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

APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-4043

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

BRYAN LEE OGLE,

Defendant – Appellant.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Joseph R. Goodwin, District Judge. (2:18-cr-00057-1)

Argued: March 8, 2022 Decided: September 13, 2023

Before KING, WYNN, and RUSHING, Circuit Judges.

Affirmed by published opinion. Judge Rushing wrote the opinion, in which Judge King and Judge Wynn joined.

ARGUED: Paul Eugene Stroebel, STROEBEL & STROEBEL, PLLC, Charleston, West Virginia, for Appellant. Jeremy Bryan Wolfe, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee. **ON BRIEF:** Lisa G. Johnston, Acting United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charleston, West Virginia, for Appellee.

RUSHING, Circuit Judge:

Bryan Lee Ogle asks us to decide whether his Tennessee conviction for aggravated assault is a violent felony within the meaning of the Armed Career Criminal Act (ACCA). We conclude that it is and so affirm Ogle's sentence.

Ogle pled guilty to possessing a firearm as a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).[1] At the time of his offense, Ogle had numerous prior felony convictions. The Government requested an enhanced sentence under ACCA. "ACCA mandates a 15-year minimum sentence for a defendant convicted of a firearms offense who has three or more prior convictions for either a 'serious drug offense' or a 'violent felony.'" *United States v. Hasson*, 26 F.4th 610, 617 (4th Cir. 2022) (quoting 18 U.S.C. § 924(e)(1)). The Government argued that two of Ogle's prior convictions qualified as serious drug offenses, which he does not dispute, and that his 2017 conviction for aggravated assault in violation of Tennessee Code § 39-13-102 qualified as a violent felony. The district court agreed, overruling Ogle's objection, and sentenced him to 210 months in prison.

The only issue Ogle raises on appeal is whether his Tennessee conviction for aggravated assault qualifies as a violent felony. We review that question de novo. *United States v. Middleton*, 883 F.3d 485, 488 (4th Cir. 2018).

[1] In 2022, Congress amended Section 924(a)(2) so that it no longer provides the penalty for Section 922(g) convictions. *See* Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12004(c), 136 Stat. 1313, 1329 (2022).

As relevant here, ACCA defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). This definition is commonly called ACCA's "force clause." *Middleton*, 883 F.3d at 488. In this context, "'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010).

"To decide whether an offense satisfies the [force] clause, courts use the categorical approach." *Borden v. United States*, 141 S. Ct. 1817, 1822 (2021). Under that method, "we examine whether a state crime has as an element the 'use, attempted use, or threatened use of physical force against the person of another,' and do not consider the particular facts underlying the defendant's conviction." *United States v. Burns-Johnson*, 864 F.3d 313, 316 (4th Cir. 2017). "If any—even the least culpable—of the acts criminalized do not entail that kind of force," the statute of conviction is not a violent felony. *Borden*, 141 S. Ct. at 1822. If a single statute sets forth multiple crimes with distinct elements, we "look[] to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). We then compare the elements of that crime with the force clause, as the categorical approach commands. *Id.*

At the time of Ogle's conviction for aggravated assault in August 2017, the relevant Tennessee law defined the crime 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). And according to Section 39-13-101:

> (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.

Tenn. Code Ann. § 39-13-101 (2016).

We agree with the parties that Tennessee's aggravated assault statute is divisible as between subparagraphs (A) and (B), which define distinct crimes with diverse elements subject to different punishments. A conviction under subparagraph (A) is a "Class C felony," which is punishable by three to 15 years in prison. Tenn. Code Ann. § 39-13-102(e)(1)(A)(ii), (iii); *see id.* § 40-35-111(b)(3). A conviction under subparagraph (B),

however, is a "Class D felony," which is punishable by two to 12 years in prison. *Id.* § 39-13-102(e)(1)(A)(v), (vi); *see id.* § 40-35-111(b)(4). Because these "statutory alternatives carry different punishments, . . . they must be elements." *Mathis*, 136 S. Ct. at 2256 (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)); *see also Guevara-Solorzano v. Sessions*, 891 F.3d 125, 132 (4th Cir. 2018) (finding statute divisible "because each subsection provides for a different punishment"). Subparagraphs (A) and (B), therefore, set forth distinct crimes. *See United States v. Perez-Silvan*, 861 F.3d 935, 941–942 (9th Cir. 2017) (finding 2005 version of Tenn. Code Ann. § 39-13-102(a) divisible); *United States v. Batey*, No. 22-5339, 2023 WL 2401193, at *2–4 (6th Cir. Mar. 8, 2023) (finding 2010 and 2015 versions of Tenn. Code Ann. § 39-13-102(a) divisible); *United States v. Cooper*, 739 F.3d 873, 880 (6th Cir. 2014) (reaching the same conclusion for a prior version of the Tennessee statute).

We also agree with the parties that Ogle was convicted under subparagraph (A). According to the charging information, guilty plea, and judgment, Ogle pleaded guilty to aggravated assault by "knowingly and feloniously caus[ing] [his victim] to reasonably fear imminent bodily injury through the use of a deadly weapon[.]" J.A. 88. We therefore conclude that Ogle was convicted of violating subparagraph (A), which criminalizes "knowingly" committing an assault that involves one of four aggravating circumstances, including "use or display of a deadly weapon." Tenn. Code Ann. § 39-13-102(a)(1)(A).

Aggravated assault under subparagraph (A) "consists of three elements: (1) *mens rea*; (2) commission of an assault as defined in 39-13-101;" and (3) an aggravating

circumstance.[2] *State v. Hammonds*, 30 S.W.3d 294, 298 (Tenn. 2000). The least culpable conduct that qualifies is (1) knowingly (2) causing extremely offensive or provocative physical contact with another (3) that involves the display of a deadly weapon. *See* Tenn. Code Ann. §§ 39-13-101(a)(3), 39-13-102(a)(1)(A)(iii). A deadly weapon is "[a] firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury," or "[a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury." Tenn. Code Ann. § 39-11-106(a)(5) (2014).

Even this least culpable version of aggravated assault satisfies ACCA's force clause because it has as an element the threatened use of force capable of causing physical pain or injury to another person. *See Johnson*, 559 U.S. at 140; 18 U.S.C. § 924(e)(2)(B)(i). Displaying a deadly weapon in the course of an assault is necessarily a threat of violent force. *See*, *e.g.*, *United States v. Salmons*, 873 F.3d 446, 449 (4th Cir. 2017) (reasoning that aggravating factors like "the threat or presenting of firearms, or other deadly weapon" necessarily "entail actual, attempted, or threatened use of violence against another person" (internal quotation marks omitted)). Our sister circuits agree that, for this reason, Tennessee knowing aggravated assault involves, at a minimum, the threatened use of "violent physical force." *Perez-Silvan*, 861 F.3d at 943–944 ("[W]e cannot imagine one using or displaying a deadly weapon in the course of an offensive touching without

[2] The parties agree that the second element is not further divisible. *See Hammonds*, 30 S.W.3d at 301–302; *Perez-Silvan*, 861 F.3d at 940–941. We need not consider if the third element is divisible, as the parties seem to assume, because each statutory aggravating circumstance involves "the use, attempted use, or threatened use of physical force." 18 U.S.C. § 924(e)(2)(B)(i).

threatening the use of violent force."); *Braden v. United States*, 817 F.3d 926, 933 (6th Cir. 2016) (holding that defendant's Tennessee knowing aggravated assault convictions were violent felonies); *Hollom v. United States*, 736 Fed. App. 96, 101 (6th Cir. 2018) ("[E]xtremely offensive or provocative touching, coupled with the use or display of a deadly weapon, includes an implied threat of force sufficient to constitute a crime of violence under the Sentencing Guidelines.").[3] We now join them in holding that intentional or knowing aggravated assault in violation of Tennessee Code § 39-13-102(a)(1)(A) is a violent felony.

Ogle resists this conclusion, arguing that aggravated assault cannot be a violent felony because the second element of the crime—simple assault—requires only de minimis force. While it is true that "[d]e minim[i]s physical force, such as mere offensive touching, is insufficient to trigger the ACCA's force clause," *Middleton*, 883 F.3d at 489, Ogle overlooks the third, aggravating, element of the offense. Each of the aggravating circumstances listed in the statute involves the use, attempted use, or threatened use of violent physical force. *See* Tenn. Code Ann. § 39-13-102(a)(1)(A)(i)–(iv) (requiring that the assault "[r]esults in serious bodily injury to another," "[r]esults in the death of another," "[i]nvolved the use or display of a deadly weapon," or "[i]nvolved strangulation or

[3] "We rely on precedents addressing whether an offense is a crime of violence under the [Sentencing] Guidelines interchangeably with precedents evaluating whether an offense constitutes a violent felony under [ACCA], as the two terms are defined in a substantively identical manner." *United States v. Carthorne*, 726 F.3d 503, 511 n.6 (4th Cir. 2013) (internal quotation marks omitted).

attempted strangulation"). This third element of aggravated assault satisfies the requirements of ACCA's force clause, which is all the categorical approach demands.

We also reject Ogle's contention that the facts underlying his aggravated assault conviction provide an example of non-violent force that satisfies the statutory elements. Ogle contends that he knowingly drove his car into a police cruiser while the deputy was inside but, because no one was seriously injured, the offense could not have involved violent force. ACCA's force clause, however, does not require that injury be an element of the crime. It requires only the use, attempted use, or threatened use of force "*capable of* causing physical pain or injury." *Johnson*, 559 U.S. at 140 (emphasis added). Moreover, Ogle has not shown any "realistic probability" that Tennessee would apply the aggravated assault statute to the slightest contact between two vehicles, as he hypothesizes. *United States v. Jones*, 914 F.3d 893, 901 (4th Cir. 2019). In his own case, which is the only example he offers, Ogle used his vehicle in such a way that it caused the deputy to reasonably fear imminent bodily injury.

Finally, Ogle's appeal to our decision in *United States v. Simmons*, 917 F.3d 312 (4th Cir. 2019), is unavailing. There, we held that the North Carolina offense of assault with a deadly weapon on a government official was not categorically a crime of violence because it could be committed with a *mens rea* of "culpable negligence." *Id.* at 321. Because Ogle's crime of conviction required proof that he acted "[i]ntentionally or knowingly," *Simmons* is inapposite. Tenn. Code. Ann. § 39-13-102(a)(1)(A).

In sum, we hold that a conviction for aggravated assault under Tennessee Code § 39-13-102(a)(1)(A) is categorically a violent felony. The judgment of the district court is *AFFIRMED*.

AO 245B (Rev. 09/19) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Southern District of West Virginia

UNITED STATES OF AMERICA
v.
Bryan Lee Ogle

JUDGMENT IN A CRIMINAL CASE

Case Number: 2:18-cr-00057

USM Number: 01375-509

Paul Stroebel
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) one of the Superseding Indictment

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § § 922 (g) (1) and 924 (a) (2)	Felon in Possession of a Firearm	2/8/2018	One

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/28/2021
Date of Imposition of Judgment

JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE

1/28/2021
Date

DEFENDANT: Bryan Lee Ogle
CASE NUMBER: 2:18-cr-00057

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
210 months

☑ The court makes the following recommendations to the Bureau of Prisons:
that the defendant be housed at a maximum security facility.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Bryan Lee Ogle
CASE NUMBER: 2:18-cr-00057

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

5 years

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Bryan Lee Ogle
CASE NUMBER: 2:18-cr-00057

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Bryan Lee Ogle
CASE NUMBER: 2:18-cr-00057

SPECIAL CONDITIONS OF SUPERVISION

The defendant will participate in a program of testing, counseling and treatment for drug and alcohol abuse as directed by the probation officer.

The defendant must participate in a mental health treatment program and follow the rules and regulations of the program. The probation officer, in consultation with the treatment provider, will supervise your participation in the program. The defendant has an identified mental health diagnosis in his personal history.

The defendant must not use or possess alcohol. The defendant has a documented history of serious alcohol abuse, including criminal history related to the abuse of alcohol.

The defendant is not a legal resident of the Southern District of West Virginia, therefore, the period of supervised release is to be administered by the Eastern District of Tennessee where the defendant is a legal resident and/or the district where a suitable release plan has been developed.

The defendant shall comply with the Standard Conditions of Supervision adopted by the Southern District of West Virginia in Local Rule of Criminal Procedure 32.3, as follows:

1) If the offender is unemployed, the probation officer may direct the offender to register and remain active with Workforce West Virginia.

2) Offenders shall submit to random urinalysis or any drug screening method whenever the same is deemed appropriate by the probation officer and shall participate in a substance abuse program as directed by the probation officer. Offenders shall not use any method or device to evade a drug screen.

3) As directed by the probation officer, the defendant will make copayments for drug testing and drug treatment services at rates determined by the probation officer in accordance with a court-approved schedule based on ability to pay and availability of third-party payments.

4) A term of community service is imposed on every offender on supervised release or probation. Fifty hours of community service is imposed on every offender for each year the offender is on supervised release or probation. The obligation for community service is waived if the offender remains fully employed or actively seeks such employment throughout the year.

5) The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

DEFENDANT: Bryan Lee Ogle
CASE NUMBER: 2:18-cr-00057

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$ 100.00	$	$	$	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss***	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, Pub. L. No. 115-299.
** Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Bryan Lee Ogle
CASE NUMBER: 2:18-cr-00057

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

The $100 special assessment will be paid through participation in the Inmate Financial Responsibility Program. If not paid immediately, the defendant shall pay the assessment in payments of not less than $25 per quarter through participation in the Bureau of Prisons' Inmate Financial Responsibility Program. Any remaining balance shall be paid during the term of supervised release.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

UNITED STATES OF AMERICA,

v. CRIMINAL ACTION NO. 2:18-cr-00057

BRYAN LEE OGLE,

AMENDED MEMORANDUM OPINION AND EXPLANATION OF REASONS

On January 28, 2021, Defendant Bryan Lee Ogle appeared before me to be sentenced. At that hearing there were a number of objections. I sentenced Mr. Ogle to 210 months of imprisonment to be followed by 5 years of supervised release. I write now to preserve my reasoning on those objections and the sentence for the record.

Mr. Ogle was charged with being a felon in possession of a firearm after he fled from approaching police officers, drove at speeds over 100 miles per hour, crashed his car, fled on foot, only to be tackled when officers believed he was retrieving a firearm. Once subdued, Mr. Ogle was found to be in possession of a firearm. Days later, after being taken to a hospital, Mr. Ogle again attempted to flee, leading to him disarming a law enforcement officer and firing the weapon. The bullet was deflected by an officer's belt. Mr. Ogle pled guilty to attempted murder in state court for shooting at the police officer and was sentenced to 6-30 years. I am sentencing Mr. Ogle for his possession of a firearm when he fled from police the first time.

I. Defendant's Objections to the Presentence Investigation Report

After Defendant pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. 922(g)(1) and 924(a)(2), I ordered the United States Probation Office to prepare a presentence investigation report. [ECF No. 49].

At the hearing, three objections to the report remained. First, Defendant objected to the application of the 4-level enhancement for the possession of a firearm in connection with another felony offense under U.S.S.G. § 2K2.1(b)(6)(B). Second, Defendant objected to the inclusion of certain state charges in the calculation of his criminal history points. Third, Defendant objected to the Probation Officer's determination that the Armed Career Criminal Act applied to his sentence.

a. Possessing a Firearm in Connection with Another Felony Enhancement Objection

In the calculation of Mr. Ogle's offense level for the presentence investigation report, Defendant objected to the application of a 4-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B). Section 2K2.1 determines the offense level for a defendant convicted of the unlawful receipt, possession, or transportation of firearms or ammunition. Section 2K2.1(b)(6)(B) provides that "if the defendant used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase [the offense level] by 4 levels. If the resulting offense level is less than level 18, increase [the offense level] to level 18."

Application Note 14 of § 2K2.1(b)(6) provides several definitions that are helpful in applying this subsection. First it notes that this subsection should "apply if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense." U.S.S.G. § 2K2.1, cmt. n.14(A). "Another felony offense" is defined as "any federal, state, or local offense, other than the . . . firearms possession or trafficking offense, punishable by imprisonment for a term exceeding one year, regardless of whether a criminal charge was brought, or a conviction obtained." § 2K2.1, cmt. n.14(C).

In determining whether the other felony offense should be considered under U.S.S.G § 2K2.1(b)(6)B, that other felony offense must be relevant conduct to the offense of conviction. § 2K2.1, n.14(E); *see also United States v. Hussey*, No. 2:18-CR-13, 2018 WL 3300244 (E.D. Tenn. July 3, 2018) ("the four-level enhancement for use of a firearm or ammunition in connection with another felony offense pursuant to U.S.S.G. § 2K2.1(b)(6)(B), only appl[ies] as "relevant conduct" if the [other felony offense is] "part of the same course of conduct or common scheme or plan as the offense of conviction."). The Fourth Circuit Court of Appeals has held that the requirements for this enhancement are satisfied "when a firearm has some purpose or effect with respect to the other offense, including cases where a firearm is present for protection or to embolden the actor." *United States v. Bolden*, 964 F.3d 283, 287 (4th Cir. 2020).

Here, the other felony offense involves Defendant's first attempt to flee from law enforcement. On February 8th, 2018, a police officer pulled over Defendant and exited his car to initiate conversation with Defendant. While the officer was

approaching Defendant's car, Defendant fled in his vehicle. A chase ensued involving multiple police vehicles, with Defendant travelling at speeds greater than 100 miles per hour. After eventually crashing his car, Defendant fled on foot despite officers' commands to surrender himself. After being chased, according to witness testimony at the sentencing hearing, Mr. Ogle reached for a firearm and pulled it out[1] before being tackled by law enforcement officers and ultimately arrested.

Under West Virginia law, a "person who intentionally flees or attempts to flee in a vehicle from a law-enforcement officer . . . acting in his or her official capacity after the officer has given a clear visual or audible signal directing that person to stop, and who operates the vehicle in a manner showing a reckless indifference to the safety of others, is guilty of a felony and, upon conviction thereof, shall be fined not less than $1,000 nor more than $2,000 and shall be imprisoned in a state correctional facility not less than one nor more than five years." W. Va. Code § 61-5-17(f). Further, a "person who intentionally disarms or attempts to disarm a law-enforcement officer . . . acting in his or her official capacity is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility not less than one nor more than five years." W. Va. Code § 61-5-17.

Here, the firearm was not merely present during Defendant's felonious flight from law enforcement. The possession of the firearm, which prompted his flight, also emboldened his flight and in his later violent resistance to law enforcement. Because it is not required that Defendant be charged or convicted of these other felony

[1] Defendant disputes that the firearm was ever removed from its holster.

offenses, and because they were clearly relevant conduct to his unlawful possession of a firearm, I found that the 4-Level enhancement was properly applied in the pre-sentence investigation report. This increased the offense level from 24 to 28.

However, because I ultimately found that the Armed Career Criminal designation applied to Defendant, this objection is mooted because the offense Armed Career Criminal Designation raises the total offense level beyond 28 to 33.

b. Criminal History Objection

Defendant's second objection is that certain state offenses should not be included in his criminal history calculation. In the presentence investigation report, the Probation Officer noted that on February 10, 2018, two days after Defendant's encounter with the police that resulted in the instant offense, Defendant was charged with escape, malicious assault, assault during the commission of a felony, disarming and attempt to disarm a law enforcement officer, attempted murder, wanton endangerment, and possession of a firearm by a prohibited person in Kanawha County Circuit Court. [ECF No. 49, at 18]. This all occurred after Defendant was taken to the hospital, tried to escape, and ultimately fired a gun that he wrestled away from one law enforcement officer at another law enforcement officer. These charges were resolved when Defendant pled guilty to attempted murder two years later. When the presentence investigation report was authored, sentencing on these charges was still pending, but Defendant was ultimately sentenced to 6-30 years in prison on these charges.

Defendant argues that this sentence should not be considered as part of Defendant's criminal history because it "does not meet the definition of a prior

sentence as defined by U.S.S.G. § 4A1.2(a)." However, while these charges and a summary of the conduct were included in the presentence investigation report, this conviction did not ultimately count toward Defendant's criminal history points and, ultimately, had no effect on the Defendant's criminal history category.

U.S.S.G. § 4A1.1 provides the instructions for counting criminal history points. 3 points are added for "each prior sentence of imprisonment exceeding one year and one month." § 4A1.1(a). 2 points are added "for each prior sentence of imprisonment of at least sixty days not counted in (a)." § 4A1.1(b). And, finally, one point is added "for each prior sentence not counted in (a) or (b), up to a total of 4 points." § 4A1.1(c).

Defendant has 5 convictions that would have been counted under § 4A1.1(c): 1) Defendant pled guilty to driving under the influence, implied consent, and simple possession in 2007 [ECF No. 49, at 10]; 2) Defendant pled guilty to driving under the influence and implied consent in 2013 [ECF No. 49, at 13]; 3) Defendant pled guilty to two counts of assault in 2015 [ECF No. 49, at 15]; 4) Defendant pled guilty to aggravated assault and driving on a revoked license [ECF No. 49, at 17]; and 5) Defendant's conviction for attempted murder in 2018. But, because only 4 points can be ascribed to Defendant under § 4A1.1(c), the fifth conviction was not counted toward his criminal history point total. [ECF No. 49, at 18, 31–32]. Because it was not counted toward the total criminal history points, I found that Defendant's objection to the inclusion of this conviction in the presentence investigation report was moot and denied it as such.

c. Armed Career Criminal Act Objection

Finally, Defendant objected to his designation as an armed career criminal. Specifically, Defendant argued that his conviction for Tennessee aggravated assault should not be considered a violent felony under the Armed Career Criminal Act and that this enhancement was incorrectly applied. Defendant conceded that he has two prior convictions that satisfy the requirements of the Armed Career Criminal Act and only objected to this conviction for Tennessee aggravated assault.

The Armed Career Criminal Act provides that "in the case of a person who violates section 922(g) of this title," as Defendant has here, "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 . . . ." 18 U.S.C. § 924(e). The Act goes on to define "violent felony" as "any crime punishable by imprisonment for a term exceeding one year . . . that (i) has as an element the use, attempted use, or threatened use of physical force against the person of another [("the force clause")]; 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 [("the enumerated clause")]." § 922(e)(2)(B). However, determining whether a previous conviction qualifies as a violent felony is not always a simple task.

After identifying the statute that the criminal conviction was obtained under, I must determine if that statute is divisible or indivisible. *United States v. Allred*, 942 F.3d 641, 647 (4th Cir. 2019). An indivisible statute is one that contains a single

set of elements defining a single crime and calls for me to apply the categorical approach. The categorical approach calls for me to review "the most innocent conduct" that the statute in question criminalizes and compare the elements of the offense to the Armed Career Criminal Act's definition of a violent felony. *United States v. Middleton*, 883 F.3d 485 (4th Cir. 2018). The conduct that actually led to the conviction is of no consequence in this analysis.

On the other hand, if the statute is divisible, then I apply the modified categorical approach. A statute is divisible when it "sets forth alternative elements and in doing so effectively creates multiple 'distinct crimes.'" *Allred*, 942 F.3d at 649 (quoting *United States v. Gardner,* 823 F.3d793, 802 (4th Cir. 2016)). "When a criminal statute is phrased disjunctively it serves as a signal that it may well be divisible." *Id.*

In a divisible statute, there will be versions of the crime that do meet the definition of a violent felony under the Armed Career Criminal Act and other versions that do not. For a conviction under a divisible statute to be considered as a conviction of a violent felony, the prosecutor "charging a violation of a divisible statute must generally select the relevant element from its list of alternatives." *Descamps v. United States*, 579 U.S. 254, 257 (2013)). Once a statute is found to be divisible, the sentencing judge may "consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior convictions." *Descamps*, 579 U.S. at 257. If there was a guilty plea, then that may be consulted as well. *Id.* at 262. However, as with the categorical approach, the actual offense conduct is irrelevant to this analysis.

At that point, I consider the most innocent conduct criminalized by the version of the statute that the defendant was convicted under and compare the elements of the offense to the Armed Career Criminal Act's definition of a violent felony.

When determining whether the elements of the offense meet the requirements of the Armed Career Criminal Act's definition of a violent felony, it must either meet the requirements of the force clause in subsection (i) which requires that there is an element of the "use, attempted use, or threatened use of physical against the person of another;" or it must be one of the enumerated crimes in subsection (ii) which are "burglary, arson, or extortion." The remainder of the statute, known as the residual clause, was found to be unconstitutionally vague by the United States Supreme Court. *Johnson v. United States*, S. Ct. 2551, 2557–60 (2015). Because aggravated assault is not one of the enumerated offenses under subsection (ii), the question will be whether it satisfies the force clause in subsection (i).

To satisfy the force clause, the statute must first require a mens rea greater than recklessness. *Middleton*, 883 F.3d at 498; *United States v. Hodge*, 902 F.3d 420 (4th Cir. 2018). "Force" is not defined in the Armed Career Criminal Act, but the Supreme Court has given it its plain meaning, i.e., "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). The force must be "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). "De minimus physical force, such as mere offensive touching, is insufficient to trigger the [Armed Career Criminal Act's] force clause because it is not violent." *Middleton*, 883 F.3d at 489.

The first step is to determine whether the Tennessee statute for aggravated assault that Defendant was convicted under is divisible or indivisible. At the time of his conviction, the Tennessee statute for aggravated assault was codified as:

> (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 (2017).

Section 39-13-101 defines an assault ("Tennessee simple assault") as:

> (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.

The Supreme Court of Tennessee has clarified that a conviction for aggravated assault under § 39-13-102(a)(1)(A) requires not just a showing that a deadly weapon was used or displayed and that caused a person to cause reasonable bodily harm, but that the defendant intentionally or knowingly used or displayed a deadly weapon to put a person in fear of bodily harm. *Hughes v. Metropolitan Government of Nashville and Davidson County*, 340 S.W.3d 352, 370 (Tenn. 2011) (citing *State v. Wilson*, 924 S.W.2d 648, 650–51 (Tenn. 1996)).

The Tennessee aggravated assault statute has been examined under the Armed Career Criminal Act by two courts of appeals. The United States Court of Appeals for the Sixth Circuit considered it in *Hollom v. United States*, 736 F. App'x 96 (6th Cir. 2018). In *Hollom*, the court was considering Tennessee aggravated assault under the context of being a crime of violence in the United States Sentencing Guidelines, but the test applied is the same as determining whether it is a violent felony under the Armed Career Criminal Act. *Id.* at 98 (citing *United States v. Gibbs,* 626 F. 3d 344, 352 n.6 (6th Cir. 2010)).

The Sixth Circuit found that a conviction of Tennessee aggravated assault requires 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." *Id.* at 99 (citing *State v. Hammonds*, 30 S.W.3d 294, 298 (Tenn. 2000)). The Tennessee court found that the third element, which can be met by either causing serious bodily injury or by the use or display of a deadly weapon is divisible. It then went on to find that the second element, commission of a simple assault is not itself divisible because it is merely the means by which the aggravated assault is committed. *Hollom v. United States*, 736 F. App'x 96, 100 (2018).

The Sixth Circuit analyzed whether the intentional display of a deadly weapon that causes physical contact with another, and where a reasonable person would regard the contact as extremely offensive or provocative, would satisfy the force clause of the Armed Career Criminal Act. *Id.* Recognizing that a conviction could be obtained under the simple assault statute that only required offensive or provocative touching, the court held that a conviction for aggravated assault could be obtained

that involved only the offensive or provocative touching. But only one element of the offense needs to require the use or threatened use of force, 18 U.S.C. § 924(e), and a conviction would require a showing of serious bodily harm or the use or display of a deadly weapon *in addition* to the offensive or provocative touching.

The Ninth Circuit Court of Appeals addressed whether the "display of a deadly weapon" required by the Tennessee aggravated assault statute satisfies the force clause. "Regardless of whether the deadly weapon itself touches the victim's body, we cannot imagine one using or displaying a deadly weapon in the course of an offensive touching without threatening the use of violent force." *Id.* at 101 (quoting *Perez-Silvan*, 861 F.3d at 942–43). When offensive or provocative touching is "coupled with the use or display of a deadly weapon, includes an implied threat of force sufficient to constitute a crime of violence[.]" *Hollom*, at 101.

First, like the Sixth and Ninth Circuits, I find that the Tennessee aggravated assault statute is divisible. This statute obviously presents different versions of the crime that a conviction could be obtained under. A defendant could be convicted for (1) intentionally or knowingly committing a simple assault that causes serious bodily injury to another; (2) intentionally or knowingly committing a simple assault that results in the death of another; (3) intentionally or knowingly committing a simple assault that involved the use or display of a deadly weapon; or (4) intentionally or knowingly committing a simple assault that involved strangulation or attempted strangulation. I agree with the Sixth and Ninth Circuits and the Supreme Court of Tennessee in finding that the statute is divisible.

Having found that the statute is divisible, I consulted a limited set of documents to determine which version of the statute that Defendant was convicted under. The information filed against Defendant in Tennessee state court charged him with "causing [a law enforcement officer] to reasonably fear imminent bodily injury through the use of a deadly weapon, to-wit: striking his patrol cruiser with another motor vehicle in violation of T.C.A. 39-13-102." [ECF No. 40-1, 1]. It is clear that Defendant was convicted under Tennessee Code § 39-13-102(a)(1)(A)(iii): "Intentionally or knowingly [committing] a [simple assault], and the assault involved the use or display of a deadly weapon."

Having determined what version of the aggravated assault statute the defendant was prosecuted under, I now consider the most innocent conduct criminalized under that version of the statute and determine if it meets the requirements of the force clause. Like the Sixth and Ninth Circuits before me, I must determine whether the intentional display of a deadly weapon that causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative satisfies the requirements of the force clause of the Armed Career Criminal Act. That is, does this version of the statute have "as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

I agree with the Sixth and Ninth Circuits here. To find that the intentional display of a deadly weapon during the commission of a simple assault was not violent would require ignoring the fact that the force clause may be satisfied by "threatened

use of physical force" as opposed to the application or attempted application of that force.

Defendant also contended that this conviction could not satisfy the force clause because the elements of a simple assault can be satisfied with a mens rea of recklessness as opposed to intentionally or knowingly acting. As Defendant notes, the Fourth Circuit requires that a statute which permits a conviction with a mens rea of reckless cannot qualify as a violent felony under the Armed Career Criminal Act. *Middleton*, 883 F.3d at 498. However, after applying the modified categorical approach, I know that Defendant's conviction under Tennessee Code § 39-13-102(A)(1)(A)(iii) required proof of a mens rea of intentionally or knowingly. Therefore, Defendant's argument about the mens rea requirement fails.

Having found that this conviction meets the requirements of the Armed Career Criminal Act, I overruled Defendant's objection on this matter. Section 4B1.4 of the United States Sentencing Guidelines governs the offense level of Armed Career Criminals. Because Defendant did not use or possess a firearm during the commission of the three predicate offenses, Defendant's offense level is increased to 33. This increase moots the 4-level increase under § 2K2.1(b)(6)(B) because that increase only increased the offense level to 28 and I am required to use the greater of these two numbers. *See* U.S.S.G. § 4B1.4(b).

After decreasing the offense level for some acceptance of responsibility under U.S.S.G. § 3E1.1(a),(b), Defendant's total offense level was 30. [ECF No. 49, at 7]. Defendant has 20 criminal history points and has a criminal history category of VI.

18 U.S.C. § 924(a)(2) provides that there is a 10-year maximum sentence for unlawful possession of a firearm. However, the application of the Armed Career Criminal Act requires a minimum sentence of 15 years (or 180 months) and a maximum sentence of life in prison. 18 U.S.C. § 924(e)(1). Under the Guidelines, an Offense Level of 30 and a criminal history category of VI, the recommended imprisonment range is 168 to 210 months. However, because of the statutory minimum required by the Armed Career Criminal Act, the guideline range is adjusted upward to be 180 months to 210 months.

II. The Sentence

Prior to imposing a sentence, I received evidence and heard argument from the Government and the Defendant on both the § 3553(a) factors and the ultimate sentence. Defendant asked the court for a sentence at the bottom of the guideline range and asked me to consider Defendant's childhood where he was abused by his father and never had a stable home. Defendant also noted that much of his criminal history is related to drug addiction and asked that I consider that Defendant has admitted his guilt with regard to unlawfully possessing the firearm.

The Government called Mr. John James Perrine, chief of police in Marmet, West Virginia, to testify about his encounters with Defendant. Mr. Perrine described at length his first encounter with Defendant on February 8, 2018. Mr. Perrine described how officers attempted to approach Defendant's vehicle to question him about a missing person when Defendant sped off in his vehicle reaching speeds over 100 miles per hour before crashing into a ditch. Mr. Perrine then described how Defendant ignored law enforcement commands, fled on foot, and ultimately began to

pull a firearm from his waist before being tackled and tased by police officers and eventually subdued and taken into custody.[2]

Mr. Perrine then described his interactions with Defendant on February 10, 2018, that ultimately led to Defendant's conviction for attempted murder in West Virginia state court. After the incident on February 8, Defendant was taken to the hospital for treatment. Mr. Perrine was on hospital detail on February 10. Mr. Perrine described that minutes before Defendant was to be discharged and transferred to police custody, Defendant asked to go to the bathroom, and then fled through an adjoining patient's room. Mr. Perrine tracked him through the hospital, finally discovering his location in a hospital subbasement. Mr. Perrine coordinated with another officer for backup and the two planned to confront Defendant.

Mr. Perrine approached Defendant and attempted to pepper spray him. A struggle ensued and Defendant disarmed Mr. Perrine. Two shots were fired. Mr. Perrine lost consciousness briefly, and only learned later that Defendant had fired two shots at the officer backing him up. One of the shots hit the backup officer but was deflected and did not harm him.

After presenting the testimony of Mr. Perrine, the Government explained that it sought a top of the guidelines sentence because it believed that Defendant is a danger to others. The Government noted that this is Defendant's thirteenth felony conviction, and that Defendant has 25 prior misdemeanor convictions. The Government emphasized Defendant's violent behavior during both the February 8

2 Defendant disputes where the firearm was ultimately discovered. Defendant's argument is supported by another officer's police report, but it is undisputed that the firearm did belong to Defendant and that he possessed it during the chase.

and the February 10 incidents, and explained that it was possible that more than one law enforcement officer could have died that day.

Defendant addressed the court himself to provide context to the court, claiming that he never actually fired a weapon at the officer in the hospital.[3] Defendant noted that he struggles with addiction and that he is not a violent person and asked that he receive a lower sentence because he did not try to hurt anyone.

I considered all of this testimony and argument, as well as the information in the presentence investigation report, and the § 3553(a) factors before ultimately concluding that Defendant should be imprisoned for a term of 210 months, the top of the guideline range, followed by a 5-year term of supervised release. I imposed this sentence because I believe that Defendant is the definition of a career criminal. To say that he has a troubling criminal history would be an understatement with 13 felony convictions and 25 misdemeanors. Defendant embodies every reason we have for prohibiting people convicted of felonies from possessing firearms. Violence against a police officer is a direct assault on the rule of law. There are no more dangerous offenses than those which threaten our law enforcement officers.

The law reasonably prohibits people convicted of felonies from having firearms because those people have proven that they are a danger to society and that when they get in trouble again, they pose a direct threat to law enforcement.

Defendant's past history and personal characteristics justify the sentence that I imposed. I cannot think of, nor have I ever seen, a more serious breach of the law

3 I note, however, that Defendant pled guilty to attempted murder for this charge.

by a felon possessing a firearm. Defendant had 12 other times to learn that he was not allowed to possess a firearm, but he was not deterred.

In addition to his sentence, I found that the Defendant was dangerous and recommended that he serve out his sentence at a maximum-security facility.

The court **DIRECTS** the Clerk to send a copy of this Order to the defendant and counsel, the United States Attorney, the United States Probation Office, and the United States Marshal.

ENTER: February 3, 2021

JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

UNITED STATES OF AMERICA,

v. CRIMINAL ACTION NO. 2:18-cr-00057

BRYAN LEE OGLE,

ORDER

At a hearing held on July 27, 2020, the defendant, Bryan Lee Ogle, appeared in person and by counsel, Paul Stroebel, for the purpose of the defendant's plea to count one of the Superseding Indictment filed against him. The United States was represented at the hearing by Jeremy Wolfe, AUSA.

The court inquired of the defendant, both personally and through counsel, to determine the defendant's competency. The court found the defendant competent and capable of entering an informed plea.

The court then read to the defendant the charge contained in the Superseding Indictment. The court inquired as to the defendant's plea. The defendant then pleaded guilty.

The court then read the pertinent portion of 18 U.S.C. §§ 922 (g) (1) and 924 (a) (2). The court explained the elements that the United States would have had to prove had this matter gone to trial. After hearing and considering the defendant's explanation of why he considered himself guilty and hearing evidence from the United States about what it would have been able to prove at trial, the court found that there was a sufficient factual basis for the defendant's plea of guilty.

The court further informed the defendant, pursuant to the requirements of Fed. R. Crim. P. 11(c)(1), of the nature of the charge and of the consequences of pleading guilty to the charge. After explaining thoroughly these items and after hearing and considering the defendant's responses to the court's questions, the court found that the defendant understood the nature of the charge and the consequences of pleading guilty.

The court further informed the defendant, pursuant to the requirements of Fed. R. Crim. P. 11(c)(3), (c)(4), of the constitutional and other legal rights that the defendant was giving up by pleading guilty. After explaining thoroughly these items and after hearing and considering the defendant's responses to the court's questions, the court found that the defendant understood his constitutional and other legal rights.

The court further inquired of the defendant, pursuant to the requirements of Fed. R. Crim. P. 11(d), to insure that the defendant's plea was voluntary. After hearing and considering the defendant's responses to the court's questions, the court found that the defendant's plea was voluntary.

The defendant further executed a written plea of guilty which was witnessed by his counsel and ordered filed by the court. The court accepted the defendant's plea. Accordingly, the court **ADJUDGES** the defendant, Bryan Lee Ogle, guilty, and the defendant now stands convicted of violating 18 U.S.C. §§ 922 (g) (1) and 924 (a) (2).

The court **ORDERS** that the Probation Office prepare and forward a draft presentence report to the United States and counsel for the defendant no later than **September 10, 2020**; that the United States Attorney and counsel for the defendant file objections to the draft presentence report no later than **September 24, 2020**; that the Probation Office submit a final presentence report to the court no later than **October 8, 2020**; and that the United States and counsel for the

defendant file a sentencing memorandum no later than **October 15, 2020**. In their respective sentencing memoranda, the court **ORDERS** the United States and counsel for the defendant to offer any evidence or argument related to a requested sentence or sentencing range in light of Gall v. United States, 552 U.S. 38 (2007). The court **SCHEDULES** final disposition of this matter for **October 22, 2020 at 2:00 p.m.**

The court **ORDERS** the defendant detained pending sentencing. The court **DIRECTS** that the defendant be committed to the custody of the United States Marshal for confinement. The court further **DIRECTS** that the defendant be afforded reasonable opportunity for private consultation with counsel. Finally, the court **DIRECTS** that, on order of a court of the United States or on request of an attorney for the United States, the person in charge of the correction facility in which the defendant is confined deliver the defendant for the purpose of an appearance in connection with court proceedings.

The court **DIRECTS** the Clerk to send a copy of this Order to the defendant and counsel, the United States Attorney, the United States Probation Office, and the United States Marshal.

ENTER: July, 27, 2020

JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE

2015 Tennessee Code
Title 39 - Criminal Offenses
Chapter 13 - Offenses Against Person
Part 1 - Assaultive Offenses
§ 39-13-102. Aggravated assault.

(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.

(2) For purposes of subdivision (a)(1)(A)(iv), "strangulation" means intentionally or knowingly impeding normal breathing or circulation of the blood by applying pressure to the throat or neck or by blocking the nose and mouth of another person, regardless of whether that conduct results in any visible injury or whether the person has any intent to kill or protractedly injure the victim.

(b) A person commits aggravated assault who, being the parent or custodian of a child or the custodian of an adult, intentionally or knowingly fails or refuses to protect the child or adult from an aggravated assault as defined in subdivision (a)(1) or aggravated child abuse as defined in § 39-15-402.

(c) A person commits aggravated assault who, after having been enjoined or restrained by an order, diversion or probation agreement of a court of competent jurisdiction from in any way causing or attempting to cause bodily injury or in any way committing or attempting to commit an assault against an individual or individuals, intentionally or knowingly attempts to cause or causes bodily injury or commits or attempts to commit an assault against the individual or individuals.

(d) A person commits aggravated assault who, with intent to cause physical injury to any public employee or an employee of a transportation system, public or private, whose operation is authorized by title 7, chapter 56, causes physical injury to the employee while the public employee is performing a duty within the scope of the public employee's employment or while the transportation system employee is performing an assigned duty on, or directly related to, the operation of a transit vehicle.

(e) (1) (A) Aggravated assault under:

(i) Subsection (d) is a Class A misdemeanor;
(ii) Subdivision (a)(1)(A)(i), (iii), or (iv) is a Class C felony;
(iii) Subdivision (a)(1)(A)(ii) is a Class C felony;
(iv) Subdivision (b) or (c) is a Class C felony;
(v) Subdivision (a)(1)(B)(i) or (iii) is a Class D felony;
(vi) Subdivision (a)(1)(B)(ii) is a Class D felony.

(B) However, the maximum fine shall be fifteen thousand dollars ($15,000) for an offense under subdivision (a)(1)(A), subdivision (a)(1)(B), subsection (c), or subsection (d) committed against any of the following persons who are discharging or attempting to discharge their official duties:

(i) Law enforcement officer;
(ii) Firefighter;
(iii) Medical fire responder;
(iv) Paramedic;
(v) Emergency medical technician;
(vi) Health care provider; or
(vii) Any other first responder.

(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.

(3)

(A) In addition to any other punishment authorized by this section, the court shall order a person convicted of aggravated assault under the circumstances set out in this subdivision (e)(3) to pay restitution to the victim of the offense. Additionally, the judge shall order the warden, chief operating officer, or workhouse administrator to deduct fifty percent (50%) of the restitution ordered from the inmate's commissary account or any other account or fund established by or for the benefit of the inmate while incarcerated. The judge may authorize the deduction of up to one hundred percent (100%) of the restitution ordered.

(B) Subdivision (e)(3)(A) applies if:

(i) The victim of the aggravated assault is a correctional officer, guard, jailer, or other full-time employee of a penal institution, local jail, or workhouse;

(ii) The offense occurred while the victim was in the discharge of official duties and within the victim's scope of employment; and

(iii) The person committing the assault was at the time of the offense, and at the time of the conviction, serving a sentence of incarceration in a public or private penal institution as defined in § 39-16-601.

Tenn. Code Ann. § 39-13-102 (2015).