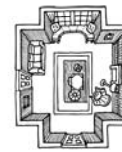
Case o' the Week

A little memo on a big case.

From: Steven Kalar, Federal Public Defender, N.D. Cal. FPD   Date: Monday, August 26, 2019
Re: *United States v. Begay*, 2019 WL 3884261 (9th Cir. Aug. 19, 2019): ***Taylor Categorical Sentencing****:* Big win, second-degree murder *not* a "crime of violence

NONVIOLENT CLUE



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Players: Decision by Judge D.W. Nelson, joined by Judge Clifton. Dissent by Judge N.R. Smith. Admirable victory for AFPD "Edie" Cunningham, D. Arizona.

Facts: Begay was convicted of second-degree murder, in violation of 18 USC §§ 1111 and 1153. *Id.* at *1. He was also convicted of discharging a gun during a "crime of violence" (this murder), under 18 USC § 924(c). *Id.* at *2.

Issue(s): "Begay was convicted of discharging a firearm during a 'crime of violence' under 18 U.S.C. § 924(c). On appeal, Begay argues that second-degree murder does not qualify as a 'crime of violence.'" *Id.*

Held: "To determine whether second-degree murder is a 'crime of violence' we apply the 'categorical approach' laid out in *Taylor* . . . Based on the facts of this case, it may be hard to understand how the shooting of [the victim,] Ben by Begay might not be a 'crime of violence.' Under the categorical approach, however, we do not look to the facts underlying the conviction, but "compare the elements of the statute forming the basis of the defendant's conviction with the elements of" a "crime of violence." *See Descamps*. . . . The defendant's crime cannot be a categorical 'crime of violence' if the conduct proscribed by the statute of conviction is broader than the conduct encompassed by the statutory definition of a "crime of violence." *See id*." *Id.* at *3. "Second-degree murder does not constitute a crime of violence under the elements clause—18 U.S.C. § 924(c)(3) (A)—because it can be committed recklessly." *Id.* at *4. "We REVERSE Count Two of Begay's conviction for discharging a firearm during a "crime of violence" under 18 U.S.C. § 924(c)(1)(A) . . . ." *Id.* at *6.

Of Note: In a curious cultural mash-up, Judge N.R. Smith begins his dissent by quoting *Zoolander*: "I feel like I am taking crazy pills." *Id.* at *6 (N.R. Smith, J., dissenting). In Judge Smith's view, the majority should have used second-degree murder's "malice aforethought" requirement as a sort of proxy, that revs-up a *reckless*-conduct offense into qualifying as a "crime of violence." He urges this novel "malice aforethought" theory as a new way to find that a *reckless* second-degree murder is serious enough to be a "crime of violence." *Id.* Judge Smith's dissent conspicuously baits the en banc hook. Here's hoping the Ninth doesn't nibble – the dissent doesn't grapple with the reality of the controlling *Fernandez-Ruiz* decision, and fails to engage with the Majority's (correct) reading of *Voisine*. This outcome may stick in some craws, but *Begay*'s legal analysis is spot on.

How to Use: The nub of *Begay* is this: did the Supreme Court's 2016 decision in *Voisine*, holding that a "misdemeanor crime of domestic violence" includes "reckless assaults," overrule the Ninth's 2006, en banc *Fernandez-Ruiz* decision, holding that crimes that can be committed recklessly are not "crimes of violence" under § 16? *Id.* at *5. In a thoughtful and principled analysis, Judge D.W. Nelson explains that *Voisine* left this question open. *Id.* Judge Nelson remains faithful to Ninth Circuit law interpreting 18 U.S.C. § 16 to 18 U.S.C. § 924(c), and – staying true to precedent – continues to hold that a "crime of violence under 18 U.S.C. § 924(c)(3) requires the intentional use of force." *Id.* Read *Begay* carefully when considering a "reckless" offense the government argues is a "crime of violence." Under existing Ninth authority, "reckless" just won't cut it.

For Further Reading: Last week a (Latino) Tenderloin drug dealer was sentenced in federal court. *See* https://www.justice.gov/usao-ndca/pr/tenderloin-drug-dealer-sentenced-three-years-prison The week before, the "Federal Initiative for the Tenderlon" ("FIT") kicked off with drug charges for nine (Latino) defendants. *See* https://www.justice.gov/usao-ndca/pr/nine-defendants-charged-international-drug-trafficking-conspiracy Days before, thirteen (Latino) defendants were charged in a drug trafficking conspiracy, working the 'loin. *See* https://www.justice.gov/usao-ndca/pr/thirteen-defendants-charged-cross-bay-drug-trafficking-conspiracy Substitute "Latino defendant" for "black defendant," and "FIT" has some *Safe Schools* déjà vu, all over again. *See "For Further Reading,"* available here; http://circuit9.blogspot.com/2017/01/case-o-week-slings-and-arrows-of.html, and here: http://circuit9.blogspot.com/2018/10/case-o-week-sold-on-sellers-sellers-and.html