

FILED

*United States v. Peterson*, No. 07-30465

OCT 27 2009

BYBEE, Circuit Judge, concurring in the judgment:

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

I concur in the judgment because I agree that our en banc decision in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007) (en banc), squarely controls this case: since the Oregon statute under which Peterson was convicted “is missing an element of the generic crime altogether,” the modified categorical approach is inapplicable. *Id.* at 1073. I write separately because I continue to believe that *Navarro-Lopez* was wrongly decided for the reasons set forth in my dissenting opinion in *Aguilar-Turcios v. Holder*, \_\_\_ F.3d \_\_\_, 2009 WL 3086012, \*8-\*15 (9th Cir. Sep. 29, 2009). I do not find it necessary to reiterate those reasons here, but I think it is worth noting that under any reasonable interpretation of the modified categorical approach as set forth in *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005), the district court correctly increased Peterson’s sentence because he was a “career offender.”

The Sentencing Guidelines provide for a sentence enhancement if the defendant is a “career offender,” meaning that: “(1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instance offense of conviction is a felony that is [ ] a crime of violence . . . ; and (3) the defendant has at least two prior felony convictions of [ ] a crime of violence . . . .” U.S. Sentencing Guidelines Manual § 4B1.1(a). The

Guidelines define “crime of violence” as “any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a *serious risk of physical injury to another*.” *Id.* § 4B1.2(a) (emphasis added).

On June 6, 2007, Peterson pleaded guilty to bank robbery, in violation of 18 U.S.C. § 2113(a). Prior to this plea, Peterson had a prior state conviction for assault and had been convicted twice under Oregon Revised Statute § 811.540 for attempting to elude a police officer.<sup>1</sup> Because his assault conviction unquestionably constitutes a “crime of violence,” the question in this case is whether one of his two convictions for attempting to elude a police officer qualifies as a “crime of violence,” which would give him the “two prior felony convictions of [ ] a crime of violence” necessary to categorize him as a “career offender.” *Id.* § 4B1.1(a).

Under any reasonable application of the modified categorical approach, both

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<sup>1</sup> Under this statute, a person commits a felony if:

- (a) The person is operating a motor vehicle; and
- (b) A police officer . . . gives a visual or audible signal to bring the vehicle to a stop . . . and [ ]:
  - (A) The person, while still in the vehicle, knowingly flees or attempts to elude a pursuing police officer . . . .

Or. Rev. Stat. § 811.540(1).

of Peterson's convictions under § 811.540(1) fall within the Guidelines definition of a "crime of violence." In the first incident, police attempted to stop Peterson after he nearly struck a police officer with his vehicle while under the influence of alcohol. Peterson led the police on a lengthy pursuit through areas heavily congested with traffic and people, during which he ran red lights and stop signs, nearly collided with other cars on the road, and drove at speeds in excess of ninety miles per hour. During the second incident, following a domestic dispute with his girlfriend, Peterson again ran several red lights and stop signs and used excessive speed. In order to stop Peterson, police were forced to wedge the car he was driving between a police car and the center divider of a main highway.

In sentencing Peterson as a "career offender" following his 2007 conviction for bank robbery, the district court relied on Peterson's plea colloquy before the Oregon state court regarding his first eluding incident. Peterson admitted that he was under the influence of alcohol during the incident, that he was "driving in a reckless manner that endangered the safety of persons or property," and that he "unlawfully and recklessly engage[d] in conduct that created a substantial risk of serious injury" to several people.

It is clear from the record and from Peterson's admissions that he engaged in "conduct that present[ed] a serious potential risk of physical injury to another."

Thus, he escapes being sentenced as a “career offender” only because of our ill-considered decision in *Navarro-Lopez*. I reluctantly concur in the judgment.