Case No. 13-5714

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDWARD YOUNG,

Defendant-Appellant.

On appeal from the United States District Court
for the Eastern District of Tennessee

BRIEF OF THE UNITED STATES

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STATEMENT REGARDING ORAL ARGUMENT

The United States submits that the facts and legal arguments are adequately presented in the parties' briefs and the record such that the Court's decisional process is unlikely to be aided by oral argument. Accordingly, oral argument is not requested.

STATEMENT OF THE ISSUES

I. Whether applying the Armed Career Criminal Act's ("ACCA"), 18 U.S.C. § 924(e), mandatory penalties for Defendant's knowing possession of ammunition after having been previously convicted of three violent felonies is consistent with the Due Process Clause of the Fifth Amendment.

II. Whether applying the ACCA's mandatory penalties for Defendant's knowing possession of ammunition after having been previously convicted of three violent felonies is consistent with the Eighth Amendment.

COMBINED STATEMENT OF THE CASE AND FACTS

In early October 2011, law enforcement officials received reports of several burglaries of storage buildings and vehicles in and around Chattanooga, Tennessee. (Presentence Investigation Report ("PSR") at ¶ 4, Confidential Document.) Based on video surveillance of the areas burglarized, officers were able to identify a specific car that had been present at several of the burglaries. (*Id.*) After

determining that Defendant was the owner of that suspect vehicle, officers went to Defendant's residence to investigate. (*Id*.)

When the officers arrived at Defendant's house, they observed a different vehicle, which they had also previously seen in the burglary surveillance videos, sitting in Defendant's driveway. (*Id*.) Defendant consented to a search of his house. (*Id*.) Inside the residence, the officers found several items that had been stolen during the burglaries. (*Id*.) Officers also found seven shotgun shells inside a box in a chest of drawers next to Defendant's bed. (*Id*.; *accord* R. 29, Plea Agreement at PageID# 55.)

While one of the officers was holding the shotgun shells, Defendant "voluntarily stated that they were his." (R. 29, Plea Agreement at PageID# 55.) Defendant also admitted, after waiving his *Miranda* rights, that he had possessed the shotgun shells. (PSR at ¶ 4.) Defendant later claimed that he had obtained the shotgun shells while helping a neighbor dispose of her deceased husband's possessions. (R. 35-1, Young Declaration at PageID# 81.) At the time that he obtained and possessed the shotgun shells, Defendant had already been convicted of numerous prior felonies, including four aggravated burglaries, three burglaries, five thefts, and two assaults. (R. 29, Plea Agreement at PageID# 56; *accord* PSR at ¶¶ 19-25.)

Defendant was subsequently charged with and pleaded guilty to knowingly possessing ammunition as a felon, in violation of 18 U.S.C. § 922(g)(1). (R. 1, Indictment at PageID# 1; R. 29, Plea Agreement at PageID# 54-55.) Based on his multiple prior burglary convictions, Defendant was deemed an armed career criminal and was accordingly subject to a mandatory minimum sentence of fifteen years' imprisonment. (PSR at ¶¶ 14, 20-22, 46.) Because that mandatory minimum sentence was higher than Defendant's advisory Guidelines range of 135 to 168 months' imprisonment, the mandatory minimum also became Defendant's effective Guidelines range. (*Id*. at ¶ 47.)

Defendant did not dispute that his prior burglary convictions made him an armed career criminal under the ACCA. (R. 35, Defendant's Sentencing Memorandum at PageID# 67.) Instead, Defendant alleged that applying the ACCA's penalty provisions in his case would violate the Fifth and Eighth Amendments. (*Id*. at PageID# 68-78; *accord* R. 41, Sentencing Tr. at PageID# 112-26.) The district court rejected those arguments as precluded by prior decisions of this Court. (R. 41, Sentencing Tr. at PageID# 129-30.)

After considering the 18 U.S.C. § 3553(a) factors and Defendant's other sentencing arguments, the district court imposed the statutory mandatory minimum sentence of 180 months' imprisonment. (*Id*. at PageID# 130-35; *accord* R. 38,

Judgment, PageID# 98-103.) This timely appeal followed.[1] (R. 39, Notice of Appeal, PageID# 104.)

SUMMARY OF ARGUMENT

The district court did not violate the Fifth Amendment's due process guarantee by imposing the fifteen-year minimum sentence that Congress has mandated for Defendant's knowing possession of ammunition after having been previously convicted of at least three violent felonies. Federal law unambiguously prohibits felons from knowingly possessing ammunition. That prohibition is neither a strict-liability offense nor is it so obscure that Defendant should not have reasonably been aware of it. Defendant's alleged unawareness of that prohibition is no excuse for his failure to heed it.

The district court also properly rejected Defendant's Eighth Amendment challenge to his ACCA sentence. This Court, as well as every other federal court of appeals, has consistently found that the ACCA's mandatory penalties are not cruel, unusual, or grossly disproportionate. Defendant's offense is not less serious that the offenses at issue in prior cases. Moreover, Defendant is precisely the kind of felon for whom the ACCA was designed. Applying the ACCA is his case was both appropriate and constitutional.

[1] The National Association of Criminal Defense Lawyers has requested the Court's permission to appear as *amicus curiae* in this case and has filed a proposed *amicus* brief in support of Defendant. As of the filing of the government's brief, the Court has not yet ruled upon that request.

ARGUMENT

The ACCA requires a mandatory minimum fifteen-year sentence for a felon who knowingly possesses ammunition after having sustained three prior convictions "for a violent felony or a serious drug offense, or both." 18 U.S.C. § 924(e)(1). Among other offenses, the statute includes burglaries within its definition of "violent felony." 18 U.S.C. § 924(e)(2)(B)(ii); *accord Taylor v. United States*, 495 U.S. 575, 599 (1990). The district court found that Defendant was subject to the penalty provisions of the ACCA based on his seven prior burglary convictions. (PSR at ¶¶ 20-22.) Defendant does not challenge that conclusion on appeal. Instead, Defendant contends that, notwithstanding his undisputed status as an armed career criminal, the mandatory fifteen-year penalty that Congress has prescribed for such offenders should not be applied in his case because to do so would allegedly violate the Fifth and Eighth Amendments. (Def. Br. at 8-9.) While this Court reviews those as-applied constitutional challenges to the ACCA *de novo*, *e.g.*, *United States v. Anderson*, 695 F.3d 390, 398 (6th Cir. 2012), it should reject both of them as meritless.

I. Applying the ACCA's mandatory penalties for Defendant's knowing possession of ammunition is consistent with the Due Process Clause of the Fifth Amendment.

The Fifth Amendment provides that "[n]o person shall be … deprived, of life, liberty, or property, without due process of law." U.S. Const. Amend. V.

Implicit in that due process guarantee is the requirement that laws provide fair warning of the conduct which they criminalize. *See*, *e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("[B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.").

Citizens, however, are presumed to know the law and are expected to conform their conduct to it. *Cheek v. United States*, 498 U.S. 192, 199 (1991). As such, courts have consistently applied the rule, "deeply rooted in the American legal system," that "ignorance of the law or a mistake of law is no defense to criminal prosecution." *Id.*; *accord*, *e.g.*, *Barlow v. United States*, 32 U.S. 404, 411 (1833) ("It is a common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally."). "The benefits of such a presumption are manifest. To allow an ignorance of the law excuse would encourage and reward indifference to the law. Further, the difficulty in proving a defendant's subjective knowledge of the law would hamper criminal prosecutions." *United States v. Baker*, 197 F.3d 211, 218 (6th Cir. 1999).

Despite that well-established rule, Defendant contends that it would violate due process to punish him for knowingly possessing ammunition because he allegedly did not know that it was unlawful for him—a seven-time convicted

burglar—to do so. (Def. Br. at 10-22.) Defendant raises two arguments in support of that contention. First, Defendant alleges that his crime—a violation of 18 U.S.C. § 922(g)(1)—is a "public welfare offense" which has no *mens rea* element and, thus, is allegedly suspect under the Due Process Clause. (Def. Br. at 12-15.) Second, Defendant argues that § 922(g)(1)'s prohibition against possessing ammunition is allegedly so obscure that Defendant should not be faulted for not being aware of it. (Def. Br. at 16-22.) Defendant's first argument is misplaced and his second argument lacks merit.

A. Section 922(g)(1) is not a strict-liability, public welfare offense.

Contrary to Defendant's contention, 18 U.S.C. § 922(g)(1) is not a strict liability offense. Rather, the statute contains a requirement that the defendant have acted "knowingly" in order for its penalty provisions to apply. 18 U.S.C. § 924(a)(2); *accord United States v. McCormick*, 517 F. App'x 411, 414 (6th Cir. 2013) ("Section 924(a)(2) … requires that any violation of section 922(g)(1) be knowing." (internal quotation marks omitted)); *see also Bryan v. United States*, 524 U.S. 184, 187-89 (1998) (explaining how Congress specifically added "a scienter requirement as a condition to the imposition of penalties for most unlawful acts defined in § 922" when it amended the statute in 1986 as part of the Firearm Owner's Protection Act); *United States v. Langley*, 62 F.3d 602, 604-05

(4th Cir. 1995) (*en banc*) (discussing the history of the *mens rea* component in 18 U.S.C. § 922(g)(1)).

That *mens rea* only applies to the possession element of the offense. *E.g.*, *United States v. Capps*, 77 F.3d 350, 352 (10th Cir. 1996) ("[T]he only knowledge required for a § 922(g) conviction is knowledge that the instrument possessed is a firearm."). A defendant is not required to "have specific knowledge of [his] felon status and of the resultant disability imposed by law on the possession of firearms [and ammunition] before being guilty of a charge under 18 U.S.C. § 922(g)(1)." *United States v. Davis*, 27 F. App'x 592, 600 (6th Cir. 2001); *accord United States v. Beavers*, 206 F.3d 706, 708 (6th Cir. 2000) ("[T]he term 'knowingly' only requires that the accused know that he possessed a firearm, not that he knew that such possession was illegal."); *see also Bryan*, 524 U.S. at 192 ("[T]he term 'knowingly' does not necessarily have any reference to a culpable state of mind or to knowledge of the law. As Justice Jackson correctly observed, 'the knowledge requisite to knowing violation of a statute is factual knowledge as distinguished from knowledge of the law.'" (quoting *Boyce Motor Lines v. United States*, 342 U.S. 337, 345 (1952) (Jackson, J., dissenting))).

Nevertheless, the existence of that *mens rea* requirement with respect to the possession element means that § 922(g)(1) does not create a strict liability offense. *See* Black's Law Dictionary (9th ed. 2009) (defining "strict liability offense" as

"[a]n offense for which the action alone is enough to warrant a conviction, *with no need to prove a mental state*" (emphasis added)); *see also Liparaota v. United States*, 471 U.S. 419, 423 n.5 (1985) ("The required mental state may of course be different for different elements of a crime."). As such, it is not the type of "public welfare" or "regulatory" offense which the Supreme Court has construed more carefully for due process concerns. *See, e.g., Staples v. United States*, 511 U.S. 600, 606 (1994) (explaining that Congress has created, as a "form of strict criminal liability" certain "public welfare" or "regulatory" offenses" which the Court has permitted in "limited circumstances"). Defendant's arguments based on his characterization of the statute as a strict liability, public welfare offense are misplaced.

To the extent that Defendant is suggesting that specific knowledge that his felon status prevented him from possessing ammunition must be included in the *mens rea* for § 922(g)(1), the case law does not support such a contention. The presumption that criminal statutes should contain a *mens rea* "requires knowledge only of the facts that make the defendant's conduct illegal, lest it conflict with the related presumption" that ignorance of the law is no defense to criminal prosecution. *Staples*, 511 U.S. at 622 n.3 (Ginsburg, J., concurring). Indeed, "[i]f the ancient maxim that 'ignorance of the law is no excuse' has any residual validity, it indicates that the ordinary intent requirement—*mens rea*—of the

criminal law does not require knowledge that an act is illegal, wrong, or blameworthy." *United States v. Freed*, 401 U.S. 601, 612 (1971) (Brennan, J., concurring). "Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law." *Reynolds v. United States*, 98 U.S. 145, 167 (1878).

In short, Defendant was not convicted because he was caught "unwittingly" with ammunition in his home (Def. Br. at 19), but rather was convicted because he "knowingly possessed ammunition" as a felon. (R. 29, Plea Agreement at PageID# 55.) Defendant's alleged unawareness of the federal prohibition against felons possessing ammunition is not a basis on which this Court can or should refuse to apply the penalties that Congress has mandated for Defendant's offense.

B. Section 922(g)(1)'s prohibition of the possession of ammunition by felons is not so technical or obscure that it threatens to ensnare individuals engaged in apparently innocent conduct.

Defendant next contends that his case falls within an exception to the maxim that ignorance of the law is no excuse. (Def. Br. at 16-22.) Defendant correctly notes this Court has not applied that maxim "when faced with a law so technical or obscure that it threatens to ensnare individuals engaged in apparently innocent conduct." *Baker*, 197 F.3d at 219 (citing *Bryan*, 524 U.S. at 194); *accord United States v. Napier*, 233 F.3d 394, 397-98 (6th Cir. 2000). However, the law which

Defendant violated—18 U.S.C. § 922(g)(1)—does not fall within that narrow exception.

First, § 922(g)(1) is not the kind of highly technical statute for which an exception to the maxim is permitted. *See*, *e.g.*, *Cheek*, 498 U.S. at 199-200 (explaining that, because of the complexity of the federal tax laws, Congress has "softened the impact of the common-law presumption by making specific intent to violate the law an element of certain criminal tax offenses"). The statute does not use "obscure technical or scientific terms foreign to ordinary persons." *United States v. Caseer*, 399 F.3d 828, 839 (6th Cir. 2005). Rather, the statute uses everyday terms that most individuals would understand—"felon", "firearm", "ammunition", "possess"—to describe a simple concept: convicted felons may not possess firearms or ammunition. 18 U.S.C. § 922(g)(1).

Additionally, § 922(g)(1) is not so obscure that it prohibits conduct which is apparently innocent. As Defendant recognizes, "courts have generally agreed that prohibited persons have fair notice that their ability to possess firearms is highly regulated, if not completely barred." (Def. Br. at 15.) *See*, *e.g.*, *Capps*, 77 F.3d at 353 ("[A] person convicted of a felony cannot reasonably expect to be free from regulation when possessing a firearm."); *Langley*, 62 F.3d at 607 (same); *see also District of Columbia v. Heller*, 554 U.S. 570, 626 (2008) (describing "prohibitions on the possession of firearms by felons" as "longstanding" ones which are not

called into question by the Second Amendment's protection of an individual right to bear arms). Likewise, this Court has repeatedly rejected the argument that similar provisions of the same statute—§ 922(g)(8) and § 922(g)(9)—are so obscure as to potentially cover apparently innocent conduct. *See Napier*, 233 F.3d at 399 (finding that defendant's "status alone, as one subject to a domestic violence order, was sufficient to preclude him from claiming a lack of fair warning with respect to the requirements of § 922(g)(8)"); *Baker*, 197 F.3d at 218-20 (same); *Beavers*, 206 F.3d at 710 ("Beavers's conviction on a domestic violence offense sufficiently placed him on notice that the government might regulate his ability to own or possess a firearm.").

Defendant nevertheless contends that his case should be treated differently because of the difference between firearms and ammunition. (Def. Br. at 16-18.) Specifically, Defendant claims that, while it is obvious that felons cannot lawfully possess firearms, it is allegedly not so obvious that they cannot lawfully possess ammunition. (Def. Br. at 17.)

However, if, as Defendant concedes, it is reasonable to expect a felon to know that his possession of firearms might be subject to governmental regulation, then it is also reasonable to expect a felon to know that his possession of ammunition would likewise be subject to regulation. Firearms and ammunition, while technically distinct, generally go together. Indeed, it is their combination

together that creates a dangerous weapon that can inflict injury on others. A citizen who knew that the government had placed restrictions on one part of that dangerous combination—the firearm—should not be surprised to learn that the government had placed restrictions on the other part of that combination—the ammunition.[2] *See United States v. Phillips*, 177 F. App'x 942, 954 (11th Cir. 2006) ("Just as Congress could rationally decide to punish possession of a firearm by a convicted felon without requiring possession of ammunition, Congress could also rationally decide to punish possession of ammunition by a convicted felon without also requiring possession of a firearm. Congress made a rational decision that certain individuals should be required to separate themselves fully from certain wares common to the criminal enterprise, and it is not for us to invalidate that decision.").

[2] Defendant accurately notes that some states do not prohibit felons from possessing ammunition. (Def. Br. at 16; *accord* Proposed *Amicus* Br. at 5-8.) However, that some governmental entities have decided not to regulate the possession of ammunition by felons does not mean that it is not conduct which might appropriately be the subject of governmental regulation. *See, e.g.*, *Chandler v. Florida*, 449 U.S. 560, 579 (1981) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))).

In addition, possession of ammunition by a convicted felon is not the kind of apparently innocent conduct that citizens would be surprised to learn is criminal.[3] The primary purpose for possessing ammunition is to use it with a firearm. If a felon cannot lawfully possess a firearm—a restriction which Defendant concedes is reasonable and generally understood—then it is unlikely that a felon would have a legitimate purpose for possessing ammunition.[4] As such, prohibiting the possession of ammunition by felons does not ensnare individuals who are engaged in apparently innocent conduct.

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[3] Defendant cites *United States v. Blom*, 242 F. 3d 799 (8th Cir. 2001), in support of his contention that "even a state police officer might not know it is a federal law violation for a felon to possess ammunition." (Def. Br. at 17.) *Blom* stands for no such proposition. On the contrary, the court in *Blom* found that a "state police officer who knew Blom was a convicted felon *would likely know* it was a federal crime for him to possess ammunition," but simply concluded that, because the officer in that case had no reason to know that Blom was a felon, the officer had no reason to find Blom's possession of ammunition suspicious. 242 F.3d at 808 (emphasis added). Like the Eighth Circuit, this Court has also recognized that the contraband nature of ammunition when found in a felon's possession is clear. *See, e.g., United States v. Lyon*, 488 F. App'x 40, 42 (6th Cir. 2012) ("Because the officers were aware that Lyons was a previously-convicted felon and therefore was not permitted to possess ammunition or a firearm, the incriminating nature of this box of ammunition was immediately apparent." (internal citation omitted)).

[4] Defendant suggests that he could have lawfully possessed the ammunition for sporting purposes. (Def. Br. at 16.) However, unless Defendant was intending to throw the shotgun shells at large targets from close range, he would have needed a shotgun—an item which Defendant agrees he could not lawfully possess—to use the ammunition for a sporting purpose.

In short, the prohibition of the possession of ammunition by felons is not so obscure or technical that it would offend due process to presume that citizens are generally aware of it. Accordingly, Defendant cannot avoid the general rule that ignorance of the law is no excuse. Because Defendant knowingly possessed ammunition as a felon, the district court appropriately imposed the penalty that Congress has mandated for that offense. No due process violation occurred.

II. Applying the ACCA's mandatory penalties for Defendant's knowing possession of ammunition is consistent with the Eighth Amendment.

The Eighth Amendment prohibits the imposition of any "cruel and unusual punishments." U.S. Const. Amend. VIII. Interpreting that provision in the context of non-capital sentences, the Supreme Court has found that the Eighth Amendment "contains a 'narrow proportionality principle.'" *Ewing v. California*, 538 U.S. 11, 20 (2003) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (Kennedy, J., concurring)). That principle "does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id*. at 23 (quoting *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring)); *accord Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) ("A *gross* disproportionality principle is applicable to sentences for terms of years." (emphasis added)).

In applying that narrow proportionality principle, courts must keep in mind that "the fixing of prison terms for specific crimes involves a substantive

penological judgment that, as a general matter, is 'properly within the province of the legislatures, not courts.'" *Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring) (quoting *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980)). One legitimate penological concern that courts must respect is the legislature's decision to "deal[] in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal laws." *Rummel*, 445 U.S. at 276; *accord Ewing*, 538 U.S. at 25 ("Recidivism has long been recognized as a legitimate basis for increased punishment."). Given the legislature's primary role in assessing such concerns, "federal courts should be reluctant to review legislatively mandated terms of imprisonment and … successful challenges to the proportionality of particular sentences should be exceedingly rare." *Hutto v. Davis*, 454 U.S. 370, 374 (1982) (citations and internal quotation marks omitted); *accord Ewing*, 538 U.S. at 22.

Applying those principles to the ACCA, this Court has consistently found that the fifteen-year minimum sentence mandated by that statute does not violate the Eighth Amendment. *E.g.*, *United States v. Moore*, 643 F.3d 451, 456 (6th Cir. 2011); *United States v. Warren*, 973 F.2d 1304, 1311 (6th Cir. 1992); *accord United States v. Reynolds*, 215 F.3d 1210, 1214 (11th Cir. 2000) ("[E]very circuit to have considered the issue has concluded that the 15-year minimum mandatory sentence under the ACCA is neither disproportionate to the offense nor cruel and

unusual punishment."); *see also United States v. Brown*, 443 F. App'x 956, 960 (6th Cir. 2011) ("We have seen this movie before, and each time it ends badly for the defendant."). Those prior decisions are binding on this panel. *See* 6 Cir. R. 32.1(b) ("Published panel opinions are binding on later panels. A published opinion is overruled only by the court en banc."); *accord Salmi v. Sec. of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985) ("A panel of this Court cannot overrule the decision of another panel … unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting *en banc* overrules the prior decision.").

Defendant nevertheless contends that this Court should depart from that precedent for two reasons. First, Defendant claims that, because his offense was allegedly only a strict liability crime, he is allegedly less culpable than other ACCA offenders and his ACCA sentence is allegedly grossly disproportionate to his offense. (Def. Br. at 22-32.) Second, Defendant contends that applying the ACCA in his case would not be consistent with the purpose of the statute. (Def. Br. at 32-36.) Defendant is mistaken on both points.

A. Defendant's fifteen-year sentence is not grossly disproportionate to his offense of knowingly possessing ammunition after having previously been convicted of at least three violent felonies.

In attacking the proportionality of his sentence, Defendant primarily focuses on the gravity of his offense, arguing that it was not very serious because it

allegedly was a "strict liability, malum prohibitum offense involving the lowest level of criminal culpability." (Def. Br. at 23.) However, as already explained above, § 922(g)(1) is not a strict liability crime. *See supra* Section I.A. Defendant's Eight Amendment arguments based on that characterization of his offense are misplaced.

In addition, Defendant's offense was not, as he claims, "unwitting, passive, and innocent." (Def. Br. at 32.) Rather, Defendant was convicted for "knowingly possess[ing] ammunition," (R. 29, Plea Agreement at PageID# 55), despite having multiple prior convictions, seven of which were for burglary offenses (PSR at ¶¶ 19-25). That unlawful possession of ammunition was not any less serious than the offenses committed by the ACCA offenders in cases where the ACCA's penalties have been upheld. On the contrary, by statutory definition, Defendant's offense was of exactly the same type as the offenses committed by those other offenders since the ACCA's penalties only apply to individuals "who violate[] section 922(g)." 18 U.S.C. § 924(e)(1). *See, e.g.*, *Moore*, 643 F.3d at 453, 456 (rejecting Eighth Amendment challenge to ACCA as applied to a felon who possessed a firearm in violation of 18 U.S.C. § 922(g)(1)).

In arguing that his offense was not particularly grave—and, thus, allegedly unworthy of the fifteen-year mandatory minimum penalty required by the ACCA—Defendant as well as proposed *amicus*, focus only on Defendant's self-

serving account of how he allegedly obtained the ammunition and ignore Defendant's undisputed history of repeated burglaries. (Def. Br. at 25-26; Proposed *Amicus* Br. at 4-5.) That approach, however, is inconsistent with the way that the Supreme Court has applied the narrow proportionality principle to determine whether a sentence is grossly disproportionate.

In *Ewing*, a case involving the imposition of a sentence of twenty-five years' to life imprisonment on a recidivist shoplifter under California's three strikes law, the Supreme Court expressly rejected Ewing's attempt to characterize his offense as "merely 'shoplifting three golf clubs.'" 538 U.S. at 28. Instead, the Court found that "[i]n weighing the gravity of Ewing's offense, [it] must place on the scales not only his current felony, but also his long history of felony recidivism." *Id*. at 29. "Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions." *Id*.; *accord United States v. Rodriquez*, 553 U.S. 377, 385 (2008) (rejecting, as an "erroneous proposition," the claim "that a defendant's prior record of convictions has no bearing on the seriousness of an offense"). When considered in that proper context, the Court found that Ewing's lengthy sentence was "justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by [Ewing's] own long, serious criminal record." *Ewing*, 538 U.S. at 29-30.

Just as Ewing was not sentenced to a minimum twenty-five year term of imprisonment because of the mere theft of three golf clubs, Defendant was not sentenced to the ACCA's fifteen-year mandatory minimum term of imprisonment for simply possessing a few shotgun shells. Rather, Defendant faced that sentence because he knowingly possessed the shotgun shells after having been previously been convicted of burglary *seven times*. (PSR at ¶¶ 20-22.) Given Defendant's history of repeatedly failing to comply with the law, it was not unreasonable for Congress to demand that a more severe penalty be imposed for Defendant's knowing possession of ammunition than would have otherwise been applicable absent that criminal history. *See Rodriquez*, 553 U.S. at 385 ("[A]n offense committed by a repeat offender is often thought to reflect greater culpability and thus to merit greater punishment. Similarly, a second or subsequent offense is often regarded as more serious because it portends greater future danger and therefore warrants an increased sentence for purposes of deterrence and incapacitation."); *Witte v. United States*, 515 U.S. 389, 400 (1995) ("[T]he enhanced punishment imposed for the later offense 'is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'" (quoting *Gryger v. Burke*, 334 U.S. 728, 732 (1948))).

Indeed, the Supreme Court "has consistently affirmed the imposition of longer sentences, even for non-violent offenses, based on an offender's recidivism." *United States v. Lyons*, 403 F.3d 1248, 1256 (11th Cir. 2005). *See Hutto*, 454 U.S. at 374-75 (1982) (affirming two consecutive twenty-year sentences for a recidivist who possessed and distributed nine ounces of marijuana); *Rummel*, 445 U.S. at 265 (affirming life sentence with the possibility of parole for recidivist who obtained $120.75 by false pretenses). In doing so, the Court has explained that such sentences are based on "a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated." *Ewing*, 538 U.S. at 30.

The ACCA is based on a similar rational judgment that felons who have committed at least three prior violent felonies or serious drug offenses pose a greater danger to the public when they possess firearms or ammunition than felons without such a criminal history. *See Begay v. United States*, 553 U.S. 137, 146 (2008) (The ACCA "focuses upon the special danger created when a particular type of offender—a violent criminal or drug trafficker—possesses a gun. … [T]he Act looks to past crimes … because an offender's criminal history is relevant to the question whether he is a career criminal, or, more precisely, to the kind or degree of danger the offender would pose were he to possess a gun."); *Taylor*, 495 U.S. at 587-88 ("Congress focused its efforts on career offenders—those who commit a

large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons."). As such, Congress reasonably chose to increase the penalties applicable for violations of § 922(g)(1) for those more dangerous offenders so as to incapacitate them.[5] *United States v. Vann*, 660 F.3d 771, 826 (4th Cir. 2011) ("Congress designed ACCA to incapacitate individuals whose prior conduct

[5] Proposed *amicus* notes that some states have recently made different legislative choices concerning the imposition of mandatory recidivism sentencing enhancements. (Proposed *Amicus* Br. at 9-13.) However, that different legislatures have made different policy judgments regarding the best manner in which to achieve the penological goals of sentencing in the case of recidivists simply underscores the fact that such judgments are best left to political branches of government and should generally be respected by the courts. *See Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring) ("Determinations about the nature and purposes of punishment for criminal acts implicate difficult and enduring questions respecting the sanctity of the individual, the nature of law, and the relation between law and the social order. … And the responsibility for making these fundamental choices and implementing them lies with the legislature."); *Solem v. Helm*, 463 U.S. 277, 290 (1983) ("Reviewing courts ... should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes."); *Gore v. United States*, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, these are peculiarly questions of legislative policy." (internal citation omitted)); *Ex parte United States*, 242 U.S. 27, 42 (1916) ("[T]he authority to define and fix the punishment for crime is legislative.").

Moreover, given that many states still have and use recidivism sentencing statutes, the ACCA's imposition of enhanced penalties for defendants with a history of violent felony or drug convictions cannot be considered "unusual punishment." U.S. Const. Amend. VIII. Indeed, those existing state recidivism statutes as well as the ACCA are the very "objective indicia of society's standards" which proposed *amicus* urges this Court to consider in conducting its Eighth Amendment analysis. (Proposed *Amicus* Br. at 3, 4, 7 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008).)

'makes [it] more likely that [they], later possessing a gun, will use that gun deliberately to harm a victim.'" (quoting *Begay*, 553 U.S. at 145)). "Nothing in the Eighth Amendment prohibits [Congress] from making that choice." *Ewing*, 538 U.S. at 25.

Additionally, nothing about the mandatory nature of the ACCA's penalties runs afoul of the Eighth Amendment. "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history." *Harmelin*, 501 U.S. at 994-95. The Supreme Court has consistently affirmed that "Congress has the power to define criminal punishments without giving the courts any sentencing discretion." *Chapman v. United States*, 500 U.S. 453, 467 (1991).

In short, Defendant's fifteen-year sentence for possessing ammunition after having previously been convicted of three violent felonies, while severe, is not grossly disproportionate to his offense. Defendant's attempts to minimize the seriousness of his conduct are either based on his mistaken assumption that § 922(g)(1) is a strict liability offense or his failure to acknowledge the serious nature of his prior criminal history and instant offense. Contrary to his bald assertions, Defendant is not an innocent individual who was unwittingly caught with shotgun shells. Rather, he is a seven-time convicted burglar whose knowing possession of ammunition Congress reasonably determined merits a stiff penalty.

Nothing in the Eighth Amendment requires this Court to override that Congressional determination of the appropriate sentence for Defendant's offense.

B. Defendant was properly classified as an armed career criminal under the ACCA.

Finally, while not disputing that he qualifies as an armed career criminal under the plain language of the ACCA, Defendant contends that applying the statute in his case would "not in any way comport with the intent of Congress in enacting the ACCA." (Def. Br. at 32.) As an initial matter, that argument, even if valid—it is not—would not demonstrate a violation of the Eighth Amendment. The possibility that a penalty statute might have broader application than Congress intended does not mean that applying the statute to persons clearly covered by its terms would be cruel and unusual punishment. On the contrary, applying penalties to a defendant that are different than what is required by the applicable penalty statute would be unusual punishment and might also pose equal protection problems.

In any event, Defendant's contention that applying the ACCA in his case contravenes the will of Congress lacks merit. The intent of Congress is "best determined by the statutory language it chooses." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495 n.13 (1985); *accord United States v. Locke*, 471 U.S. 84, 95 (1985) ("[D]eference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to

assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962))); *see also United States v. Hughes*, No. 11-1201, __ F.3d __, 2013 WL 5763162, at *5 (6th Cir. Oct. 25, 2013) ("Neither policy concerns, nor some general sense of the statute's overriding purpose, nor the spirit of the age, provides us with any lawful basis to do what Hughes asks us to do here. … [A]s judges we are confined to what the law says.").

Here, the language of the ACCA undisputedly covers Defendant. The statute imposes enhanced penalties on felons who have three previous convictions for a "violent felony." 18 U.S.C. § 924(e)(1). The statute includes "burglary" within the definition of violent felony. 18 U.S.C. § 924(e)(2)(B). Thus, Defendant's seven prior burglary convictions qualify him as an armed career criminal under the statute.[6]

Defendant nevertheless contends that he "does not fall within the category of persons Congress intended to imprison as recidivists with weapons." (Def. Br. at 35.) However, even if this Court could set aside the plain statutory language—it

[6] While the Supreme Court has clarified that only generic burglaries—*i.e.*, those "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime"—qualify as "burglaries" under the ACCA, *Taylor*, 495 U.S. at 599, three of Defendant's prior burglary convictions were Tennessee aggravated burglaries (PSR at ¶ 21-22), which this Court has previously found are categorically generic burglaries. *United States v. Nance*, 481 F.3d 882, 888 (6th Cir. 2007). Thus, there is no question that Defendant is an armed career criminal under the statute.

cannot, *see American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982) ("Going behind the plain language of a statute in search of a possibly contrary congressional intent is 'a step to be taken cautiously' even under the best of circumstances.")—the legislative history of the ACCA indicates that Defendant is precisely the kind of individual to which the statute was targeted.

As the Supreme Court explained in *Taylor*, "[t]he legislative history [of the ACCA] indicates that Congress singled out burglary (as opposed to other frequently committed property crimes such as larceny and auto theft) for inclusion as a predicate offense, both in 1984 [when it initially passed the statute] and in 1986 [when it amended the statute], because of [burglary's] inherent potential for harm to persons." 495 U.S. at 588. Congress did not make any attempt to limit the statutory language to "some special subclass of burglaries that might be especially dangerous," but rather "apparently thought that all burglaries serious enough to be punishable by imprisonment for more than a year constituted a category of crimes that shared this potential for violence and that were likely to be committed by career criminals." *Id*.

That legislative history—to the extent that it is relevant to this Court's analysis given the plain language of the statute—indicates that Congress intended the ACCA to apply to career burglars, like Defendant, who subsequently chose to possess firearms or ammunition in contravention of 18 U.S.C. § 922(g)(1). That

decision constituted a reasonable legislative judgment that persons who commit multiple burglaries—a crime that inherently involves a risk of violence—are the kind of individuals who, if they were able to possess firearms and ammunition, might actually use those objects to cause harm to others. *See*, *e.g.*, *Begay*, 553 U.S. at 146 (explaining that prior burglary offenses "reveal a degree of callousness toward risk [and] also show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger"). Defendant's mere disagreement with that Congressional judgment is not a basis on which this Court can or should vacate the sentence statutorily required for Defendant's offense.

In sum, Defendant is not only an armed career criminal under the terms of the ACCA, but is also the very kind of felon whom Congress intended to punish more severely under that statute. Despite Defendant's attempts to rewrite the record on appeal, the undisputed facts demonstrate that Defendant is not an innocent individual who was unwittingly caught with shotgun shells. Rather, Defendant is an experienced, seven-time convicted burglar who appears to have recently used his burglary skills. He was found in possession of not only ammunition, but also several items that had been stolen during a recent string of burglaries. (PSR at ¶ 4.) Deterring career burglars who have chosen to return to a life of crime from possessing firearms and ammunition is precisely the purpose for

which the ACCA's stiff mandatory penalties were designed. Defendant's refusal to acknowledge the seriousness of his prior criminal history and present actions should not excuse him from the penalties which those actions triggered. Defendant's sentence should be affirmed.

CONCLUSION

For the foregoing reasons, Defendant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on November 27, 2013, this brief was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt, and those parties may access this brief through the Court's electronic filing system. Any parties not listed on the electronic filing receipt will be served by regular United States mail, postage prepaid.

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CERTIFICATION PURSUANT TO RULE 32(A)(7)(B)

I certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, in that it contains 6,702 words, excluding the cover, table of contents, table of authorities, statement regarding oral argument, the certificates of counsel, and the designation of relevant district court documents. This certification is based upon the word count of the word-processing program used by the United States, Microsoft Word 2010.

s/Christopher D. Poole
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DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

EDWARD YOUNG,
Defendant-Appellant.

On appeal from the United States District Court for the Eastern District of Tennessee
No. 1:12-CR-00045

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