No. 22-5451

IN THE SUPREME COURT OF THE UNITED STATES

JOHN THAT LUONG, PETITIONER

v.

UNITED STATES OF AMERICA

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

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends (Pet. 9-15) that his convictions for using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c), are infirm in light of United States v. Taylor, 142 S. Ct. 2015 (2022). In Taylor, this Court held that attempted Hobbs Act robbery, in violation of 18 U.S.C. 1951(a), does not qualify as a "crime of violence" under 18 U.S.C. 924(c)(3)(A) because it does not "require the government to prove the use, attempted use, or threatened use of force." Taylor, 142 S. Ct. at 2025. Here, petitioner acknowledges (Pet. i) that the "predicate offense supporting his [S]ection 924(c)

convictions" was "completed" -- not attempted -- "Hobbs Act robbery," but nonetheless asks (Pet. 11) this Court to grant the petition for a writ of certiorari, vacate the decision of the court of appeals, and remand for further proceedings (GVR) "to allow the Ninth Circuit to consider [petitioner]'s arguments that completed Hobbs Act robbery is not a crime of violence under [S]ection 924(c)" in light of Taylor. That request lacks merit, because Taylor did not affect the classification of completed Hobbs Act robbery as a crime of violence under Section 924(c)(3)(A).

1. The court of appeals correctly recognized that "[petitioner]'s § 924(c) convictions are based on Hobbs Act robbery," which "is a crime of violence under § 924(c)(3)(A)." Pet. App. 3a. The recognition of completed Hobbs Act robbery as a crime of violence under Section 924(c)(3)(A), which classifies any federal felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," 18 U.S.C. 924(c)(3)(A), reflects the consensus view of every court of appeals to address the issue;[1] does not conflict

[1] See, e.g., United States v. Richardson, 948 F.3d 733, 742 (6th Cir.), cert. denied, 141 S. Ct. 344 (2020); Brown v. United States, 942 F.3d 1069, 1075 (11th Cir. 2019) (per curiam); United States v. García-Ortiz, 904 F.3d 102, 109 (1st Cir. 2018), cert. denied, 139 S. Ct. 1208 (2019); United States v. Melgar-Cabrera, 892 F.3d 1053, 1060-1066 (10th Cir.), cert. denied, 139 S. Ct. 494 (2018); United States v. Hill, 890 F.3d 51, 56-60 (2d Cir. 2018), cert. denied, 139 S. Ct. 844 (2019); United States v. Buck, 847 F.3d 267, 274-275 (5th Cir.), cert. denied, 137 S. Ct. 2231, and 138 S. Ct. 149 (2017); Diaz v. United States, 863 F.3d

with any decision of this Court; and was not called into question by Taylor.

In Taylor, this Court held that attempted Hobbs Act robbery does not qualify as a crime of violence under Section 924(c)(3)(A), because "no element of attempted Hobbs Act robbery requires proof that the defendant used, attempted to use, or threatened to use force." 142 S. Ct. at 2021. In so holding, the Court reasoned that "the government could win a lawful conviction against [a hypothetical defendant] for attempted Hobbs Act robbery" if that defendant had merely "intended and attempted to [threaten the use of force], but * * * failed" to actually "g[e]t to the point of threatening the use of force against anyone or anything." Ibid.

At the same time, Taylor observed that, "to win a conviction for a completed robbery the government must show that the defendant engaged in the 'unlawful taking or obtaining of personal property from the person . . . of another, against his will, by means of actual or threatened force.'" 142 S. Ct. at 2020 (citation omitted). The requirement of "actual or threatened force" differentiates completed Hobbs Act robbery from attempted Hobbs Act robbery, and it eliminates any doubt that a conviction for completed Hobbs Act robbery is a conviction for a crime that "has as an element the use, attempted use, or threatened use of physical

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781, 783 (8th Cir. 2017); United States v. Rivera, 847 F.3d 847, 848-849 (7th Cir.), cert. denied, 137 S. Ct. 2228 (2017).

force against the person or property of another," 18 U.S.C. 924(c)(3)(A).

2. Petitioner's suggestion (Pet. 10-15) that this Court enter a GVR order to permit further analysis of completed Hobbs Act robbery is unwarranted. Contrary to petitioner's contention (Pet. 10-12), the decision below does not rest on deprecated circuit precedent.

In denying relief, the court of appeals cited circuit precedent "reaffirming that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A)." Pet. App. 3a (citing United States v. Dominguez, 954 F.3d 1251, 1260-1261 (9th Cir. 2020), cert. granted, judgment vacated on other grounds, 142 S. Ct. 2857 (2022)). Dominguez involved the classification of both completed and attempted Hobbs Act robbery. See Dominguez, 954 F.3d at 1261-1262. The defendant in Dominguez filed a petition for a writ of certiorari presenting a question only about the classification of attempted Hobbs Act robbery. See No. 20-1000 Pet. i. After this Court held in Taylor that attempted Hobbs Act robbery is not a crime of violence, it GVR'd Dominguez "for further consideration in light of [Taylor]." 142 S. Ct. 2857.

On remand, the court of appeals issued an amended order reversing Dominguez's Section 924(c) conviction predicated on attempted Hobbs Act robbery, but "affirm[ing] on all remaining counts for the reasons explained in [the] opinion reported at 954

F.3d 1251." United States v. Dominguez, 48 F.4th 1040 (9th Cir. 2022) (capitalization and emphasis omitted). And the decision below in this case cites the portion of the opinion that addressed completed Hobbs Act robbery. See Pet. App. 3a (citing Dominguez, 990 F.3d at 1260-1261). No sound reason exists to question the court of appeals' determination that the cited portion of the opinion, addressing the classification of a crime that Taylor did not involve, remains valid circuit precedent.

Petitioner errs in asserting (Pet. 11-12) that Taylor "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." Petitioner notes (Pet. 12-13) that Dominguez "cit[ed] this Court's decision in Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)," when rejecting the theory that Hobbs Act robbery could encompass threats to intangible property that would not fall within Section 924(c)(3)(A), and he contends (Pet. 13) that Taylor's "clarifi[cation of] the scope of the 'realistic probability' test first articulated in Duenas-Alvarez" undermines the court of appeals' reasoning. But Dominguez also "d[id] not discern any basis in the text" of the Hobbs Act to support petitioner's argument, 954 F.3d at 1261 (citation omitted), and that textual analysis independently supported its classification of completed Hobbs Act robbery as a crime of violence.

Moreover, even if no part of Dominguez remained binding, or even if Dominguez itself had depended entirely on Duenas-Alvarez, the decision below correctly observes that Dominguez merely "reaffirm[ed] that Hobbs Act robbery is a crime of violence under § 924(c)(3)(A)." Pet. App. 3a (emphasis added); see Dominguez, 954 F.3d at 1260 ("We previously held in Mendez that Hobbs Act robbery is a crime of violence under the elements clause." (citing United States v. Mendez, 992 F.2d 1488, 1491 (9th Cir. 1993))). That earlier circuit precedent both supports the decision below as a matter of circuit law and predates Duenas-Alvarez by more than a decade and thus did not engage in a "realistic probability" analysis at all. See Mendez, 992 F.2d at 1491.

The petition for a writ of certiorari should accordingly be denied.[2]

Respectfully submitted.

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OCTOBER 2022

[2] The government waives any further response to the petition for a writ of certiorari unless this Court requests otherwise.