

No. \_\_\_\_\_

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In the  
Supreme Court of the United States

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**Mark Allen Hayden,**

*Petitioner,*

v.

**United States of America,**

*Respondent.*

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

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SUPPLEMENTAL BRIEF FOR PETITIONER  
IN SUPPORT OF PETITION FOR CERTIORARI

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## QUESTIONS PRESENTED

Whether *Floyd v. State*, \_\_ S.W.3d\_\_, 2024 WL 4757855 (Tex. Crim. App. November 13, 2024) – issued by the Texas Court of Criminal Appeals after the decision below -- demonstrates that Petitioner’s prior statute of conviction cannot be divided for the purposes of the categorical approach, and hence demonstrates a reasonable probability of relief if the court below were given a chance to reconsider in light of that intervening authority?

Whether 18 U.S.C. §922(g)(1) comports with the Second Amendment, and whether this Court should hold the instant Petition pending resolution of the circuit split presented by *Range v. Garland*, \_\_ F.4th\_\_, 2024 WL 5199447 (3rd Cir. Dec. 23, 2024)(en banc), and *United States v. Jackson*, 110 F.4th 1120 (8th Cir. 2024)?

## **PARTIES TO THE PROCEEDING**

Petitioner is Mark Allen Hayden, who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

**TABLE OF CONTENTS**

QUESTION PRESENTED ..... i

PARTIES TO THE PROCEEDING ..... ii

INDEX TO APPENDICES ..... iv

TABLE OF AUTHORITIES ..... v

SUPPLEMENTAL BRIEF ..... 1

GUIDELINE, STATUTES, AND CONSTITUTIONAL  
PROVISIONS..... 1

ARGUMENT ..... 1

    Events following the submission of the Reply in Support of the  
    Petition for Certiorari materially improve Petitioner’s case for  
    Certiorari  
    .....1

CONCLUSION..... 5

## INDEX TO APPENDICES

Appendix A *United States v. Rose*, \_\_F.4th\_\_, 2025 WL 383155 (5<sup>th</sup> Cir. Feb. 4, 2025)

Appendix B Excerpt from Government's Submission to the Sentencing Commission

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Federal Cases</b>	
<i>Johnson v. United States</i> , 576 U.S. 591 (2015) .....	3
<i>Lawrence on Behalf of Lawrence v. Chater</i> , 516 U.S. 163 (1996) .....	5
<i>United States v. Garrett</i> , 24 F.4th 485 (5th Cir. 2022) .....	3
<i>United States v. Hayden</i> , No. 24-10132, 2024 WL 4501063 (5th Cir. Oct. 16, 2024)(unpublished).....	4
<i>United States v. Rose</i> , __F.4th__, 2025 WL 383155 (5 <sup>th</sup> Cir. Feb. 4, 2025) .....	2, 3
<b>State Cases</b>	
<i>Floyd v. Texas</i> , __S.W.3d__, 2024 WL 4757855 (Tex. Crim. App. Nov. 13, 2024) .....	2, 3
<b>Federal Statutes</b>	
28 U.S.C. § 2255.....	2
Armed Career Criminal Act, 18 U.S.C. § 924(e).....	3, 4
USSG § 2K2.1 .....	2
USSG § 4B1.2.....	2, 4, 5
USSG § 4B1.2(a)(1).....	2
USSG § 4B1.2(a)(2).....	2
USSG § 4B1.2(a)(2).....	5
USSG § 4B1.2(e)(3) .....	2, 5
<b>State Statutes</b>	
Tex. Penal Code § 29.02(a) .....	1

**Other Authorities**

Letter of Scott Meisler to Chairman Reeves regarding Proposed  
Amendments to Sentencing Guidelines, (Feb. 3, 2025 (“DOJ  
Comments”) ..... 4

**PETITIONER'S SUPPLEMENTAL BRIEF**

**RELEVANT GUIDELINE, STATUTES AND CONSTITUTIONAL PROVISION**

Federal Sentencing Guideline 4B1.2 reads in relevant part:

(a) Crime of Violence.--The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

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(e)(3) Robbery.--"Robbery" is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase 'actual or threatened force' refers to force that is sufficient to overcome a victim's resistance.

Texas Penal Code §29.02(a) provides:

(a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:

(1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

## ARGUMENT

### **Events following the submission of the Reply in Support of the Petition for Certiorari materially improve Petitioner’s case for Certiorari.**

Petitioner wishes to call the Court’s attention to two intervening developments that shed light on the proper disposition of the petition: 1) the opinion of the court below in *United States v. Rose*, \_\_F.4th\_\_, 2025 WL 383155 (5<sup>th</sup> Cir. Feb. 4, 2025), and the government’s submission to the Sentencing Commission regarding proposed Amendments.

Petitioner received an enhanced sentence under §2K2.1 and §4B1.2 on account of his prior Texas conviction for robbery, which the district court treated as a “crime of violence.” Guideline 4B1.2 defines a “crime of violence” as either: 1) an offense punishable by more than one year that “has as an element the use, attempted use, or threatened use of physical force against the person of another,” §4B1.2(a)(1) or 2) certain enumerated offenses, among them “robbery,” *see* §4B1.2(a)(2), which is expressly defined at §4B1.2(e)(3). Between them, the *Rose* opinion and the DOJ’s submission eliminate both of these two alternatives, §4B1.2(a)(1) (“the force clause”) and §4B1.2(a)(2) (“the enumerated offenses”), as valid bases for treating Petitioner’s prior robbery conviction as a “crime of violence.”

In *Rose*, the court below agreed with the position of Petitioner in this Court regarding the significance of *Floyd v. Texas*, \_\_S.W.3d\_\_, 2024 WL 4757855 (Tex. Crim. App. Nov. 13, 2024). Mr. Rose challenged the denial of a motion under 28 U.S.C. §2255. *See Rose*, 2025 WL 383155, at \*1. Specifically, he contended that

*Johnson v. United States*, 576 U.S. 591 (2015), invalidated his sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. §924(e). *See id.*

The government defended the sentence, and in doing so contended that Mr. Rose’s prior Texas convictions for robbery-by-threat and aggravated-robbery-by-threat had as an element the threatened use of force against the person of another, rendering them “violent felonies” under ACCA. *See id.* Before *Floyd*, the government’s position was supported by *United States v. Garrett*, 24 F.4th 485 (5th Cir. 2022), which held Texas robbery divisible into robbery-by-injury (non-qualifying, due to the presence of a reckless *mens rea*) and robbery-by-threat (qualifying).

After the conclusion of briefing in *Rose*, however, the Texas Court of Criminal Appeals issued *Floyd*. As discussed in the Petition, *Floyd* holds that Texas aggravated robbery defendants have no right of jury unanimity as to the commission of the offense by threat or injury. *See Floyd*, 2024 WL 4757855, at \*1. And the *Rose* panel held that *Floyd* “unequivocally” changed Fifth Circuit law, such that *Garrett* no longer validated the use of the aggravated robbery conviction as a violent felony. *Rose*, 2025 WL 383155, at \*1. It remanded in a published opinion. *See id.*

*Rose*, in other words, concludes that *Floyd* has precisely the impact on Fifth Circuit law propounded in the Petition in this case. It confirms that Texas robbery offenses are no longer divisible into threats (which have the threatened use of force as an element) and injuries (which lack the use of force against the person of another as an element, owing to the presence of a reckless *mens rea*). It is a published opinion showing clear or obvious error in the sole rationale of the opinion below: that Texas

robbery satisfies the force clause in USSG §4B1.2, *see United States v. Hayden*, No. 24-10132, 2024 WL 4501063, at \*1 (5th Cir. Oct. 16, 2024)(unpublished)(“The state indictment indicates that Hayden was convicted of robbery-by-threat, which satisfies the relevant definition.”), which is identical to that of ACCA.

A second event following the submission of the Petition in this case also materially advances Petitioner’s cause. On February 3, 2025, the Deputy Chief of the Appellate Division of the Criminal Section of the Department of Justice offered the official comment of the Department on proposed Amendments to the Sentencing Guidelines. *See* Letter of Scott Meisler to Chairman Reeves regarding Proposed Amendments to Sentencing Guidelines, (February 3, 2025)(“DOJ Comments”) available at [https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/90FR128\\_public-comment\\_R.pdf#page=716](https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/202502/90FR128_public-comment_R.pdf#page=716) , last visited February 12, 2025. In this document, the Department asked the Sentencing Commission to change the definition of “robbery” found in USSG §4B1.2, which the Guideline names as a “crime of violence.” DOJ Comments, at p.10-11, PDF pages 725-726 at link. In doing so, the DOJ explicitly conceded that when the Commission adopted the current definition of “robbery” found in USSG §4B1.2, it:

likely eliminat[ed] as crimes of violence numerous state robbery statutes that previously qualified, on the grounds that those statutes allow conviction based on reckless conduct.

DOJ Comments, at p.10, PDF page 725 at link. And it listed the Texas robbery statute as among the statutes that may be violated by reckless conduct. *See id.* at p.10, n.21, page 726 in PDF.

This Commentary represents the official position of the DOJ as to the application of §4B1.2 to the defendant's prior statute of conviction. Further, it clearly precludes any reliance by the government – absent simple self-contradiction – on §§4B1.2(a)(2) and (e)(3) as an alternative basis to affirm Petitioner's sentence. This makes it significantly more likely that Petitioner will receive relief on remand. Similar concessions have been held to merit a grant of certiorari, vacatur of the judgment below, and remand. *See Lawrence on Behalf of Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

### CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 12th day of February, 2025.

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