

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA            )  
  ) Criminal Action  
                  vs.                    ) No. 09-cr-375-1  
  )  
MITCHELL VAZQUEZ,                    )  
  )  
                          Defendant     )

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APPEARANCES:

          JOSEPH A. LABAR, ESQUIRE  
          Assistant United States Attorney  
          On behalf of the United States of America

          BENJAMIN B. COOPER, ESQUIRE  
          Assistant Federal Defender  
          On behalf of Defendant

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M E M O R A N D U M     O P I N I O N

JAMES KNOLL GARDNER,  
United States District Judge

          The matter before the court is the objection of defendant Mitchell Vazquez to paragraph 54 of his January 4, 2010 Presentence Investigation Report, which classified defendant as a career offender pursuant to section 4B1.1 of the United States Sentencing Guidelines.<sup>1</sup>

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<sup>1</sup> The objection was made in Defendant's Response to Government's Supplemental Sentencing Memorandum filed June 23, 2010 (Document 77). See pages 9 and 10 of the Notes of Testimony of the Sentencing Hearing Before the Honorable James [Knoll] Gardner[,] United States District Judge held June 24, 2010.

On June 24, 2010 I conducted a sentencing hearing and heard argument on this objection.<sup>2</sup> At the close of the hearing, I ordered supplemental briefing and took the matter under advisement. I have considered the Government's Supplemental Memorandum of Law on Sentencing and Defendant Mitchell Vazquez's Brief on Questions Raised by the Court at the June 24, 2010 Sentencing Hearing, both of which were filed on July 12, 2010.

For the reasons articulated below, I now conclude that defendant is not a career offender within the meaning of U.S.S.G. § 4B1.1, and I sustain his objection.

#### PROCEDURAL HISTORY

On June 3, 2009, an eight-count sealed Indictment was filed against defendant Mitchell Vazquez and his co-defendants David Mendez and Gerardo Roberto Hernandez. The Indictment charged defendant Vazquez with one count of conspiracy to distribute 100 grams or more of heroin in violation of 21 U.S.C. § 846, seven counts of distribution of heroin in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(c), and aiding and abetting as defined in 18 U.S.C. § 2.

On June 3, 2009, defendant Vazquez made his initial appearance before United States Magistrate Judge Henry S. Perkin. On June 4, 2009, defendant Vazquez was arraigned before

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<sup>2</sup> Defendant also objected to paragraph 48 of the Presentence Investigation Report, which authorized a two-level enhancement to defendant's base offense level under § 2D1.1(b)(1) of the United States Sentencing Guidelines. This objection was made at the June 24, 2010 sentencing hearing, but was not argued or resolved at that time because the hearing was continued until disposition of the objection to defendant's classification as a career offender.

Magistrate Judge Perkin. The Indictment was unsealed on June 18, 2009.

On October 19, 2009, defendant Vazquez entered an open guilty plea to all eight counts of the indictment. Defendant appeared before me for sentencing on June 24, 2010. At that time, I heard argument on defendant's objection to application of the Career Offender provision and took the objection under advisement. Hence this Memorandum Opinion.

### CONTENTIONS

#### Defendant's Contentions

Defendant Vazquez objects to the application of § 4B1.1, the Career Offender provision of the United States Sentencing Guidelines, to classify him as a career offender. Specifically, defendant contends that his 1987 New York felony conviction for manslaughter in the second degree, a crime committed by recklessly causing the death of another person, is not a "crime of violence" as defined in U.S.S.G. § 4B1.2(a)(2).<sup>3</sup> Therefore, defendant contends that this offense does not qualify as a predicate offense to trigger the application of § 4B1.1.

In support of his argument, defendant contends that the

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<sup>3</sup> Section 4B1.2(a)(2) defines "crime of violence" as follows:

The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that...is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

2008 decision of the United States Supreme Court in Begay v. United States, 553 U.S. 137, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008), changed the required analysis of what constitutes a "crime of violence" under the residual, or "otherwise involves" clause of § 4B1.2(a)(2).<sup>4</sup> Specifically, defendant contends that after Begay, an offense cannot qualify as a "crime of violence" unless it is both similar in *degree* of risk and in *kind* of risk posed to the examples listed in the first clause of § 4B1.2(a)(2): burglary of a dwelling, arson, extortion, or crimes involving the use of explosives. Defendant further contends that to be similar in kind of risk post-Begay, the offense must involve purposeful, violent, and aggressive conduct.

Defendant also contends that after Begay, offenses with a mens rea of recklessness may no longer qualify as "crimes of violence." In support of this argument, defendant relies on the Third Circuit's post-Begay decisions in Polk v. United States, 577 F.3d 515 (3d. Cir. 2009), and United States v. Johnson, 587 F.3d 203 (3d. Cir. 2009), as well as post-Begay decisions from the Second, Sixth, and Seventh Circuits. Therefore,

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<sup>4</sup> As explained further in the Discussion below, Begay addressed the issue of what crimes would qualify as "violent felonies" under the residual, or "otherwise involves" clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii). Begay v. United States, 553 U.S. 137, 142, 128 S.Ct. 1581, 1584-1585, 170 L.Ed.2d 490, 496-497 (2008). This clause, reading "or otherwise involves conduct that presents a serious potential risk of physical injury to another," is worded identically to the "otherwise involves" clause of U.S.S.G. § 4B1.2(a)(2). In the Third Circuit, Begay is applicable in determining what crimes are crimes of violence under U.S.S.G. § 4B1.2(a)(2). See Polk v. United States, 577 F.3d 515, 519 & n.1 (3d. Cir. 2009); United States v. Johnson, 587 F.3d 203, 207-208 (3d. Cir. 2009).

defendant contends that because his involuntary manslaughter offense has a mens rea of recklessness, it should not count as a "crime of violence."

Application Note 1 of the Commentary to § 4B1.2 includes "manslaughter" in an enumerated list of crimes which qualify as a crimes of violence. Defendant contends that after Begay, the fact that the list in Application Note 1 includes "manslaughter" is no longer dispositive of whether any manslaughter offense is a "crime of violence." Instead, defendant contends that the type of conduct criminalized in the particular manslaughter statute, i.e. purposeful as opposed to merely reckless, must be considered.

Defendant further contends that after Begay, it is inconsistent with the meaning of § 4B1.2(a)(2) to read Application Note 1's listing of "manslaughter" to include manslaughter in the second degree under New York law (an offense with a mens rea of recklessness). Defendant relies on Stinson v. United States, 508 U.S. 36, 38, 113 S.Ct. 1913, 1915, 123 L.Ed.2d 598, 603 (1993), to support his contention that the guideline provision controls to the extent that Application Note 1 is inconsistent with the required interpretation of the guideline itself.

Therefore, defendant argues that his 1987 conviction for manslaughter in the second degree under New York law is not a "crime of violence" under § 4B1.2(a)(2), and thus the Career Offender provision is inapplicable to his sentence.

#### Government's Contentions

The Government contends that defendant Vazquez's 1987 New York felony conviction of manslaughter in the second degree is a "crime of violence" as defined in U.S.S.G. § 4B1.2. The government asserts that because "manslaughter" is included in the enumerated list of crimes in Application Note 1 of the Commentary to § 4B1.2, manslaughter in the second degree counts as a predicate offense to trigger the application of the Career Offender provision, U.S.S.G. § 4B1.1. Accordingly, the government contends that the probation officer properly applied a six-level enhancement in calculating defendant's Offense Level.<sup>5</sup>

The government relies on the decision of the United States Supreme Court in Taylor v. United States, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), and the decision of the United States Court of Appeals for the Third Circuit in United States v. Bennett, 100 F.3d 1105 (3d Cir. 1996), both decided prior to Begay, for the proposition that the only analysis

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<sup>5</sup> Defendant Vazquez's Presentence Investigation Report assigns defendant a Base Offense Level of 26 (paragraph 47). Defendant received a two-level Specific Offense Characteristic enhancement pursuant to § 2D1.1(b)(1) for the possession of a loaded double barrel shotgun (paragraph 48), resulting in an Adjusted Offense Level of 28 (paragraph 53). Defendant then received a six-level enhancement through application of § 4B1.1, the Career Offender provision, for conviction of two "crimes of violence offenses", raising his Adjusted Offense Level to 34 (paragraph 54). Finally, defendant received a two-level downward Adjustment for Acceptance of Responsibility (paragraph 55) and a one-level downward Additional Adjustment for Acceptance of Responsibility (paragraph 56), resulting in a Total Offense Level of 31 (paragraph 57). Without the Career Offender enhancement, defendant's Total Offense Level would be 25.

In addition, paragraph 69 of the Presentence Investigation Report notes that defendant has six criminal history points, resulting in a criminal history category of III. Because the Career Offender provision was applied, the criminal history category was raised to VI. Without the Career Offender enhancement, defendant's criminal history category is III.

required under § 4B1.2 is whether manslaughter in the second degree under New York law shares the elements of generic, contemporary manslaughter, such as the elements listed in the Model Penal Code.

The government contends that because manslaughter in the second degree in New York is almost indistinguishable from the generic definition of manslaughter in the Model Penal Code<sup>6</sup>, it is "manslaughter" within the meaning of Application Note 1 of the commentary to § 4B1.2, and therefore is a "crime of violence."

Finally, the government contends that Begay does not

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<sup>6</sup> Defendant Vazquez was convicted of manslaughter in the second degree in violation of New York Penal Law § 125.15(1). The statute reads, in relevant part: "A person is guilty of manslaughter in the second degree when...[h]e recklessly causes the death of another person." New York Penal Law § 15.05(3) in relevant part defines "recklessness" as follows:

A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

Under New York law, the prosecution must prove three elements to establish manslaughter in the second degree: "the creation of a substantial and unjustifiable risk; an awareness and disregard of the risk on the part of the defendant; and a resulting death." People v. Licitra, 47 N.Y.2d 554, 558, 393 N.E.2d 456, 459 (N.Y. 1979).

Section 210.3(1)(a) of the Model Penal Code, in relevant part, defines manslaughter as "[c]riminal homicide...committed recklessly." The Model Penal Code further defines "recklessly" in § 2.02(c) as follows:

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

apply to the situation of defendant Vazquez. Specifically, the government contends that Begay and the subsequent Circuit Courts of Appeals decisions relied upon by defendant are relevant only to determine if a crime that is not listed in Application Note 1 is a "crime of violence" under the "otherwise involves" clause of § 4B1.2(a)(2). Therefore, the government asserts that Begay has no effect on the list of enumerated crimes in Application Note 1.

For the following reasons, I agree with defendant. I conclude that defendant's 1987 conviction for manslaughter in the second degree under New York law is not a "crime of violence" under U.S.S.G. § 4B1.2(a)(2), and thus defendant is not a career offender within the meaning of U.S.S.G. § 4B1.1.

#### DISCUSSION

Under § 4B1.1 of the United States Sentencing Guidelines, defendant Vazquez should be designated as a career offender and subject to an enhancement of his Offense Level if he has, among other requirements, "at least two prior felony convictions of either a crime of violence or a controlled substance offense." Section 4B1.2(a) of the guidelines defines a "crime of violence" as:

...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 burglary of a dwelling, arson, or  
extortion, involves use of explosives, or  
otherwise involves conduct that presents a  
serious potential risk of physical injury to

another.

At issue for purposes of defendant Vazquez's objection is § 4B1.2(a)(2). Defendant's 1987 conviction for manslaughter in the second degree under New York law is a "crime of violence" under this provision only if it falls within the residual, or "otherwise involves" clause.

As noted above, the government contends that defendant's conviction is a "crime of violence" because Application Note 1 of the Commentary to § 4B1.2 includes "manslaughter" in an enumerated list of crimes which qualify as crimes of violence.<sup>7</sup> "Manslaughter" is listed without any specification whether it includes all types and degrees of manslaughter, or only manslaughter crimes bearing a particular mens rea. Thus, the government argues that defendant's conviction is clearly a crime of violence. I disagree, because this argument does not account for the required interpretation of § 4B1.2(a)(2) itself in light of the Supreme Court's decision in Begay v. United States, supra. Begay addressed the issue of how to determine whether a crime is a "violent felony" under the residual, or "otherwise involves" clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii). Begay, 553 U.S. at 142, 128 S.Ct. at 1584-1585, 170 L.Ed.2d at 496-497. This clause, "or otherwise

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<sup>7</sup> Application Note 1 reads, in pertinent part: "'Crime of violence' includes murder, **manslaughter**, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling." U.S. Sentencing Guidelines Manual § 4B1.2 cmt. n.1 (2009) (emphasis added).

involves conduct that presents a serious potential risk of physical injury to another," is worded identically to the "otherwise involves" clause of U.S.S.G. § 4B1.2(a)(2).

Therefore, the United States Court of Appeals for the Third Circuit has held that Begay is applicable in determining what are "crimes of violence" under U.S.S.G. § 4B1.2(a)(2). Polk v. United States, 577 F.3d 515, 519 & n.1 (3d. Cir. 2009); United States v. Johnson, 587 F.3d 203, 207-208 (3d. Cir. 2009).

In Begay, the Court held that to be a "violent felony" under the "otherwise involves" clause of 18 U.S.C. §

924(e)(2)(B)(ii), an offense must be "roughly similar, in kind as well as in degree of risk posed," to the examples listed in the first clause of § 924(e)(2)(B)(ii): burglary, arson, extortion, or crimes involving the use of explosives. 553 U.S. at 143, 128 S.Ct. at 1585, 170 L.Ed.2d at 497.

The Begay Court reasoned that by providing these listed examples, Congress intended to limit the scope of the "otherwise involves" clause to crimes similar to the examples themselves, rather than including every offense that presents a serious potential risk of physical injury to another. Id. at 142, 128 S.Ct. at 1584-1585, 170 L.Ed.2d at 496-497. Thus, even where a crime may be similar to the examples in *degree* of risk, it must also be similar to the examples in *kind* of risk posed. Id. at 142-143, 128 S.Ct. at 1585, 170 L.Ed.2d at 497.

The offense in Begay was driving under the influence, under New Mexico state law. The Supreme Court concluded that this offense was not similar in kind of risk to the examples, and thus not a "violent felony" under § 924(e)(2)(B)(ii). In so concluding, the Court noted that "DUI differs from the example crimes...in at least one pertinent and important respect. The listed crimes all typically involve purposeful, violent, and aggressive conduct....[In contrast,] the conduct for which the drunk driver is convicted...need not be purposeful or deliberate." Begay, 553 U.S. at 144-146, 128 S.Ct. at 1586-1587, 170 L.Ed.2d at 499. In Polk, supra, the Third Circuit applied Begay's analysis of § 924(e)(2)(B)(ii) to determine whether an offense is a "crime of violence" under U.S.S.G. § 4B1.2(a)(2). Polk, 577 F.3d at 519 & n.1. The Polk Court notes that "Begay and the remands from the Supreme Court that have followed it indicate that the definitions are close enough that precedent under [§ 924(e)(2)(B)(ii)] must be considered in dealing with [U.S.S.G. § 4B1.2(a)(2)]." Id.

The Polk court concluded that following Begay, the federal offense of possession of a weapon in prison was not a "crime of violence," despite that Court's pre-Begay holding in United States v. Kenney that the identical offense was a "crime of violence" for purposes of § 4B1.2(a)(2). Polk, 577 F.3d at 518-519 (citing United States v. Kenney, 310 F.3d 135, 137 (3d.

Cir. 2002)). In so concluding, the Court noted:

Begay points out that even a serious potential for injury is not enough to qualify a crime for career offender enhancement; the risk created must also be 'similar in kind' to the crimes set out. They involve overt, active conduct that results in harm to a person or property. The possibility that one will confront another person with violent results is not sufficient.

Polk, 577 F.3d at 519 (internal citations omitted).

In a subsequent case, the Third Circuit again employed Begay's analysis of both degree and kind of risk, reiterating that post-Begay, "a crime is similar in kind to one of the enumerated examples if it 'typically involve[s] purposeful, violent, and aggressive conduct.'" United States v. Johnson, 587 F.3d 203, 207-208 (3d. Cir. 2009) (quoting Begay, 533 U.S. at 144-145, 128 S.Ct. at 1586, 170 L.Ed.2d at 498). The Johnson Court concluded that, under Pennsylvania law, the offense of simple assault, when committed intentionally or knowingly, met Begay's requirements for a "crime of violence" under § 4B1.2(a)(2).<sup>8</sup> Id.

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<sup>8</sup> The issue of whether reckless simple assault qualifies as a "crime of violence" was not specifically before the Johnson Court, as the government had abandoned the argument that reckless conduct alone was sufficient after filing their appellate brief with the Third Circuit. Johnson, 587 F.3d at 209-211. However, the Court, in dicta, discussed this issue at length:

(Footnote 8 continued):

(Continuation of footnote 8):

Although we need not revisit the issue in this case, we question whether reckless conduct may amount to a crime of violence post-Begay.... The [Begay] Court distinguished [purposeful, violent, and aggressive] conduct from drunk driving...which the Court noted "is a crime of negligence or recklessness, rather than violence or aggression."

at 211-212.

As the Third Circuit noted in Johnson, "nearly every court of appeals that has considered the issue has held that reckless conduct does not qualify as a crime of violence post-Begay." Johnson, 587 F.3d at 211 n.8 (collecting cases). Of the cases cited by the Johnson Court, the decisions of the Second Circuit in United States v. Gray, 535 F.3d 128 (2d Cir. 2008), the Sixth Circuit in United States v. Baker, 559 F.3d 443 (6th Cir. 2009), and the Seventh Circuit in United States v. Woods, 576 F.3d 400 (7th Cir. 2009), are particularly instructive.

In Gray, the Second Circuit held that a conviction under New York's reckless endangerment statute was not a "crime of violence" under § 4B1.2(a)(2) post-Begay. 535 F.3d at 129. In so holding, the Court noted that "[r]eckless endangerment on its face does not criminalize purposeful or deliberate conduct. Despite coming close to crossing the threshold into purposeful conduct, the criminal acts defined by the reckless endangerment statute are not intentional, a distinction stressed by the

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The Court's repeated invocation of "purposefulness," and the contrast the Court drew between that state of mind and negligence or recklessness, suggest that a crime committed recklessly is not a crime of violence.

Johnson, 587 F.3d at 211 n.8 (quoting Begay, 553 U.S. at 145-146, 128 S.Ct. at 1587, 170 L.Ed.2d at 499 (internal citations omitted)). Thus, although Johnson does not specifically hold that reckless conduct would not qualify as a crime of violence, it is instructive in the matter before the court.

Supreme Court in Begay." Id. at 132.

Similarly, in Baker, supra, the Sixth Circuit held that it was plain error for the district court to conclude that a conviction under Tennessee's reckless endangerment statute qualified as a "crime of violence" under § 4B1.2(a)(2) post-Begay. United States v. Baker, 559 F.3d 443, 454 (6th Cir. 2009). In so holding, the Court noted that "the offense does not clearly involve the type of purposeful, violent, and aggressive conduct as burglary, arson, extortion, or the use of explosives. Rather, on its face the statute criminalizes only reckless conduct." Id. at 453 (internal quotation marks and citations omitted).

The district court's error was "plain" because "Begay clearly altered the requirements for an offense to qualify as a predicate felony under the 'otherwise' clause" by requiring that an offense be similar "'in kind as well as in degree of risk posed' to the listed examples in § 4B1.2(a)(2)." Baker, 559 F.3d at 454 (quoting Begay, 553 U.S. at 143, 128 S.Ct. 1585, 170 L.Ed.2d at 497).

In Woods, supra, the Seventh Circuit held that a conviction in Illinois for involuntary manslaughter, because it required a mens rea of recklessness, was not a "crime of violence" under § 4B1.2(a)(2) post-Begay. 576 F.3d at 401. The Court so held without addressing the fact that "manslaughter" is listed as a "crime of violence" in Application Note 1 of the Commentary to §

4B1.2.

In contrast, two Seventh Circuit cases decided before Begay indicate that the Court had categorically considered manslaughter offenses to be "crimes of violence" regardless of mens rea because of their listing in Application Note 1. See United States v. Kindle, 453 F.3d 438, 440, 442 (7th Cir. 2006), which held that career offender designation was proper based on one conviction for involuntary manslaughter and one for second degree burglary. See also United States v. Gant, 902 F.2d 570, 572 (7th Cir. 1990), which held that voluntary manslaughter was a "crime of violence".

Woods, when compared with Kindle and Gant, indicates that, at least in the Seventh Circuit, the simple fact of a crime's inclusion in the Application Note 1 list is no longer the end of the inquiry post-Begay. When considering the above caselaw from the Second, Sixth, and Seventh Circuits, together with the Third Circuit's discussion in Johnson of whether reckless crimes can qualify as crimes of violence after Begay, I agree with defendant that the simple listing of a crime in Application Note 1 is no longer dispositive.

The government's argument that all types of manslaughter are "crimes of violence" rests heavily on this assertion. See Government's Supplemental Memorandum of Law on Sentencing at 2.

However, I note that they rely on pre-Begay caselaw to support this argument. See id. at 3-4.

Accordingly, I conclude that to determine whether an offense qualifies as a "crime of violence" under the "otherwise involves" clause of § 4B1.2(a)(2) in light of Begay, I am required to determine two things: (1) whether the offense is both similar in degree of risk to the crimes listed in the first clause of § 4B1.2(a)(2) (burglary of a dwelling, arson, extortion, or crimes involving explosives) in that it presents a serious potential risk of physical injury to another, and (2) whether the risk created is similar in kind those crimes. See Polk, 577 F.3d at 519 (citing Begay, 577 U.S. at 142-143, 128 S.Ct. at 1585, 170 L.Ed. at 497).

I further conclude that to determine whether the risk is similar in kind, I must examine whether the offense "involve[s] purposeful, violent, and aggressive conduct." United States v. Johnson, 587 F.3d at 207-208 (quoting Begay, 533 U.S. at 144-145, 128 S.Ct. at 1586, 170 L.Ed.2d at 498).

In this case, defendant Vazquez was convicted of manslaughter in the second degree in violation of New York Penal Law § 125.15. The statute reads, in relevant part: "A person is guilty of manslaughter in the second degree when...[h]e recklessly causes

the death of another person." Therefore, as noted above, defendant Vazquez contends that because this offense requires a mens rea of only recklessness, it is not a "crime of violence" under U.S.S.G. § 4B1.2(a)(2), and thus the Career Offender provision is inapplicable to enhance defendant's sentence.

Under the analysis required by Begay, I conclude that manslaughter in the second degree under New York law is similar in degree of risk to the listed examples, because causing the death of another person, even recklessly, clearly presents a serious potential risk of physical injury to another. Begay, 577 U.S. at 142-143, 128 S.Ct. at 1585, 170 L.Ed. at 497.

However, I also conclude that this offense is not similar in kind of risk to the listed examples because the conduct criminalized in the statute is reckless conduct, rather than purposeful conduct. See Johnson, 587 F.3d at 211 n.8.

Therefore, defendant Vazquez's 1987 conviction under New York law for manslaughter in the second degree is not a "crime of violence" under U.S.S.G. § 4B1.2(a)(2). This conclusion is supported by Johnson, which suggests that a purely reckless crime is not a "crime of violence" for purposes of § 4B1.2(a)(2). Johnson, 587 F.3d at 211 n.8 (quoting Begay, 553 U.S. at 145-146, 128 S.Ct. at 1587, 170 L.Ed.2d at 499 (internal citations omitted)).

As noted above, the government contends that Begay is

inapplicable to defendant Vazquez's conviction because "manslaughter" appears in Application Note 1 of the Commentary to § 4B1.2 in an enumerated list of crimes that qualify as "crimes of violence", which Begay leaves undisturbed. The government further contends that the analysis required under § 4B1.2 is whether manslaughter in the second degree in New York shares the elements of generic, contemporary manslaughter, such as the elements listed in the Model Penal Code. I disagree with both arguments.<sup>9</sup>

The government is correct that Begay, which interprets the "otherwise involves" clause of § 924(e)(2)(B)(ii), as well as

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<sup>9</sup> In support of its contention that defendant's 1987 conviction for manslaughter in the second degree is a "crime of violence" because of its inclusion in Application Note 1, the government relies on pre-Begay caselaw. See Government's Supplemental Memorandum of Law on Sentencing at 3-4. Accordingly, because I have concluded that Begay and the subsequent Circuit Court of Appeals cases applying Begay provide the relevant analysis, I do not consider these cases to be dispositive.

In support of its contention that the required analysis is to compare the statutory definition of the offense with the generic, contemporary definition in the Model Penal Code, the government relies on two pre-Begay cases, Taylor v. United States, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990); and United States v. Bennett, 100 F.3d 1105 (3d Cir. 1996). I do not find these cases to be persuasive, as they not only pre-date Begay, but are not clearly on point. Both cases deal with whether particular convictions for

(Footnote 9 continued):

(Continuation of footnote 9):

burglary qualified as "burglary" within the meaning of 18 U.S.C. § 924(e)(2)(B)(ii) (whose language is the same as § 4B1.2(a)(2)). See Taylor at 577, 110 S.Ct. at 2147, 109 L.Ed.2d at 614; Bennett at 1107-1108.

Unlike manslaughter, burglary is a crime specifically listed in U.S.S.G. § 4B1.2(a)(2). Also, these cases do not address § 4B1.2(a)(2) of the sentencing guidelines, the enumerated list in Application Note 1, or what is required for an offense to qualify as a "crime of violence" within the meaning of that list. Accordingly, I conclude that these cases are of limited value concerning the issue before the court.

Polk, Johnson, and the cases from other circuits which apply Begay to interpret the identical clause in § 4B1.2(a)(2), provide guidance only as to what "crime of violence" means under the "otherwise involves" clause. These cases do not directly address the issue before this court: whether after Begay, a particular manslaughter offense is categorically a "crime of violence" because "manslaughter" is on the enumerated list in Application Note 1, even if the statute applicable to the offense criminalizes only reckless conduct.

However, it is well-settled that "the commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." Stinson v. United States, 508 U.S. 36, 38, 113 S.Ct. 1913, 1915, 123 L.Ed.2d 598, 603 (1993). Accordingly, I must consider Application Note 1 of the commentary to § 4B1.2 only to the extent that it is consistent with my interpretation of § 4B1.2 itself, in light of the Supreme Court's holding in Begay.

As discussed above, I have concluded that in light of Begay, the New York offense of manslaughter in the second degree is not a "crime of violence" under U.S.S.G. § 4B1.2(a)(2) because the conduct criminalized in the statute is reckless conduct, rather than purposeful conduct. A reading of "manslaughter" in

Application Note 1 as including all manslaughter offenses, including those which require only a mens rea of recklessness, would be inconsistent with § 4B1.2(a)(2) as interpreted by the Third Circuit in Johnson.

Therefore, to the extent that Application Note 1 could be construed as including manslaughter with a mens rea of recklessness as a "crime of violence", such a construction would be inconsistent with the guideline itself, and not authoritative. See Stinson, 508 U.S. at 38, 113 S.Ct. at 1915, 123 L.Ed.2d at 603.

Accordingly, because I conclude that defendant's New York conviction of manslaughter in the second degree is not a "crime of violence" for purposes of U.S.S.G. § 4B1.2(a)(2), I sustain defendant's objection to the probation officer's application of the Career Offender provision enhancement, U.S.S.G. § 4B1.1.

#### CONCLUSION

For the foregoing reasons, I conclude that defendant's 1987 New York conviction for manslaughter in the second degree is not a "crime of violence" under U.S.S.G. § 4B1.2(a)(2), and thus defendant is not a career offender within the meaning of U.S.S.G. § 4B1.1.

Because defendant's manslaughter conviction in Queens County, New York (enumerated in paragraph 62 of the Presentence Investigation Report) is not a crime of violence, defendant does

not have at least two prior felony convictions of either a crime of violence or a controlled substance offense. Therefore I recalculate his sentence guideline computation by eliminating his six offense level Chapter Four enhancement in paragraph 54 of the Presentence Investigation Report. As a result, his Total Offense Level in paragraph 57 is 25, not 31.

Because defendant has six criminal history points (paragraphs 62 and 64 of the Presentence Investigation Report) his criminal history category is III according to the sentencing table at U.S.S.G. Chapter 5, Part A. Because he is not a career criminal, his criminal history category does not escalate to VI as indicated in paragraph 69. A Total Offense Level of 25 and a criminal history category of III yields a guideline sentence range of 70 to 87 months.<sup>10</sup>

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
	)	Criminal Action
vs.	)	No. 09-cr-375-1
	)	
MITCHELL VAZQUEZ,	)	
	)	
Defendant	)	

O R D E R

NOW, this 8th day of November 2010, upon consideration of defendant Mitchell Vazquez's written objection to paragraph 54

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<sup>10</sup> If defendant were a career criminal, he would have a Total Offense Level of 31 and a criminal history category of VI, which yields a guideline sentence range of 188 to 235 months.

of the Presentence Investigation Report revised January 4, 2010 in this matter, which objection was made in Defendant's Response to Government's Supplemental Sentencing Memorandum filed June 23, 2010 (Document 77); after oral argument held at the June 24, 2010 sentencing hearing; and for the reasons expressed in the accompanying Memorandum Opinion,

IT IS ORDERED that defendant's objection is sustained.

IT IS FURTHER ORDERED that the Presentence Investigation Report is amended to reflect a Total Offense Level of 25 and a criminal history category of III, which yields a guideline sentence range of 70 to 87 months.<sup>11</sup>

BY THE COURT:

/s/ James Knoll Gardner  
James Knoll Gardner  
United States District Judge

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<sup>11</sup> For the reasons expressed in the accompanying Memorandum Opinion, paragraph 54 of the Presentence Investigation Report, Chapter Four Enhancements, which added six offense levels to defendant's Adjusted Offense Level (Subtotal) of 28 (paragraph 53) is deleted, and defendant's Total Offense Level of 31 (paragraph 57) is reduced to 25. Defendant has six criminal history points (paragraphs 62 and 64). Therefore, his criminal history category is III according to the sentencing table at United States Sentencing Guidelines Chapter 5, Part A. Because I have concluded that defendant should not be classified as a career offender pursuant to section 4B1.1 of the guidelines, his criminal history category does not escalate to a category VI as indicated in paragraph 69 of the Presentence Investigation Report.

