

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOHN THAT LUONG,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner John Luong filed a 28 U.S.C. § 2255 motion, arguing that the statute underlying his convictions for possessing a firearm in furtherance of a crime of violence, 18 U.S.C. § 924(c), was unconstitutionally vague under this Court’s decisions in *Johnson v. United States*, 576 U.S. 591 (2015), and *United States v. Davis*, 139 S. Ct. 2319 (2019). The district court and Ninth Circuit rejected Luong’s arguments, concluding that his predicate offense supporting his section 924(c) convictions—completed Hobbs Act robbery, in violation of 18 U.S.C. § 1951—was a crime of violence under section 924(c)’s still-constitutional elements clause. The Ninth Circuit relied solely on its prior decision in *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020), to reach this conclusion. But this Court later issued an order in *Dominguez* that granted certiorari, vacated the Ninth Circuit’s judgment, and remanded in light of *United States v. Taylor*, 142 S. Ct. 2015 (2022). *See Dominguez v. United States*, 142 S. Ct. 2857 (2022). And the Ninth Circuit has since remanded *Dominguez* back to the district court, leaving the *Dominguez* opinion vacated.

The question presented is:

Whether the Court should grant Luong’s petition for a writ of certiorari, vacate the Ninth Circuit’s judgment, and remand for further proceedings in light of *Taylor*.

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OPINION BELOW

The Ninth Circuit's decision (App. 1a–4a) is unreported, but available at 2022 WL 1657358. The Ninth Circuit's opinion in *United States v. Dominguez* (App. 5a–22a) is reported at 954 F.3d 1251.

JURISDICTION

The Ninth Circuit issued its decision on May 25, 2022. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 924(c) provides:

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a violation of this subsection that occurs after a prior conviction under this subsection has become final, the person shall--

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

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

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term “brandish” means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition--

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

18 U.S.C. § 1951 provides:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section--

(1) The term “robbery” means 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.

(2) The term “extortion” means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term “commerce” means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

STATEMENT OF THE CASE

I. Luong was convicted of two counts of violating 18 U.S.C. § 924(c).

A 1998 superseding indictment charged Luong and 18 codefendants with racketeering, Hobbs Act, firearm, and drug offenses. (ER-140–229.) As relevant, it charged Luong with two counts of conspiracy to commit Hobbs Act robbery, in violation of 18 U.S.C. § 1951(a) (Counts 10 and 13); two counts of Hobbs Act robbery, in violation of section 1951(a) (Counts 11 and 14); and two counts of use of a firearm to commit a crime of violence, in violation of 18 U.S.C. § 924(c) (Counts 12 and 15). (ER-177–82.) Counts 12 and 15—the section 924(c) charges—referred both to the Hobbs Act conspiracy and to the Hobbs Act robbery charges as potential predicate offenses. (ER-124–27.)

In 2000, the jury returned guilty verdicts on all of the Hobbs Act charges (Counts 10, 11, 13, and 14), and the two section 924(c) charges (Counts 12 and 15). (ER-49–50.) The district court originally imposed a sentence of 1,058 months (over 88 years) in prison. (ER-38.) Luong appealed his conviction and sentence. *See United States v. Luong*, 215 F. App'x 639 (9th Cir. 2006). The Ninth Circuit affirmed Luong's conviction. *See id.* at 644–45. But the court remanded for resentencing in light of *United States v. Booker*, 543 U.S. 220 (2005), which held that the mandatory Sentencing Guidelines violated the constitution. *See id.* at 646–67. Upon resentencing, the district court imposed a reduced sentence of 65 years in prison, 25 years of which was for the two section 924(c) counts alone.¹ (ER-28.)

¹ The district court recently further reduced Luong's sentence by 15 years, granting Luong's motion for a sentence reduction under 18 U.S.C. § 3582(c)(1)(A). *See*

Luong again appealed his sentence, and the Ninth Circuit affirmed. *See United States v. Luong*, 627 F.3d 1306, 1312 (9th Cir. 2010).

II. The district court denied Luong’s section 2255 motion, and the Ninth Circuit affirmed.

On June 2, 2016, Luong applied with the Ninth Circuit for leave to file a second or successive section 2255 motion. (ER-17–25.) Luong specifically sought leave to challenge his convictions on Counts 12 and 15—the section 924(c) charges—based on this Court’s decision in *Johnson v. United States*, 576 U.S. 591 (2015), which held that the residual clause of the Armed Career Criminal Act’s (ACCA’s) definition of “violent felony” was unconstitutionally vague. (ER-17–21.) Luong argued that his section 924(c) convictions were based on predicate offenses of conspiracy to commit Hobbs Act robbery, which qualified as “crimes of violence” only under the similarly worded and also unconstitutionally vague residual clause of section 924(c)(3)(B). (ER-19–22.) The Ninth Circuit granted leave to file the second or successive motion, and transferred it to the district court. (ER-15–16.)

On July 10, 2018, the district court denied Luong’s section 2255 motion. (ER-5–14.) The court ruled that the superseding indictment charged the section 924(c) offense based solely on the predicate offense of Hobbs Act robbery, not Hobbs Act conspiracy, which the court concluded was a crime of violence under section 924(c)’s elements clause. (ER-9–14.) Luong appealed the district court’s denial of his section 2255 motion to the Ninth Circuit, which granted him a certificate of

United States v. Luong, No. 96-cr-00094-JSW, Dkt. 2446 (N.D. Cal. June 9, 2022). Luong’s sentence still remains 50 years, and his projected release date is not until 2055. *See* <https://www.bop.gov/inmateloc/> (Reg. No. 08838-097).

appealability. (Ninth Cir. No. 18-16369, Dkt. 10.) On appeal, Luong raised two arguments. First, he argued that his two section 924(c) convictions were based on Hobbs Act conspiracy, not Hobbs Act robbery, which no longer qualified as a crime of violence after this Court’s decision in *United States v. Davis*, 139 S. Ct. 2319 (2019). (Ninth Cir. No. 18-16369, Dkt. 23 at 12–22.)

Second, Luong argued that even if his section 924(c) convictions were based on Hobbs Act robbery, those convictions must still be vacated because Hobbs Act robbery did not qualify as a crime of violence under the still-constitutional elements clause. Specifically, he argued that Hobbs Act robbery could be committed by means of placing the victim in fear of injury to his property, which under the Hobbs Act’s expansive definition of “property” includes even intangible property. Luong argued that such threats were insufficient under the elements clause, which requires violent force capable of causing physical injury. (*Id.* at 22–25.)

Meanwhile, while Luong’s appeal was pending, the Ninth Circuit issued an opinion in *United States v. Dominguez*, 954 F.3d 1251 (9th Cir. 2020), which held that both completed Hobbs Act robbery and attempted Hobbs Act robbery were crimes of violence under section 924(c)’s still-constitutional elements clause. (App 5a–22a.) The defendant had argued that one means of committing completed Hobbs Act robbery was by means of placing the victim in fear of future injury to intangible property, which did not require sufficient violent force to satisfy the elements clause. *See* 954 F.3d at 1260. The Ninth Circuit rejected this argument, holding that the defendant was required to point to a realistic probability that the government would actually initiate such a prosecution, citing this Court’s opinion in

Gonzales v. Duenas- Alvarez, 549 U.S. 183, 193 (2007). *See Dominguez*, 954 F.3d at 1260.

On May 25, 2022, the Ninth Circuit affirmed the district court’s denial of Luong’s section 2255 motion. The court rejected Luong’s argument that his underlying predicate offenses supporting his section 924(c) convictions were for Hobbs Act conspiracy, and instead concluded that the predicate offenses were for completed Hobbs Act robbery. The court further held that completed Hobbs Act robbery was a crime of violence under section 924(c)’s elements clause, citing its prior opinion in *United States v. Dominguez*, 954 F.3d 1251, 1260–61 (9th Cir. 2020), which at the time was pending before this Court on an unresolved petition for a writ of certiorari. (App 2a–3a.)

III. Post-judgment proceedings in *Dominguez*

On June 21, 2022, after the Ninth Circuit’s judgment issued in this case, this Court issued its opinion in *United States v. Taylor*, 142 S. Ct. 2015 (2022), holding that attempted Hobbs Act robbery was not a crime of violence under the elements clause of section 924(c). On June 27, 2022, this Court issued an order granting certiorari, vacating, and remanding (GVR) in *Dominguez*, sending the case back to the Ninth Circuit in light of *Taylor*. *See Dominguez v. United States*, 142 S. Ct. 2857 (2022). On July 29, 2022, the Ninth Circuit issued a short order remanding the case back to the district court. *See United States v. Dominguez*, No. 14-10268, Dkt. 153, 2022 WL 3041163, at *1 (9th Cir. July 29, 2022). Then the government then moved the Ninth Circuit, over the defendant’s objection, to reinstate portions of its original opinion in *Dominguez*, which addressed whether completed Hobbs Act

robbery qualified as a crime of violence under the elements clause. *See id.*, Dkt.

156. This motion remains pending as of the filing of this petition.

REASONS FOR GRANTING THE WRIT

I. **This Court’s order vacating the Ninth Circuit’s controlling opinion in *Domínguez* is a post-judgment intervening event that warrants a GVR order here.**

A. This Court issues GVR orders when an intervening event has legal bearing on the decision below.

This Court routinely issues GVR orders when an intervening event, typically a decision of this Court, makes it “not certain that the case was free from all obstacles to reversal on an intervening precedent.” *See Henry v. City of Rock Hill*, 376 U.S. 776, 776 (1964) (per curiam). The Court issues such GVR orders to indicate that an intervening precedent is “sufficiently analogous and, perhaps, decisive to compel re-examination of the case.” *Id.* at 777.

GVR orders are appropriate when “intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation” *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). Justice Scalia dissented from the Court’s GVR order in *Lawrence*, and advocated a more-restrictive interpretation of the scope of this Court’s GVR power. But even in Justice Scalia’s view, a GVR is warranted, among other reasons, “where an intervening factor has arisen that has a legal bearing upon the decision.” *Id.* at 191–92 (Scalia, J., dissenting).

This Court has also been more liberal in its use of its GVR power when the petitioner is a criminal defendant. *See Stutson v. United States*, 516 U.S. 193, 196 (1996) (per curiam) (“Finally, it is not insignificant that this is a criminal case. When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated.”).

- B. This Court should issue a GVR order in light of this Court’s intervening order vacating *Dominguez*, and based on the Court’s intervening opinion in *Taylor*.

This Court’s order vacating *Dominguez* is an intervening post-judgment event that warrants a GVR order here. The Ninth Circuit’s decision in Luong’s appeal was based decisively on *Dominguez*’s holding that completed Hobbs Act robbery was a crime of violence under section 924(c). *See* App 3a. The Ninth Circuit declined the government’s invitation to affirm based on a procedural bar, and the court did not rely on any other source of law besides *Dominguez* to rule that completed Hobbs Act robbery was a crime of violence. *See* App 2a–3a & n.2.

Thus, the Ninth Circuit relied on *Dominguez* to affirm in Luong’s appeal, even though a petition for a writ of certiorari was then pending in *Dominguez*. After this Court vacated the Ninth Circuit’s opinion in *Dominguez*, the Ninth Circuit simply remanded the case to the district court and issued no revised opinion. *See Dominguez*, 2022 WL 3041163, at *1. Given that *Dominguez* is remains vacated, there is no reasoned basis to support the Ninth Circuit’s ruling in Luong’s appeal,

and whether completed Hobbs Act robbery is a crime of violence under section 924(c) is an open question in the Ninth Circuit.

This post-judgment intervening event warrants the Court exercising its GVR power in this case to allow the Ninth Circuit to consider Luong’s arguments that completed Hobbs Act robbery is not a crime of violence under section 924(c) in the first instance. *See Lawrence*, 516 U.S. at 167 (GVR order is appropriate where intervening developments that court of appeals did not consider “reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration”); *id.* at 191–92 (Scalia, J., dissenting) (GVR orders warranted “where an intervening factor has arisen that has a legal bearing upon the decision”); *see also Stutson*, 516 U.S. at 196 (GVR orders are especially warranted in criminal cases).

Further, even if the Ninth Circuit were later to reissue an amended opinion in *Dominguez*, as urged in the government’s pending motion in the Ninth Circuit, this Court should still GVR Luong’s petition because any opinion that may emerge in the future from the Ninth Circuit in *Dominguez* will not be the same opinion that the Court actually relied on when it decided Luong’s appeal, and will instead have to grapple with this Court’s opinion in *Taylor*, the basis for its GVR order. This would still amount to a significant post-judgment intervening event warranting a GVR in Luong’s case. *See id.*

This Court should also GVR Luong’s petition in light of the Court’s intervening decision in *Taylor*, which separately has a significant legal bearing on the Ninth Circuit’s holding that completed Hobbs Act robbery was a crime of violence under

the elements clause in *Dominguez*. In *Dominguez*, the Ninth Circuit held both that completed Hobbs Act robbery and attempted Hobbs Act robbery qualified as crimes of violence under the elements clause of section 924(c). *See Dominguez*, 954 F.3d at 1258–62. The Ninth Circuit’s holding that attempted Hobbs Act robbery qualified as a crime of violence was directly contrary to the Court’s later holding in *Taylor*. *Compare id.* at 1261–62, *with Taylor*, 142 S. Ct. at 2020–21.

As to completed Hobbs Act robbery, the Ninth Circuit concluded that it necessarily required the government to prove that the defendant used, attempted to use, or threatened to use violent force. *See Dominguez*, 954 F.3d at 1260. The defendant in *Dominguez* had argued that one means of committing robbery under the Hobbs Act was by placing the victim in fear of future injury to his property, including fear of injury to intangible property, which he argued was not the “violent force” required by *Johnson v. United States*, 559 U.S. 133, 140 (2010). *See Dominguez*, 954 F.3d at 1260; *see also* 18 U.S.C. § 1951(b)(1) (defining “robbery” as “the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of . . . threatened force, or violence, or fear of injury, immediate or future, to his person or property . . .”). *Dominguez* pointed to multiple circuits’ pattern jury instructions for completed Hobbs Act robbery that define “property” broadly to include intangible rights. *See Dominguez*, No. 14-10268, Dkt. 107 at 10–12 & n.7.

But the Ninth Circuit rejected *Dominguez*’s argument that committing Hobbs Act robbery by means of future threats to injure a victim’s intangible economic interests did not amount to the “violent force” required to satisfy the elements

clause under *Johnson*. *See* 954 F.3d at 1260–61. Specifically, the Ninth Circuit did not even engage this possible means of violating the Hobbs Act, “because Dominguez fails to point to any realistic scenario in which a robber could commit Hobbs Act robbery by placing his victim in fear of injury to an intangible economic interest,” citing this Court’s decision in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). *See* 954 F.3d at 1260. The Ninth Circuit’s interpretation of this Court’s *Duenas-Alvarez* decision in *Dominguez* is directly contrary to how the Court in *Taylor* explained the relevance of *Duenas-Alvarez* in federal cases.

The Court in *Taylor* did not address whether completed Hobbs Act robbery is a crime of violence. *See* 142 S. Ct. at 2020 (“Whatever one might say about *completed* Hobbs Act robbery, attempted Hobbs Act robbery does not satisfy the elements clause.”). But the Court clarified the scope of the “realistic probability” test first articulated in *Duenas-Alvarez*. *See id.* at 2024–25. In *Taylor*, the government argued that the petitioner had failed to cite a specific case of a federal prosecution for attempted Hobbs Act robbery without the threat being communicated to the victim, suggesting that under *Duenas-Alvarez* a defendant must show that there is a “realistic probability” that such conduct falling outside the scope of the elements clause has actually been prosecuted. *See id.*

The Court rejected the government’s interpretation and application of *Duenas-Alvarez*. *See id.* The Court noted that *Duenas-Alvarez* arose in the context of the Immigration and Nationality Act and involved federal courts interpreting state criminal statutes, and was informed by federal courts’ deference to how state courts interpret their own laws. *See id.* *Taylor*, which involved the federal Hobbs Act,

implicated no such federalism concerns. *See id.* at 2025. The Court also noted that the Hobbs Act’s plain terms covered the conduct the petitioner argued fell outside the elements clause, and questioned whether it was appropriate to put the burden on a defendant to show how the government exercises its own prosecutorial discretion. *See id.* at 2024 (“Put aside the oddity of placing a burden on the defendant to present empirical evidence about the government’s own prosecutorial habits. Put aside, too, the practical challenges such a burden would present in a world where most cases end in plea agreements, and not all of those cases make their way into easily accessible commercial databases.”).

Thus, this Court in *Taylor* made it clear that when federal courts are deciding whether a federal predicate offense qualifies as a crime of violence under section 924(c), the *Duenas-Alvarez* “realistic probability” test does not apply. *See id.* at 2024–25. Federal courts are quite capable of determining “whether the elements of one federal law align with those prescribed in another.” *Id.* at 2025. Yet the Ninth Circuit in *Dominguez* relied on just this application of the “realistic probability” test in a section 924(c) case interpreting the scope of a federal predicate offense, contrary to this Court’s teaching in *Taylor*. *See id.; Dominguez*, 954 F.3d at 1260–61.

Further, the appellant’s argument in *Dominguez* (also advanced by Luong below) that one means by which a defendant may commit a Hobbs Act robbery is by causing the victim to fear future injury to his intangible property is plausible. The text of the Hobbs Act defines robbery broadly, to include obtaining the victim’s property against his will by means of “fear of injury, immediate or future, to his

person or property.” 18 U.S.C. § 1951(b). And, multiple circuits’ pattern jury instructions expressly instruct jurors that “property” under the Hobbs Act’s definition of robbery includes intangible property. *See* Tenth Circuit Criminal Pattern Jury Instructions, No. 2.70, *available at* <https://www.ca10.uscourts.gov/sites/ca10/files/documents/downloads/Jury%20Instructions%202021%20Version.pdf> (“‘Property’ includes money and other tangible and intangible things of value that are transferable – that is, capable of passing from one person to another.”); Eleventh Circuit Pattern Jury Instructions (Criminal Cases), No. O70.3, *available at* <https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstructionsCurrentComplete.pdf?revDate=20200227> (“‘Property’ includes money, tangible things of value, and intangible rights that are a source or element of income or wealth.”).

Because the Ninth Circuit in *Dominguez* and by extension in this appeal relied on an interpretation and application of *Duenas-Alvarez* that this Court rejected in *Taylor*, this Court should GVR this case in light of *Taylor*.

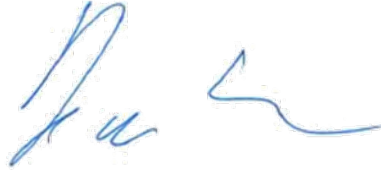
CONCLUSION

The Court should grant this petition for a writ of certiorari, vacate the judgment below, and remand for further consideration in light of *Taylor*.

Respectfully submitted,

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