United States Court of Appeals
for the Fourth Circuit

No. 19-6823

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DUPREE TURNER,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of North Carolina,
No. 4:15-cr-00055-BO-1 (Hon. Terrence W. Boyle)

REPLY BRIEF

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The Government does not dispute that nothing in the record indicates that Dupree Turner was told about or otherwise aware of the specific-intent element of brandishing when he pled guilty. He would not have pled guilty to the crime had he known. And he raised this issue in the district court, which rejected it on the merits. Thus, there is no procedural hurdle to this claim, and the clearest path is for the Court to vacate the brandishing conviction based on involuntariness. This is so even if the Court is not persuaded by Turner's claim that there was an insufficient factual basis for the brandishing plea. On remand, the Government can decide whether it again wishes to pursue any § 924(c) charge.

The heart of the matter, though, is that Turner is actually innocent of brandishing. The Government has no genuine rebuttal to the fact that, based on the established record, no reasonable person could conclude that Turner specifically intended to "intimidate" the CI or that the gun was displayed "in relation to" the underlying drug crime—each a required element of the offense. In the prosecutor's own words, the CI "said jokingly" that "if he had a pistol" he would steal Turner's rims. And Turner responded in jest when he showed the CI his gun. The Government does

not deny that they laughed throughout the interaction, which was captured on video, nor that the gun was put away before the drug sale took place in the same manner as it had before. And critically, the Government agrees that the district court and prosecutor believed this was "all for the rims." No reasonable juror could find either the specific-intent or in-relation-to element of brandishing beyond a reasonable doubt on these facts. Thus, actual innocence excuses the default of this claim, and the conviction can be vacated based on having an insufficient factual basis as well.

The Court can also set aside the procedural default because prior counsel was ineffective for failing to challenge the factual basis of the plea on direct appeal, which prejudiced Turner. The Government is admittedly correct that undersigned counsel failed to explicitly tie trial counsel's incompetence to prior appellate counsel's ineffective assistance. But if this Court does not agree that the plea was involuntary or that Turner has established actual innocence, the Court should exercise its discretion to consider the argument anyway. Turner raised the issue in the district court, where it was rejected on the merits, and it is now fully briefed in this Court as well. Nothing in the law requires Turner to finish the sentence he is currently serving for a crime he did not commit.

ARGUMENT

I. Turner's Plea To Brandishing Was Involuntary

A. There is no procedural bar to this claim

The Government has waived procedural default as a defense to Turner's involuntary-plea claim, and the specific arguments he brings on appeal were presented to and ruled upon by the district court.

The Government did not argue below that Turner's involuntary-plea claim was procedurally defaulted, opting instead to urge dismissal on the merits. DE56 at 4-5. The district court accepted that invitation. JA96-97. For good measure, Turner affirmatively argued in his opening brief here that even though the district court had reached the merits of the claim, any perceived procedural default could be set aside anyway. *See* Op. Br. 18. But the Government still did not press procedural default in their response, contending instead that the "district court properly adjudicated the arguments before it." Gov't Br. 24. Thus, it is now crystal clear that the Government has waived this affirmative defense. *See, e.g.*, *United States v. Bennerman*, 785 F. App'x 958, 963 (4th Cir. 2019) (per curiam) ("[P]rocedural default is an affirmative defense that the government failed to raise before the district court and has therefore waived.").

Instead (and quite tellingly) the Government's lead argument is that Turner failed to sufficiently articulate in his pro se § 2255 motion the "more nuanced" argument he makes here—that the plea was involuntary because he was unaware, when he pled guilty, of the specific-intent element required for brandishing. Gov't Br. 24, 26. In other words, the Government argues that Turner waived the argument because he did not present it to the district court for consideration in the first instance.

But that simply isn't true. Turner conspicuously argued that trial counsel's "lack of investigation" into "*potential defense[s]*" and failure "to explain and explicate *the definition* ... [of] 18 U.S.C. [§] 924(c)(1)(A)(ii)," i.e., brandishing, "renders the plea involuntarily entered." JA68 (emphasis added). Thus, he argued, his plea was involuntary because, due to counsel's ineffective assistance, he did not have "any understanding of the exact nature of the offense[] charged, or the factual basis for it." JA66. Turner also contended that "the facts surrounding his conduct with regard to the weapon do not support a finding that he had the required intent to intimidate," JA83, which the Government expressly acknowledges in its brief, Gov't Br. 14.

This is more than enough to show that Turner presented the argument to the district court, especially since he was pro se at the time. Courts must generously read pro se filings, "particularly" ones involving "civil rights issues." *See Brown v. N.C. Dep't of Corr.*, 612 F.3d 720, 722 (4th Cir. 2010) (quotation marks omitted). Pro se filers do not have to use magic words and identify specifically what they are talking about so long as they sufficiently alert the district court to what the issue is. Thus, Courts "liberally construe[]" filings "even where pro se plaintiffs do not reference any source of law, or where they cite the wrong part of the Constitution." *See Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 540 n.4 (4th Cir. 2017) (citations omitted). For example, this Court recently rejected an assertion that a pro se plaintiff waived his right to appellate review by failing to file specific objections in district court to a magistrate judge's report and recommendation. *Martin v. Duffy*, 858 F.3d 239, 245-46 (4th Cir. 2017). The Court held that the plaintiff "sufficiently alerted the district court that he believed the magistrate judge erred in recommending dismissal" of his claims, because even though he had identified only one of the claims in his brief, he also "attached an 'Amended Complaint' that restated" many of the others. *Ibid.*

Here, of course, Turner actually pointed to the correct authority—yet another indication that he squarely presented the argument. Right at the outset in arguing his involuntary-plea claim, Turner cited *Henderson v. Morgan*, 426 U.S. 637 (1976), *see* JA73; *see also* JA53, which is the primary authority for the proposition that when, as here, a defendant is not apprised of the specific-intent element of a crime, and the record otherwise contains no evidence of the defendant's admission to such fact, the plea is involuntary. *See* Op. Br. 18-22. Turner also made the correct arguments in the right sections of his brief. And the issues in this case largely overlap, *see* Op. Br. 8 n.1, 49 n.7, so Turner's arguments throughout further support that the issue was properly presented. The Government's primary argument thus boils down to urging this Court to strictly construe some parts of Turner's § 2255 motion and to completely ignore others, which is especially unfair given that he wrote it himself.

In all events, there is a difference between preserving "claims" and making new "arguments" in support of a preserved claim. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992). There is no dispute

that Turner properly preserved his involuntary-plea claim, and he can make any argument in support of that claim now. *See, e.g.*, *United States v. Robinson*, 744 F.3d 293, 300 & n.6 (4th Cir. 2014) (citing *Escondido* to reach defendant's argument that the district court erred in including a marijuana sentence in his criminal history score, because "[a]lthough he did not make this precise argument before the district court, [he] did challenge his criminal history score, and thus preserved his claim").

In the alternative, the Government requests that if this Court finds that Turner actually raised the argument, it should remand to the district court solely to address the claim "as it has now been framed," suggesting that the district court has not already rejected the argument. *See* Gov't Br. 27. Again, that simply isn't accurate. As just laid out, Turner expressly argued that he was unaware of brandishing's specific-intent element, such that his plea was involuntary. And the district court rejected that argument, based in part on its view that Turner affirmed at the plea hearing that "he understood the charges he was pleading guilty to" and "was, in fact, guilty." JA96. The judge believed that such affirmations are enough to "demonstrate that [a] guilty plea was knowing and voluntary." *See* JA97. Given this reasoning (which, as discussed next, is deeply

flawed), there is no reason to think the district court's decision turned on how the involuntariness argument was "framed."

As a last-ditch effort to constrain any remand, the Government argues that Turner would remain guilty of carrying and using a firearm in violation of 18 U.S.C. § 924(c), no matter what ultimately happens to the brandishing plea. Gov't Br. 27. But "the relief that the Government seeks is not supported by the plain language of § 2255," which "states that, if a court finds that collateral relief is warranted, 'the court *shall vacate and set the judgment aside* and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.'" *See Diri v. United States*, 2019 WL 5076388, at *3 (W.D.N.C. Oct. 9, 2019) (quoting 28 U.S.C. § 2255(b)) (emphasis added). "Section 2255 permits discharge, resentencing, a new trial, or sentence correction, but it does not permit the type of substitution of one offense for another that the Government urges." *See id.*

In contrast to the atextual relief the Government desires, Turner seeks only what § 2255 by terms requires when collateral relief under that provision is warranted: "vacate and set the judgment aside." 28 U.S.C. § 2255(b). Counsel confirmed with the Bureau of Prisons that

Turner is currently serving his brandishing sentence, which is projected to conclude on September 28, 2024. *Cf.* Find an inmate, Federal Bureau of Prisons, https://www.bop.gov/inmateloc/ (enter 59504-056 in the "Number" field of "Find By Number," then click "Search"). So vacating Turner's brandishing conviction could result in discharge, depending on how the Government intends to proceed on remand. But only after vacating and remanding may the district court consider whether to "discharge the prisoner or resentence him or grant a new trial or correct the sentence." 28 U.S.C. § 2255(b).[1]

B. Turner did not know about the critical, specific-intent element of brandishing when he pled guilty

On the merits, the Government has little to say, and almost none of it contradicts Turner's description of the record.

[1] This is not a case in which an appellate court might "direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense." *Rutledge v. United States*, 517 U.S. 292, 306 (1996); *see also id.* (declining "to consider the precise limits on the appellate courts' power" to do so). Those court of appeals decisions are sufficiency-of-the-evidence cases on direct appeal, *see id.* 305-06, not habeas cases brought pursuant to § 2255, which commands that an unlawful judgment be set aside and then authorizes only certain follow-on proceedings.

We can start with where the parties agree. In reviewing the involuntary-plea claim, this Court construes the record in the light most favorable to Turner. *United States v. Murillo*, 927 F.3d 808, 815 (4th Cir. 2019); *see* Gov't Br. 23. And "the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that *the nature* of the charge and *the elements* of the crime were explained to the defendant" by *someone*. *See Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) (citing *Henderson*, 426 U.S. at 647) (emphasis added); Gov't Br. 29. The parties also agree that at the plea hearing, Turner testified only that he had *enough time* to meet with and that he understood his counsel; was competent to proceed; understood the rights he was giving up and penalties he faced in pleading guilty; was pleading guilty of his own volition; and was guilty of the crimes as charged in the indictment. *See* Op. Br. 21-22; Gov't Br. 24-25.

Moreover, the Government does not dispute that the record is devoid of anything establishing that Turner was informed that brandishing requires a specific intent to intimidate another person—it was not in the indictment, and there was no mention of the requirement during the plea hearing by trial counsel, the prosecution, or the judge. Op. Br. 19-22. Nor

does the Government dispute that this is an unusual case because, in contrast with the norm, the judge did not even ask Turner whether counsel had explained the elements of the offense (or, for that matter, whether Turner was satisfied with his trial counsel). *See* Op. Br. 20-22. And there is no other evidence indicating that trial counsel privately informed Turner of the specific-intent requirement.

The Government's only evidence that Turner understood the mens rea element of the crime is that Turner allegedly represented under oath at the hearing that he "understood the charges against him." Gov't Br. 25 (citing JA16-17). The Government later backpedals, saying only that Turner's affirmations at the hearing "strongly indicate" that he understood the charges. Gov't Br. 28. Either way, that is not what the transcript actually shows:

> **Q** [Judge Boyle:] Okay. Have you seen a copy of the charges against you?
>
> **A** [Turner:] Yes, sir, I have.
>
> * * *
>
> **Q** [Judge Boyle:] In Count Five, you are charged with brandishing a firearm during a drug trafficking crime. The punishment for that is seven years in addition to any other punishments you might receive, up to life, together with a $250,000 fine and five years of supervised release.

> Do you understand that *those are the charges* and the punishments that you are facing?
>
> **A** [Turner:] Yes, sir.

JA16-17 (emphasis added). In other words, Turner was only asked—and therefore could only respond—that he was "charged with brandishing a firearm during a drug trafficking crime," not that he was also aware of the unstated elements of the offense. The Government's invitation to nonetheless infer that he understood the charge violates the standard that applies here—that the record be read in the light most favorable to Turner.

District courts often ask defendants whether they understand "the *nature* of the charges" and whether they "discussed the elements of each of the offenses with [their] attorneys." *See* Op. Br. 20-21 (quotation marks omitted and emphasis added). This Court sometimes finds that such testimony is enough to reject post-sentencing allegations that a plea was unintelligently and thus involuntarily entered. *Ibid.* The court below did not even ask these bare-minimum questions.

Thus, for the reasons explained at length in the opening brief, the proceedings below were plainly insufficient to ensure that Turner's plea to brandishing was voluntary under the Fifth Amendment. Op. Br. 17-

23. The record must show somewhere that the defendant understood the full nature of the offense. Op. Br. 20 (explaining that, consistent with *Henderson*, there must be "a fair presumption from the face of the record that the defendant was … aware" of the elements of the crime). Here, there is nothing.

This information is especially important for brandishing, because the layman's understanding of that term does not coincide with the narrower definition of the § 924(c) crime. People generally do not think that brandishing is only accomplished when done "in order to intimidate" others. Op. Br. 23. Rather, brandishing is also commonly understood as holding, waving, or exhibiting something in an "excited" or "ostentatious" manner, without regard to *why* the item is being brandished. *See, e.g.*, Oxford Advanced American Dictionary, https://bit.ly/2Uchsof (last visited Mar. 27, 2020) (to "brandish" is "to hold or wave something, especially a weapon, in an aggressive *or excited* way" (emphasis added)); Cambridge Dictionary, https://bit.ly/3afyY0t (last visited Mar. 27, 2020) (to "brandish" is "to wave something in the air in a threatening *or excited* way" (emphasis added)); Merriam-Webster, https://bit.ly/2Uf4zKd (last visited

Mar. 27, 2020) (to "brandish" includes "2: to exhibit in an *ostentatious or* aggressive manner" (emphasis added)).

The Government also "invite[s] this Court to conclude" that Turner "admi[tted]" in his § 2255 motion that he "eventually had all the relevant information while his case was pending in district court," but never moved to withdraw the plea. Gov't Br. 27-28. The Government did not make this argument below. (Pressing it here is amusing, considering the Government's contention, debunked above, that Turner did not adequately express an argument he *did* make below.) And once again, the Government's merits arguments are so weak that they resort to nit-picking and looking for magic words in a pro se criminal defendant's habeas petition. The Government's position again requires drawing impermissible inferences against Turner, and in any event, he said nothing of the sort. Even just a fair reading of the record shows that Turner was not aware of the mens rea required for brandishing when he pled guilty, and would not have done so had he known.

Contrary to the Government's characterization, Turner's pro se statement that he was not made aware of the intent element until "*after* [he] decided to accept the plea of guilty," JA68, says nothing about when,

specifically, he became aware of the nature of brandishing. And it most certainly is not an "admission" that he learned about the mens rea element "while his case was pending in district court," as the Government would like this Court to infer. *See* Gov't Br. 27.[2] For the Government to be correct, there would have to be evidence that Turner found out about the intent element before he was sentenced. *See* Fed. R. Crim. P. 11(e) ("After the court imposes sentence, the defendant may not withdraw a plea of guilty … , and the plea may be set aside only on direct appeal or collateral attack."). And nothing in the record or anywhere else suggests that this is the case.

Thus, it means little that Turner did not file a motion to withdraw the plea. On the contrary, under the standard of review that applies here, this fact only helps Turner. In the light most favorable to him, it is equally possible (if not more so) that his failure to file a motion to withdraw indicates that he did not know about the specific-intent element,

[2] The Government does not even take its own argument seriously, later suggesting that the case should be remanded for a hearing on "what [Turner] knew about [] 'brandishing'" and "when he acquired that knowledge." Gov't Br. 29; *see also* Gov't Br. 12-13 (describing Turner's statement as "*imply[ing]* that defense counsel explained" brandishing "after [Turner] decided to accept the plea and after he actually entered the plea" (emphasis added)).

and thus did not discover the problem, until it was too late to do so. *See* Fed. R. Crim. P. 11(e).

For these reasons, this Court should vacate the conviction and remand for further proceedings to determine whether to "discharge" Turner, "resentence him," "grant a new trial," or "correct the sentence." 28 U.S.C. § 2255(b). Indeed, for the reasons given *infra* Part II.B.1 (discussing actual innocence), it is implausible to think that Turner was knowingly and voluntarily admitting guilt to a crime that he obviously did not commit. At a minimum, though, Turner has certainly cleared the hurdle for this Court to reverse and remand for an evidentiary hearing—viewing the record in the light most favorable to him, "the motion and the files and records of the case" do *not* "conclusively show that [he] is entitled to no relief." *See* 28 U.S.C. § 2255(b). Thus, the district court must, at the very least, "grant a prompt hearing" to "determine the issues and make findings of fact and conclusions of law" on this claim. *See id.*

II. Turner's Plea To Brandishing Was Not Supported By An Adequate Factual Basis

A. There were insufficient facts to accept the guilty plea

As before, we can start with where the parties agree. To accept a defendant's guilty plea, the district court may look to "anything that appears on the record," and that record must have sufficient facts for the court to conclude "that the defendant committed *all of the elements* of the offense." Gov't Br. 35-36 (quoting *United States v. Moussaoui*, 591 F.3d 263, 300 (4th Cir. 2010); *United States v. DeFusco*, 949 F.2d 114, 120 (4th Cir. 1991)) (emphasis added). Thus, the district court abuses its discretion in accepting a guilty plea when it could not "reasonably have determined that there was a sufficient factual basis" for every element "based on the record before it." *See* Gov't Br. 36 (quoting *United States v. Mastrapa*, 509 F.3d 652, 660 (4th Cir. 2007)); *see United States v. Douglas*, 213 F.3d 633, at *1 (4th Cir. 2000) (per curiam) ("[I]f an insufficient factual basis for essential elements of the charge was not shown, the acceptance of a plea by the district court constitutes an abuse of discretion."). And, critically, the Government does not dispute that brandishing requires *both* that the defendant have a specific intent to intimidate another and that the brandishing be done "in relation to" the underlying

drug crime. For largely the same reasons that he is actually innocent, *see infra* Part II.B.1, the district court abused its discretion in finding a factual basis for each of those elements.

The Government begins by arguing that the record is sufficient to establish that Turner *possessed* a firearm *in furtherance* of a drug crime. Gov't Br. 36-37 (relying on *United States v. Lomax*, 293 F.3d 701 (4th Cir. 2002)). But that is a red herring. Turner was not charged with possessing a firearm in furtherance of a drug crime. JA10; *see* Op. Br. 29-30 n.4. He was charged with "knowingly carry[ing] and us[ing] a firearm *during and in relation to* a drug trafficking crime" and "brandish[ing] said firearm." JA10 (emphasis added). Possession is a different § 924(c) offense, with a different "standard of participation." *United States v. Combs*, 369 F.3d 925, 934 (6th Cir. 2004) (emphasis removed).

Thus, in *Combs*, the Sixth Circuit "reverse[d] [a] conviction and remand[ed] to the district court to dismiss the indictment for failure to charge an offense" when the indictment charged the defendant "with 'possess[ing] a firearm during and in relation to' a drug trafficking crime." 369 F.3d at 934. The court held that indicting the defendant "based on the *conduct* from the § 924(c) 'possession' offense in conjunction with the

standard of participation (during and in relation) from the other 'use' offense result[ed] in a failure to charge him with *any* codified federal crime." *Ibid.* The Government therefore misdirects this Court by pointing to (and heavily relying on) the Court's decision in *Lomax* as "guidance." *See* Gov't Br. 36-39. That case was about § 924(c) possession.

Rather, the relevant "standard of participation" inquiry here is whether the firearm was brandished "in relation to" the underlying drug crime. The most obvious evidence that there was an insufficient factual basis for this element is that the judge and prosecutor viewed the purported brandishing as "all for the rims." JA19. The Government makes no attempt to challenge "the court's summation" of the facts, Gov't Br. 7-8, and surely the lower court was correct, on this record, to sum up the interaction as it did. The question, then, is whether the district court abused its discretion by finding a sufficient factual basis after confirming that the brandishing was "all for the rims" and thus *not* "in relation to" the underlying drug crime. The answer must surely be "yes."

The Government's arguments for why the district court *could* have otherwise found a sufficient factual basis on this element are thus irrelevant. This Court applies an abuse-of-discretion standard in this context

because it is the trial court's role to determine in *its* discretion whether there is a factual basis. The district court abused that discretion based on its own "summation" of the facts, and this Court should not affirm based on how else the trial judge could have hypothetically exercised his discretion. *See, e.g.*, *United States v. Smith*, 86 F.3d 1165, at *4 (9th Cir. 1996) (per curiam) ("Although the administrative law judge perhaps could have exercised his discretion to reject the stipulation or required foundation evidence as a condition of accepting it, [the appeals board] could not properly review the record and decide the facts contrary to the stipulation which had been accepted and which had shaped the hearing before the ALJ."). This is reason alone to vacate the conviction and remand.

In any event, none of the Government's arguments are persuasive. The Government again misstates that Turner represented at the plea hearing that "he understood Count Five," Gov't Br. 37; as noted above, he affirmed only that he understood that brandishing was one of the crimes he was charged with, not that he knew what brandishing requires. *Supra* pp.11-12; *see* JA17. The Government further argues that the "district court's description of the charge reflected that brandishing of the firearm

must bear a relationship to the drug-trafficking crime." Gov't Br. 37 (citing JA17). Again, not so. The court actually described the charge as "brandishing a firearm *during* a drug trafficking crime." JA17 (emphasis added). The judge did not mention that brandishing must also be done *in relation to* the drug offense, *see* Op. Br. 29-33, which the Government does not dispute. There is no indication that even *the court* understood that the brandishing must be done in relation to the underlying drug crime, much less that the court was satisfied Turner so understood the law. Indeed, the court's confusion on this point explains why it accepted the plea despite acknowledging that the gun was shown "all for the rims" on Turner's car.

As for the mens rea element, the Government argues that Turner's statements in the § 2255 motion "undercut his claim" that there was an insufficient factual basis to find an intent to intimidate the CI. Gov't Br. 39. Once again, the Government unfairly construes Turner's pro se statements.

For example, the Government believes Turner viewed the CI's joke as a "'bold[] threat[],'" which "demonstrates an intent to intimidate" in return. Gov't Br. 39 (quoting JA79). But when read in context, it is clear

that the statements cherry-picked by the Government are tongue-in-cheek. Turner obviously did not believe that the CI was making a bold threat that required an intimidating response. Just like the prosecutor, Turner described the CI's statement as a "jok[e]." JA79. And the CI's joke that "*if*," hypothetically, "he had a pistol he *would* rob" Turner of his rims, JA18 (emphasis added), only shows that the CI made clear that he did not actually have a gun, so how could Turner feel "boldly threatened"? So too for Turner's pro se embellishment of "mano y mano male dominance." Gov't Br. 39 (quoting JA79). A fair reading of Turner's words in context shows, fundamentally, that he viewed the whole thing "jokingly and laughingly," as "nothing more than two men playfully mocking one another"—"Simply put, harmless jesting." JA79-80 (emphasis removed).

B. There is no procedural bar to reaching this claim

1. Turner is actually innocent of brandishing

Again, the parties agree on the legal standard. To establish actual innocence to set aside the default of his Rule 11 claim, Turner need only show, based on the record as viewed in the light most favorable to him, that it is more likely than not that no reasonable juror would have convicted him. Gov't Br. 30, 34-35. And once he clears that threshold, this Court can reach any of his claims. Gov't Br. 34.

Turner more than meets the standard, because the record is insufficient to support a brandishing conviction beyond a reasonable doubt. The only record facts regarding Turner's conduct in displaying the firearm were that when the CI got into his car, the CI joked that *if* he had a firearm, he would steal Turner's rims. Turner joked in kind that the CI would not have a big enough firearm. The Government—which has had in its possession the video and audio recording of the transaction since the outset—does not dispute Turner's characterization that the two were joking and laughing during this exchange. *See* JA79. And the Government agrees that the prosecutor and Court believed the exchange was "all [about] the rims." *See* Gov't Br. 7-8 (quoting JA19).

No reasonable jury could find either the required intent-to-intimidate-another or in-relation-to-a-drug-crime elements established beyond a reasonable doubt on these facts. *See supra* Part II.A; Op. Br. 38-40. In only one sentence, the Government argues that Turner fails to show actual innocence on "the record as it is currently developed" because a "seasoned" district court judge "found otherwise." Gov't Br. 35. But this is just an argument that a defendant can never show actual innocence. That is obviously wrong. The record is simply devoid of facts establishing that

Turner displayed the firearm intending to intimidate the CI, and the district judge and prosecution themselves believed that the display was "all for the rims," i.e., *not* "in relation to" a drug crime.

2. The default can also be set aside because Turner's counsel on direct appeal was constitutionally deficient for failing to raise this claim

The above is more than sufficient for the Court to vacate Turner's plea to brandishing and remand for further proceedings pursuant to § 2255, either because the plea was involuntary or because there was an insufficient factual basis for it (or both). But the procedural default on the latter claim could be set aside for the additional reason that Turner's counsel on direct appeal provided ineffective assistance of counsel for failing to raise it, which prejudiced Turner.

The Government urges the Court to find that this argument has been abandoned on appeal. Gov't Br. 20-21, 32-33. And it is true that undersigned counsel failed to explicitly articulate, in the opening brief, that prior appellate counsel's ineffective assistance establishes cause and prejudice to set aside the default. But this Court is not precluded from considering the argument. And all the reasons given in the opening brief for why Turner's trial counsel was constitutionally deficient, Op. Br. 40-

50, also show why his prior appellate counsel provided ineffective assistance.

The Government is correct that, in general, arguments not raised in the opening brief are considered abandoned. However, "special circumstances may justify deviation" from the general rule. *United States v. Lewis*, 235 F.3d 215, 218 n.3 (4th Cir. 2000). And this Court has "discretion to overlook the waiver of this argument." *See In re Bane*, 565 F. App'x 246, 250 (4th Cir. 2014) (per curiam); *accord W. Va. Coal Workers' Pneumoconiosis Fund v. Bell*, 781 F. App'x 214, 227 (4th Cir. 2019) (Richardson, J., writing separately and announcing the judgment) ("[C]ourts of appeals sometimes do overlook a party's forfeiture, because 'we possess the discretion under appropriate circumstances to disregard the parties' inattention to a particular argument or issue.'" (quoting *United States v. Holness*, 706 F.3d 579, 592 (4th Cir. 2013))). Indeed, courts will sometimes do so even "when *both* parties have failed to address an issue." *Bell*, 781 F. App'x at 227.

If the Court rejects Turner's involuntary-plea claim and also finds that he fails to sufficiently establish actual innocence to set aside the default of his Rule 11 claim, the Court should exercise its discretion and set

aside the default based on direct appellate counsel's ineffectiveness in failing to argue that there was an insufficient factual basis for the plea. *E.g.*, *Holness*, 706 F.3d at 592-93 (addressing issue raised by *neither* party because it "fairly arises from the face of the record," "may be definitively resolved thereon," and doing so "is likely to promote judicial economy"). The issue was fully briefed before the district court, which rejected it on the merits. And although the Government raises abandonment on appeal, it also argues on the merits that appellate counsel on direct was not deficient. So the issue is now fully briefed here as well.

According to the Government, previous appellate counsel had considered and rejected the Rule 11 argument, "demonstrat[ing] one of the 'hallmark[s] of effective appellate advocacy,' specifically, the 'winnowing out weaker arguments on appeal and focusing on those more likely to prevail.'" Gov't Br. 32-33 (quoting *United States v. Allmendinger*, 894 F.3d 121, 126 (4th Cir. 2018)). Thus, the Government contends, Turner "failed to sustain his burden in the district court of demonstrating that appellate counsel was ineffective." Gov't Br. 33.

But "winnowing out" weaker arguments on appeal is only a "hallmark" of effective advocacy if the arguments that are left on the table are

actually weaker than the ones that are raised. *See Allmendinger*, 894 F.3d at 126-31 (reversing district court's denial of a § 2255 motion because direct appellate counsel provided ineffective assistance by declining to bring a claim that had "a strong chance of success" in lieu of claims that were "far from certain" to succeed, and the Court "likely would have reversed" had counsel brought the stronger claim on direct appeal, establishing prejudice). Thus, *Allmendinger* only helps Turner.

Just as in *Allmendinger*, this Court's "precedent at the time" gave Turner "a strong chance of success" on the Rule 11 claim. *See* 894 F.3d at 128. Turner highlighted *United States v. Mastrapa*, 509 F.3d 652 (4th Cir. 2007), in the opening brief. Op. Br. 24-28. There, like here, no Rule 11 challenge had been made to the district judge, so this Court reviewed the claim on appeal for plain error. 509 F.3d at 657. And there, like here, the defendant "did not admit the necessary *mens rea* before entering his plea and the record contained no factual basis to support that element of the offense," *id.* at 655, even though there was testimony that the defendant met with drug dealers and then transported methamphetamine to the hotel room where the dealers intended to complete a sale, *id.* at 658. If it was plain error on that record to find a sufficient factual basis for the

"knowingly" intent element of the drug conspiracy charge, *id.* at 660, it was surely plain error here to find a sufficient factual basis for the *specific*-intent element of Turner's brandishing charge.

And even more so than in *Allmendinger*, "it is equally clear that the contentions raised by [Turner]'s appellate counsel did not" have a good chance of success. *See* 894 F.3d at 128. There, the Court found deficient performance when counsel's "likelihood of prevailing on a claim of procedural error" was "far from certain." *Id.* at 129. Here, appellate counsel had almost no chance of succeeding on the sole claim he made in Turner's direct appeal, and did not challenge the brandishing conviction at all.

Counsel brought only one claim, which the Court rejected in a four-page, unpublished per curiam opinion without argument, *see* JA45-49: that the district court erred in enhancing Turner's sentencing-guidelines range based on a prior "crime of violence" conviction. This challenge applied only to the sentence imposed on the first four counts of conviction, so counsel argued *nothing* regarding Turner's brandishing conviction. And Turner had two New Jersey convictions that could qualify as a crime of violence—possession of a sawed-off shotgun and robbery. So to win,

counsel had to establish that neither qualified. But counsel acknowledged that pending cases in this Court and the Supreme Court had the potential to dispose of his claim. 16-4162 Turner Br. 13-15. And even if the Supreme Court ruled such that Turner's sawed-off-shotgun conviction did not qualify as a crime of violence, he would still have to convince this Court that the robbery conviction did not qualify either. *Ibid.*

The failure to raise *any* challenge to the brandishing conviction is especially egregious considering that prior counsel had the space in his brief to include the claim, having over 9,000 words to spare. And there is no need to remand to see why prior counsel neglected to bring a Rule 11 challenge to the brandishing plea. If it was strategic, it was inexplicable. *See Allemendinger*, 894 F.3d at 129-30 (rejecting the strategic reason, given by direct appellate counsel in a "sworn statement," for not bringing a strong claim as failing to "identify any true strategic rationale for failing to raise" the stronger claim). And if it was unconsidered, that is worse. *See Correll v. Ryan*, 539 F.3d 938, 949 (9th Cir. 2008) ("An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all.").[3]

[3] If this Court thinks that it matters whether Turner's prior counsel actually considered whether to bring the Rule 11 claim, *see* Gov't Br. 32,

Because a Rule 11 challenge to the plea constituted a clearly stronger argument than the issues raised on direct appeal (and indeed, could have been brought alongside the claim that *was* brought without at all hindering the argument), and this Court likely would have reversed on that basis, prior appellate counsel was ineffective for failing to raise the claim and Turner was prejudiced by the error. *See Allmendinger*, 894 F.3d at 130-31. That is also cause and prejudice to set aside the default of the claim. *See* Op. Br. 40-41 & n.5.

Turner should not be faulted for failing to press his prior appellate counsel to make an argument that counsel should have made on his own, when Turner did not even know, at the time, that such an argument was available regarding the mens rea element of brandishing. If all else fails, he has, at the very least, sufficiently alleged cause and prejudice to set aside the default based on prior appellate counsel's ineffective assistance,

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the Court should find—especially given the standard of review—that the only claim counsel considered was whether there was an argument based on an erroneous statement in the initial presentence report that brandishing carries a five-year mandatory minimum, which was corrected in the final version. *See* 16-4162 Turner Br. 11 n.1 ("Undersigned counsel has looked into *this issue* and does not believe it to be meritorious, and it will not be argued in this brief." (emphasis added)).

such that he is entitled to a hearing on the issue. *United States v. Magal-lanes*, 10 F. App'x 778, 783 (10th Cir. 2001) (unpublished) (vacating district court's denial of § 2255 motion and remanding for evidentiary hearing based on similar allegations).

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's judgement and remand. At a minimum, the Court should remand for a hearing pursuant to 28 U.S.C. § 2255(b).

Dated: March 27, 2020

Respectfully submitted,

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I hereby certify that on March 27, 2020, I caused the foregoing document to be electronically filed with the Clerk of Court for the U.S. Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered users of that system and that service will be accomplished by that system.

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