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United States Court of Appeals,
Ninth Circuit.
Fidel **SUAZO PEREZ**, Petitioner,
v.
Michael B. MUKASEY, Attorney General, Respondent.
No. 06-73523.
Argued and Submitted Dec. 5, 2007.
Filed Jan. 22, 2008.

Background: Lawful permanent resident, who was native and citizen of Mexico, petitioned for review of summary affirmance by Immigration Appeals (BIA) of removal order by immigration judge (IJ), alleging that misdemeanor conviction for domestic violence assault in fourth degree, under state law, was not crime of violence constituting aggravated felony under removal statute.

Holdings: The Court of Appeals, [McKeown](#), Circuit Judge, held that:
(1) assault conviction was not categorically conviction for crime of violence;
(2) assault conviction was not crime of violence under modified categorical approach.

Petition granted.

West Headnotes

[\[1\] KeyCite Notes](#) 

- ↳ [24](#) Aliens, Immigration, and Citizenship
 - ↳ [24V](#) Denial of Admission and Removal
 - ↳ [24V\(G\)](#) Judicial Review or Intervention
 - ↳ [24k396](#) Standard and Scope of Review
 - ↳ [24k398](#) k. Review of Initial Decision or Administrative Review. [Most Cited](#)

[Cases](#)

Where the Board of Immigration Appeals (BIA) affirms an order of an immigration judge (IJ) without opinion, Court of Appeals reviews the IJ's decision as the final agency action.

[\[2\] KeyCite Notes](#) 

- ↳ [24](#) Aliens, Immigration, and Citizenship
 - ↳ [24V](#) Denial of Admission and Removal
 - ↳ [24V\(G\)](#) Judicial Review or Intervention
 - ↳ [24k385](#) k. Jurisdiction and Venue. [Most Cited Cases](#)

Although Court of Appeals lacks jurisdiction to review any final order of removal against an alien who is removable by reason of having committed an aggravated felony, court has jurisdiction over questions of law for such removal cases. Immigration and

Nationality Act, §§ 101(a)(43)(F), 237(a)(2)(A)(iii), [8 U.S.C.A. §§ 1101\(a\)\(43\)\(F\), 1227\(a\)\(2\)\(A\)\(iii\)](#).



[3] [KeyCite Notes](#)

- ↳ [24](#) Aliens, Immigration, and Citizenship
 - ↳ [24V](#) Denial of Admission and Removal
 - ↳ [24V\(C\)](#) Removal or Deportation; Grounds
 - ↳ [24k270](#) Crime and Related Grounds
 - ↳ [24k276](#) k. Crimes of Violence. [Most Cited Cases](#)



- ↳ [24](#) Aliens, Immigration, and Citizenship [KeyCite Notes](#)
 - ↳ [24V](#) Denial of Admission and Removal
 - ↳ [24V\(G\)](#) Judicial Review or Intervention
 - ↳ [24k396](#) Standard and Scope of Review
 - ↳ [24k404](#) k. Law Questions. [Most Cited Cases](#)

In analyzing whether a lawful permanent resident's conviction is for a crime of violence, constituting aggravated felony under removal statute, which is a question reviewed de novo, Court of Appeals first applies the "categorical approach" by comparing the elements of the statute of conviction to the generic crime, a "crime of violence," and then to determine whether the full range of conduct covered by the criminal statute falls within the meaning of that generic term. [18 U.S.C.A. § 16\(a\)](#).



[4] [KeyCite Notes](#)

- ↳ [24](#) Aliens, Immigration, and Citizenship
 - ↳ [24V](#) Denial of Admission and Removal
 - ↳ [24V\(C\)](#) Removal or Deportation; Grounds
 - ↳ [24k270](#) Crime and Related Grounds
 - ↳ [24k276](#) k. Crimes of Violence. [Most Cited Cases](#)

Legal permanent resident's misdemeanor conviction for domestic violence assault in fourth degree, under Washington law, was not categorically conviction for generic "crime of violence" constituting aggravated felony within meaning of removal statute, under categorical approach requiring full range of conduct covered by Washington law to fall within generic term for removal statute, since crime statute was overbroad on ground that fourth degree assault could be committed by nonconsensual offensive touching, but such conduct did not rise to level of crime of violence. [18 U.S.C.A. § 16\(a\)](#); [West's RCWA 9A.36.041](#).



[5] [KeyCite Notes](#)

- ↳ [110](#) Criminal Law
 - ↳ [110I](#) Nature and Elements of Crime
 - ↳ [110k12](#) Statutory Provisions
 - ↳ [110k13](#) Creation and Definition of Offenses
 - ↳ [110k13\(1\)](#) k. In General. [Most Cited Cases](#)

Where the state statute does not lay out the elements of the crime, a reviewing court looks to state common law for guidance in determining categorical reach of state crime to determine whether the full range of conduct covered by the criminal statute falls within the meaning of that generic crime.

[6] [KeyCite Notes](#) 

- ↳ [37](#) Assault and Battery
 - ↳ [37II](#) Criminal Responsibility
 - ↳ [37II\(A\)](#) Offenses
 - ↳ [37k60](#) k. Degrees. [Most Cited Cases](#)

Under Washington law, fourth degree assault can be committed by nonconsensual offensive touching. [West's RCWA 9A.36.041](#).

[7] [KeyCite Notes](#) 

- ↳ [24](#) Aliens, Immigration, and Citizenship
 - ↳ [24V](#) Denial of Admission and Removal
 - ↳ [24V\(C\)](#) Removal or Deportation; Grounds
 - ↳ [24k270](#) Crime and Related Grounds
 - ↳ [24k276](#) k. Crimes of Violence. [Most Cited Cases](#)

If a crime is categorically overbroad, under analysis of whether state law crime constitutes generic crime of violence, which is aggravated felony under removal statute, Court of Appeals proceeds to a modified categorical approach looking beyond the statute of conviction and considering a narrow, specified set of documents that are part of the record of conviction to determine whether the defendant was convicted of the necessary elements of the generic crime; the modified categorical approach may be applied where a statute of conviction is divisible into several different crimes, one or more of which may constitute a crime of violence. [18 U.S.C.A. § 16\(a\)](#).

[8] [KeyCite Notes](#) 

- ↳ [24](#) Aliens, Immigration, and Citizenship
 - ↳ [24V](#) Denial of Admission and Removal
 - ↳ [24V\(C\)](#) Removal or Deportation; Grounds
 - ↳ [24k270](#) Crime and Related Grounds
 - ↳ [24k276](#) k. Crimes of Violence. [Most Cited Cases](#)

Modified categorical approach for determining whether state crime constituted generic crime of violence, as aggravated felony under removal statute, by entailing use, attempted use, or threatened use of physical force against person or property of another, applied to analysis of legal permanent resident's misdemeanor conviction for domestic violence assault in fourth degree, under Washington law, since statute of conviction was divisible into different ways that crime could be committed, including attempt, with unlawful force, to inflict bodily injury on another. [18 U.S.C.A. § 16\(a\)](#); [West's RCWA 9A.36.041](#).

[\[9\] KeyCite Notes](#)



- ↳ [24](#) Aliens, Immigration, and Citizenship
 - ↳ [24V](#) Denial of Admission and Removal
 - ↳ [24V\(C\)](#) Removal or Deportation; Grounds
 - ↳ [24k270](#) Crime and Related Grounds
 - ↳ [24k276](#) k. Crimes of Violence. [Most Cited Cases](#)

Legal permanent resident's misdemeanor conviction for domestic violence assault in fourth degree, under Washington law, was not conviction for "crime of violence" constituting aggravated felony as predicate offense within meaning of removal statute, under modified categorical approach looking beyond statute of conviction to consider narrow set of documents as part of record of conviction to determine whether conviction covered necessary elements of generic crime, since written guilty plea and police report left unclear whether conviction rested on attempt to inflict injury with unlawful force, unlawful touching, or putting another person in apprehension of harm, all of which were encompassed under Washington law. [18 U.S.C.A. § 16\(a\)](#); [West's RCWA 9A.36.041](#).

[\[10\] KeyCite Notes](#)



- ↳ [24](#) Aliens, Immigration, and Citizenship
 - ↳ [24V](#) Denial of Admission and Removal
 - ↳ [24V\(C\)](#) Removal or Deportation; Grounds
 - ↳ [24k270](#) Crime and Related Grounds
 - ↳ [24k276](#) k. Crimes of Violence. [Most Cited Cases](#)

Generally, under modified categorical approach to determine whether crime constitutes generic crime of violence, as aggravated felony under removal statute, by looking beyond the statute of conviction and considering a narrow, specified set of documents that are part of the record of conviction to determine whether the defendant was convicted of the necessary elements of the generic crime, review is limited to statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding made by the trial judge to which the defendant assented, including police reports if specifically incorporated into the guilty plea or admitted by a defendant. [18 U.S.C.A. § 16\(a\)](#).

[\[11\] KeyCite Notes](#)



- ↳ [24](#) Aliens, Immigration, and Citizenship
 - ↳ [24V](#) Denial of Admission and Removal
 - ↳ [24V\(C\)](#) Removal or Deportation; Grounds
 - ↳ [24k270](#) Crime and Related Grounds
 - ↳ [24k276](#) k. Crimes of Violence. [Most Cited Cases](#)

Defendant entering an *Alford* plea does not prevent evaluation of a police report, under the modified categorical approach to determine whether crime constitutes generic crime of violence, as aggravated felony under removal statute, by looking beyond the statute of conviction and considering a narrow, specified set of documents that are part of the record of conviction to determine whether the defendant was convicted of the necessary elements of the generic crime, since legal implications of a guilty plea are the same whether or not a defendant maintains his innocence. [18 U.S.C.A. § 16\(a\)](#).

***1224** Matt Adams, Northwest Immigrant Rights Project, Seattle, Washington, for the petitioner.


[Peter Keisler](#), Assistant Attorney General, Civil Division, Department of Justice, Washington, D.C.; [David V. Bernal](#), Jesse M. Bless, Office of Immigration Litigation, Civil Division, Department of Justice, Washington, D.C., for the respondent.

On Petition for Review of an Order of the Board of Immigration Appeals. Agency No. A95-562-903.

Before: [M. MARGARET McKEOWN](#) and [RICHARD R. CLIFTON](#), Circuit Judges, and [WILLIAM W. SCHWARZER](#),^{FN*} District Judge.

[FN*](#) The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

[McKEOWN](#), Circuit Judge:

 [\[1\]](#) Fidel Suazo Perez ("Suazo") petitions for review of the Board of Immigration Appeals' ("BIA") summary affirmance of the Immigration Judge's ("IJ") removal order.^{FN1} The IJ ordered Suazo's removal on the basis that his conviction for misdemeanor assault was a conviction for a "crime of violence," and thus an "aggravated felony." Because fourth degree assault under Washington law is not categorically a "crime of violence," and the modified categorical approach does not establish that Suazo's conviction was based on a "crime of violence," we grant his petition.

[FN1.](#) Where the BIA affirms an IJ's order without opinion, we review the IJ's decision as the final agency action. [Khup v. Ashcroft, 376 F.3d 898, 902 \(9th Cir.2004\)](#).

BACKGROUND


Suazo is a native and citizen of Mexico who entered the United States in 1989 and became a lawful permanent resident in 2005. Suazo was then convicted for domestic violence assault in the fourth degree***1225** under [RCW §§ 9A.36.041, 10.99.020](#).^{FN2} He was sentenced to 365 days imprisonment. The Department of Homeland Security charged Suazo with being removable on the basis that his conviction constituted an "aggravated felony" under [8 U.S.C. §§ 1101\(a\)\(43\)\(F\)](#) and [1227\(a\)\(2\)\(A\)\(iii\)](#), or a "crime involving moral turpitude" under [8 U.S.C. § 1227\(a\)\(2\)\(A\)\(i\)](#).


[FN2.](#) [RCW § 10.99.020\(5\)\(d\)](#) provides that "[a]ssault in the fourth degree ([RCW 9A.36.041](#))," when committed by one family or household member against another, constitutes "domestic violence."



Expressly applying a modified categorical approach, the IJ concluded that Suazo's conviction for fourth degree domestic violence assault was a "crime of violence" under [18 U.S.C. § 16\(a\)](#),^{FN3} and ordered Suazo's removal on the basis of his "aggravated felony" conviction. The IJ also concluded that Suazo had not committed a crime involving moral turpitude. The BIA summarily affirmed the IJ's decision.


[FN3.](#) Only [18 U.S.C. § 16\(a\)](#) is implicated by Suazo's petition, because [§ 16\(b\)](#) pertains only to felonies.


ANALYSIS

 [2] The question we consider is whether Suazo's conviction qualifies as a "crime of violence," and therefore an "aggravated felony," which is a ground for removal. See [8 U.S.C. §§ 1101\(a\)\(43\)\(F\), 1227\(a\)\(2\)\(A\)\(iii\)](#). Although we lack jurisdiction to review "any final order of removal against an alien who is removable by reason of having committed" an aggravated felony, *id.* § 1252(a)(2)(C), Suazo's challenge presents a question of law over which we have jurisdiction. *Id.* § 1252(a)(2)(D); see [Morales-Alegria v. Gonzales, 449 F.3d 1051, 1053 \(9th Cir.2006\)](#) (stating that whether an offense constitutes an "aggravated felony" under [§ 1101\(a\)\(43\)\(F\)](#) is a question of law).


 [3] In analyzing whether Suazo's conviction was for a "crime of violence," a question we review de novo, we first apply the categorical approach set forth by the Supreme Court in [Taylor v. United States, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 \(1990\)](#). The categorical approach requires us to compare the elements of the statute of conviction, fourth degree assault under Washington law, to the generic crime, a "crime of violence" under [18 U.S.C. § 16\(a\)](#), and then to determine whether the "'full range of conduct' covered by [the criminal statute] falls within the meaning of that term." [Chang v. INS, 307 F.3d 1185, 1189 \(9th Cir.2002\)](#) (citation omitted).



 [4]  [5] We begin with the federal definition of a "crime of violence": "an offense 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. § 16\(a\)](#). [Section 9A.36.041 of the Washington Revised Code](#) states that a person is guilty of fourth degree assault if, "under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another." Because the Washington statute does not lay out the elements of the crime, we look to state common law for guidance. See [Ortega-Mendez v. Gonzales, 450 F.3d 1010, 1016 \(9th Cir.2006\)](#) ("in determining the categorical reach of a state crime, we consider not only the language of the state statute, but also the interpretation of that language in judicial opinions.") (citation omitted).


 [6] Washington courts have held that fourth degree assault can be committed in three ways: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; or (3) putting another in apprehension of harm. See [*1226 State v. Aumick, 126 Wash.2d 422, 894 P.2d 1325, 1328 n. 12 \(1995\)](#) (en banc); [State v. Davis, 60 Wash.App. 813, 808 P.2d 167, 172 \(1991\)](#). Under Washington law, fourth degree assault can be committed by nonconsensual offensive touching. See [Aumick, 894 P.2d at 1328 n. 12](#). We have held that "conduct involving mere offensive touching does not rise to the level of a 'crime of violence' within the meaning of [18 U.S.C. § 16\(a\)](#)." [Ortega-Mendez, 450 F.3d at 1017](#). Accordingly, because the "full range of conduct" covered by the Washington fourth degree assault statute does not "fall[] within the meaning of" a "crime of violence," Suazo's conviction was not categorically a conviction for a "crime of violence." [Chang, 307 F.3d at 1189](#).

 [7] If a crime is categorically overbroad, we proceed to a modified categorical approach in which we look beyond the statute of conviction and consider "a narrow, specified set of documents that are part of the record of conviction" to determine whether the defendant was convicted of the necessary elements of the generic crime. [Tokatly v.](#)

[Ashcroft](#), 371 F.3d 613, 620 (9th Cir.2004). The modified categorical approach may be applied where a statute of conviction is divisible into several different crimes, one or more of which may constitute a “crime of violence.” [Navarro-Lopez v. Gonzales](#), 503 F.3d 1063, 1073 (9th Cir.2007) (en banc) (citing [Carty v. Ashcroft](#), 395 F.3d 1081, 1084 (9th Cir.2005)).

 [8] In [Carty](#), the statute of conviction was, on its face, divisible into two different crimes. [395 F.3d at 1083-84](#). In contrast, the Washington fourth degree assault statute does not expressly lay out different ways that the crime may be committed. [RCW § 9A.36.041](#). However, Washington courts have interpreted the statute to encompass three different ways of committing the crime, including an attempt, with unlawful force, to inflict bodily injury on another. See [Aumick](#), 894 P.2d at 1328 n. 12; see also 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 35.50 (2d ed. 2005) (following state common law in defining the three ways that fourth degree assault may be committed). Thus, Suazo's Washington assault conviction may have entailed “the use, attempted use, or threatened use of physical force against the person or property of another.” [18 U.S.C. § 16\(a\)](#). In such a case, the modified categorical approach may be invoked to determine whether the defendant's fourth degree assault conviction was for a “crime of violence.”

 [9]  [10] We next consider which documents comprise the “narrow, specified set of documents” that may be used in the modified categorical analysis. [Tokatly](#), 371 F.3d at 620. We are generally limited to reviewing the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding made by the trial judge to which the defendant assented. [Shepard v. United States](#), 544 U.S. 13, 16, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). Police reports may be considered “if specifically incorporated into the guilty plea or admitted by a defendant.” [Parrilla v. Gonzales](#), 414 F.3d 1038, 1044(9th Cir.2005).

 [11] In a section of his written plea, Suazo checked a box by which he agreed that “the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.” Like Parrilla, Suazo's decision to incorporate the police report into his guilty plea made the report “an explicit statement ‘in which the factual basis for the plea was confirmed by the defendant.’” [Id.](#) (quoting [Shepard](#), 544 U.S. at 26, 125 S.Ct. 1254). Thus, in this circumstance, “relying upon the [police report] *1227 to establish the elements of the crime” of conviction “does not undermine the purposes of our limited modified categorical inquiry.” [Id.](#) (citations omitted).^{FN4}

^{FN4}. That Suazo entered an *Alford* plea does not prevent us from evaluating the police report under the modified categorical approach. See [United States v. Guerrero-Velasquez](#), 434 F.3d 1193, 1197 (9th Cir.2006) (“Whether or not a defendant maintains his innocence, the legal implications of a guilty plea are the same in the context of the modified categorical approach under [Taylor](#).”).

Despite our consideration of the written guilty plea and the police report, the record does not demonstrate that Suazo's conviction was based on an attempt to inflict bodily injury on another person with unlawful force. In other words, the record leaves unclear whether his conviction rested on an attempt to inflict injury with unlawful force, an unlawful touching, or putting another person in apprehension of harm. Therefore, we “are compelled to hold that the government has not met its burden of proving that the

conduct of which the defendant was convicted constitutes a predicate offense” that is a basis for removal. [Tokatly, 371 F.3d at 620-21.](#)

Because the Washington fourth degree assault statute is categorically overbroad, and the modified categorical approach does not establish that Suazo was convicted of a “crime of violence,” we grant his petition and remand to the BIA for further proceedings as necessary.

PETITION GRANTED.

C.A.9 (Wash.),2008.

Suazo Perez v. Mukasey

512 F.3d 1222, 08 Cal. Daily Op. Serv. 909

Briefs and Other Related Documents ([Back to top](#))

- [2007 WL 2801169](#) (Appellate Petition, Motion and Filing) Reply Brief for Petitioner (Aug. 22, 2007)
- [2007 WL 3033038](#) (Appellate Petition, Motion and Filing) Brief for Respondent (Jul. 23, 2007)
- [2007 WL 2124161](#) (Appellate Petition, Motion and Filing) Opening Brief for Petitioner (May 22, 2007)
- [06-73523](#) (Docket) (Jul. 14, 2006)

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