

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 12 2021

FOR THE NINTH CIRCUIT

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

RICARDO JOSE HERDOCIA JARQUIN,  
AKA Ricardo Jose Herdocia,

Petitioner,

v.

MERRICK B. GARLAND, Attorney  
General,

Respondent.

No. 19-70266

Agency No. A028-749-019

MEMORANDUM\*

On Petition for Review of an Order of the  
Board of Immigration Appeals

Argued and Submitted March 2, 2021  
Portland, Oregon

Before: PAEZ and WATFORD, Circuit Judges, and TUNHEIM,\*\* District Judge.

Petitioner Ricardo Jose Herdocia Jarquin petitions for review of a final order of the Board of Immigration Appeals (“BIA”) finding him removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii) because of his conviction under California Penal

---

\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The Honorable John R. Tunheim, Chief United States District Judge for the District of Minnesota, sitting by designation.

Code § 417.8. We have jurisdiction under 8 U.S.C. § 1252 and review de novo whether a conviction under state law constitutes a removable offense. *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1130 (9th Cir. 2016). We grant the petition and remand.

In 2018, the Immigration Judge (“IJ”) ordered Herdocia Jarquin removed as a person who has committed an aggravated felony under 8 U.S.C. § 1227(a)(2)(A)(iii), based on his conviction for a crime of violence pursuant to 8 U.S.C. § 1101(a)(43)(F). A crime of violence is “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). The sole ground of removability was Herdocia Jarquin’s 2014 conviction under California Penal Code § 417.8, which makes it a crime to “draw[] or exhibit[] any firearm, whether loaded or unloaded, or other deadly weapon, with the intent to resist or prevent the arrest or detention of himself or another by a peace officer[.]” The IJ concluded that Herdocia Jarquin’s conviction under California Penal Code § 417.8 also rendered him ineligible for asylum and withholding of removal. *See* 8 U.S.C. § 1158(b)(2)(A)(ii); 1158(b)(2)(B)(i).

On appeal to the BIA, Herdocia Jarquin argued that his offense under California Penal Code § 417.8 was not a crime of violence. The BIA discerned no basis to reverse the Immigration Judge’s decision, relying on our opinion in *Reyes-*

*Alcaraz v. Ashcroft*, in which we held that a conviction under California Penal Code § 417.8 necessarily involves a threatened use of physical force and is thus a crime of violence under 18 U.S.C. § 16(a). 363 F.3d 937, 941 (9th Cir. 2004).

Herdocia Jarquin argues that California Penal Code § 417.8 is not a crime of violence because it does not categorically require force *against another*. The government contends that this argument is foreclosed by our holding in *Reyes-Alcaraz*. However, in *Reyes-Alcaraz* we did not consider whether a conviction under California Penal Code § 417.8 required the use or threatened use of physical force against another, and therefore, that case is not precedential for the question Herdocia Jarquin raises here. *See, e.g., Morales-Garcia v. Holder*, 567 F.3d 1058, 1064 (9th Cir. 2009); *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985) (“[U]nstated assumptions on non-litigated issues are not precedential holdings binding future decisions.”).

To determine whether a conviction under state law constitutes a crime of violence, we apply the categorical approach from *Taylor v. United States*, 495 U.S. 575 (1990). *Flores-Vega v. Barr*, 932 F.3d 878, 882 (9th Cir. 2019). Under the categorical approach, the court examines the state statute to determine whether it “categorically fits within the generic federal definition of a corresponding aggravated felony.” *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) (quotation omitted). In determining the scope of a crime of conviction, we are bound by state

courts' interpretation of state criminal statutes. *See United States v. Flores-Cordero*, 723 F.3d 1085, 1087 (9th Cir. 2013), *as amended on denial of reh'g*, (Oct. 4, 2013). “State cases that examine the outer contours of the conduct criminalized by the state statute are particularly important because ‘we must presume that the conviction rested upon [nothing] more than the least of th[e] acts criminalized.’” *United States v. Strickland*, 860 F.3d 1224, 1226–27 (9th Cir. 2017) (quoting *Moncrieffe*, 569 U.S. at 190–91).

Since *Reyes-Alcaraz*, California courts have concluded that California Penal Code § 417.8 can be violated even when the offender seeks only to harm himself. *See, e.g., People v. Thong Ngot Sang*, No. F042554, 2004 WL 1067962 at \*5 (Cal. Ct. App. May 13, 2004) (unpublished); *People v. Lawhead*, No. C072151, 2015 WL 1524585 at \*2 (Cal. Ct. App. Apr. 3, 2015) (unpublished). Thus, California courts have applied California Penal Code § 417.8 to a broader range of conduct than “the use, attempted use, or threatened use of physical force against the person or property *of another*.” 18 U.S.C. § 16(a) (emphasis added). Accordingly, a conviction under § 417.8 is not a categorical crime of violence, and is therefore not a removable offense pursuant to 8 U.S.C. §§ 1227(a)(2)(A)(iii) and 1101(a)(43)(F).

**PETITION GRANTED AND REMANDED.**