APPENDIX A
Eleventh Circuit Court of Appeals' Opinion affirming
Brundidge's conviction and sentence

Brundidge v. United States of America

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-10571
Non-Argument Calendar

D.C. Docket No. 4:15-cr-00012-CDL-MSH-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARSENIO BRUNDIDGE,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Georgia

(September 13, 2017)

Before MARCUS, WILSON and BLACK, Circuit Judges.

PER CURIAM:

Arsenio Brundidge appeals his convictions and total 235-month sentence for possession of a firearm by a convicted felon and possession of cocaine, violations of 18 U.S.C. §§ 922(g)(1) & 924(e)(1) and 21 U.S.C. § 844, respectively. Brundidge asserts: (1) the Government's statements during closing arguments were improper and caused substantial prejudice; and (2) his prior conviction for Georgia burglary did not qualify as a predicate offense under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). After review,[1] we affirm.

I. DISCUSSION

A. Prosecutorial misconduct

"In determining whether there was prosecutorial misconduct, we examine whether the prosecutor's remarks were (1) improper and (2) prejudicially affected the defendant's substantial rights." *United States v. Azmat*, 805 F.3d 1018, 1044 (11th Cir. 2015). "Prosecutorial misconduct must be considered in the context of the entire trial, along with any curative instruction." *United States v. Lopez*, 590 F.3d 1238, 1256 (11th Cir. 2009).

"[A]lthough a prosecutor may not exceed the evidence presented at trial during her closing argument, she may state conclusions drawn from the trial

[1] We review Brundidge's claim of prosecutorial misconduct for plain error because Brundidge did not object to the Government's closing arguments at trial. *See United States v. Azmat*, 805 F.3d 1018, 1045 (11th Cir. 2015). We review for plain error when a defendant fails to object to an ACCA enhancement before the district court. *United States v. Jones*, 743 F.3d 826, 828 (11th Cir. 2014). An error is "plain" if the asserted error is clear from the plain meaning of a statute, constitutional provision, or from a holding of the Supreme Court or this Court. *United States v. Rodriguez*, 627 F.3d 1372, 1381 (11th Cir. 2010).

evidence." *United States v. Reeves*, 742 F.3d 487, 505 (11th Cir. 2014). Thus, an issue raised by a defendant during closing is fair game for the prosecution on rebuttal. *Id.*; *see also United States v. Bernal-Benitez*, 594 F.3d 1303, 1315 (11th Cir. 2010) (noting it is not improper for a prosecutor to mention the defendant has the same subpoena powers as the government, particularly when done in response to the prosecutor's failure to call a specific witness).

As part of its obligation to prove guilt beyond a reasonable doubt, the government may not make comments that would shift the burden of proof to the defendant. *Bernal-Benitez*, 594 F.3d at 1315. However, the prosecutor may comment on the failure of defense counsel, as opposed to the defendant, to counter or explain evidence. *See Bernal-Benitez*, 594 F.3d at 1315 (holding the prosecutor's comment was merely a request the jury closely examine the record for support of defense counsel's attacks).

Brundidge does not establish the Government's statements during closing arguments constitute plain error. The Government's statement that Deputy Powell previously knew Brundidge was not calculated to mislead or inflame the jury's passions. *See Azmat*, 805 F.3d at 1045 ("A prosecutor's remarks, suggestions, insinuations, and assertions are improper when they are calculated to mislead or inflame the jury's passions."). Further, the Government was allowed to rebut defense counsel's argument on this issue. *See Reeves*, 742 F.3d at 505 ("[T]he prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.”).

The Government also did not shift the burden of proof in addressing defense counsel’s arguments on Deputy Powell’s credibility. The Government was allowed to respond to defense counsel’s arguments on this issue. *Id*. Moreover, the Government may request the jury closely examine the evidence for support of defense counsel’s attacks. *Bernal-Benitez*, 594 F.3d at 1315. And the court cured any undue prejudice by explaining the Government’s burden of proof in its jury instructions. *See id.* (concluding the court, following closing argument, cured any undue prejudice in its instruction on the government’s burden of proof).

Although the Government speculated whether Brundidge stole the firearm, the court quickly provided a curative instruction, stating the jury should not speculate about that issue because it was not an issue in the case. We presume the jury followed the district court’s curative instruction. *Lopez*, 590 F.3d at 1256. Under a plain error standard of review, it is not plain the Government’s statement was incurable. *See United States v. Rodriguez*, 627 F.3d 1372, 1381 (11th Cir. 2010).

Brundidge does not establish the cumulative effects of the alleged errors denied him a fair trial. *See Lopez*, 590 F.3d at 1258 (stating in addressing a claim of cumulative error, we examine the trial as a whole to determine whether the defendant was afforded a fundamentally fair trial). Brundidge did not establish plain error from the Government's closing arguments, and there can be no cumulative error where there are no individual errors. *See Azmat*, 805 F.3d at 1045. Thus, his convictions are affirmed.

B. ACCA

At the time of Brundidge's conviction in 2010, Georgia's burglary statute provided:

> A person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another or enters or remains within any other building, railroad car, aircraft, or any room or any part thereof . . . .

United States v. Gundy, 842 F.3d 1156, 1164 (11th Cir. 2016) (citing Ga. Code Ann. § 16-7-1(a) (2011)). In *Gundy*, we held the Georgia statute was divisible, and applying the modified categorical approach, we determined the defendant's burglary convictions qualified as ACCA predicate offenses because the indictments charged that he burgled one dwelling house and two business houses. *Id.* at 1168-69.

The district court did not plainly err in counting Brundidge's Georgia burglary conviction as an ACCA predicate offense. We have held the statute is divisible and the offense qualifies as an ACCA predicate offense under the modified categorical approach. *Gundy*, 842 F.3d at 1168-69. Brundidge does not cite a contrary holding, as required under plain error review. *See Rodriguez*, 627 F.3d at 1381. Moreover, a court may rely on undisputed facts contained in the presentence investigation report (PSI) in applying the modified categorical approach. *See United States v. Ramirez-Flores*, 743 F.3d 816, 820 & n.3 (11th Cir. 2014) (stating courts may consider undisputed facts contained in the PSI in applying the modified categorical approach). Thus, we affirm Brundidge's total sentence.

II. CONCLUSION

Brundidge did not establish plain error from the Government's closing arguments or in counting his prior conviction for burglary as a predicate offense under the ACCA. Thus, we affirm his convictions and total sentence.

AFFIRMED.

APPENDIX B
18 U.S.C. § 922(g)

Brundidge v. United States of America

18 U.S.C. section 922(g)

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

(2) who is a fugitive from justice;

(3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));

(4) who has been adjudicated as a mental defective or who has been committed to a mental institution;

(5) who, being an alien—

(A) is illegally or unlawfully in the United States; or

(B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));

(6) who has been discharged from the Armed Forces under dishonorable conditions;

(7) who, having been a citizen of the United States, has renounced his citizenship;

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C) **(i)** includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

APPENDIX C
18 U.S.C. § 924(e)

Brundidge v. United States of America

18 U.S.C. section 924(e)
(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

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

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

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

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APPENDIX D

District Court's Final Judgement

Brundidge v. United States of America

AO 245B (Rev. 10/15) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Middle District of Georgia

UNITED STATES OF AMERICA
v.
ARSENIO C. BRUNDIDGE

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:15-CR-12-CDL-001

USM Number: 97889-020

WILLIAM KENDRICK, JR
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) __________

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

☒ was found guilty on count(s) 1 & 2 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 922(g)(1) and § 924(e)(1)	Possession of a Firearm by a Convicted Felon	11/3/2014	1
21 U.S.C. § 844	Possession of Cocaine	11/3/2014	2

The defendant is sentenced as provided in pages 2 through 6 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.

1/26/2016
Date of Imposition of Judgment

s/ Clay D. Land
Signature of Judge

CLAY D. LAND, CHIEF U.S. DISTRICT JUDGE
Name and Title of Judge

01/28/2016
Date

DEFENDANT: ARSENIO C. BRUNDIDGE
CASE NUMBER: 4:15-CR-12-CDL-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 235 months - (Count 1 – 235 months; Count 2 – 12 months to be served concurrently for a total of 235 months) THIS SENTENCE SHALL RUN CONSECUTIVELY TO ANY PROBATION REVOCATION WHICH MAY BE IMPOSED IN MUSCOGEE CO SUPERIOR COURT CASE NUMBERS SU06CR748; SU08CR1341; SU10CR2131; SU12CR233; SU12CR232: AND SU12CR244.

☒ The court makes the following recommendations to the Bureau of Prisons:
that defendant be allowed to participated in any drug and alcohol program that is available for which he qualifies

☒ 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: ARSENIO C. BRUNDIDGE
CASE NUMBER: 4:15-CR-12-CDL-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 5 years (5 years as to Ct. 1 and 1 year as to Ct. 2 to run concurrent for a total of 5 years)

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall 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 the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: ARSENIO C. BRUNDIDGE
CASE NUMBER: 4:15-CR-12-CDL-001

SPECIAL CONDITIONS OF SUPERVISION

You shall participate in a program of drug and alcohol testing and treatment. The U.S. Probation Office shall administratively supervise your participation in the program by approving the program, administering the testing, and supervising the treatment. You shall contribute to the costs of such treatment not to exceed an amount determined reasonable by the court approved "U.S. Probation Office's Sliding Scale for Services", and shall cooperate in securing any applicable third-party payment, such as insurance or Medicaid.

You shall participate in a mental health treatment program and comply with the treatment regimen of your mental health provider. The U.S. Probation Office shall administratively supervise your participation in the program by approving the program and monitoring your participation in the program. You shall contribute to the costs of such treatment not to exceed an amount determined reasonable by the court approved "U.S. Probation Office's Sliding Scale for Services", and shall cooperate in securing any applicable third-party payment, such as insurance or Medicaid.

You shall participate in a program working toward the completion of your GED as directed by the Bureau of Prisons and the U.S. Probation Office.

You shall participate in an approved program for domestic violence/anger management.

You shall submit your person, property, house, residence, vehicle, papers, computers (as defined by 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. The Defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.

DEFENDANT: ARSENIO C. BRUNDIDGE
CASE NUMBER: 4:15-CR-12-CDL-001

CRIMINAL MONETARY PENALTIES

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

	Assessment	Fine	Restitution
TOTALS	**$ 125.00** ($100.00 on Ct. 1 and $25 on Ct. 2)	**$** 0	**$** 0

☐ 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	$ 0	

☐ 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 ☐ fine ☐ restitution.

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

* 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: ARSENIO C. BRUNDIDGE
CASE NUMBER: 4:15-CR-12-CDL-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payment of $ ____________ due immediately, balance due

☐ not later than ____________________ , or
☐ in accordance ☐ C, ☐ D ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or

C ☐ Payment in equal __________ *(e.g., weekly, monthly, quarterly)* installments of $ __________ over a period of __________ *(e.g., months or years)*, to commence __________ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal __________ *(e.g., weekly, monthly, quarterly)* installments of $ __________ over a period of __________ *(e.g., months or years)*, to commence __________ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within __________ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Any criminal monetary penalty ordered by the court shall be due and payable in full immediately. Present and future Assets are subject to enforcement and may be included in the treasury offset program allowing qualified federal benefits to be applied to the balance of criminal monetary penalties.

Payment during the term of supervised release will commence within 60 days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time. (fine/restitution) payment shall be due during the period of imprisonment at the rate of not less than $25 per quarter and pursuant to the bureau of prisons' financial responsibility program. The value of any future assets may be applied to offset the balance of criminal monetary penalties. The defendant may be included in the treasury offset program, allowing qualified benefits to be applied to offset the balance of any criminal monetary penalties.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX E

Appellant's Supplemental Brief filed in the Eleventh Circuit Court of Appeals

Brundidge v. United States of America

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CASE NO.: 16-10571-HH

UNITED STATES OF AMERICA,

PLAINTIFF-APPELLEE,

v.

ARSENIO BRUNDIDGE,

DEFENDANT-APPELLANT.

SUPPLEMENTAL PRINCIPAL BRIEF OF THE APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION
CASE NO.: 4:15-CR-00012-CDL-MSH-1

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Certificate of Interested Persons and Corporate Disclosure Statement

The undersigned appellate counsel of record for Defendant-Appellant, Mr. Brundidge, in compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, certifies that the following listed persons and parties have an interest in the outcome of this case: [1]

Brundidge, Arsenio C., Defendant-Appellant;

Dodson, Jonathan R., Appellate Attorney for Defendant-Appellant, Mr. Brundidge, Research and Writing Specialist for the Federal Defenders of the Middle District of Georgia, Inc.;

Hunt, Christina L., Executive Director for the Federal Defenders of the Middle District of Georgia, Inc.;

Hyde Jr., Melvin E., Trial Attorney for Plaintiff-Appellee, United States of America, Assistant United States Attorney, Middle District of Georgia;

Hyles, Stephen, United States Magistrate Judge, Middle District of Georgia;

Kendrick Jr., William J., Trial Attorney for Defendant-Appellant, Mr. Brundidge, Middle District of Georgia;

Land, Clay D., Chief United States District Judge, Middle District of

[1] Undersigned counsel will refer to the Appellant as such, or as "Brundidge," and will refer to Appellee as such, as "the United States" or as "the Government."

Georgia;

Peterman, III, G.F., Acting United States Attorney, Middle District of Georgia;

Schieber, Michelle, Appellate Attorney for Plaintiff-Appellee, United States of America, Assistant United States Attorney, Middle District of Georgia;

Shelnutt, J. Mark, Trial Attorney for Defendant-Appellant, Mr. Brundidge, Middle District of Georgia;

United States of America, Plaintiff-Appellee;

Victims: There are no identifiable victims in this case; and no publicly traded company or corporation has an interest in the outcome of this appeal.

Statement Regarding Oral Argument

Appellant requested oral argument in his principal brief, for reasons specific to the issue of improper closing raised in that brief. In the event this Court grants that request, Appellant also requests the opportunity to address at oral argument the issue raised in this supplemental brief.

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Rules

Statement of Subject Matter and Appellate Jurisdiction

This is a direct appeal in a criminal case from the January 26, 2016, judgment of the United States District Court for the Columbus Division of the Middle District of Georgia. R 44.[2] The district court had jurisdiction under 18 U.S.C. § 3231. Arsenio Brundidge filed a timely notice of appeal on February 8, 2016. R 50. This Court has jurisdiction based on 28 U.S.C. § 1291.

[2] The electronic record (CM/ECF) in this case is cited "R # at #."

Statement of the Supplemental Issue

THE COURT ERRED IN FINDING BRUNDIDGE WAS AN ARMED CAREEER CRIMINAL BASED IN PART ON A PRIOR GEORGIA BURGLARY, RESULTING IN AN ILLEGAL SENTENCE.

Statement of the Case

This criminal appeal arises from Appellant's conviction and sentence, after a jury found him guilty being a felon in possession of a firearm, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(e)(1), and of possessing cocaine, in violation of Title 21, United States Code, section 844. R 44.

Course of Proceedings and Disposition

A federal grand jury sitting in the Middle District of Georgia indicted. Brundidge for being a felon in possession of a firearm (with three prior convictions of controlled substances offenses or crimes of violence), and for possessing cocaine. R 1. He proceeded to trial on the first count. R 65-66. The jury found him guilty. R 30. The court sentenced him to 235 months prison followed by supervised release, consistent with the bottom of the guidelines range indicated in his presentence investigation report. R 42, 44.

Brundidge is incarcerated at the United States Penitentiary – McCreary, at 330 Federal Way, Pine Knot, Kentucky, 42635.

Statement of the Facts

Brundidge was charged in a two-count indictment. R 1. Count one charged him with being a felon in possession of a firearm after being convicted by the Superior Court of Muscogee County, Georgia on two different occasions of possessing cocaine with intent to sell, and on another occasion of burglary. *Id*. Count two charged him with possessing cocaine. *Id*.

The presentence report listed the three prior offenses alleged in the indictment, as well as other offenses, none of which qualify as a "violent felony" or "serious drug offense" as defined in 18 U.S.C. section 924(e)(2). R 42 at 7 – 23. It concluded Brundidge qualified as an Armed Career Criminal under U.S.S.G. section 4B1.4, making his criminal history category VI and his offense level 33, which produced a recommended sentencing range of 235 to 293 months. *Id*. at 6, 24, 29. It also found that a fifteen year mandatory minimum applied based on the three prior convictions alleged in the indictment. *Id*. at 29.

At sentencing, neither side objected to the presentence report. R 67 at 6. The court sentenced Brundidge to 235 months prison, consecutive to any sentence he received for violating probation in Georgia state court. *Id*. at 13. It stated its sentence was based on "the nature of the offense and the defendant's substantial criminal history." *Id*.

Standards and Scopes of Review

Brundidge did not object below to his sentence or his designation as an armed career criminal. The court reviews Brundidge's designation as an armed career criminal for plain error, under which Brundidge has the burden of showing a "deviation from a legal rule" that is "clear" and "affects substantial rights." *United States v. Olano*, 507 U.S. 725, 732-34 (1993). However, a court does not have jurisdiction to sentence a defendant in excess of the statutory maximum. *United States v. Bushert*, 997 F. 2d 1343, 1351 n. 18 (11th Cir. 1993) ("It is both axiomatic and jurisdictional that a court of the United States may not impose a penalty for a crime beyond that which is authorized by statute.") A " 'defendant cannot be said to have waived his right to appellate review of sentence imposed in excess of the maximum penalty provided by statute . . . .' " *Id*. (quoting *United States v. Marin*, 961 F. 2d 493, 496 (4th Cir. 1992)) This Court therefore must vacate Brundidge's sentence if it finds he did not qualify as an armed career criminal. *Cf. United States v. Olson*, 716 F. 3d 850, 853 (11th Cir. 1983) ("Harmless error cannot give the district court authority that it does not possess.").

Summary of Argument

The court sentenced Brundidge to 235 months prison as an armed career criminal based on his prior Georgia burglary conviction. Georgia burglary is broader than generic burglary because its locational element includes watercraft and railroad cars. It is not a divisible crime because Georgia case law and pattern jury instructions do not require the factfinder to decide a specific type of location to constitute a specific type of burglary. Because Georgia burglary is broader than generic burglary and indivisible, it cannot be an ACCA predicate.

The court's error resulted in an illegal sentence. When ACCA does not apply, the statutory maximum for being a felon in possession of a firearm is ten years. As a court does not have jurisdiction to sentence a defendant in excess of the maximum, Brundidge's 235 month sentence was unlawful.

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Argument and Citations of Authority

I. THE COURT ERRED IN FINDING BRUNDIDGE WAS AN ARMED CAREEER CRIMINAL BASED IN PART ON A PRIOR GEORGIA BURGLARY, RESULTING IN AN ILLEGAL SENTENCE.

The Government charged Brundidge with violating 18 U.S.C. sections 922(g) and 924(e)(1). Section 924(a)(2) authorizes the District Court to sentence a defendant to "not more than 10 years" for violating subsection 922(g). For armed career criminals, however, section 924(e)(1) requires a minimum fifteen-year sentence and authorizes up to a life sentence. Thus "a defendant who is erroneously sentenced under the ACCA is necessarily sentenced in excess of the statutory maximum." *Morris v. United States*, 516 Fed. Appx. 882, 884 (11th Cir. 2013).

Section 924(e)(1) applies to persons with three prior convictions of a serious drug offense or "violent felony." A "violent felony" is a crime punishable by more than a year, that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary arson, or extortion, [or] involves the use of explosives . . . ." 18 U.S.C. § 924(e)(2)(B).

Brundidge's indictment alleged two prior Georgia convictions of possessing cocaine with intent to sell, which qualified as serious drug offenses, and one prior Georgia conviction of burglary. As shown below, Georgia burglary does not qualify as a "violent felony" because it is broader than generic burglary and is indivisible. Thus, Brundidge did not have the required prior convictions, and subsection 924(e)(1) did not apply to him. Instead, subsection 924(a)(2) applied. And that subsection does not authorize the district court to sentence Brundidge in excess of ten years.

When Brundidge was convicted of Georgia burglary in 2010,[3] that statute applied to persons who, intending to commit a felony or theft therein, entered or remained within a "dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another or . . . any other building, railroad car, aircraft of any room or any part thereof." O.C.G.A. § 16-7-1 (2010). On its face, the statute does not include an element involving the "use, attempted use, or threatened use or physical force against the person of another." 18 U.S.C. § 924(e)(2)(B). Thus, it could only be an ACCA predicate if it were a "generic burglary" within the meaning of the second clause of section 924(e)(2)(B). *See Taylor v. United States*, 495 U.S. 575 (1990) (establishing "categorical approach").

[3] In 2012, the Georgia Legislature amended the statute, dividing burglary into first and second degree burglary. Neither crime qualifies as an ACCA predicate, as both contain the same overbroad, indivisible language of the version at issue in this case. Moreover, both first and second degree Georgia burglary have an even broader locational element, now applying to "aircraft," and a new, expansive statutory definition of "dwelling." *See Georgia Laws* 2012, Act 709, § 3-1, eff. July 1, 2012.

Courts use the "categorical approach" to determine "whether a prior conviction is for generic burglary." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Georgia burglary would qualify under this approach if "the elements of the crime of conviction sufficiently match the elements of generic burglary, ..." *Id*. If the statutory elements do not match the generic elements, "no conviction under that law could count as an ACCA predicate," regardless of the underlying facts of a given case. *Id*. at 2249;

A "divisible" statute "list[s] elements in the alternative, and thereby define[s] multiple crimes." *Id*. If Georgia burglary were divisible, the sentencing court could "look to a limited class of documents . . . to determine what crime, with what elements a defendant was convicted of." *Id*. If the documents showed the prior conviction was for a crime with elements matching generic burglary, the prior conviction would qualify as a "violent felony" under this "modified categorical approach." *See also Shepard v. United States*, 544 U.S. 13 (2005) (establishing modified categorical approach).

However, a law "that enumerates various factual means of committing a single element," without denoting separate, disjunctive elements, is not "divisible." *Id*. To differentiate between alternative elements and alternative "factual means of committing a single element," courts look to state sources such as state case law construing the elements of the statute, statutory text assigning different punishments to different alternatives, or the "record of a prior conviction itself." *Id*. at 2256-57.

In *Mathis*, 136 S. Ct. at 2243, the Court held that Iowa burglary did not categorically qualify as a "violent felony" because its locational element was broader than generic burglary, and the disjunctive statutory language did not make the crime divisible because it did not denote alternative *elements*. Specifically, while generic burglary "requires unlawful entry into a 'building or other structure[,]'" Iowa burglary "reaches a broader range of places: 'any building, structure, *[or] land, water, or air vehicle*.'" *Id*. at 2250 (italics and bracketed language added in *Mathis*). In determining the text did not establish alternative elements, the Court relied on Iowa's interpretation of its burglary statute. *See State v. Duncan*, 312 N.W.2d 519, 523 (Iowa 1981) (jury did not have to agree unanimously on one of the locations to convict defendant of burglary).

In *United States v. Lockett*, 810 F. 3d 1262 (2016), this Court came to the same conclusion as to South Carolina burglary. South Carolina burglary applies to persons who enter "a dwelling." S.C. Code § 16-11-312(A). It defines "dwelling" as, among other things, "the living quarters of a *building* which is used or normally used for sleeping, living, or lodging by a person." *Id*. at § 16-11-310(2). It defines "building" as, among other things, "watercraft or aircraft." *Id*. at § 16-11-310(1).

Because generic burglary does not encompass "things like boats and vehicles," the Court concluded South Carolina burglary is not generic. *Lockett*, 810 F. 3d at 1270.

To determine whether South Carolina burglary was divisible, it considered what South Carolina state courts construed to be its elements. South Carolina courts held the type of dwelling was not an essential element of burglary. *Id*. at 1271 (citing *State v. Smalls*, 336 S.C. 301 (Ct. App. 1999)). As well, South Carolina's model jury instructions did not require jurors to choose a type of "dwelling." *Id*. Because, in pleading guilty, Lockett only admit the essential elements of South Carolina burglary, he only waived a jury finding as to *these* elements. *Id*. at 1272. "That means Mr. Lockett never had the protection of the Sixth Amendment for the fact of what kind of dwelling (or what part of a dwelling) he entered. Without that protection, we can't assume his South Carolina burglary convictions were generic." *Id*; *see also United States v. Howard*, 742 F. 3d 1334 (11th Cir. 2014) (finding Alabama burglary, which defines the operative term "building" by a list of alternatives that includes vehicles and watercraft, is non-generic and indivisible); *Descamps v. United States*, 133 S. Ct. 2276 (2013) (finding California burglary did not qualify as ACCA predicate because it was broader than generic burglary and indivisible).

The Georgia burglary statute is like the Iowa, South Carolina, and Alabama burglary statutes: its locational element is broader than generic burglary but does not establish alternative crimes. Brundidge was convicted of Georgia burglary in 2010. Then, a person commit burglary when they entered a "dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another." O.C.G.A. § 16-7-1(b) (2010).

Georgia case law does not make the specific type of location an essential element of burglary. In *Keathley v. State*, 305 Ga. App. 318, 319 (11th Cir. 2010), this Court reversed a burglary conviction for insufficient evidence. It recited "[t]he essential elements of burglary are: (1) entering the building of another; (2) without authority; (3) with the intent to commit a theft [or felony] therein." *Id; see also Hawkins v. State*, 249 Ga. App. 26, 27 (2001) (finding sufficient evidence of burglary); *Freelove v. State*, 229 Ga. App. 310 (1997) (same); *Shy v. State*, 220 Ga. App. 910, 911 (1996) (finding evidence of burglary sufficient as to one defendant, insufficient as to another); *Caldwell v. State*, 183 Ga. App. 110, 111 (1987) (finding sufficient evidence of burglary); *Brinson v. State*, 208 Ga. App. 556, 557 (1993) (same); *Lloyd v. State*, 168 Ga. App. 5 (1983) (same); *Davis v. State*, 139 Ga. App. 105, 106 (1976) (finding indictment sufficiently charged burglary). The pattern jury instruction for Georgia burglary mirrors the language in *Keathley*, without requiring any more specificity as to the type of building. *See Georgia Suggested Pattern Jury Instruction* 2.62.10; *Hart v. State*, 238 Ga. App. 325, 326

(1999) (finding jury instruction on burglary sufficient); *Jackson v. State*, 260 Ga. App. 848, 849 (2003) (same).

Time after time, Georgia case law listed the elements of burglary without indicating that the alternative locations in the statute denote different elements. As the statute's "illustrative examples are not alternative elements," Georgia burglary, like South Carolina, Alabama, and Iowa burglary, is indivisible. *Howard*, 742 F. 2d at 1348. Therefore, Brundidge's conviction in Muscogee County Superior Court of burglary is not an ACCA predicate. It cannot trigger a fifteen year mandatory minimum under 18 U.S.C. section 924(e)(1), cannot authorize a sentence in excess of ten years, and does not require an enhanced offense level and criminal history category under U.S.S.G. section 4B1.1.

The District Court's error affected Brundidge's substantial rights. First, it resulted in an illegal sentence, irrespective of the Guidelines. Again, subsection 924(a)(2) authorizes the District Court to sentence a defendant to "not more than 10 years" for unlawfully possessing a firearm under 18 U.S.C. section 922(g). The court had no discretion to exceed its jurisdiction. There is no question that, but for the error, Brundidge's sentence would have been substantially lower.

Even if its error were not jurisdictional, applying ACCA drastically increased Brundidge's recommended sentencing range. But for the court's finding him to be an armed career criminal, Brundidge's offense level would have been 14, instead of 33. U.S.S.G. § 2K2.1(a)(6). His criminal history category would have remained VI. His recommended guideline range would have been 37-46 months – a fraction of the sentence he received. The Supreme Court recently held that nearly all Guidelines errors will amount to plain error, and no additional evidence beyond the error itself is required to show the error affected the defendant's substantial rights. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016). Here, the error is plain and the prejudice is undeniable and substantial.

Conclusion

For the foregoing reasons, this Court should reverse Brundidge's sentence and remand for a resentencing. For the reasons stated in Brundidge's original principal brief, it should reverse his conviction and remand for a new trial.

Dated this 30th day of September, 2016.

s/ Jonathan Dodson

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Certificate of Compliance

Pursuant to Fed. R. App. P. 32(a)(7)(C), I, Jonathan Dodson, appellate counsel for Mr. Arsenio Brundidge, hereby certify that the number of words in this brief, as counted by the Microsoft Office Word 2007-processing system, according to the method described in 11th Cir. R. 32-4, is **3,855** words, which is less than the 14,000 allowed for appellate briefs by Fed. R. App. P. 32(a)(7)(B)(i).

I also certify that this Supplemental Principal Brief of the Appellant is not more than twenty (20) pages, pursuant to this Court's September 20, 2016, Order granting appellant's motion for leave to file this supplemental brief.

Certificate of Service

I, Jonathan Dodson, appellate counsel of record for the Appellant, Mr. Arsenio Brundidge, hereby certify that I have, on this 30th day of September, 2016, filed the foregoing *Supplemental Principal Brief of the Appellant* with the Clerk of Court using the Eleventh Circuit's CMECF system, which will send electronic notification of filing to counsel of record. I also certify that I caused a copy of the foregoing *Supplemental Principal Brief of the Appellant* to be served in paper format upon the following, by placing a copy of the same in the United States Mail, postage prepaid, addressed to: Mr. Arsenio Brundidge, 97889-020, USP McCreary, U.S. Penitentiary, P.O. Box 3000, Pine Knot, Kentucky 42635. I further certify that, on the date set forth above, I caused the foregoing submission to be dispatched for filing with the Clerk of Court by Federal Express overnight delivery.

s/ Jonathan Dodson

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APPENDIX F
Appellee's Answer Brief filed in the Eleventh Circuit Court of Appeals

Brundidge v. United States of America

16-10571-HH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ARSENIO BRUNDIDGE,
Defendant-Appellant.

On Appeal from the United States District Court
For the Middle District of Georgia, Columbus Division
District Court No. 4:15-cr-00012-CAR-MSH-1

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-5, the undersigned counsel of record hereby certifies that the following persons have, or may have had, an interest in the outcome of this case:

Brundidge, Arsenio C., Defendant-Appellant;

Dodson, Jonathan R., Attorney for Defendant-Appellant;

Hunt, Christina, Executive Director, Federal Defenders of the Middle District of Georgia, Inc.;

Hyde, Melvin E., Jr., Assistant United States Attorney, Middle District of Georgia;

Hyles, M. Stephen, Magistrate Judge, United States District Court, Middle District of Georgia;

Kendrick, William J., II, former Attorney for Defendant-Appellant;

Land, Clay D., Chief Judge, United States District Court, Middle District of Georgia;

Peterman, G. F., III, United States Attorney, Middle District of Georgia;

Schieber, Michelle L., Assistant United States Attorney, Middle District of Georgia;

United States v. Arsenio Brundidge, Appeal No. 16-10571-HH

Shelnutt, J. Mark, former Attorney for Defendant-Appellant;

Victims: There are no identified victims.

No publicly traded company or corporation has an interest in the outcome of this appeal.

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not request oral argument. The facts and legal arguments are adequately presented in the briefs and record, the issues on appeal are not complex, the briefs fully address the law governing the resolution of those issues, and the decisional process would not be significantly aided by oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

Federal Statutes

Federal Rules

STATEMENT OF JURISDICTION

This is an appeal from a final judgment following a jury verdict from a bifurcated trial in a criminal case in the United States District Court for the Middle District of Georgia. The district court had subject matter jurisdiction over this criminal case under 18 U.S.C. § 3231. This Court has jurisdiction to review the judgment of the district court under 28 U.S.C. § 1291, and jurisdiction to review the court's sentence under 18 U.S.C. § 3742(a). The district court imposed sentence on January 27, 2016, and entered final judgment on January 28, 2016. Arsenio Brundidge filed his notice of appeal on February 9, 2016, making this appeal timely pursuant to Federal Rule of Appellate Procedure 4(b)(1)(A)(i).

STATEMENT OF THE ISSUES

A. Whether Brundidge, who did not raise any challenges at trial to the prosecutor's statements during closing argument, has shown for the first time in this Court that the challenged statements demonstrate prosecutorial misconduct and are so egregious as to warrant reversal under a plain error standard of review.

B. Whether Brundidge has shown that the district court plainly erred by using his prior Georgia burglary convictions as Armed Career Criminal predicates where at the time of sentencing there was no controlling authority holding that a conviction under Georgia's burglary statute cannot qualify as a generic burglary under the ACCA, and where, since the filing of Brundidge's brief, this Court has held that prior Georgia burglary convictions qualify as violent felony offenses for purposes of the ACCA.

STATEMENT OF THE CASE

After a bifurcated jury trial in which he was convicted of drug and gun offenses, Arsenio Brundidge appeals his convictions on two grounds. First, he contends that the Assistant United States Attorney engaged in prosecutorial misconduct during the closing arguments and that the AUSA's statements amounted to plain error requiring reversal. Second, Brundidge maintains that the district court erred in using a prior Georgia burglary conviction to enhance his sentence under the Armed Career Criminal Act. The United States will show that there was no plain error requiring reversal of the conviction or sentence.

A. Course of Proceedings and Disposition in the Court Below

Arsenio Brundidge was indicted on March 10, 2015, by a grand jury sitting in the Middle District of Georgia and charged with possession of a firearm by a convicted felon (Count One), in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(e)(1), and possession of a detectable amount of cocaine, in violation of 21 U.S.C. § 844. Doc. 1. Brundidge retained William J. Kendrick II and Mark Shelnutt to represent him. Doc. 9; DE Mar. 19, 2015; Doc. 25. Brundidge elected to try his case to a jury and, after a two-day, bifurcated trial, the jury found him guilty on both counts of the indictment. Doc. 30. At sentencing, the district court found that Brundidge was an armed career criminal and sentenced him to 235 months' imprisonment on the gun charge and 12 months' imprisonment on the drug charge, to run concurrently. Doc. 44. This appeal followed. Doc. 50.

B. Statement of Facts

1. The Evidence.

At the trial, Muscogee County Sheriff's Officer Clinton Powell testified that while he was out serving a civil warrant on November 3, 2014, he observed Arsenio Brundidge, who he knew prior to that day, and learned that Brundidge had outstanding warrants. Doc. 65 at 32-38. Powell radioed for backup and waited for Corporal Tony Newton and a trainee, Deputy Eric Weiss, to arrive. Doc. 65 at 39. Together they developed a plan to take Brundidge into custody. Doc. 65 at 39.

Consistent with their plan, Weiss and Powell approached Brundidge, who was standing on a corner with several people. Doc. 65 at 40. When Powell said Brundidge's name, Brundidge immediately took off running. Doc. 65 at 40. Weiss and Powell followed in pursuit, and Brundidge headed in the direction of where Newton had stationed himself. Doc. 65 at 40-42, 72-73. When Brundidge saw Newton he turned left and went over a wooden fence. Doc. 65 at 42-43. As Powell attempted to climb over the fence after Brundidge, he saw him getting off the ground with a black firearm in his left hand. Doc. 65 at 43-44. Brundidge immediately deployed his Taser, but it had no effect on Brundidge. Doc. 65 at 43. Brundidge then threw the firearm and it landed within reach of Powell, who grabbed it and put it in his pocket. Doc. 65 at 44-46.

After pocketing the gun, Powell resumed his pursuit of Brundidge. Doc. 65 at 46-47. Powell caught up with Brundidge behind a building, and placed him under arrest. Doc. 65 at 47. After Brundidge was in handcuffs, Powell found marijuana and crack cocaine during a search incident to arrest. Doc. 65 at 47-48. Powell later identified the gun as a nine-millimeter Jimenez, serial number 136696. Doc. 65 at 53. Fingerprint experts were not able to obtain any fingerprints from the gun. Doc. 65 at 147. The marijuana and cocaine packages were not submitted for fingerprints. Doc. 65 at 148.

On cross-examination, counsel for Brundidge questioned Powell extensively about where Brundidge was when he threw the gun, and where it was that the gun landed. Doc. 65 at 73-76. On cross, Powell testified that he spoke to a witness, Alex Berry, who stated that she saw Brundidge throw the gun. Doc. 65 at 77-78. Powell later obtained a video statement from Berry. Doc. 65 at 82. Berry was subpoenaed to appear at the trial, but she was never called as a witness, and the video statement was never played for the jury. Doc. 65 at 83.

Corporal Tony Newton confirmed that he and Weiss responded to Powell's call for assistance in picking up Brundidge based on outstanding warrants. Doc. 65 at 94-96. Newton also testified that Brundidge ran as soon as Powell tried to make contact with him, and that Brundidge changed direction when he saw Newton at the back of the house. Doc. 65 at 96-97. Newton saw Powell behind Brundidge as Brundidge was running toward him. Doc. 65 at 97-98. Powell saw Brundidge go over the fence and also tried to taze him, but tazing was not effective. Doc. 65 at 98-99, 102. Powell never saw Brundidge discard anything. Doc. 65 at 100.

Deputy Eric Weiss testified similarly. Doc. 65 at 103-06. However, when Brundidge attempted to scale the fence, Weiss went off in a different direction in an attempt to cut him off. Doc. 65 at 106-07, 111-12. Weiss heard some discussion about a gun being involved as he headed off, but could not say for certain that a gun was involved. Doc. 65 at 107. All of the officers lost track of Brundidge for a little while, but then found him outside a nearby business and took him into custody. Doc. 65 at 107-08.

After Powell testified, the United States called Daniel Ogletree, who testified that he had earlier purchased the firearm that Powell saw while chasing Brundidge. Doc. 65 at 89-90. Ogletree testified that the gun was stolen from his home during a burglary on September 30, 2014. Doc. 65 at 90-91.

After the United States rested, Brundidge elected not to put up any evidence. Doc. 65 at 177-78. The parties made closing arguments, after which the trial court charged the jury only as to the possession of cocaine count. Doc. 65 at 188-202, 203-11. The jury returned a verdict of guilty as to the cocaine count. Doc. 66 at 10.

After the verdict was published, the court explained to the jury that it would have to decide a second count, the gun count. Doc. 66 at 10-12. The United States informed the jury that the parties had stipulated that Brundidge was a convicted felon. Doc. 66 at 12-13. The parties again made closing arguments, and the court charged the jury. Doc. 66 at 14-48, Doc. 48-57. The jury returned a verdict of guilty as to the gun count. Doc. 66 at 60.

2. The Closing Arguments

a. Possession of Cocaine (Phase One)

In this bifurcated trial, the first issue to go to the jury was the charge of possession of cocaine (Phase One). The United States began its closing argument by pointing out that Deputy Powell was out serving civil papers and was not looking to arrest anyone, but that he knew Brundidge and so checked for outstanding warrants on him. Doc. 65 at 188-89. Once Powell confirmed that Brundidge had outstanding warrants, Powell sought backup before approaching him. Doc. 65 at 189.

The United States then argued that the only reason that Brundidge ran when the officers approached him was because he knew he had outstanding warrants, knew he had drugs, and knew he had a stolen firearm. Doc. 65 at 190. The United States explained to the jury that Brundidge was searched after he was arrested for the safety of the arresting officers and others and to keep contraband out of the jail. Doc. 65 at 190-191. The United States anticipated that Brundidge might argue that he was set up, and so explained that the officers had no reason to set him up because the warrants were already sufficient to justify his arrest. Doc. 65 at 189-92.

In his closing argument, counsel for Brundidge disagreed with the United States, stating right from the start that Deputy Powell had an interest in the case because he knew Brundidge. Doc. 65 at 196. In this vein, counsel for Brundidge made the following statement: "But I don't know that we can say here today that he didn't have any interest in the case, when he knew who Mr. Brundidge was in the very beginning but that never even comes out as to how he knows who he was and how he knew what's going on with

Mr. Brundidge . . . ." Doc. 65 at 196. Counsel for Brundidge then suggested that Powell might not be credible because "he said some things that no other officer said, and they were all there." Doc. 65 at 197. Counsel also questioned why Alex Berry did not testify. Doc. 65 at 197-98.

Defense counsel also urged the jurors to question the credibility of the witnesses. Doc. 65 at 198. Specifically, counsel for Brundidge called into question Powell's credibility, saying, "ain't no way that this gun's flying over this house and nobody but one person can come to court and say they saw it." Doc. 65 at 200. Counsel then made the following argument about how Powell's testimony about the gun could lead to reasonable doubt, stating:

> And if you got a problem with that, you got an issue with the things flying over the house and the rainbow and—and everything else running behind and nobody—nobody sees anything? If you got an issue with that, then you got an issue with credibility. And you got an issue when it comes down possibly to some impeachment. And don't you know that that issue is reasonable doubt? That's what it is. They're going to tell you about that. The judge is going to tell you. That what it is, reasonable doubt, a doubt that can be given reason.

Doc. 65 at 200.

In rebuttal, the United States questioned the logic of defense counsel's argument, acknowledging that catching someone in a lie might be impeachment, and that a lie might be enough to find reasonable doubt, but arguing that counsel had failed to show that there were any lies, stating,

> But nowhere during that summation did Mr. Kendrick ever tell you who lied and about what. These are phantom lies. Who lied? Where was the suggestion that anybody lied? And if there was no lie and there was no suggestion that anybody lied, then there was no impeachment. And if there was no impeachment, there is no reasonable doubt based on impeachment.

Doc. 65 at 202. The United States also responded to opposing counsel's suggestion that Powell had an interest in the case and his argument that it never came out during the trial how Powell knew Brundidge. In response, the United States noted, "Well, the defense could have asked Mr. Powell while he was on the stand why he knew Mr. Brundidge, except I suspect he would not have liked the answer." Doc. 65 at 202.

Counsel for Brundidge raised no objection to the government's closing argument. After the closing arguments were presented, the court charged the jury on the possession of cocaine count. The jury returned a verdict of guilty as to the drug count. Doc. 66 at 10.

b. Possession of a Firearm by Convicted Felon (Phase Two)

After the jury found Brundidge guilty of the cocaine charge, the jury was then asked to decide the gun charge (Phase Two). The parties stipulated that Brundidge was a convicted felon, but no other additional evidence was presented. Doc. 66 at 13-14. The United States began its closing argument by explaining the elements needed to establish a conviction for possession of a firearm by a convicted felon, focusing particularly on the element of possession. Doc. 66 at 14-17. The United States argued that in order for the jury to find Brundidge not guilty of possessing the firearm, it would have to find that Deputy Powell testified falsely, and encouraged the jury to find that Powell did not lie. Doc. 66 at 17-18.

In discussing Powell's credibility, the United States said the following:

> Credibility cannot be attacked in this case by some vague suggestion that Deputy Powell might not be telling the truth. There has to be some evidence to suggest that Deputy Powell was not telling the truth. What evidence did you hear from the witness stand to suggest that he was not telling the truth? You didn't. All you heard was vague suggestions that he might not be telling the truth. And that's not good enough, because you have to base your verdict on the evidence that you hear from the witness stand and the exhibits that you received. Vague suggestions do not suffice. Where is the evidence to demonstrate that he was not telling the truth?

Doc. 66 at 18-19. The United States then reviewed the testimony for the jury, focusing on how the evidence supported a finding that Brundidge threw the gun that Powell found. Doc. 66 at 19-27. The United States then explained the categories of persons who are prohibited from owning firearms, explaining that Brundidge was a prohibited person. Doc. 66 at 27-29.

The prosecutor also talked about the fact that the gun was stolen, adding that he did not know if Brundidge stole the gun, but that if he could prove that Brundidge stole the gun, he would have charged him with that offense, too. Doc. 66 at 29. The United States added that felons are more likely to steal firearms because they cannot obtain them legally. Doc. 66 at 29-30. With reference to Brundidge specifically, the prosecutor stated,

> Now, I don't know if Mr. Brundidge took this weapon. I don't know if he stole it. I do tell you this. If I could prove it, he would've been charged with it. I can't prove it. I don't know if he stole it. What I do know that felons are more likely, if they have a firearm, to steal than other persons because they cannot legally obtain a firearm.

Doc. 66 at 29.

After explaining the process someone has to go through to get a gun legally, the prosecutor added these comments, "A convicted felon cannot legally obtain a firearm. So did Mr. Brundidge steal this gun? I have no idea." Doc. 66 at 30. At that point the trial court interjected, stating, "And, ladies and gentlemen, you should not speculate about that because that is not an issue in this case." Doc. 66 at 30.

In his closing argument, counsel for Brundidge again challenged Powell's credibility about the gun, suggesting that Powell changed his account of where Brundidge threw the gun because he was making it up. Doc. 66 at 32-34; 41. Counsel then challenged the photographs, the lack of fingerprints, and the absence of testimony about the gun from any other witness. Doc. 66 at 34-35. Counsel again questioned the United States' decision not to call Alex Berry, suggesting that "she would say something that—that the government didn't want to hear." Doc. 66 at 36. Counsel also suggested that the United States did not call [GBI] Agent Will Panoke because he "knew the other version of what they say supposed to happen." Doc. 66 at 37. Counsel also questioned the government's failure to call the other people who were outside when officers first confronted Brundidge. Doc. 66 at 37.

The United States started its rebuttal closing argument by stating, "Well, I heard something today that I didn't expect to hear. It's a new rule of law. Mr. Kendrick has now told us that reasonable doubt can be established by what a witness did not see." Doc. 66 at 44. Counsel then argued that there were no inconsistencies in the testimony, but that some witnesses saw things that others did not. Doc. 66 at 44. Counsel also explained that the government did not call Alex Berry because she did not appear to be competent to testify when she showed up at the courthouse. Doc. 66 at 46.

Counsel for Brundidge raised no objection to the government's closing argument. After the jury was charged and deliberated, it returned a verdict of guilty. Doc. 66 at 60-61.

3. Sentencing

In anticipation of sentencing, the United States Probation Office prepared a Presentence Investigation Report, using the United States Sentencing Commission Guidelines Manual effective November 1, 2015. Doc. 42 ¶ 9. Probation calculated an adjusted offense level of 26 for Group One, the gun count, and an adjusted offense level of 6 for Group Two, the drug count, for a combined adjusted offense level of 26. Doc. 42 ¶¶ 18, 24, 28. Probation determined, however, that Brundidge was an armed career criminal pursuant to 18 U.S.C. § 924(e) based on two prior felony convictions for possession of cocaine with intent to distribute and a felony conviction for Georgia burglary, resulting in a total offense level of 33. Doc. 42 ¶¶ 13, 30, 31, 56, 60, 64.

Probation calculated Brundidge's criminal history score at nineteen, and added two points because he committed the instant offense while under a state sentence, for a total score of 21 and a criminal history category of VI. Doc. 41 ¶¶ 66-68. Probation determined an advisory Guidelines range of 235 to 293 months' imprisonment for Brundidge's gun conviction and 12 months' imprisonment for the drug conviction. Doc. 42 ¶ 91. As an armed career criminal, Brundidge was subject to a statutory mandatory minimum of 15 years (180 months). Doc. 42 at 1. Brundidge presented no written objections to the Report. Doc. 42-1.

Brundidge raised no objections to the Report at sentencing but asked that the court sentencing him to the mandatory minimum of 180 months. Doc. 67 at 6, 10-11. The district court imposed a sentence of 235 months as to Count One and 12 months as to Count Two, to be served concurrently. Doc. 67 at 13. The court also directed that the sentence run consecutive to any probation revocation imposed by the Muscogee County Superior Court. Doc. 67 at 13. Brundidge raised no objections to the sentence imposed by the district court. Doc. 67 at 17. This appeal followed.

C. Statement of the Standard or Scope of Review

In this appeal, Brundidge alleges that the prosecutor's statements during closing arguments rose to the level of prosecutorial misconduct and that the district court erred in using a prior Georgia burglary conviction to determine his status as an armed career criminal. Brundidge failed to raise either of these arguments at trial and, therefore, they are reviewed here for plain error. United States v. Azmat, 805 F.3d 1018, 1045 (11th Cir. 2015) ("When the defendant does not object to the propriety of the prosecutor's statement, we review for plain error only."); United States v. Weeks, 711 F.3d 1255, 1260-62 (11th Cir. 2013) (reviewing challenge to ACCA enhancement under plain error standard of review).

To demonstrate plain error, an appellant must show (1) error, (2) that is plain, and (3) that has affected the defendant's substantial rights. United States v. Hesser, 800 F.3d 1310, 1325 (11th Cir. 2015). If the Court finds that the appellant has made his showing, it may exercise its discretion to recognize a forfeited error, "but only if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." Id. (internal quotations omitted).

An appellant claiming that a prosecutor's remarks during closing argument to the jury constituted prosecutorial misconduct "must demonstrate that the prosecutor's remarks (1) were improper and (2) prejudicially affected his substantial rights." Id. at 1328 (citing United States v. Eckhardt, 466 F.3d 938, 947 (11th Cir. 2006)). "A prosecutor's remarks, suggestions, insinuations, and assertions are improper when they are calculated to mislead or inflame the jury's passions." Azmat, 805 F.3d at 1018 (citing United States v. Rodriguez, 765 F.3d 1546, 1560 (11th Cir. 1985)). An appellant who argues that the prosecutor misrepresented evidence to the jury but failed to object to a prosecutor's statements at trial is, "in effect, arguing that this error was so egregious that the District Court should have intervened *sua sponte* to remedy it." Hesser, 800 F.3d at 1329.

Objections or arguments, including objections or arguments related to sentencing, not raised in the district court are reviewed only for plain error. Weeks, 711 F.3d at 1261 (reviewing for plain error whether crimes were committed on different occasions within the meaning of the ACCA). "Generally, there 'can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving [an issue].'" Id. at 1261.

SUMMARY OF THE ARGUMENT

Brundidge did not raise any challenges at trial to the prosecutor's statements during closing argument and cannot meet his burden under a plain error standard of review. Brundidge has failed in this Court to demonstrate prosecutorial misconduct in any of the statements challenged by him and has failed to show that any of the challenged statements, either separately or combined, were so egregious as to warrant reversal.

Brundidge has failed to show that the district court plainly erred by using his prior Georgia burglary conviction as an Armed Career Criminal predicate. At the time of sentencing there was no controlling authority holding that a conviction under Georgia's burglary statute cannot qualify as a generic burglary under the ACCA. Moreover, since the filing of Brundidge's brief, this Court has held that prior Georgia burglary convictions qualify as violent felony offenses for purposes of the ACCA.

ARGUMENT AND CITATION OF AUTHORITY

A. Brundidge has Failed to Show that the Prosecutor's Statements During Closing Arguments Resulted in Substantial Prejudice to Him.

Brundidge argues that the prosecutor made statements during his closing arguments that were so improper that they affected his substantial rights. At trial, Brundidge did not object to any of the statements made by the prosecutor during closing arguments and review here is for plain error only. The United States will show that the prosecutor's statements, when viewed in context, were not improper under any standard.

1. Phase One—the Drug Count

For the most part, Brundidge takes issue with statements made by the prosecutor during the closing arguments for Phase Two of the trial, dealing with the gun charge. Brundidge does, however, take issue with one statement made by the prosecutor during the initial closing argument and one statement made in rebuttal in Phase One. More specifically, Brundidge contends that the prosecutor "repeatedly highlighted the arresting officer's prior knowledge of Brundidge—once insinuating their prior contact would prejudice the jury against Brundidge." Brundidge Br. at 25 (citing Doc. 65 at 188, 202). Relying on the same statements, Brundidge also claims the prosecutor "made a theme of Brundidge's criminal character," Brundidge Br. at 26 (citing Doc. 65 at 188), and later "suggested a prior contact with law enforcement" that would have "cast the defendant in a bad light," Brundidge Br. at 27 (citing Doc. 65 at 202).

Review of the record shows nothing improper about the prosecutor's statements. In his initial opening statement, the prosecutor said only that Brundidge was "an individual [Deputy Powell] knew from the past," Doc. 65 at 188, and talked about the warrant, Doc. 65 at 188-89, only to explain to the jury why Powell singled him out from the group of people standing outside. Contrary to Brundidge's argument, there was nothing prejudicial or inflammatory about these statements as they merely set the stage for why Powell ended up chasing Brundidge.

Brundidge also takes issue with statements made by the prosecutor in rebuttal. Again, however, when reviewed in context, nothing about these statements was improper. In his closing argument, counsel for Brundidge questioned Powell's credibility, stating that Powell had an interest in the case because he knew Brundidge, then adding that it "never even comes out as to how he knows who he was and how he knew what's going on with Mr. Brundidge." Doc. 65 at 196. In his rebuttal, the prosecutor said very little, but he did respond to counsel's comment that the jury was not told how Powell knew Brundidge by stating, "Well, the defense could have asked Mr. Powell while he was on the stand why he knew Mr. Brundidge, except that I suspect he would not have liked the answer." Doc. 65 at 202.

Brundidge concedes that "defense counsel arguably opened the door to *some* response when he suggested the unknown prior relationship between Powell and Brundidge might have given Powell 'an interest in the case.'" Brundidge Br. at 37. Brundidge maintains, nevertheless, that the prosecutor's statement that counsel "would not have liked the answer" was improper and prejudicial. Brundidge Br. at 38. Contrary to Brundidge's contentions, the prosecutor's statements during Phase One were not plainly erroneous. Certainly they were not so egregious as to seriously affect the fairness, integrity or public reputation of the trial. "[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial." United States v. Young, 470 U.S. 1, 11 (1985).

Here, defense counsel knew that Brundidge had a criminal record and that he was known to law enforcement officers in Muscogee County but, because of the nature of the bifurcated case, the jury was not to be told about Brundidge's criminal history during Phase One. Knowing that the jury was not to be made aware of Brundidge's criminal history, Defense counsel, nevertheless, argued that the government had failed to show how Deputy

Powell even knew Brundidge. Doc. 65 at 196. Defense counsel thus invited the prosecutor to offer some response to the challenge to Powell's credibility. See Young, 470 U.S. at 11-12.

Although the prosecutor could not tell the jury how it was that Powell knew Brundidge, the prosecutor was well within his rights to tell the jury that defense counsel could have questioned Powell about it while he was on the witness stand, and well within his rights to suggest that defense counsel, himself, did not ask the question because he already knew the answer and knew that it would not be favorable to Brundidge. Contrary to Brundidge's arguments in this Court, it is unlikely that the jury was led astray by the prosecutor's vague suggestion that defense counsel did not ask about the relationship between Powell and Brundidge because "he would not have liked the answer." Doc. 65 at 202. See Young, 470 U.S. at 11-12.

2. Phase Two—the Gun Count

Immediately after the jury returned a guilty verdict on the drug charge, the jurors were made aware that they would have to decide a second count—the gun count. Doc. 66 at 10-11. The United States then read to the jury the parties' stipulation that Brundidge was a convicted felon. Doc. 66 at 12-13. No other evidence was presented but both parties offered argument. Doc. 66 at 13-14. Here, again, and also for the first time, Brundidge argues that the prosecutor made improper and prejudicial statements during closing argument.

a. The burden-shifting claim

In his initial closing argument in Phase Two, the prosecutor emphasized that the only element of the offense even remotely in dispute was whether Brundidge actually possessed the gun. Doc. 66 at 14-17. The prosecutor further argued that possession had, in fact, been proven, but chose to address Brundidge's claim, made during the Phase One arguments, that the witnesses—primarily Deputy Powell—were not credible. Doc. 65 at 17-19. Brundidge contends these statements were improper, but the United States submits that when the statements are viewed in context, see Young, 470 U.S. at 11-12, the statements do not amount to prejudicial error.

In discussing Powell's credibility, the prosecutor explained to the jurors that they would have to believe that Powell testified falsely about seeing the gun in Brundidge's hand and seeing Brundidge throw the gun. Doc. 66 at 17-18. The prosecutor argued that Powell had too much to lose, and nothing to gain, by lying. Doc. 66 at 18. The prosecutor also argued that defense counsel had done no more than assert that Powell was lying, but could point to nothing in the record that would support this claim, stating:

> Credibility cannot be attacked in this case by some vague suggestion that Deputy Powell might not be telling the truth. There has to be some evidence to suggest that Deputy Powell was not telling the truth. What evidence did you hear from the witness stand to suggest that he was not telling the truth? You didn't. All you heard was vague suggestions that he might not be telling the truth. And that's not good enough, because you have to base your verdict on the evidence that you hear from the witness stand and the exhibits that you receive. Vague suggestions do not suffice. Where is the evidence to demonstrate that he was not telling the truth?

Doc. 66 at 18-19.

Brundidge argues that the prosecutor's statements served to shift the burden of proof to Brundidge by suggesting that he was required to produce evidence. Brundidge Br. at 19-24. It is clear, however, that the prosecutor was talking only about the credibility of the witnesses—and particularly whether Brundidge had shown that Powell was not credible—and, therefore, was not attempting to shift the burden to Brundidge to show that he was innocent. Brundidge maintains that the prosecutor "went much further" in this case than did the prosecutor in United States v. Bernal-Benitez, 594 F.3d 1303 (11th Cir. 2010), Brundidge Br. at 21-22, but the United States submits that the cases are factually similar and, just as the challenged comments in Bernal-Benitez were proper, id. at 1315, so, too, were the prosecutor's comments proper here.

Brundidge further argues, however, that the prosecutor's arguments from his rebuttal closing in Phase Two also served to shift the burden to Brundidge. Brundidge Br. at 23-24. In rebuttal, counsel stated the following:

> Well, I heard something today that I didn't expect to hear. It's a new rule of law. Mr. Kendrick has now told us that reasonable doubt can be established by what a witness did not see. When the judge charges you on reasonable doubt, see if anywhere in there it says reasonable doubt is established by what a witness did not see.

Doc. 66 at 44. Brundidge maintains that the prosecutor's statements "gave the impression that defense counsel had 'the *obligation* to introduce evidence to support their credibility arguments.'" Brundidge Br. at 24. Again, however, when these statements are viewed in context, no plain error has been shown.

In his closing argument in Phase Two, as he did in Phase One, counsel for Brundidge challenged Deputy Powell's credibility, repeatedly stressing that no one other than Powell ever saw the gun in Brundidge's possession, and no one other than Powell saw Brundidge throw the gun. Doc. 66 at 37-43. At one point, counsel stated that "in order for Deputy Powell to be telling the truth about how all this happened," that Weiss and Newton "would have to see it as well." Doc. 66 at 36-37. Counsel later stated that because Newton did not see the gun, his testimony provided reasonable doubt:

> When I got Corporal Newton, my favorite right here, that is reasonable doubt, all you need, because when the judge talks to you about impeachment and credibility, he's going to say if another witness saw something completely different or didn't see what the other witness said, you consider that. And that's reasonable doubt. You need one.

Doc. 66 at 40. Counsel then added, "And in order to believe Deputy Powell, you have to believe his story about the gun flying from Mr. Brundidge[‘s] hands that no one else can confirm, no one else can confirm." Doc. 66 at 41. Counsel also told the jurors that in order accept Powell's testimony, they would have to believe that Weiss and Newton were lying or that Newton was "just blind or something." Doc. 66 at 41.

In rebuttal, the prosecutor sought to clarify for the jury how to determine when witness testimony is inconsistent and how to reconcile inconsistent witness testimony. As the prosecutor explained, "There's nothing inconsistent about one witness seeing something that another witness did not." Doc. 66 at 44. Counter to Brundidge's argument here, the prosecutor did not in any way attempt to shift the burden to Brundidge but, instead, responded to defense counsel's incorrect assertions that in order for the jury to accept Powell's testimony, both Newton and Weiss had to have also seen Brundidge with the gun. There was nothing in the prosecutor's statement that shifted the burden to Brundidge. When the prosecutor's statements are viewed in context with the entire argument, it cannot be said that the statements were improper or that they prejudicially affected Brundidge's substantial rights.

b. The source of Brundidge's gun

In setting out the elements of the charge of possession of a firearm by a convicted felon, the prosecutor elected to detail for the jury the categories of people who are prohibited from possessing firearms legally. Doc. 66 at 27. Counsel then explained that being a prohibited person does not stop some people from getting a gun, noting that Brundidge was one example of that. Doc. 66 at 28-29. Counsel then expounded on how it is that prohibited persons obtain guns, noting that they cannot buy them legally, so that often they steal them. Doc. 66 at 29. With reference to Brundidge specifically, the prosecutor stated,

> Now, I don't know if Mr. Brundidge took this weapon. I don't know if he stole it. I do tell you this. If I could prove it, he would've been charged with it. I can't prove it. I don't know if

> he stole it. What I do know that felons are more likely, if they have a firearm, to steal than other persons because they cannot legally obtain a firearm.

Doc. 66 at 29.

After explaining the process someone has to go through to get a gun legally, the prosecutor added these comments, "A convicted felon cannot legally obtain a firearm. So did Mr. Brundidge steal this gun? I have no idea." Doc. 66 at 30. At that point, the trial court interjected, stating, "And, ladies and gentlemen, you should not speculate about that because that is not an issue in this case." Doc. 66 at 30. Brundidge argues that the prosecutor's statements about how he came to have the gun was the "most harmful misconduct," Brundidge Br. at 29, and that the trial court's immediate instruction to the jury, while "timely," "did not lessen the impact of the Government's inflammatory remark," Brundidge Br. at 38. The United States disagrees.

The prosecutor's remarks were reasonable in the context of a trial for the charge of possession of a firearm by a convicted felon. It was incumbent on the government to show that Brundidge, despite being a prohibited person, possessed the gun and it was reasonable for the prosecutor to suggest how and why the weapon might have come into Brundidge's possession if he were not allowed to obtain it legally. Moreover, the district court timely, properly, correctly, and with little fanfare, interjected to inform the members of the jury that they should not speculate as to whether Brundidge stole the gun because it was not an issue for them to decide. There is nothing in the record to suggest, and therefore no reason to believe, as Brundidge argues, that the jury did anything but follow the judge's instructions.

Despite Brundidge's skepticism of curative instructions, Brundidge Br. at 38-43,[1] this Court considers "the presence of curative instructions and the strength of the government's case" in determining whether there has been reversible error. United States v. Rodriguez, 765 F.2d 1546, 1560 (11th Cir. 1985). Here, the curative instructions were timely and very clear, and the government's case was strong. Although, Brundidge asserts that the government's case was not strong, the only disputed issue was whether

[1] The United States notes that the fact that "popular media" may have "mocked the impotence of curative instructions," Brundidge Br. at 39, should not weigh with this Court in deciding whether to overturn a criminal conviction as a result of statements made by a prosecutor in his closing argument. Moreover, a cartoon from *The New Yorker*, Brundidge Br. at 39, while amusing, is neither record evidence nor legal authority that this Court should consider.

Powell actually saw Brundidge with the gun and then saw him throw it, or whether Powell completely fabricated the account of how he ended up with a stolen gun after chasing Brundidge. Brundidge sought to discredit Powell's testimony on this issue, but was unsuccessful.

Moreover, Brundidge's contention that the jurors were unable to follow the judge's curative instructions, Brundidge Br. at 41-43, is at odds with authority from this Circuit in a similar context: "We generally presume that jurors follow their instructions. More specifically, we apply 'the strong presumption . . . that jurors are able to compartmentalize evidence by respecting limiting instructions specifying the defendants against whom the evidence may be considered.'" United States v. Hill, 643 F.3d 807, 829 (11th Cir. 2011).

In order to obtain a reversal of his conviction, Brundidge would have to demonstrate that the prosecutor's remarks were "so highly prejudicial as to be incurable by the court's instructions." United States v. Reeves, 742 F.3d 487, 506 (11th Cir. 2014). Brundidge has failed to make the showing required by Reeves and has failed to show that the prosecutor's remarks seriously affected the fairness, integrity or public reputation of the proceeding.

c. Cumulative error

Brundidge claims that the prosecutor made "pronounced and persistent" improper arguments to the jury, resulting in cumulative error that warrants reversal. Brundidge Br. at 43-48. The United States submits that Brundidge has failed to show that the combined effect of the prosecutor's statements gives rise to reversible error under the cumulative error doctrine.

"Even where individual judicial errors or prosecutorial misconduct may not be sufficient to warrant reversal alone, we may consider the cumulative effects of errors to determine if the defendant has been denied a fair trial." United States v. Lopez, 590 F.3d 1238, 1258 (11th Cir. 2009). When addressing a claim of cumulative error, the Court "must examine the trial as a whole to determine whether the appellant was afforded a fundamentally fair trial." Id. at 1258. See also United States v. Flanders, 752 F.3d 1317, 1334 (11th Cir. 2014) (reviewing the total effect of all errors in the context of the trial as a whole to determine whether the appellant was afforded a fundamentally fair trial).

Here, Brundidge has not demonstrated prosecutorial misconduct in any of the challenged statements. Thus, the Court should find that there was no error, let alone cumulative error, in the closing argument. Moreover, to the extent that Brundidge may have shown error, when reviewing the trial as a whole, Brundidge has failed to show that his trial was fundamentally unfair.

B. The District Court Did Not Err in Sentencing Brundidge as an Armed Career Criminal.

In his supplemental brief, Brundidge argues that the district court erred in sentencing him as an armed career criminal under 18 U.S.C. § 924(e) because the prior Georgia burglary felony conviction that the court used to enhance his sentence is not a violent felony under § 924(e)(1). Supp. Br. at 7. Brundidge cannot show that the district court plainly erred in this regard, however, because at the time the district court sentenced Brundidge on January 26, 2016, there was no precedent from the Supreme Court or this Court directly resolving the issue of whether Georgia burglary is a valid Armed Career Criminal Act predicate. This case is unlike United States v. Jones, 743 F.3d 826, 829-31 (11th Cir. 2014), in which this Court found plain error where the district court imposed an ACCA enhancement using an Alabama third-degree burglary conviction where Eleventh Circuit precedent held that a conviction under Alabama's third-degree burglary statute cannot qualify as generic burglary under the ACCA. See United States v. Howard, 742 F.3d 1334, 1343-45 (11th Cir. 2014).

Here, unlike in Jones, there is no precedent from this Court holding that a conviction under Georgia's burglary statute cannot qualify as a generic burglary under the ACCA. In fact, since Brundidge filed his supplemental brief, this Court has reached a contrary result as to Georgia burglary. In the published decision of United States v. Gundy, 842 F.3d 1156 (11th Cir. Nov. 23, 2016), this Court held that Georgia's burglary statute is divisible and that Gundy's prior Georgia burglary convictions qualified as violent felony offenses for purposes of the ACCA.[2] Id. at 1169. The Court found that "Gundy's state court indictments make clear that Gundy's Georgia burglary convictions involved these three elements: (1) an unlawful entry (2) into a dwelling house or building (3) with intent to commit a crime therein." Id. Similarly, Brundidge's unobjected-to Presentence Report makes clear that

[2] In Gundy one member of the panel dissented. Id. at 1170 (Pryor, Jill, JJ., dissenting). Since the decision was published, Gundy has filed a petition for rehearing en banc, and the United States has been ordered to respond to the petition by January 12, 2017. In addition, this Court is scheduled to hear oral argument in a case that also raises a challenge to the use of a Georgia burglary conviction for an ACCA enhancement, United States v. Heard, No. 15-10612. Nevertheless, as of this writing, Gundy is binding precedent in this Circuit.

Brundidge pleaded guilty to "enter[ing] the dwelling of another with intent to commit a theft therein." Doc. 42 ¶ 60.

Brundidge seeks to avoid the plain error standard by arguing that it does not apply because "a court does not have jurisdiction to sentence a defendant in excess of the statutory maximum." Supp. Br. at 5 (quoting United States v. Bushert, 997 F.2d 1343, 1351 n.18 (11th Cir. 1993)). Brundidge relies on cases interpreting the provisions of appeal waivers for his contention that the plain error standard of review should not apply because, he maintains, he was sentenced illegally, but Brundidge's argument confuses waiver, which deals with the right to right to raise an argument at all, with the standard of review that applies to an argument that is properly before the Court. Supp. Br. at 5.

Here, Brundidge has the right to raise his ACCA argument with the Court—there is no contention that he waived the argument entirely—but because he failed to raise it first in the district court, this Court's review is limited. Any argument that Brundidge has that he was sentenced beyond the statutory maximum can only be made after he has shown error that is plain and that has affected his substantial rights. United States v. Hesser, 800 F.3d 1310, 1325 (11th Cir. 2015). If the Court finds that Brundidge has made his showing, it may exercise its discretion to recognize that he was sentenced above the statutory maximum in determining whether the error seriously affected the fairness, integrity or the public reputation of judicial proceedings. Id. Brundidge has not even show that there was error, however, much less plain error. Accordingly, this Court should affirm the sentence imposed by the district court.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court affirm Arsenio Brundidge's conviction and sentence.

This the 29th day of December, 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word limit of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 7180 words, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Eleventh Circuit Rule 32-4.

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). Using the Microsoft Word 2016 software program, this document has been prepared using a proportionally spaced typeface in 14-point characters in Book Antiqua font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the within and foregoing Brief of Appellee with the Clerk of the Court using the Eleventh Circuit's CM/ECF system, which will send electronic notification of filing to counsel of record for Appellant.

I further certify that pursuant to Federal Rule of Appellate Procedure 25(a)(2)(B) and General Order 39, seven paper copies of this Brief were dispatched for filing with the Clerk of Court using a third-party commercial carrier that will deliver them to the Clerk within three days.

This the 29th day of December, 2016.

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APPENDIX G

Appellant's Reply Brief filed in the Eleventh Circuit Court of Appeals

Brundidge v. United States of America

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

CASE NO.: 16-10571-HH

UNITED STATES OF AMERICA,

PLAINTIFF-APPELLEE,

v.

ARSENIO BRUNDIDGE,

DEFENDANT-APPELLANT.

REPLY BRIEF OF THE APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION
CASE NO.: 4:15-CR-00012-CDL-MSH-1

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Certificate of Interested Persons and Corporate Disclosure Statement

The undersigned appellate counsel of record for Defendant-Appellant, Mr. Brundidge, in compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, certifies that the following listed persons and parties have an interest in the outcome of this case:

Brundidge, Arsenio C., Defendant-Appellant;

Dodson, Jonathan R., Appellate Attorney for Defendant-Appellant, Mr. Brundidge, Assistant Federal Defender for the Federal Defenders of the Middle District of Georgia, Inc.;

Hunt, Christina L., Executive Director for the Federal Defenders of the Middle District of Georgia, Inc.;

Hyde Jr., Melvin E., Trial Attorney for Plaintiff-Appellee, United States of America, Assistant United States Attorney, Middle District of Georgia;

Hyles, Stephen, United States Magistrate Judge, Middle District of Georgia;

Kendrick Jr., William J., Trial Attorney for Defendant-Appellant, Mr. Brundidge, Middle District of Georgia;

Land, Clay D., Chief United States District Judge, Middle District of Georgia;

Peterman, III, G.F., Acting United States Attorney, Middle District of Georgia;

Schieber, Michelle, Appellate Attorney for Plaintiff-Appellee, United States of America, Assistant United States Attorney, Middle District of Georgia;

Shelnutt, J. Mark, Trial Attorney for Defendant-Appellant, Mr. Brundidge, Middle District of Georgia;

United States of America, Plaintiff-Appellee;

Victims: There are no identifiable victims in this case; and no publicly traded company or corporation has an interest in the outcome of this appeal.

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Rules

Statement of the Issues

I. THE GOVERNMENT MADE IMPROPER ARGUMENTS IN CLOSING, CAUSING SUBSTANTIAL PREJUDICE.

II. THE COURT ERRED IN FINDING BRUNDIDGE WAS AN ARMED CAREEER CRIMINAL BASED IN PART ON A PRIOR GEORGIA BURGLARY, RESULTING IN AN ILLEGAL SENTENCE.

Argument and Citations of Authority

I. THE GOVERNMENT MADE IMPROPER ARGUMENTS IN CLOSING, CAUSING SUBSTANTIAL PREJUDICE.

Brundidge[1] argues the Government commit cumulative, plain error in its closing arguments by (1) inviting the jury to speculate about whether Brundidge obtained the gun in a burglary, (2) highlighting the fact that Deputy Powell had previous knowledge of Brundidge, (3) arguing that reasonable doubt cannot arise from what a witness did not see, (4) that, for the jury to find a reasonable doubt, Brundidge "has" to produce evidence to contradict the testimony of Deputy Powell, and (5) that defense counsel would not have wanted the jury to hear how Deputy Powell previously knew Brundidge.

In its response, the Government tries to put its offending comments in a different context. It argues the officer discussed Powell's prior knowledge of Brundidge and his open warrant "to set the stage for why Powell ended up chasing Brundidge." Appellee Brief at 19. Notably, Appellant does not take issue with the officer's fleeting mention that he knew Brundidge from some past encounter. He argues the Government inappropriately highlighted this fact in closing. Powell's reasons for singling out Brundidge were not an element of the charge the Government had to prove. However preferential it may be to "set the stage" as a

[1] Undersigned counsel refers to Appellant as such, or as "Brundidge," and refers to the Government as such.

matter of good storytelling, this concern should not outweigh the prejudice to the defendant.

Next, Appellant has acknowledged that the Government was entitled to respond to his response to its unsupported assertion that Deputy Powell "didn't have any interest in the case . . . ." R[2] 65 at 196. Nonetheless, he stresses that the invited error doctrine does not "license . . . otherwise improper arguments." *United States v. Young*, 470 U.S. 1, 12 (1985). It merely adds some context in determining the prejudicial impact of an improper argument. Here, the cumulative nature of the errors far outweighed any mitigating effect of Brundidge's "invitation" to respond to this particular point.

The Government argues it did not shift the burden when it claimed "[t]here has to be some evidence to suggest that Deputy Powell was not telling the truth[,]" and argued reasonable doubt cannot arise from "what a witness did not see." Appellee Brief at 23-24 (quoting R 66 at 18-19, 44). It contends because this argument pertained to witness credibility, its statements did not shift the burden of proof. But the Government has the burden of proving each element, and the credibility of its witnesses goes to the weight of its evidence. Hence, in *United States v. Bernal-Benitez*, 594 F. 3d 1303, 1315 (11th Cir. 2010), the Court indicated that an argument "focus[ing] on defense counsel's . . . obligation to

[2] "R" denotes the record on appeal (CM/ECF), followed by the document number and page number.

introduce evidence to support their credibility arguments" was impermissible burden shifting. Because the arguments in that case focused on counsel's "ability rather than obligation," they did not constitute burden-shifting. *Id*. Here, by suggesting Brundidge "has" to produce evidence discrediting its witness to support a reasonable doubt as to the witness's testimony, the Government was arguing that the jury "had" to credit its evidence if Brundidge did not produce evidence. It was arguing Brundidge had the burden of proving, with evidence, that credible evidence did not support the elements of his charge. This was improper.

The Government seeks to cast its burden-shifting arguments as another permissible response to Appellant's attempts to impeach Deputy Powell's credibility. It contends it was trying to "clarify for the jury how to determine when witness testimony is inconsistent and how to reconcile inconsistent testimony." Appellee Brief at 25. But misleading the jury about the burden of proof did not add clarity. Nothing about trial counsel's attempted impeachment of Deputy Powell can authorize shifting the burden of proof. The jury could evaluate Powell's credibility without any evidence form Brundidge. It could find, perhaps based on nonverbal cues, that Powell was not credible. The Government's misleading arguments suggested to the jury it had to find Powell credible unless Brundidge impeached him with evidence. This misstatement on such a crucial element of due process prejudiced the result of the trial.

The Government asserts that *Bernal-Benitez*, 594 F. 3d at 1315, is "factually similar" to this case. Appellee Brief at 23. But, as noted above, the prosecutor's statements in that case did not cross the line into burden-shifting. In one statement, "the prosecutor rhetorically asked whether two FBI agents with many years of experience would 'put their badges on the line.' " *Id*. at 1313. Similarly, the prosecutor asked "why people in the government with years of experience would go to all this trouble to try and frame an illegal Mexican who has no proper drug offenses." *Id*. Appellant has not taken issue with the prosecutor's similar argument in this case. Third, the prosecutor argued " 'nobody has submitted any *suggestion* as to why agents would have any motivation to fabricate evidence against some small time.' " *Id*. (italics added). Later it said the jury should "decide whether any *articulable reason* has been presented to you to doubt the truthfulness of the testimony of the agents." *Id*. at 1314 (italics added). The prosecutor was commenting on the weakness of Bernal-Benitez's *argument*. Here, in contrast, the prosecutor argued "[t]here *has* to be some *evidence* to suggest that Deputy Powell was not telling the truth." R 66 at 19 (italics added).

Finally, the prosecutor argues its extended speculation about how Brundidge obtained the gun was just part of its "setting out the elements of the charge of possession of a firearm by a convicted felon, ..." Appellee Brief at 26. It contends it was "reasonable" for the prosecutor to hypothesize that he burglarized the home of a testifying witness, since it admitted it could not prove this fact. *Id*. at 27. "To establish a violation of § 922(g)(1), the government must prove beyond a reasonable doubt three elements: (1) that the defendant was a convicted felon, (2) that the defendant was in knowing possession of a firearm, and (3) that the firearm was in or affecting interstate commerce." *United States v. Deleveaux*, 205 F. 3d 1292, 1296-97 (11th Cir. 2000). It strains credulity to suggest that speculating about uncharged crimes is relevant to these elements, or was otherwise a "reasonable" argument.

The Government argues the district court's fleeting curative instruction eliminated any prejudice from any of its offending remarks. It relies on *United States v. Reeves*, 742 F. 3d 487, 506 (11th Cir. 2014), to assert Brundidge "would have to demonstrate that the prosecutor's remarks were 'so highly prejudicial as to be incurable by the court's instructions' " Appellee Brief at 29 (quoting *Reeves*, *supra*). This quoted passage from *Reeves* can be traced to *United States v. Slocum*, 708 F.2d 587, 598 (11th Cir. 1983). There, this Court stated:

> An instruction to disregard evidence withdrawn from the jury is sufficient grounds for an appellate court to uphold a trial court's denial of a motion for mistrial unless the evidence is so highly prejudicial as to be incurable by the trial court's admonition. *United States v. Walker,* 621 F.2d 163, 168 (5th Cir.1980), *cert. denied* 450 U.S. 1000, 101 S.Ct. 1707, 68 L.Ed.2d 202 (1981); *United States v. Klein*, 546 F.2d 1259, 1263 (5th Cir.1977). **Such a level of prejudicial effect exists where there is "a significant possibility ... that ... the stricken statement had a**

> **substantial impact upon the verdict of the jury**." *United States v. Arenas-Granada*, 487 F. 2d 858, 859 (5th Cir. 1973).

Id. (bold added).

Here, there is a "significant possibility" that the Government's misstatements of the burden and standard of proof affected the result. Again, Powell's credibility was crucial to the Government's case, as no one else testified the gun was in Brundidge's hand. As stated in the principal brief:

> Any juror may have declined to give Brundidge the benefit of his or her reasonable doubt based on the picture the Government painted of Brundidge's criminal character, or, having some reason to doubt his guilt, may have determined it should nonetheless convict him because Brundidge had not shown through affirmative evidence that the testimony of Deputy Powell or another officer was false.

Principal Brief at 52. This distinguishes *Reeves*, 742 F. 3d at 506, where the Court found an improper argument harmless in light of a curative instruction and "because the record contains sufficient independent evidence of Moss's guilt concerning the conspiracy charge, including the presentation of several recorded conversations between Moss and Reeves discussing cocaine purchases." Here, only Powell's testimony implicated Appellant.

Appellant has cited to social science supporting his argument that curative instructions are not very effective. *See* Principal Brief at 45 (citing Linda J. Demain, *In Search Of an Anti-Elephant: Confronting the Human Inability To*

Forget Inadmissible Evidence, 16 Geo. Mason L. Rev. 99 (Fall, 2008) (and social science cited therein). He also acknowledged the history of using curative instructions in this country, notwithstanding their known ineffectiveness. Realistically, a curative instruction is just one factor among many affecting the potential that an improper comment swayed the verdict. But even if this Court begins by presuming the jury could discount inflammatory evidence in light of the curative instruction, the social science on this issue goes a long way towards rebutting that presumption, at least in a close case such as this one.

II. THE COURT ERRED IN FINDING BRUNDIDGE WAS AN ARMED CAREEER CRIMINAL BASED IN PART ON A PRIOR GEORGIA BURGLARY, RESULTING IN AN ILLEGAL SENTENCE.

Brundidge argued in his supplemental brief that his enhanced sentence as an armed career criminal was plain error because it was based on Georgia burglary. He argued Georgia burglary could not serve as a predicate because it was not "generic" burglary within the meaning of *Taylor v. United States*, 495 U.S. 575, 599 (1990), and was not divisible. *Taylor* defined generic burglary as "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime. *Id*. After he filed his supplemental brief raising this issue and before the Government filed its brief, a panel of this Court held that the pre-2012 version of Georgia burglary at issue in this case was a divisible statute, denoting different crimes, one of which met the *Taylor* definition of generic burglary. *See United States v. Gundy*, 842 F. 3d 1156 (11th Cir. 2016). The Government relies on *Gundy* in its response, and also argues that any error was not a plain error.

Appellant acknowledges this Court's prior-panel-precedent rule. *See In re Lambrix*, 776 F. 3d 789, 793-94 (11th Cir. 2015).[3] *Gundy*, however, does not completely resolve the issue raised here. Had the Court in *Gundy* found Georgia burglary always qualified as generic burglary, there would be nothing to do but affirm the District Court's holding, or decide to rehear the issue *en banc*. But the *Gundy* Court did not find Georgia burglary *categorically* qualified as generic burglary; it divided the statute into separate crimes, one of which was generic burglary. *Id*. at 1166-68.

It thus used the modified categorical approach, and that approach requires another step. Because Georgia burglary established more than one crime, a district court must "peek" at the record of the particular prior conviction at issue to determine if the conviction was for the crime of generic burglary. *Mathis v. United States*, 579 U.S. __, 136 S. Ct. 2243, 2256 (2016) (citation omitted). It must "look to 'a limited class of documents (for example, the indictment, jury instructions or

[3] As the Government acknowledges, another panel of this Court will hear oral arguments on this issue on February 23, 2017, in *United States v. Heard*, 15-1012 (11th Cir. 2016), and this Court has not yet ruled on a motion for *en banc* rehearing filed in *Gundy*, 14-12113 (11th Cir.)

plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Id*. at 1168 (quoting *Mathis*, 136 S. Ct. at 2249).

The District Court below did not evaluate Georgia burglary under the modified categorical approach. The record on appeal does not contain the charging document, plea agreement, plea colloquy or any documentation of the prior offense. The Government relies on the Presentence Report to conclude Appellant pled guilty to generic burglary. It states the "Accusation filed in this case reflects that, between April 1, 2010, and April 2, 2010, the defendant entered the dwelling of another with intent to commit a theft therein." R 37 at 20. It says nothing more about the substance of his burglary offense.

This assertion does not resolve the issue for four reasons. First, the modified categorical approach does not allow a court to find an ACCA predicate based on what the probation officer gleaned from documents not in evidence. The District Court must base its conclusion on its own review of the state court documents in light of the state legal authorities. Materials that can support a finding that an offense qualified as generic under the modified categorical approach are "limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Shepard v. United States*, 544 U.S. 13, 26 (2005).

Second, the "Allegation" might have "reflect[ed]" the *factual basis*, and not the *essential elements* of the crime to which Appellant pled guilty. A charging document might include any number of detailed factual allegations, in order to give fair notice to the defendant of his charges. This would not mean the Government had to prove each detail alleged beyond a reasonable doubt to convict. "The key, . . ., is elements, not facts." *Descamps v. United States*, 570 U.S. __, 133 S. Ct. 2276, 2283 (2013). Judge Pryor made this point in her dissent in *Gundy*:

> the many indictment cases on which the majority relies never considered whether the types of locations listed in Georgia's burglary statute are alternative elements or means of committing the crime because these cases were concerned only with the need to "inform the accused as to the charges against him so that he may present his defense and not . . . be taken by surprise" and to "protect the accused against another prosecution for the same offense."

Gundy, 842 F. 3d at 1176-77 (Pryor, Jill, J. dissenting) (quoting *Smarr v. State*, 317 Ga. App. 584 (2012)). Judge Pryor would have held Georgia burglary categorically did not qualify as generic burglary. But even if Georgia burglary is divisible, the fact remains that not every assertion in a charging document alleges an essential element. As with alternatively phrased statutes, a charging document can include both essential elements and gratuitous "means" – factual details that are unnecessary to state the offense, and need not be proven beyond a reasonable doubt to support a conviction. Thus a Presentence Report that paraphrases some part of a charging document does not resolve the issue.

Third, the charging document alone would be insufficient to show which conduct Appellant *pled guilty* to. This is essential in a divisible crime resolved by a guilty plea. According to the *Gundy* majority, Georgia burglary establishes different crimes depending on different types of locations. Who is to say Appellant did not dispute that he burglarized a "dwelling," and the parties did not agree for him to plead guilty to a different type of Georgia burglary? The terms of his guilty plea were necessary to resolve this ambiguity.

Fourth, even if a *Shepard* document, instead of secondhand information about the Accusation, indicated Appellant pled guilty to burglarizing a "dwelling," it would not show he pled to generic burglary. The locational element of generic burglary is "building or structure." *Taylor*, 495 U.S. at 599. "Dwelling" under the pre-2012 version of O.C.G.A. § 16-7-1(a) is not coextensive with the generic "building or structure." The statute did not define dwelling, but allowed that something other than a building or structure could be a dwelling:

> [a] person commit[] . . . burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad card, watercraft, or other such structure *designed for use as the dwelling* of another or enters or remains within any other building, railroad car, aircraft, or any room or any part thereof.

Id. (italics added); *cf*. *Hutchings v. State*, 3 Ga. App. 300 (Ga. Ct. App. 1907) (insufficient evidence that a corncrib was the "subject-matter of burglary" in violation of the 1895 Georgia burglary statute under which "[a]ll outhouses contiguous to and within the curtilage or protection of the mansion house shall be considered as parts of the mansion or dwelling house.") Therefore a conviction of pre-2012 Georgia burglary of a "dwelling" does not charge the generic offense.

For these reasons, the District Court could not have relied on the Presentence Report in determining whether Appellant pled guilty to generic burglary. Because the record on appeal does not include any *Shepard* documents which could support the enhancement, this Court should reverse and remand to the District Court for resentencing.

Of course, the reason the District Court did not review any *Shepard* documents related to Appellant's prior burglary conviction is that Appellant did not object to his designation as an armed career criminal. This Court therefore reviews the ACCA enhancement for plain error.

The Government argues that the error does not satisfy the plain error standard. Appellee Brief at 31-34. First, it asserts the ACCA sentencing enhancement could not be plain error "because *at the time the district court sentenced Brundidge* on January 26, 2016, there was no precedent from the Supreme Court or this Court directly resolving the issue . . . ." Appellee Brief at

31 (italics added). However, this Court determines whether the error was plain "under current law." *United States v. Olano*, 507 U.S. 725, 732 (1993). It has interpreted "current law" to include new case law promulgated while a case is on direct appeal. *See United States v. Humphrey*, 164 F. 3d 585, 588 n. 5 (11th Cir. 1995) ("we have considered decisions made between the alleged error of the district court and the appeal when deciding if an error is plain.") Because "current law" holds that Georgia burglary is a non-generic but divisible statute, and the District Court found the Georgia burglary was a predicate without reviewing determining which variant of Georgia burglary Appellant pled guilty to, the error here is plain.

The Government tries to distinguish *United States v. Jones*, 743 F. 3d 826, 829-31 (11th Cir. 2014), where this Court held the District Court plainly erred by counting Alabama third-degree burglary as an ACCA predicate. It seems to argue that controlling precedent was available to Jones at sentencing, unlike in this case. *See* Appellee Brief at 31 (citing *United States v. Howard*, 742 F. 3d 1334, 1344-45 (11th Cir. 2014)). But *Howard* was an intervening precedent, occurring after Jones's sentencing. Appellant was identically situated to Jones when he failed to object to his ACCA enhancement.

Next, the Government contends that Appellant "seeks to avoid the plain error standard by arguing that it does not apply . . . ." Appellee Brief at 33. That is not Appellant's argument. Appellant argues that an error placing a fifteen-year sentencing floor where there should be a ten-year ceiling will always prejudice the sentence. Recognizing that the prejudice is unavoidable does not amount to evading plain error review. Prejudice is just one prong of the standard. *Cf. Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346-47 (2016) (holding "most" guidelines errors will not survive plain error review, even when the actual sentence received was also within the correct advisory sentencing range).

On a final note, although Appellant understands this Court is bound by the prior panel decision in *Gundy*, 842 F. 3d 1156, he does not waive his argument articulated in his supplemental brief that Georgia burglary is indivisible, non-generic, and categorically disqualified from serving as an ACCA predicate. As of the date of this filing, the Court has not ruled on the petition for *en banc* rehearing filed in *Gundy*, and Appellant wishes to keep his case in the appellate pipeline in the event the Court changes course after an *en banc* rehearing.

Conclusion

For the foregoing reasons, this Court should reverse Brundidge's sentence and remand for a resentencing. For the reasons stated in Brundidge's original principal brief, it should reverse his conviction and remand for a new trial.

Dated this 13 day of February, 2017.

s/ Jonathan Dodson

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Certificate of Compliance

Pursuant to Fed. R. App. P. 32(a)(7)(C), I, Jonathan Dodson, appellate counsel for Mr. Arsenio Brundidge, hereby certify that the number of words in this brief, as counted by the Microsoft Office Word 2016-processing system, according to the method described in 11th Cir. R. 32-4, is **3,454** words, which is less than the 6,500 allowed for appellate briefs by Fed. R. App. P. 32(a)(7)(B)(ii).

Certificate of Service

I, Jonathan Dodson, appellate counsel of record for the Appellant, Mr. Arsenio Brundidge, hereby certify that I have, on this 13th day of February, 2017, filed the foregoing *Reply Brief of the Appellant* with the Clerk of Court using the Eleventh Circuit's CM/ECF system, which will send electronic notification of filing to counsel of record.

I also certify that I caused a copy of the foregoing *Reply Brief of the Appellant* to be served in paper format upon the following, by placing a copy of the same in the United States Mail, postage prepaid, addressed to: Mr. Arsenio Brundidge, 97889-020, USP McCreary, P.O. Box 3000, Pine Knot, KY 42635.

I further certify that, on the date set forth above, I caused the foregoing submission to be dispatched for filing with the Clerk of Court by Federal Express overnight delivery.

.

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APPENDIX H

Appellant's Petition for Panel Rehearing filed in the Eleventh Circuit Court of Appeals

Brundidge v. United States of America

APPEAL NO.: 16-10571-HH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

ARSENIO BRUNDIDGE,
DEFENDANT-APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION
CASE NO.: 4:15-CR-00012-CDL-MSH-1

APPELLENT'S PETITION FOR PANEL REHEARING

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Certificate of Interested Persons and Corporate Disclosure Statement

The undersigned appellate counsel of record for Defendant-Appellant, Mr. Brundidge, in compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, certifies that the following listed persons and parties have an interest in the outcome of this case:

Brundidge, Arsenio C., Defendant-Appellant;

Dodson, Jonathan R., Appellate Attorney for Defendant-Appellant, Mr. Brundidge, Assistant Federal Defender for the Federal Defenders of the Middle District of Georgia, Inc.;

Hunt, Christina L., Executive Director for the Federal Defenders of the Middle District of Georgia, Inc.;

Hyde Jr., Melvin E., Trial Attorney for Plaintiff-Appellee, United States of America, Assistant United States Attorney, Middle District of Georgia;

Hyles, Stephen, United States Magistrate Judge, Middle District of Georgia;

Kendrick Jr., William J., Trial Attorney for Defendant-

Appellant, Mr. Brundidge, Middle District of Georgia;

Land, Clay D., Chief United States District Judge, Middle District of Georgia;

Peterman, III, G.F., Acting United States Attorney, Middle District of Georgia;

Schieber, Michelle, Appellate Attorney for Plaintiff-Appellee, United States of America, Assistant United States Attorney, Middle District of Georgia;

Shelnutt, J. Mark, Trial Attorney for Defendant-Appellant, Mr. Brundidge, Middle District of Georgia;

United States of America, Plaintiff-Appellee;

Victims: There are no identifiable victims in this case;

and no publicly traded company or corporation has an interest in the outcome of this appeal.

Table of Contents

Table of Authorities

Cases

Statutes

Rules

Statement Regarding Panel Rehearing

Pursuant to Fed. R. App. P. 40, Arsenio Brundidge requests a panel rehearing for the September 13, 2017, panel opinion filed in the above-captioned case, United States v. Arsenio Brundidge, docket no. 16-10571. A copy of the panel opinion is attached to this Petition for Panel Rehearing as Addendum A, as required by 11th Cir. R. 40-1.

Petition for Panel Rehearing[1]

I. The panel opinion misapplies *United States v. Gundy* and *Mathis v. United States*, by affirming Brundidge's sentence after concluding he was convicted of a "generic" burglary based on an assertion in the presentence investigation report (PSI) that his "Accusation . . . reflects" generic burglary, instead of remanding for the District Court to determine in the first instance, based on *Shepard* documents, which version of Georgia burglary he pled guilty to.

Brundidge sought and received permission to file a supplemental brief in this case, in order to raise the argument that his sentence as an Armed Career Criminal was plainly erroneous because his prior conviction of Georgia burglary did not qualify as an ACCA predicate. After filing his supplemental brief, but before the Government filed its brief, this Court issued its decision in *United States v. Gundy*, 842 F. 3d 1156 (11th Cir. 2016). Accordingly, when Brundidge filed his reply brief, he acknowledged Gundy, preserved his argument that Georgia burglary could never qualified as an ACCA predicate (since a motion for panel rehearing was then pending on the Gundy case), and argued that, at any rate, the record was insufficient to show, under the modified

[1] The undersigned cites the panel opinion as "Addendum A at #."

categorical approach required by Gundy, that he pled guilty to generic burglary.

The panel opinion relied on *Gundy* and *United States v. Ramirez-Flores*, 743 F. 3d 816, 820 & n.3 (11th Cir. 2014) in ruling that using Brundidge's prior burglary conviction was not plain error. It reasoned:

> [w]e have held the statute is divisible and the offense qualifies as an ACCA predicate offense under the modified categorical approach. *Gundy*, 842 F. 3d at 1168-69. Brundidge does not cite a contrary holding, as required under plain error review. *See Rodriguez*, 627 F. 3d at 1381. Moreover, a court may rely on undisputed facts contained in the presentence investigation report (PSI) in applying the modified categorical approach. *See United States v. Ramirez-Flores*, 743 F. 3d 816, 820 & n.3 (11th Cir. 2014) (stating courts may consider undisputed facts contained in the PSI in applying the modified categorical approach).

Add. A at 5 – 6. Respectfully, this seems to misapprehend the holding of Gundy that Georgia burglary does not categorically qualify as generic burglary, and overlook the holding of *Mathis v. United States*, __ U.S. __, 136 S. Ct. 2243 (11th Cir. 2016), requiring district courts to focus on elements and not facts. Moreover, the panel opinion does not engage the arguments pertaining to Gundy in Brundidge's reply brief, which was his only opportunity to address Gundy since it was decided after he filed his supplemental brief.

A. The panel opinion misapprehended *Gundy*.

The holding of *Gundy* was that Georgia burglary sometimes qualifies as an ACCA predicate under the modified categorical approach. The panel opinion seemed to conclude that Georgia burglary is always a generic burglary, when it stated "[w]e have held the [Georgia burglary] statute is divisible and the offense qualifies as an ACCA predicate offense under the modified categorical approach." Add. A at 5 (citing *Gundy*, 842 F. 3d at 1168-69).

Undersigned counsel does not mean to take the above-quoted sentence out of context, but the rest of the opinion did not employ the modified categorical approach, which *Gundy* requires. The panel opinion states Brundidge's claim does not survive plain error review because he failed to point to a case contradicting *Gundy*. But this overlooks Brundidge's reliance on Gundy in his reply brief in arguing that the ACCA-enhanced sentence was still plain error requiring a remand for resentencing. He argued: (1) the PSI is not a Shepard document; (2) the PSI's paraphrasing of the "Allegation" cited in the PSI could reflect the factual basis, and not the elements of the offense of conviction; (3) the "Allegation" cited in the PSI could not establish the offense of conviction, since Brundidge might have pled guilty to a different version of the offense than he was originally charged with; and (4) the term "dwelling" cited in the PSI does not show generic burglary because the definition of dwelling in the pre-2012 version of O.C.G.A. § 16-7-1(a) is broader than the generic "building or structure." *See Reply Brief* at 10 – 13.

Thus, because *Gundy* held that courts must apply the modified categorical approach, and determine whether a prior conviction was for generic burglary based on Shepard documents, and the panel's opinion neither applied the modified categorical approach nor remanded for the District Court to apply the modified categorical approach, this Court should withdraw its opinion and instead find plain error and remand for resentencing.

B. The panel opinion overlooked the distinction between means and elements that was essential to the holding in *Mathis*.

The panel opinion stated "[m]oreover, a court may rely on undisputed facts contained in the presentence investigation report (PSI) in applying the modified categorical approach." *Id.* at 6 (citing *Ramirez-Flores*, 743 F. 3d at 820 & n. 3). The Eleventh Circuit rule allowing courts to rely on undisputed facts in the PSI can be traced to *United States v. Bennett*, 472 F. 3d 825, 833 (11th Cir. 2006). In *Bennett*, this Court found Bennett's argument that his three prior felony burglaries were not ACCA predicates was meritless in part because (a) he admitted to having three prior violent felony convictions during his plea colloquy and (b) he did not object to the PSI and addendum, which indicated that "court documents of [his] prior burglaries showed [they] were of either residential or commercial buildings." *Id.* He objected to using police reports because they were non-Shepard materials, but "did not object to the underlying facts of his prior convictions as set forth in the court documents referenced in the PSI." *Id.*

After this Court decided *Bennett*, the Supreme Court decided *Descamps v. United States*, 570 U.S. __, 133 S. Ct. 2276 (2013). In *Descamps*, it emphasized "[t][he key . . . is elements, not facts." Id. at 2283. The next year, this Court decided *Ramirez-Flores*, 472 F. 3d at 823, where it cited to Bennett in support of the proposition "we have held that a sentencing court applying the modified categorical approach may consider undisputed facts contained in the PSI." Ramirez-Flores's PSI stated, as to his prior burglary conviction, that he " 'forcibly entered the victim's residence with a co-defendant and removed property from the residence.' " *Id.* This Court held his vague objection to these assertions were not sufficient to raise a factual dispute, so it deemed them to be true and used them to show he was convicted of generic burglary. After this Court decided *Ramirez-Flores*, the Supreme Court decided *Mathis v. United States*, where it again emphasized repeatedly the important distinction between elements and facts.

In *United States v. Braun*, 801 F.3d 1301, 1305–06 (11th Cir. 2015), this Court noted the parties' arguments as to whether Descamps had abrogated the rule allowing district courts to rely on undisputed PSI assertions, but it did not have to resolve the issue because it held that a sentencing court may not rely on a PSI from an unrelated proceeding as a *Shepard* document. Now, *Mathis* has further abrogated this rule, to the extent that the rule would allow district courts to find ACCA predicates based on undisputed conduct relayed in the PSI which does not establish the elements of the offense of conviction.

In *Mathis*, 136 S. Ct. at 2253, the Supreme Court held that the modified categorical approach "is not to be repurposed as a technique for discovering whether a defendant's prior conviction, even though for a too-broad crime, rested on facts (or otherwise said, involved means) that also could have satisfied the elements of the generic offense." By relying on the PSI's paraphrasing of a charging document, which itself could have included both necessary elements and extraneous conduct or "means," and which did not establish the offense to which Brundidge pled guilty, the panel opinion overlooks the distinction between conduct and elements, contravening *Mathis*.

C. Under plain error review, this Court should remand to the District Court to apply the modified categorical approach.

In sum, Brundidge argues that the District Court commit plain error by finding him to be an armed career criminal based on a prior Georgia burglary conviction. The District Court made an error: it found Georgia burglary was an ACCA predicate without reviewing Shepard documents to determine whether Brundidge was convicted of the generic version of Georgia burglary. This plainly contravenes Gundy, which became law while this appeal was pending.[2] The error caused prejudice: it resulted in a mandatory fifteen-year sentencing floor where there would be a ten-year ceiling if ACCA did not apply to Brundidge. A sentence exceeding the statutory maximum is the type of error that should not go uncorrected. It is fundamental that a defendant cannot be sentenced in excess of the statutory maximum. Declining to exercise discretion to correct the error would thus call into question the fairness, integrity, and public reputation of the judicial proceedings. *See United States v. Romano*, 314 F. 3d 1279, 1282 (11th Cir. 2002) ("obvious" that the erroneous use of 84 to 105- month sentencing range instead of the correct 57 to 71- month range seriously affected the fairness, integrity, or public reputation of the judicial proceedings.)

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[2] "An intervening decision by 'this Court or the Supreme Court squarely on point may make an error plain.' " *United States v. Jones*, 743 F. 3d 826, 829-30 (11th Cir. 2014). In *Jones*, this Court found that an ACCA enhancement based on Alabama third-degree burglary was plain error, in light of *Descamps* and *United States v. Howard*, 742 F. 3d 1334, 1344-45 (11th Cir. 2014), which were decided after Jones's sentencing and pending his direct appeal. *See also Henderson v. United States*, 568 U.S. 266 (2013).

Conclusion

For the foregoing reasons, and those articulated on Arsenio Brundidge's supplemental and reply briefs, this Court should GRANT this petition for panel rehearing and VACATE Arsenio Brundidge's sentence and remand for a resentencing.

Dated this 4th day of October, 2017.

s/ Jonathan Dodson

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Certificate of Compliance

Pursuant to Fed. R. App. P. 32(a)(7)(C), I, Jonathan Dodson, appellate counsel for Mr. Arsenio Brundidge, hereby certify that the number of words in this brief, as counted by the Microsoft Office Word 2016-processing system, according to the method described in 11th Cir. R. 32-4, is **1,619** words, which is less than the 3,900 allowed for appellate briefs by Fed. R. App. P. 32(a)(7)(B)(ii).

Certificate of Service

I, Jonathan Dodson, appellate counsel of record for the Appellant, Mr. Arsenio Brundidge, hereby certify that I have, on this 4th day of October, 2017, filed the foregoing *Appellant's Petition for Panel Rehearing* with the Clerk of Court using the Eleventh Circuit's CM/ECF system, which will send electronic notification of filing to counsel of record.

I also certify that I caused a copy of the foregoing *Appellant's Petition for Panel Rehearing* to be served in paper format upon the following, by placing a copy of the same in the United States Mail, postage prepaid, addressed to: Mr. Arsenio Brundidge, 97889-020, USP McCreary, P.O. Box 3000, Pine Knot, KY 42635.

I further certify that, on the date set forth above, I caused the foregoing submission to be dispatched for filing with the Clerk of Court by Federal Express overnight delivery.

Signature line on next page.

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ADDENDUM

United States v. Arsenio Brundidge
No.: 16-10571-HH, slip. op. (11th Cir. Sept. 13, 2017)

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-10571
Non-Argument Calendar

D.C. Docket No. 4:15-cr-00012-CDL-MSH-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARSENIO BRUNDIDGE,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Georgia

(September 13, 2017)

Before MARCUS, WILSON and BLACK, Circuit Judges.

PER CURIAM:

Arsenio Brundidge appeals his convictions and total 235-month sentence for possession of a firearm by a convicted felon and possession of cocaine, violations of 18 U.S.C. §§ 922(g)(1) & 924(e)(1) and 21 U.S.C. § 844, respectively. Brundidge asserts: (1) the Government's statements during closing arguments were improper and caused substantial prejudice; and (2) his prior conviction for Georgia burglary did not qualify as a predicate offense under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). After review,[1] we affirm.

I. DISCUSSION

A. Prosecutorial misconduct

"In determining whether there was prosecutorial misconduct, we examine whether the prosecutor's remarks were (1) improper and (2) prejudicially affected the defendant's substantial rights." *United States v. Azmat*, 805 F.3d 1018, 1044 (11th Cir. 2015). "Prosecutorial misconduct must be considered in the context of the entire trial, along with any curative instruction." *United States v. Lopez*, 590 F.3d 1238, 1256 (11th Cir. 2009).

"[A]lthough a prosecutor may not exceed the evidence presented at trial during her closing argument, she may state conclusions drawn from the trial

[1] We review Brundidge's claim of prosecutorial misconduct for plain error because Brundidge did not object to the Government's closing arguments at trial. *See United States v. Azmat*, 805 F.3d 1018, 1045 (11th Cir. 2015). We review for plain error when a defendant fails to object to an ACCA enhancement before the district court. *United States v. Jones*, 743 F.3d 826, 828 (11th Cir. 2014). An error is "plain" if the asserted error is clear from the plain meaning of a statute, constitutional provision, or from a holding of the Supreme Court or this Court. *United States v. Rodriguez*, 627 F.3d 1372, 1381 (11th Cir. 2010).

evidence." *United States v. Reeves*, 742 F.3d 487, 505 (11th Cir. 2014). Thus, an issue raised by a defendant during closing is fair game for the prosecution on rebuttal. *Id.*; *see also United States v. Bernal-Benitez*, 594 F.3d 1303, 1315 (11th Cir. 2010) (noting it is not improper for a prosecutor to mention the defendant has the same subpoena powers as the government, particularly when done in response to the prosecutor's failure to call a specific witness).

As part of its obligation to prove guilt beyond a reasonable doubt, the government may not make comments that would shift the burden of proof to the defendant. *Bernal-Benitez*, 594 F.3d at 1315. However, the prosecutor may comment on the failure of defense counsel, as opposed to the defendant, to counter or explain evidence. *See Bernal-Benitez*, 594 F.3d at 1315 (holding the prosecutor's comment was merely a request the jury closely examine the record for support of defense counsel's attacks).

Brundidge does not establish the Government's statements during closing arguments constitute plain error. The Government's statement that Deputy Powell previously knew Brundidge was not calculated to mislead or inflame the jury's passions. *See Azmat*, 805 F.3d at 1045 ("A prosecutor's remarks, suggestions, insinuations, and assertions are improper when they are calculated to mislead or inflame the jury's passions."). Further, the Government was allowed to rebut defense counsel's argument on this issue. *See Reeves*, 742 F.3d at 505 ("[T]he prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.”).

The Government also did not shift the burden of proof in addressing defense counsel’s arguments on Deputy Powell’s credibility. The Government was allowed to respond to defense counsel’s arguments on this issue. *Id*. Moreover, the Government may request the jury closely examine the evidence for support of defense counsel’s attacks. *Bernal-Benitez*, 594 F.3d at 1315. And the court cured any undue prejudice by explaining the Government’s burden of proof in its jury instructions. *See id.* (concluding the court, following closing argument, cured any undue prejudice in its instruction on the government’s burden of proof).

Although the Government speculated whether Brundidge stole the firearm, the court quickly provided a curative instruction, stating the jury should not speculate about that issue because it was not an issue in the case. We presume the jury followed the district court’s curative instruction. *Lopez*, 590 F.3d at 1256. Under a plain error standard of review, it is not plain the Government’s statement was incurable. *See United States v. Rodriguez*, 627 F.3d 1372, 1381 (11th Cir. 2010).

Brundidge does not establish the cumulative effects of the alleged errors denied him a fair trial. *See Lopez*, 590 F.3d at 1258 (stating in addressing a claim of cumulative error, we examine the trial as a whole to determine whether the defendant was afforded a fundamentally fair trial). Brundidge did not establish plain error from the Government's closing arguments, and there can be no cumulative error where there are no individual errors. *See Azmat*, 805 F.3d at 1045. Thus, his convictions are affirmed.

B. ACCA

At the time of Brundidge's conviction in 2010, Georgia's burglary statute provided:

> A person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another or enters or remains within any other building, railroad car, aircraft, or any room or any part thereof . . . .

United States v. Gundy, 842 F.3d 1156, 1164 (11th Cir. 2016) (citing Ga. Code Ann. § 16-7-1(a) (2011)). In *Gundy*, we held the Georgia statute was divisible, and applying the modified categorical approach, we determined the defendant's burglary convictions qualified as ACCA predicate offenses because the indictments charged that he burgled one dwelling house and two business houses. *Id.* at 1168-69.

The district court did not plainly err in counting Brundidge's Georgia burglary conviction as an ACCA predicate offense. We have held the statute is divisible and the offense qualifies as an ACCA predicate offense under the modified categorical approach. *Gundy*, 842 F.3d at 1168-69. Brundidge does not cite a contrary holding, as required under plain error review. *See Rodriguez*, 627 F.3d at 1381. Moreover, a court may rely on undisputed facts contained in the presentence investigation report (PSI) in applying the modified categorical approach. *See United States v. Ramirez-Flores*, 743 F.3d 816, 820 & n.3 (11th Cir. 2014) (stating courts may consider undisputed facts contained in the PSI in applying the modified categorical approach). Thus, we affirm Brundidge's total sentence.

II. CONCLUSION

Brundidge did not establish plain error from the Government's closing arguments or in counting his prior conviction for burglary as a predicate offense under the ACCA. Thus, we affirm his convictions and total sentence.

AFFIRMED.

APPENDIX I
Eleventh Circuit Court of Appeals Order denying Appellant's Petition for Panel Rehearing

Brundidge v. United States of America

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-10571-BB

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

ARSENIO BRUNDIDGE,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Georgia

BEFORE: MARCUS, WILSON and BLACK, Circuit Judges.

PER CURIAM:

The petition(s) for panel rehearing filed by ARSENIO BRUNDIDGE is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-41