

NO. _____

IN THE
Supreme Court of the United States

BRYAN LEE OGLE,

Petitioner,
v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Paul E. Stroebel
STROEBEL & STROEBEL, PLLC
P. O. Box 2582
Charleston, WV 25329
304-346-0197
paulstroebel1@gmail.com

Counsel of Record for Petitioner

I. QUESTION PRESENTED FOR REVIEW

Whether the district court erred in applying an enhanced sentence, pursuant to the Armed Career Criminal Act, 18 U.S.C. § 924(e), to Mr. Ogle at sentencing. Mr. Ogle asks this Court to review whether Tennessee's statute for aggravated assault, T.C.A. § 39-13-102, qualifies as a violent felony predicate under the Armed Career Criminal Act.

II. LIST OF ALL RELATED PROCEEDINGS

United States v. Ogle, No. 2:18-cr-00057, U.S. District Court for the Southern District of West Virginia. Judgment entered January 28, 2021.

United States v. Ogle, 21-4043 (4th Cir. Sep. 13, 2023), U.S. Court of Appeals for the Fourth Circuit. Judgment entered on September 13, 2023.

III. TABLE OF CONTENTS

I.	QUESTION PRESENTED FOR REVIEW	i
II.	LIST OF ALL RELATED PROCEEDINGS	ii
III.	TABLE OF CONTENTS.....	iii
IV.	TABLE OF AUTHORITIES	iv
V.	OPINIONS BELOW	1
VI.	JURISDICTION	1
VII.	STATUTES AND REGULATIONS INVOLVED	1
VIII.	STATEMENT OF THE CASE	4
	A. Federal Jurisdiction.....	4
	B. Facts Pertinent to the Issue Presented.....	5
IX.	REASON FOR GRANTING THE WRIT	8
	A. The Petition should be granted to determine whether Tennessee's statute for aggravated assault, T.C.A. § 39-13-102, qualifies as a violent felony predicate under the Armed Career Criminal Act.....	8
	i. The District Court and Fourth Circuit Court of Appeals Erred in the "Most Innocent Conduct" Analysis.....	9
X.	CONCLUSION.....	13

IV. TABLE OF AUTHORITIES

Cases

<i>Descamps v. United States</i> , 133 S.Ct. 2276 (2013)	8
<i>Hollom v. United States</i> , 736 Fed. Appx. 96 (6th Cir. 2018)	11
<i>Johnson v. United States</i> , 559 U.S. 133 (2010)	11
<i>Mathis v. United States</i> , 136 S.Ct. 2243 (2016)	9, 10
<i>State of Tennessee v. Hammonds</i> , 30 S.W.3d 294 (Tenn. 2000)	9
<i>United States v. Allred</i> , 942 F.3d 641 (4th Cir. 2019)	10, 11
<i>United States v. Doctor</i> , 842 F.3d 306 (4th Cir. 2016)	11
<i>United States v. Drummond</i> , 925 F.3d 681 (4th Cir. 2019)	10
<i>United States v. Middleton</i> , 883 F.3d 485 (4th Cir. 2018)	8, 11
<i>United States v. Reid</i> , 861 F.3d 523 (4th Cir. 2017)	11
<i>United States v. Simmons</i> , 917 F.3d 312 (4th Cir. 2019)	12

Statutes

18 U.S.C. § 922	4
18 U.S.C. § 924	1, 4, 6, 7, 8, 12
18 U.S.C. § 3231	4
18 U.S.C. § 3742	4

28 U.S.C. § 1291	4
28 U.S.C. § 1254	1, 5
Tenn. Code § 39-13-101	3, 8, 10
Tenn. Code § 39-13-102	2, 3, 7-10, 12
Tenn. Code § 39-17-417	7
Tenn. Code § 39-13-434	7

Rules of the Supreme Court of the United States

Rule 10(c).....	9
Rule 13.1	1, 5
Rule 13.3	1, 5
Rule 14.1	3

V. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the district court's sentence of Mr. Ogle is published and is attached to this Petition as Appendix A1. The district court's Amended Memorandum Opinion and Explanation of Reasons is unpublished and is attached to this Petition as Appendix A17. The judgment order is unpublished and is attached to this Petition as Appendix A10.

VI. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on September 13, 2023. No petition for rehearing was filed. This Petition is filed within 90 days of the court's entry of its judgment. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VII. STATUTES AND REGULATIONS INVOLVED

This case requires interpretation and application of the following statutes:

A. 18 U.S.C. § 924(e), referred to as the Armed Career Criminal Act, which states as follows:

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term “serious drug offense” means—

- (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
- (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term “conviction” includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

18 U.S.C. § 924(e)(1).

B. Tennessee Code § 39-13-102, Aggravated Assault. This statute states in pertinent part as follows:

(a) (1) A person commits aggravated assault who:

(A) Intentionally or knowingly commits an assault as defined in § 39-13-101, and the assault:

- (i) Results in serious bodily injury to another;
- (ii) Results in the death of another;
- (iii) Involved the use or display of a deadly weapon; or
- (iv) Involved strangulation or attempted strangulation; or

(B) Recklessly commits an assault as defined in § 39-13-101(a)(1), and the assault:

- (i) Results in serious bodily injury to another;
- (ii) Results in the death of another; or
- (iii) Involved the use or display of a deadly weapon.

Tenn. Code Ann. § 39-13-102 (2015). The statute in full can be found attached as Appendix A38 pursuant to Rule 14.1(f).

C. Tennessee Code § 39-13-101, Simple Assault. This statute states:

(a) A person commits assault who:

(1) Intentionally, knowingly or recklessly causes bodily injury to another;

(2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or

(3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

(b) (1) Assault is a Class A misdemeanor unless the offense is committed under subdivision (a)(3), in which event assault is a Class B misdemeanor; provided, that, if the offense is committed against a law enforcement officer or a health care provider acting in the discharge of the provider's duty, then the maximum fine shall be five thousand dollars (\$5,000).

(2) In addition to any other punishment that may be imposed for a violation of this section, if the relationship between the defendant and the victim of the assault is such that the victim is a domestic abuse victim as defined in § 36-3-601, and if, as determined by the court, the defendant possesses the ability to pay a fine in an amount not in excess of two hundred dollars (\$200), then the court shall impose a fine at the level of the defendant's ability to pay, but not in excess of two hundred dollars (\$200). The additional fine shall be paid to the clerk of the court imposing sentence, who shall transfer it to the state treasurer, who shall credit the fine to the general fund. All fines so credited to the general fund shall be subject to appropriation by the general assembly for the exclusive purpose of funding family violence shelters and shelter services. Such appropriation shall be in addition to any amount appropriated pursuant to § 67-4-411.

(c) For purposes of this section and § 39-13-102, "health care provider" means a person who is licensed, certified or otherwise authorized or permitted by the laws of this state to administer health care in the ordinary course of business in the practicing of a profession.

Tenn. Code Ann. § 39-13-101 (2016).

VIII. STATEMENT OF THE CASE

A. Federal Jurisdiction

On March 20, 2018, a federal grand jury in the Southern District of West Virginia returned a one count Indictment charging Bryan Lee Ogle as being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and 924(a)(2). J.A. at 9.¹ On March 3, 2020, a federal grand jury in the Southern District of West Virginia returned a one count superseding indictment charging Bryan Lee Ogle as being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and 924(a)(2). J.A. 12. Because those charges constitute offenses against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231.

This appeal is not interlocutory but is an appeal from a final judgment and sentence imposed against Petitioner Bryan Lee Ogle on January 28, 2021 in the Southern District of West Virginia for a criminal violation of 18 U.S.C. § 922(g), with the written judgment filed on January 28, 2021 and an Amended Memorandum Opinion and Explanation of Reasons filed on February 2, 2021. J.A. 162, 169. Mr. Ogle filed a timely notice of appeal on February 8, 2021. J.A. at 187. The United States Court of Appeals for the Fourth Circuit had jurisdiction over this matter pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on September 13, 2023. No petition for rehearing was filed. This Petition is filed within 90 days of the court's entry of its

¹ “J.A.” refers to the Joint Appendix filed in this appeal before the Fourth Circuit.

judgment. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

B. Facts Pertinent to the Issue Presented

According to the Presentence investigation report:

11. On February 8, 2018, an officer with the Montgomery Police Department (MPD) was flagged down by two individuals who stated that their son had been assaulted and possibly kidnapped by an individual, later identified as Bryan Lee Ogle, who had fled the area in a Honda automobile.

12. A short time later, the MPD officer located the vehicle driven by the defendant. The officer noticed that the Honda had a broken windshield. The MPD officer then attempted to make a traffic stop on the vehicle. The vehicle initially stopped, but ultimately fled the scene at times approaching speed of 110 miles per hour in a posted 35 miles per hour zone. During the pursuit, Ogle lost control of the vehicle and crashed into a hillside. The officer again attempted to approach the vehicle, at which time Ogle attempted to flee in the vehicle and backed into a utility pole.

13. As the officer approached the defendant inside the vehicle, Ogle attempted to drive his vehicle in the direction of the officer, however, the vehicle was damaged due to the crash and would not move.

14. At the time, Ogle exited the vehicle and fled the scene on foot. The initial responding officer as well as other officers with the Montgomery Police Department attempted to apprehend Ogle. The defendant resisted arrest by striking and injuring the responding officer. The MPD officer then attempted to utilize his taser on the defendant after Ogle made statements about possessing a gun, and he reached toward his right side. The taser was ineffective and the struggle continued between the defendant and officers. Ogle established custody of the MPD officer's taser and attempted to establish custody and remove the officer's firearm from its holster. The officer regained custody of his taser. Then, with the help of other officers, the defendant was detained. The officers conducted a search of his person, which revealed a Smith and Wesson, Model 5904, 9mm semi-automatic pistol, serial number, TDD8734, loaded with 16 rounds of 933 ammunition in the holster of Ogle's belt. Ogle was arrested and transported to the Charleston Area Medical Center (CAMC) for a medical evaluation.

J.A. 236-237.

At the time Mr. Ogle possessed the firearm in the present case, probation found that Mr. Ogle had been convicted of three prior felonies that would enhance his sentence pursuant to 18 U.S.C. § 924(e). J.A. 235. Mr. Ogle had been convicted on or about September 29, 2015, in the Circuit Court of Sevier County, Tennessee,

of the felony offense of the sale of methamphetamine, in violation of Tennessee Code § 39-17-417; convicted on or about April 5, 2017, in the Circuit Court of Jefferson County, Tennessee, of the felony offense of possession of methamphetamine with intent to deliver, in violation of Tennessee Code § 39-13-434; and convicted on or about August 15, 2017, in the Circuit Court of Sevier County, Tennessee, of the felony offense of aggravated assault, in violation of Tennessee Code § 39-13-102. J.A. 235. Probation and the United States Attorney's Office for the Southern District of West Virginia took the position that Mr. Ogle met the requirements for an enhanced sentence under the provisions of 18 U.S.C. § 924(e) based on these three prior felony convictions. J.A. 214, 239. Counsel for Mr. Ogle filed a Memorandum setting forth why 18 U.S.C. § 924(e) was not applicable to Mr. Ogle. J.A. 52-64.

At the sentencing hearing in this matter, the district court heard argument as to whether 18 U.S.C. § 924(e) was applicable to Mr. Ogle. J.A. 115-121. After hearing argument of counsel, the district court found that Tennessee Code § 39-13-102 did satisfy the force clause of the Armed Career Criminal Act and therefore the sentencing enhancement pursuant to 18 U.S.C. § 924(e) should be applied to Mr. Ogle. J.A. 121-124. The district court then sentenced Mr. Ogle to 210 months in prison followed by five years' supervised release. J.A. 158.

Mr. Ogle appealed the district court's decision to the Fourth Circuit Court of Appeals, which ultimately affirmed the application of an enhanced sentence

pursuant to 18 U.S.C. § 924(e) and affirmed the sentence of the district court. *U.S. v. Ogle*, 21-4043 (4th Cir. Sep. 13, 2023).

IX. REASON FOR GRANTING THE WRIT

A. The Petition should be granted to determine whether Tennessee's statute for aggravated assault, T.C.A. § 39-13-102, qualifies as a violent felony predicate under the Armed Career Criminal Act.

The Armed Career Criminal Act, 18 U.S.C. § 924(e), increases the sentences of certain federal defendants who have three prior convictions for “a violent felony or a serious drug offense, or both, committed on occasions different from one another.” 18 U.S.C. § 924(e)(1). Aggravated assault is not listed in the enumerated offense clause and therefore can only qualify as a violent felony if it satisfies the requirements of the force clause.

In order to determine whether a state crime qualifies as a violent felony under the ACCA’s force clause, the Court applies the categorical approach. *See Descamps v. United States*, 133 S.Ct. 2276, 2281 (2013). Under the categorical approach, the court is required to review the “most innocent conduct” that the law criminalizes and then compare the elements of the offense to the ACCA’s definition of violent felony. *United States v. Middleton*, 883 F.3d 485, 488 (4th Cir. 2018). “If the offense sweeps more broadly than the ACCA’s definition of a violent felony, the offense does not qualify as an ACCA predicate.” *Id.* *See Descamps* 133 S.Ct. at 2283. Mr. Ogle was convicted under Tennessee Code § 39-13-102(a)(1)(A)(iii): “Intentionally or knowingly [committing] an assault as defined in § 39-13-101, and the assault involved the use or display of a deadly weapon. J.A. 181. Whether

Tennessee's statute for aggravated assault qualifies as a violent felony predicate under the Armed Career Criminal Act is an important question of federal law that this Court should resolve. *See Rules of the Supreme Court 10(c).*

i. The District Court and Fourth Circuit Court of Appeals Erred in the "Most Innocent Conduct" Analysis.

Aggravated assault is defined by the Supreme Court of Appeals of Tennessee as having three elements: "(1) *mens rea*; (2) commission of an assault as defined in 39-13-101; and (3) (a) serious bodily injury or (b) use or display of a deadly weapon." *State of Tennessee v. Hammonds*, 30 S.W.3d 294, 298 (Tenn. 2000). The second element of aggravated assault as defined by the Supreme Court of Appeals in Tennessee is not divisible. *State of Tennessee v. Hammonds*, 30 S.W.3d 294, 302 (Tenn. 2000). The Tennessee court went on to hold the elements of Tennessee simple assault are means or theories by which the second element of the aggravated assault statute could be met. *Id.* The court held that the second element of aggravated assault may be established by proof that a person: (1) Intentionally, knowingly or recklessly causes bodily injury to another; (2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or (3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative. *Id.*

When dealing with T.C.A. § 39-13-102 the three simple assault variants are means by which the second element of aggravated assault may be committed and therefore are not divisible. *See Hammonds*, 30 S.W.3d at 302; *Mathis v. United*

States, 136 S.Ct. 2243, 2257 (2016). Because the Tennessee Supreme Court set out which parts of the statute are elements and which are means, a sentencing court does not need to go further to compare the elements of the state statute to the federal equivalent. *Mathis* 136 S.Ct. at 2257. “When a ruling of that kind exists, a sentencing judge need only follow what it says.” *Mathis*, 136 S.Ct. at 2256. Accordingly, any type of simple assault as defined by T.C.A. § 39-13-101 is sufficient to meet the second element of an aggravated assault. *Id.* To the extent that a statute of conviction is not divisible, the court must then determine whether “the most innocent conduct that the law criminalizes” satisfies the force clause. *United States v. Allred*, 942 F.3d 641, 648 (4th Cir. 2019) (quoting *United States v. Drummond*, 925 F.3d 681, 689 (4th Cir. 2019)). Appellant contends the most innocent conduct that would satisfy the second element of aggravated assault is T.C.A. § 39-13-101(a)(3), knowingly causing “offensive or provocative” physical contact. The Fourth Circuit has held that mere offensive touching is insufficient to trigger the ACCA’s force clause. Therefore, T.C.A. § 39-13-102 can be committed through minimal physical force and consequently does not qualify as a violent felony under ACCA’s force clause.

Under the “most innocent conduct” analysis, the use of force required to commit aggravated assault in Tennessee sweeps more broadly than the physical force required under the ACCA’s force clause. Congress did not define the term “physical force” but the Supreme Court gave the phrase its ordinary meaning: “force exerted by and through concrete bodies” as opposed to “intellectual force or

emotional force." *Johnson v. United States*, 559 U.S. 133, 138 (2010). In *Johnson*, the Court explained that "because the term 'physical force' contributes to the definition of a violent felony, it is understood to mean 'violent force - that is, force capable of causing physical pain or injury to another person.'" *United States v. Reid*, 861 F.3d 523, 527 (4th Cir. 2017)(quoting *Johnson*, 559 U.S. at 140). "Therefore, 'physical force' under the ACCA's force clause must be both physical (exerted through concrete bodies) and violent (capable of causing pain or injury to another)." *Middleton*, 883 F.3d. at 489. "De minimus physical force, such as mere offensive touching, is insufficient to trigger the ACCA's force clause because it is not violent."

Id.

When performing the most innocent conduct analysis, "there must be a realistic probability, not a theoretical possibility that the minimum conduct would actually be punished under the statute." *Allred* at 648 (quoting *United States v. Doctor*, 842 F.3d 306, 308 (4th Cir. 2016)). The United States Court of Appeals for the Sixth Circuit in an unpublished decision, *Hollom v. United States*, wrote that the court need not "imagine some perfect crime that includes the least touching married with peacefully displaying a weapon such as a holstered firearm." *Hollom v. United States*, 736 Fed. Appx. 96, 8 (6th Cir. 2018). However, the present case provides this Court with a realistic and actual factual scenario of Tennessee aggravated assault that does not qualify as a violent crime under the ACCA's force clause. In Mr. Ogle's case, or the case of anyone charged with using a vehicle under Tennessee aggravated assault statute, a defendant could lightly touch another

vehicle, causing offensive or provocative touching through a bump and the only deadly weapon displayed or used is a motor vehicle. This scenario provides a factual basis where the offensive touching is minimal and is not paired with a threat of violent force, such that T.C.A. § 39-13-102 cannot be considered a violent felony under ACCA's force clause.

Additionally, there is precedent in the Fourth Circuit for similar conduct not being categorized as a crime of violence. In *United States v. Tomonta Simmons*, the Fourth Circuit held that North Carolina assault with a deadly weapon on a government official (AWDWOGO) is not a crime of violence under the ACCA force clause. *United States v. Simmons*, 917 F.3d 312, 320 (4th Cir. 2019). The Court found that an individual who strikes a government official with a car as an ideal example of AWDWOGO prosecution that would not meet the ACCA standard for a violent crime. *Id.*

Wherefore, the defendant respectfully requests this Court grant Mr. Ogle's petition for certiorari in order to determine whether T.C.A. § 39-13-102 qualifies as a violent felony predicate under ACCA. If Mr. Ogle's conviction pursuant to T.C.A. § 39-13-102 is not considered a violent crime, then he does not have the three predicate violent felonies or serious drug offenses to qualify as an armed career criminal. Appellant respectfully requests this Court find the sentencing court and the Fourth Circuit Court of Appeals erred in applying 18 U.S.C. § 924(e), and to grant certiorari in this case.

X. CONCLUSION

For the reasons stated, Mr. Ogle respectfully requests that this Court should grant certiorari in this case.

Respectfully submitted,

BRYAN LEE OGLE,
By Counsel,

/s/Paul E. Stroebel
Paul E. Stroebel, Esquire (WV BAR 13269)
Stroebel & Stroebel, P.L.L.C.
Post Office Box 2582
Charleston, West Virginia 25329-2582
Counsel for Appellant