

Ninth Circuit Standard Language

A. Fact of Conviction

Any of the following documents or records constitutes proof of a criminal conviction (1) an official record of judgment and conviction; (2) a record of plea, verdict, and sentence; (3) a docket entry from court records that indicates the existence of the conviction; (4) official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of a conviction; (5) an abstract of a record of conviction prepared by the court in which the conviction was entered, or by a state official associated with the state's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence; (6) any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of the conviction; and (7) any document or record attesting to the conviction that is maintained by an official of a state or federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record. INA § 240(c)(3)(B); 8 C.F.R. § 1003.41(a). Additionally, "any other evidence that reasonably indicates the existence of a criminal conviction may be admissible as evidence thereof." 8 C.F.R. § 1003.41(d).

B. Conviction as a Predicate Offense

1. Categorical Approach

The categorical approach, as set forth in *Taylor v. United States*, 495 U.S. 575 (1990), is applied to determine whether a conviction constitutes a predicate offense for immigration purposes. See, e.g., *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1017-20 (9th Cir. 2005) (applying the categorical approach to determine whether conviction is a "crime involving moral turpitude" under INA § 237(a)(2)(A)(i)); *Tokatly v. Ashcroft*, 371 F.3d 613, 619-23 (9th Cir. 2004) (crime of domestic violence under INA § 237(a)(2)(E)); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 886-87 (9th Cir. 2003) (theft offense under INA § 101(a)(43)(G)). Under the categorical approach, the Court must compare the elements of the criminal statute of conviction to the generic definition and decide whether the conduct proscribed by statute is broader than the generic definition. *Cuevas-Gaspar*, 430 F.3d at 1017 (citation omitted). Only if the full range of conduct penalized by the criminal statute falls within the meaning of the generic definition will there be a categorical match. *Chang v. INS*, 307 F.3d 1185, 1189 (9th Cir. 2002) (citation omitted).

In making this determination, the Court may consider the fact of the conviction, the statute of the conviction, and case law interpreting the statutory text, but not the particular facts underlying the conviction or the name of the conviction. *Kepilino v. Gonzales*, 454 F.3d 1057, 1060-61 (9th Cir. 2006) (citations omitted); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1020 (9th Cir. 2006). Nor may the Court rely on the application of "legal imagination" to a state statute's language to find that it falls outside the generic definition. *Gonzales v. Duenas-Alvares*, 127 S. Ct. 815, 822 (2007). Rather, the Supreme Court has concluded that "[i]t requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Id.* A "realistic probability" necessarily exists where the state statute explicitly defines a crime more broadly than the generic definition. See *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007).

Subsequently, in *James v. United States*, 127 S. Ct. 1586, 1597 (2007), the Supreme Court elaborated that the proper inquiry under the categorical approach is whether the conduct proscribed by the statute "in the ordinary case" encompasses the elements of

the generic offense. Once this showing is made, “the burden shifts to the [respondent] to at least point to his own case or other cases where the state courts applied the statute in a way that would make it overbroad under Taylor.” *United States v. Carson*, 486 F.3d 618, 620 (9th Cir. 2007) (quoting *Duenas-Alvares*, 127 S. Ct. at 822) (internal quotation marks omitted).

2. Modified Categorical Approach

If the conduct proscribed by the statute of conviction is broader than the generic definition, the Court proceeds by applying the modified categorical approach. See *Randhawa v. Ashcroft*, 298 F.3d 1148, 1152 (9th Cir. 2002) (citations omitted). Under the modified categorical approach, the Court conducts a “limited examination of documents in the record of conviction to determine if there is sufficient evidence to conclude that a defendant was convicted of the elements of the generically defined crime even though his or her statute of conviction was facially over inclusive.” *Li v. Ashcroft*, 389 F.3d 892, 896 (9th Cir. 2004) (quoting *Chang*, 307 F.3d at 1189). The DHS will not meet its burden if the record does not “unequivocally” establish that the respondent was convicted of the generic offense. See *Kepilino*, 454 F.3d at 1062 (citation omitted); *Tokatly*, 371 F.3d at 620-21 (citation omitted).

Only when conducting an inquiry under the modified categorical approach is the Court permitted to consider “a limited number of judicially noticeable documents.” *Parrilla v. Gonzales*, 414 F.3d 1038, 1042 (9th Cir. 2005) (citations omitted). These documents include the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the transcript of plea proceedings. See *Tokatly*, 371 F.3d at 620 (citation omitted). Documents and testimony that require the Court to make factual determinations that were not necessarily made in the prior criminal proceeding may not be considered. *Parrilla*, 414 F.3d at 1044 (citations omitted). For example, police reports, complaint applications, and charging documents, standing alone, are never sufficient. *Shepard v. United States*, 544 U.S. 13, 16 (2005); *Martinez-Perez v. Gonzales*, 417 F.3d 1022, 1028 (9th Cir. 2005). These limitations ensure that the Court does not impermissibly “look beyond the record of conviction itself to the particular facts underlying the conviction.” See *Cuevas-Gaspar*, 430 F.3d at 1020 (quoting *Tokatly*, 371 F.3d at 620).

Certain criminal documents, such as police reports and charging papers, that generally may not be considered under the modified categorical approach are judicially noticeable “if specifically incorporated into the guilty plea or admitted by the defendant.” *Parrilla*, 414 F.3d at 1044 (citations omitted). For example, in *Parrilla*, the petitioner’s written guilty plea states, “I understand the Court will review the certification for determination of probable cause [CDPC] in determining if there is a factual basis for this plea and for sentencing.” *Id.* The Ninth Circuit held that “by explicitly incorporating the CDPC into his guilty plea, [the petitioner] in context admitted the facts of the CDPC and rendered it judicially noticeable for the purposes of applying the modified categorical approach. The CDPC here is not merely a bare police report, but rather an explicit statement in which the factual basis for the plea was confirmed by the defendant.” *Id.* (internal citations and quotation marks omitted).

Charging papers may similarly be relied on if the respondent pled guilty to the specific counts lodged against him. See *United States v. Bonat*, 106 F.3d 1472, 1477-78 (9th Cir. 1997). Charging papers may not be considered, however, where the respondent pled guilty to an offense that was not charged therein. See *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1078-79 (9th Cir. 2007); *Martinez-Perez v. Gonzales*, 417 F.3d 1022 1028-29 (9th Cir. 2005).