a defendant is a sentencing factor, not an element of the offense, and thus need not be alleged in the indictment. There is no warrant for reconsidering that rule. In keeping with Almendarez-Torres, this Court held in Apprendi v. New Jersey, 530 U.S. 466 (2000), that the Sixth Amendment requires any fact "[o]ther than the fact of a prior conviction" to be submitted to a jury, and proved beyond a reasonable doubt (or admitted by the defendant), when it increases the penalty for a crime beyond the prescribed statutory maximum. Id. at 490 (emphasis added). This Court has since repeatedly affirmed that the Sixth Amendment rule announced in Apprendi applies only to penalty-

enhancing facts "other than the fact of a prior conviction." See Descamps, 133 S. Ct. at 2288; Alleyne v. United States, 133 S. Ct. 2151, 2160 n.1 (2013); Southern Union Co. v. United States, 132 S. Ct. 2344, 2348 (2012); Carachuri-Rosendo v. Holder, 560 U.S. 563, 567 n.3 (2010); James, 550 U.S. at 214 n.8; Cunningham v. California, 549 U.S. 270, 274-275 (2007); United States v. Booker, 543 U.S. 220, 244 (2005); Blakely v. Washington, 542 U.S. 296, 301-302 (2004); Dretke v. Haley, 541 U.S. 386, 395-396 (2004).

This Court has also repeatedly, and recently, denied petitions urging that Almendarez-Torres be overruled. See Rangel-Reyes v. United States, 547 U.S. 1200, 1201-1202 (2006) (Stevens, J., respecting the denial of the petitions for writ of certiorari) ("The doctrine of stare decisis provides a sufficient basis for the denial of certiorari in these cases."); see also, e.g., Coprich v. United States, 134 S. Ct. 2832 (2014) (No. 13-10155) (government waived its right to respond); Rivas v. United States, 134 S. Ct. 2742 (2014) (No. 13-10106) (same); Williams v. United States, 134 S. Ct. 2715 (2014) (No. 13-9995) (same); Staten v. United States, 134 S. Ct. 2689 (2014) (No. 13-9229) (same); Herrell v. United States, 134 S. Ct. 486 (2013) (No. 13-6349) (same); Descamps v. United States, 133 S. Ct. 90 (2012) (No. 11-9540) (Question 2). There is no reason for a different result here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

LESLIE R. CALDWELL
Assistant Attorney General

SCOTT A.C. MEISLER
Attorney

SEPTEMBER 2014

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CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION**, via email and first-class mail, postage prepaid, this 12th day of September, 2014.

[See Attached Service List]

Donald B. Verrilli, Jr.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

September 12, 2014

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Supervisor, Case Management Specialist, Office of the Solicitor General, at (202) 514-8844, or email at SupremeCtBriefs@USDOJ.gov. Ms. Goodwin's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

14-5227
ARROYO, DANIEL
USA

M. ALLISON GUAGLIARDO
ASSISTANT FEDERAL PUBLIC DEFENDER
400 NORTH TAMPA STREET
SUITE 2700
TAMPA, FL 33602
813-228-2715
ALLISON_GUAGLIARDO@FD.ORG