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)

OPENING BRIEF FOR APPELLANT DUPREE TURNER

Daniel Woofter
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave., Ste. 850
Bethesda, MD 20814
(202) 362-0636
dhwoofter@goldsteinrussell.com

Counsel for Appellant

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INTRODUCTION

Due to the cascading failures of his trial counsel, the district judge, and the prosecution, Dupree Turner involuntarily pled guilty to brandishing a firearm in violation of 18 U.S.C. § 924(c)(1)(A)(ii), a crime he did not commit. Because no one—not his counsel, not the prosecutor, not the court—apprised Turner of the specific intent element of the crime, Turner did not appreciate the nature of the offense he was pleading guilty to. If he had, he would not have taken the plea, and no reasonable defendant would have—those failures were so abject that the court accepted Turner's plea despite the fact that the government *could not* prove, based on the conduct as agreed, that he displayed a firearm "in order to intimidate" another person, as required by the statute. His plea was thus taken without due process, in violation of the Fifth Amendment.

For the same reason, there is no procedural bar to reaching the merits. Turner is factually innocent, because his conduct does not meet the level of intent required by the crime, so this Court is permitted to look past the previous counsel's failure on direct appeal to challenge the voluntariness of the plea. That is all that is necessary to resolve this case in Turner's favor.

Still, if that were not enough, the record also does not show that Turner displayed the firearm "in relation to" the underlying drug crime, another required element of brandishing. So there was no factual basis for the plea on this ground as well. And the default could be set aside for the additional reason that Turner was prejudiced by his trial counsel's ineffective assistance in failing to advise him of multiple available defenses to the charge.

By erroneously accepting Turner's brandishing plea, the district court was forced to sentence him to no less than seven years, to run consecutive to his sentences for drug crime convictions he does not dispute. This Court should grant the petition, vacate the § 924(c) conviction, and remand for further proceedings.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Turner's criminal proceedings pursuant to 18 U.S.C. § 3231. This Court previously affirmed Turner's sentence on direct appeal. *See* JA7 (opinion and judgment entered July 11, 2017). Turner filed a timely petition for a writ of certiorari on October 10, 2017, which was denied on November 13, 2017. *See Turner v. United States*, No. 17-6365 (U.S.), http://bit.ly/2EcEMJR.

On October 26, 2018, Turner filed a timely motion to vacate his sentence in the district court, pursuant to 28 U.S.C. § 2255. JA93. The district court entered judgment on April 11, 2019, dismissing Turner's motion to vacate. *See* JA8. On May 19, 2019, Turner filed a motion in this Court for a certificate of appealability. JA128. That motion was construed as a notice of appeal, JA101, which was thus timely filed. This Court granted a partial certificate of appealability, JA130, and has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Was Turner's plea to brandishing a firearm uninformed and involuntary, and thus taken in violation of the Due Process Clause of the Fifth Amendment, because no one informed him before he pled guilty to brandishing that the government would be required to prove that he specifically intended to intimidate another person?
2. Was Fed. R. Crim. P. 11(b)(3) violated when the district court accepted Turner's plea without a sufficient factual basis to support either the specific intent or "in relation to any . . . drug trafficking crime" element of brandishing?

3. Should the procedural default be set aside, given Turner's actual innocence and the prejudice he suffered due to trial counsel's ineffective assistance?

STATEMENT OF THE CASE

1. District court proceedings and direct appeal

In 2015, a grand jury indicted Dupree Turner on three counts of distribution of heroin in violation of 21 U.S.C. § 841(a)(1); one count of felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1) and 924; and, relevant here, one count of using, carrying, and brandishing a firearm in violation of 18 U.S.C. § 924(c)(1)(A). JA9-10. These charges all stemmed from controlled purchases by a confidential informant (CI) who was working for government investigators. JA18.

In relevant part, 18 U.S.C. § 924(c)(1)(A) makes it a crime punishable by a mandatory minimum of five years to use or carry a firearm "during and in relation to any . . . drug trafficking crime," and raises the mandatory minimum to seven years "if the firearm is brandished." *Id.* § 924(c)(1)(A)(i)-(ii). To be convicted of brandishing, however, the statute

requires that the defendant "display all or part of the firearm, or otherwise make the presence of the firearm known to another person, *in order to intimidate* that person." *Id.* § 924(c)(4) (emphasis added).

At his plea hearing, Turner entered an "open" plea of guilty on all counts, i.e., without any plea agreement. *See* JA17. The court described the crime of brandishing, in full, as: "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." JA17.

All of the relevant record facts regarding Turner's display of the firearm come from a colloquy between the prosecutor and the judge. According to the prosecutor, when the CI entered Turner's vehicle, he "said jokingly . . . that if he had a pistol he would rob [Turner] of the rims from the Cadillac." JA18. "In turn," Turner "pulled a large revolver from under his seat and said that the CI's gun wouldn't be large enough, or larger than his." *Id.* The district judge confirmed "all for the rims," and the prosecutor replied "apparently, your honor." JA19. No other facts relevant to Turner's display of the firearm were referenced or discussed. The interaction, though, "was captured on video," *see* JA135, which, according to

Turner, depicts the two men laughing and joking about the incident—no more than "harmless jesting," JA78.

Based on his criminal history, the district judge found that Turner was subject to a range of 46 to 57 months on Counts 1 through 4, and sentenced him to the bottom of the range on those counts, to run concurrently. JA33-34. As for the brandishing conviction, the district court sentenced Turner to the legal minimum—84 months, required to run consecutive to the other sentences, for a total of 130 months' imprisonment. *Id.* Turner "object[ed] to the 7-year mandatory minimum in his 924[(c)]." JA35.

On direct appeal, appellate counsel challenged only the sentences on the drug trafficking and felon in possession convictions, arguing that the district court erred in enhancing Turner's guideline range based on a prior conviction. 16-4162 Turner Br. at 16-29. According to his appellate lawyer, the prior conviction did not qualify as a crime of violence. *Id.* In an unpublished per curiam opinion, this Court rejected the argument. *See* JA44-49. Prior appellate counsel failed to raise any challenge to Turner's brandishing conviction and sentence, as Turner had urged him to do. *See* 16-4162 Turner Br. at 11 n.1.

2. Collateral proceedings in district court

After this Court affirmed on direct appeal, Turner timely filed a pro se motion to vacate his sentence in the district court, pursuant to 28 U.S.C. § 2255. Turner raised a number of arguments in his motion, including three relevant to this appeal.

First, Turner claimed that his trial counsel was unconstitutionally deficient under the Sixth Amendment. Among other things, according to Turner, his counsel failed "to investigate and familiarize himself with the facts of the case in relation to the guilty plea," and "deprived [him] of potential defense[s]." JA67-68. And counsel failed to "explain and explicate the definition" of brandishing "until *after* [Turner] decided to accept the plea of guilty." JA68. The result, Turner argued, was that he pled guilty "based on erroneous advice," rendering the "guilty plea itself involuntarily and unintelligently entered," and that absent counsel's failures, the result would have been different. JA68-69.

Second, Turner claimed that his "reluctant acceptance" of the open guilty plea was not voluntary, knowing, or intelligent. JA73. According to Turner, the deficiencies of his trial counsel, just mentioned, led him to enter "an unknowing and involuntary 'open' plea," because counsel failed

to provide Turner "a fundamental understanding of the law, in relation to the facts." JA74 (internal quotation marks omitted). [1] Turner elaborated that "without critical information at his disposal or having relevant, pertinent[,] and important facts revealed to him before and during separate signif[icant] discussions," the "guilty plea could not have possibly been voluntary, knowing[,] or intelligently entered into." *Id.* (emphasis removed). In other words, Turner did not understand "the nature of the charge." JA77.

Third, Turner claimed that the district court "committed plain and reversible error when it erroneously convicted and sentenced [him] to a term of 84 months for 'brandishing' a firearm" within the meaning of § 924(c)(1)(A)(ii). JA78. The "firearm in question had absolutely no bearing or relevance whatsoever to the predicate drug trafficking offense," according to Turner. *Id.* And it was "obviously" displayed "jokingly and laughingly," he continued, in response to the CI's joke that the CI would

[1] As will be seen throughout the brief, many of the claims and issues overlap. *See, e.g.*, *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (when "a defendant is represented by counsel during the plea process and enters his plea on advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases'" (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

steal his rims if the CI had a gun. JA79. "Clearly," Turner argued, "this was nothing more than two men playfully mocking one another," or "harmless jesting." *Id.* "[P]rior to [the] sale or transaction of any drugs," the firearm was returned "to its previous storage under the vehicle's seat." *Id.*

The upshot of this interaction, which was captured on "video/audio tape," JA79-80; *see* JA135 (noting that the interaction "was captured on video"), was that there were no facts that could "support a finding that he had the required intent to intimidate." JA83. Nor, Turner contended, was there any "evidence indicating" that the "firearm furthered, advanced, or helped forward a drug trafficking crime." JA82.

The government filed a motion to dismiss the § 2255 petition for failure to state a claim, *see* DE55, DE56, *see also* JA7, which the district court granted, *see* JA94-100. The court held that Turner's ineffective assistance and involuntary plea claims had to be dismissed based on affirmations he gave during his plea colloquy to rote questions from the court.

JA96-97. And Turner's brandishing claim, the district court found, was procedurally defaulted and the default could not be excused. JA97-98.[2]

The district court denied a certificate of appealability, JA99, and this appeal followed, *see* JA101 (construing Turner's motion for certificate of appealability in this Court as a notice of appeal). This Court granted a partial certificate of appealability on:

> Whether [Turner]'s conviction under 18 U.S.C. [§] 924(c) comported with the Constitution; whether there is cause to excuse procedural default.

JA131.

SUMMARY OF ARGUMENT

I. All merits and procedural questions can be resolved in favor of Dupree Turner because his conduct does not show that he brandished a firearm for the specific purpose of intimidating another person, nothing in the record shows otherwise, and he was never told before taking his plea—by trial counsel, the district judge, or the prosecution—of this es-

[2] Turner also claimed that the court erred in enhancing his base offense level in calculating his guidelines range, JA85-88, an argument the district court also found procedurally defaulted without excuse, JA98-99. That issue is not within the scope of the certificate of appealability.

sential element of the crime. This means he was not apprised of the nature of the brandishing offense when he pled, so the plea was taken without due process in violation of the Fifth Amendment, a claim that is cognizable on a petition pursuant to 28 U.S.C. § 2255. It has long been established that when, as here, a defendant is unaware of a specific intent element because no one explains it to him, and the defendant makes no factual statement or admission necessarily implying such intent, a plea of guilty is involuntary. *See Henderson v. Morgan*, 426 U.S. 637, 645-46 (1976). Because he is actually innocent, there is no procedural bar to resolving the case on this basis alone.

II. There is a second reason to vacate Turner's brandishing sentence, which is also cognizable in this habeas posture given Turner's actual innocence: the factual basis developed at Turner's plea hearing was insufficient for the district court to accept his plea, violating Fed. R. Crim. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea."). Nothing in the record is sufficient to support either the specific intent element *or* the "in relation to" element of brandishing. The district court thus abused its

discretion by accepting the plea, and this error affected Turner's substantial rights. *See* Fed. R. Crim. P. 52(b).

A. Nothing in the transcript of the plea hearing suffices to show that Turner brandished the firearm with the specific intent to intimidate another person. And nothing from any other part of the record fills the gap. Because this failure affected Turner's substantial rights, this Court should, at the very least, vacate and remand for a new Rule 11 proceeding. *See United States v. Mastrapa*, 509 F.3d 652, 658-60 (4th Cir. 2007) (vacating sentence and remanding for new Rule 11 proceeding because there was no factual basis of the mens rea element of the crime and defendant's substantial rights were affected by what "seem[ed]" to be "a basic misunderstanding" by defendant of what implicated him in the crime).

B. Moreover, nothing in the transcript of the plea hearing suffices to show that Turner "brandished" the firearm "in relation to" a drug trafficking offense, a necessary element of the crime. *See* 18 U.S.C. § 924(c)(1)(A)(ii).

1. By the plain terms of § 924(c)(1)(A), the "in relation to" element limits brandishing, a specific type of use. And case law, from before

brandishing was specified as a use subject to a higher mandatory minimum, also interpreted brandishing as a manner of use. *See, e.g.*, *Smith v. United States*, 508 U.S. 223, 231 (1993).

In *Alleyne v. United States*, 570 U.S. 99 (2013), the Supreme Court overruled prior precedent that viewed brandishing as a mere sentencing factor, i.e., special feature of the manner in which the statute's basic crime could be carried out. *Id.* at 116 (overruling *Harris v. United States*, 536 U.S. 545, 553-54 (2002)). Rather, brandishing "constitutes an element *of a separate, aggravated offense*." *Id.* at 115 (emphasis added). Thus, the "in relation to" element of the crime must apply to limit brandishing, or it is a federal crime simply to brandish a firearm, unconnected to any crime "for which the person may be prosecuted in a court of the United States." Such interpretation would remove the jurisdictional hook to federalize brandishing as a crime.

After *Alleyne*, the "in relation to" element must apply to limit brandishing, just as Congress originally intended.

2. The district judge and the prosecutor agreed that Turner's display of the firearm was "all for the rims" on his car. In other words, if the government's CI had not joked that he would steal Turner's rims if

he had a gun (a jest that has nothing to do with a drug trafficking crime), Turner would not himself have joked in pulling out his own that the informant would need a big one. And the gun was put away before the drug transaction commenced. Thus, the gun's display was not "in relation to" the drug trafficking crime at all. *See United States v. Wilson*, 115 F.3d 1185, 1191 (4th Cir. 1997) (rational jury could not find "in relation to" element met where use of a firearm "neither facilitated nor had the potential of facilitating [the defendant's] marijuana sales").

III. There is no procedural bar to reaching any of these claims on the merits, even though Turner's previous counsel neglected to raise them on direct appeal.

A. Turner is "actually innocent" of the crime, a well-established exception to procedural default. *See Murray v. Carrier*, 477 U.S. 478, 496 (1986).

As set forth above, Turner's conduct does not establish that he displayed his firearm "in order to intimidate" the CI. Nor does the record show that the firearm was displayed "in relation to" the underlying offense. It is thus "more likely than not" that reasonable jurors would find that neither the mens rea nor the "during and in relation to" elements of

the crime could be proved beyond a reasonable doubt. *See United States v. Jones*, 758 F.3d 579, 583 (4th Cir. 2014) (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

B. Even if that were not the case, though, there is "cause and prejudice" to set aside the procedural default based on ineffective assistance of counsel, another well-established exception to the bar against considering defaulted claims. *See Carrier*, 477 U.S. at 488.

1. Trial counsel provided ineffective assistance by failing to discover or discuss with Turner the intent element or these plausible defenses. *See Heard v. Addison*, 728 F.3d 1170, 1180-81, 1183 (10th Cir. 2013) (counsel provided ineffective assistance by failing to discover or discuss plausible defense before plea); *United States v. Juarez*, 672 F.3d 381, 388 (5th Cir. 2012) (same); *Dando v. Yukins*, 461 F.3d 791, 798-800 (6th Cir. 2005) (same).

Any reasonable investigation into the law and the facts would have shown that the government could not establish the specific intent element of the crime. So, too, any reasonable investigation into the law and

the facts would have led a reasonable attorney to discuss a plausible defense with Turner that he did not display the firearm "in relation to" the drug trafficking crime.

2. Turner was prejudiced by counsel's failures, meeting the prejudice requirement for both ineffective assistance and also procedural default. *See Juarez*, 672 F.3d at 388 (counsel was deficient for failing to inform defendant of "plausible" defense to liability, and there was a "reasonable probability" that but for counsel's failures the defendant would not have pled guilty). Had Turner been informed about these defenses, he would not have taken the plea. And he has made an objective showing establishing prejudice for the reasons set forth; based on the facts of this case, he has more than cleared the hurdle to show that, more likely than not, no reasonable jury would find that he committed brandishing beyond any reasonable doubt. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (prejudice in plea context turns "in large part" on whether he "likely would have succeeded at trial").

This Court should reach the merits, vacate Turner's § 924(c) conviction, and remand for further proceedings. Alternatively, this Court

should, at a minimum, remand for a hearing pursuant to 28 U.S.C. § 2255(b).

STANDARD OF REVIEW

The district court's legal conclusions are reviewed de novo and its findings of fact for clear error. *United States v. Fisher*, 711 F.3d 460, 464 (4th Cir. 2013) (this standard applies to appeal from denial of a § 2255 motion to vacate a plea as involuntary). Any more specific standards that apply to particular legal claims are discussed in context.

ARGUMENT

I. Turner's plea was not knowing, intelligent, and voluntary, as required by the Due Process Clause of the Fifth Amendment, because no one advised him before his guilty plea of the critical specific intent element required to convict on brandishing.

The district court rejected Turner's claim that his brandishing plea was involuntary, based on conclusory affirmations during his Rule 11 colloquy that he was "prepare[d] for the hearing," "understood the charges he was pleading guilty to," was pleading guilty "of his own choice," and "was, in fact, guilty." JA96-97. This is a constitutional error, cognizable on a motion brought under 28 U.S.C. § 2255(a). *See United States v. Newbold*, 791 F.3d 455, 459 (4th Cir. 2015) ("Section 2255 allows a federal prisoner to move to set aside a sentence on the grounds 'that the sentence

was imposed in violation of the Constitution . . . .'" (quoting 28 U.S.C. § 2255(a))). And to the extent this Court believes the claim was procedurally defaulted, despite the district court's decision to reach the merits, the default should be set aside. *See infra* Part III.

Given the substantial rights a defendant forfeits when he admits a crime, "a guilty plea is a grave and solemn act to be accepted only with care and discernment." *Brady v. United States*, 397 U.S. 742, 748 (1970). Such plea "not only must be voluntary but must be knowing, intelligent," and "done with sufficient awareness of the relevant circumstances and likely consequences." *Id.* The Supreme Court has long held that this standard is not met when, as here, the defendant is not apprised of the specific intent element of a crime, and the record contains no evidence of the defendant's admission to such fact. *See Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976). Here, nothing within or outside of the record indicates that anyone ever explained to Turner that the government would have to prove he displayed a firearm specifically intending to intimidate someone else. *See* 18 U.S.C. § 924(c)(4); *Dean v. United States*, 556 U.S. 568, 572-73 (2009) ("brandishing must have been done" for this "specific purpose").

To be sure, "this information need not be conveyed at the Rule 11 hearing itself." *United States v. Mattison*, 41 F.3d 1504, 1504 (4th Cir. 1994) (per curiam). It can come, for example, from discussions with trial counsel prior to the plea, during the Rule 11 plea hearing, or from the indictment. *Id.* But the fundamental point of *Henderson* is that it has to come from somewhere. *See* 426 U.S. at 647 (plea involuntary when intent element was never conveyed to defendant from any source).

In this case, nothing in the indictment or plea hearing—the only relevant record evidence—indicates that Turner was ever informed of the government's burden to prove brandishing's crucial intent element before his plea was accepted. As for the indictment, the § 924(c)(1)(A) count provides, in toto:

> On or about April 16, 2015, in the Eastern District of North Carolina, the defendant, DUPREE TURNER did knowingly carry and use a firearm during and in relation to a drug trafficking crime for which he may be prosecuted in a court of the United States, as alleged in Count Three of the Indictment, and did brandish said firearm, in violation of Title 18, United States Code, Section 924(c)(1)(A).

JA10. Although "knowingly" is noted as the intent requirement for carrying and use, the *different* and *more specific* intent element for brandishing is nowhere to be seen. Unlike an indictment that "properly set

forth the elements of the offense," *see Mattison*, 41 F.3d at 1504 (defendant aware of element on this basis), the one here says nothing of the mens rea required for brandishing. (And, of course, the indictment's reference to "knowingly" cannot suffice because that is not the correct intent for brandishing.) The district court provided even less detail, describing the criminal act, in full, as "brandishing a firearm during a drug trafficking crime." JA17.

Nor did Turner get this information from his trial counsel. As he argued in his pro se petition, his trial counsel failed to "explain and explicate the definition" of brandishing "until *after* [he] decided to accept the plea of guilty." JA68. This Court will sometimes reject such post-plea allegations, but, consistent with *Henderson*, only when there is a fair presumption from the face of the record that the defendant was otherwise aware of the element. *See, e.g.*, *Walton v. Angelone*, 321 F.3d 442, 460 (4th Cir. 2003) (record showed that defendant understood elements of offense because colloquy established "that he had discussed his guilty pleas with his attorneys, that he understood the nature of the charges against him, that he had discussed the elements of each of the offenses with his

attorneys, that his counsel had explained the elements of each of the offenses to him, that he was pleading guilty because he was, in fact, guilty, that he was waiving certain constitutional rights, and that he understood the possible sentences he could receive"); *Beck v. Angelone*, 261 F.3d 377, 388 (4th Cir. 2001) (same); *Burket v. Angelone*, 208 F.3d 172, 190 (4th Cir. 2000) (same); *see also United States v. Foster*, 592 F. App'x 217, 217-18 (4th Cir. 2015) (per curiam) (district court's "fail[ure] to define the term 'brandish' during the plea colloquy" did not render plea involuntary because defendant testified "during the plea hearing that he was satisfied with counsel's representation and understood the elements of the offenses to which he was pleading guilty," and "ability to consult with counsel on such matters was demonstrated at the plea hearing" by the defendant "excusing himself to speak with counsel").

This is an unusual case, because the Rule 11 colloquy nowhere indicates that Turner's trial counsel discussed the elements of brandishing with him. Rather, the only remotely similar questions the district judge asked Turner were whether he "had *enough time* to meet with [his] lawyer and be prepared" for the plea hearing, and whether he "underst[ood]

his lawyer." JA15 (emphasis added). He was never asked, in stark contrast to the cases in the paragraph above, whether he "understood the elements" of the offenses to which he was pleading guilty or had consulted with his attorney on the matter, or even whether he was "satisfied with counsel's representation." Nor did the judge's colloquy with Turner's trial counsel supply the missing link: defense counsel was only asked whether Turner was competent to proceed with the hearing. *See id.*

Thus, Turner's plea was not "voluntary in the sense that it constituted an intelligent admission that he committed the offense," because he did not receive "'real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.'" *See Henderson*, 426 U.S. at 645 (quoting *Smith v. O'Grady*, 312 U.S. 329, 334 (1941)). Although "a description of every element of the offense" need not always be provided, when "intent is such a critical element of the offense"—as any specific intent element, such as the one for brandishing, must surely be—then "notice of that element is required." *See id.* at 647 n.18. This is especially necessary when, as here, the mens

rea element of the crime is more specific than the colloquial understanding of the act. In common parlance, people do not think that brandishing only occurs when it is done "in order to intimidate" others.

Because Turner "was not advised by counsel or court, at any time, that an intent" to display the gun for the specific purposes of intimidating the CI would have to be proven by the government to secure a brandishing conviction, his plea must be vacated as involuntary. *See id.* at 640-41, 646-47 (internal quotation marks omitted).

II. There was an insufficient factual basis to show either that Turner intended to intimidate another person when he displayed the firearm or that he did so during and in relation to the drug offense.

For reasons related to Turner's factual innocence and involuntariness in taking a plea, his plea hearing failed to establish a factual basis to support a plea to brandishing in violation of § 924(c)(1)(A)(ii). Although violations of the formal requirements of Fed. R. Crim. P. 11 (governing plea hearings) are not normally cognizable in a § 2255 posture, there is an exception for cases, like this one, where the defendant can make a threshold showing "that unfair procedures may have resulted in the conviction of an innocent defendant"—to ignore such a violation would otherwise be a "complete miscarriage of justice." *See United States v.*

Timmreck, 441 U.S. 780, 783-84 (1979) (non-constitutional and non-jurisdictional claim that formal requirements of Rule 11 are violated is cognizable on § 2255 review if "complete miscarriage of justice" may have resulted in innocent person pleading guilty). Thus, a proper showing of actual innocence makes a Rule 11 claim cognizable on § 2255 review. *See United States v. Foote*, 784 F.3d 931, 936, 940-41 (4th Cir. 2015); *see also Wolfe v. Johnson*, 565 F.3d 140, 160 (4th Cir. 2009) ("A proper showing of 'actual innocence' is sufficient to satisfy the 'miscarriage of justice' requirement" for procedural default of habeas claim raised for first time in a 28 U.S.C. § 2254 petition) (quoting *House v. Bell*, 547 U.S. 518, 536-37 (2006)).

Turner meets that threshold, *see infra* at Part III.A—indeed, he is, in fact, innocent of the crime. Thus, the Court can address his Rule 11 claim in this collateral posture.

A. The Rule 11 colloquy was insufficient to establish that Turner had the specific intent in displaying his gun to intimidate the CI, and the failure to establish a factual basis for a critical mens rea element is plain error subject to reversal. *See Mastrapa*, 509 F.3d at 654-55 (vacating and remanding for a new Rule 11 proceeding, because it was plain error to

accept the plea when 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").[3]

Rule 11 of the Federal Rules of Criminal Procedure "governs the duty of the trial judge before accepting a guilty plea." *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969). Generally, Rule 11 "requires a judge to address a defendant about to enter a plea of guilty, to ensure that he understands the law of his crime in relation to the facts of his case, as well as his rights as a criminal defendant." *United States v. Vonn*, 535 U.S. 55, 62 (2002). Critical here, the district judge "also must determine that the plea is voluntary and that there is a factual basis for the plea." *United States v. Williams*, 811 F.3d 621, 622 (4th Cir. 2016); *see* Fed. R. Crim. P. 11(b)(3).

This Court's *Mastrapa* opinion is instructive. There, the defendant "decided to plead guilty to [a] conspiracy" to distribute narcotics "without a written plea agreement" (like here). *Id.* at 655. And there, like here, the

[3] This Court can consider the claim given Turner's showing of actual innocence, but it was not raised in the district court, so it is subject to "plain error" review now. *Mastrapa*, 509 F.3d at 657 (plain error standard of Fed. R. Crim. P. 52(b) applies to Rule 11 challenges raised for first time on appeal).

defendant's intent "was an essential element to his guilt for violation" of the statute. *Id.* at 657. At the Rule 11 plea hearing, though, the defendant disclaimed any knowledge of the conspiracy—thus, "the only evidence in the record on which to find a factual basis" for the defendant's guilty plea "was the affidavit of a special agent." *Id.* at 658. Those facts showed that the defendant met with drug dealers in the parking lot of a Burger King, then drove a van to a hotel where the drug dealers and the defendant unloaded several grocery bags from the van into a hotel room where they would meet with a government CI to sell him the drugs. *Id.* at 658. After the CI "observed five pounds of methamphetamine in the grocery bags," the dealers and defendant were arrested. *Id.* at 655.

These facts were insufficient, this Court held, "to provide evidence of *mens rea*," so the district court committed plain error in finding "a sufficient factual basis for the *mens rea* element of the conspiracy offense for which it adjudged [the defendant] guilty." *Id.* at 658. Importantly, the Court continued that the same would be true "even if nothing" in the government agent's affidavit "were contested" by the defendant. *Id.* at 660.

Thus, the Court concluded that the district court abused its discretion in finding a factual basis to support the plea. *Id.* "The requirement

to find a factual basis," this Court stated, "is designed to 'protect a defendant who is in the position of pleading *voluntarily* with an *understanding* of the nature of the charge'" but still does not "'realiz[e] that his conduct does not actually fall within the charge.'" *Id.* at 660 (quoting Fed. R. Crim. P. 11 advisory committee's notes (1966)) (emphasis added). Of course, for the reasons set forth *supra* Part I, Turner did *not* in fact appreciate the nature of the charge, so this is an even stronger case—not only was he unaware that his conduct "does not actually fall within the charge," he was *not* "in the position of pleading voluntarily with an understanding" of its nature. *Compare id.*

But even if this Court believed that the failures here did not rise to the level of a violation of Turner's due process right to plead voluntarily, intelligently, and knowingly, his brandishing conviction must still be vacated—the *Mastrapa* Court addressed this scenario, too. At the very least, here, just as in *Mastrapa*, "the record in this case seems to reveal a basic misunderstanding by [Turner] of what implicated him" in the brandishing charge, *see id.*, because he pled guilty on the basis of facts developed by the government at the Rule 11 hearing that failed to establish he had the *specific* intent required of a brandishing conviction (lower

than the "knowingly" requirement of conspiracy at issue in *Mastrapa*). This affected Turner's "substantial rights," and it is thus "appropriate to notice the district court's plain error in this case" as well. *See id.*

For the same reasons elaborated in *Mastrapa*, this Court should vacate and remand for a new Rule 11 proceeding. At the very least, Turner meets the threshold of showing actual innocence, so such further proceedings are warranted. "To allow a district court to accept a guilty plea from a defendant who did not admit to an essential element of guilt under the charge . . . would surely cast doubt upon the integrity of our judicial process . . . ." *Id.* at 661. This case "presents serious questions" as to Turner's "knowledge regarding his guilty plea and the conduct to which he pleaded guilty." *Id.* "When the record is deficient as to the defendant's state of mind—and this deficiency affects the defendant's substantial rights—the defendant may be entitled to plead anew." *Id.* (quoting *United States v. Carr*, 271 F.3d 172, 180-81 (4th Cir. 2001)).

B. The record also clearly shows that Turner did not display his firearm "in relation to" the underlying drug offense, as required to commit the crime of brandishing.

1. The "in relation to" element of § 924(c)(1)(A) applies not only to "uses or carries," but also to "is brandished." The statute provides, in full:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> > (i) be sentenced to a term of imprisonment of not less than 5 years;
> >
> > (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
> >
> > (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A).[4] Read naturally, brandishing and discharging a firearm are types of use, subject to the "during and in relation to" limitation of the statute.

[4] The indictment charges Turner with using, carrying, and brandishing a firearm in violation of § 924(c)(1)(A), but specifically does not charge him with possessing one "in furtherance" of the drug trafficking offense. On remand, the government cannot argue that Turner may be found

Before those specific uses were broken out into their own subsections, subject to increasing mandatory minimums, the Supreme Court described brandishing as a manner of "use" during and in relation to a drug crime. *Bailey v. United States*, 516 U.S. 137, 148 (1995), *superseded on other grounds by* Pub. L. No. 105-386, 112 Stat. 3469, 3469 (Nov. 13, 1998) ("use" within the meaning of § 924(c) "includes brandishing, displaying, bartering, striking with, and, most obviously, firing or attempting to fire a firearm"); *Smith v. United States*, 508 U.S. 223, 231 (1993) (same). And since the time "brandished" and "discharged" were specifically enumerated, the Supreme Court has made clear that "because the fact of brandishing aggravates the legally prescribed range of allowable sentences, it constitutes an element *of a separate, aggravated offense*," *not* a sentencing factor that merely enhances the punishment for the basic crime of using, carrying, or possessing a firearm. *Alleyne v. United States*, 570 U.S. 99, 115-16 (2013) (emphasis added). *Alleyne* thus over-

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guilty of possession. *See Bousley v. United States*, 523 U.S. 614, 624 (1998) (because indictment only charged defendant with "using," but not "carrying" firearm, defendant only had to prove he did not "use" the firearm on remand).

ruled *Harris v. United States*, which had held that brandishing is "a paradigmatic sentencing factor," "added" to § 924(c)(1)(A) to describe a "special feature[] of the manner in which the statute's basic crime could be carried out." 536 U.S. 545, 553-54 (2002) (internal quotation marks omitted).

The Supreme Court at one time believed that "in relation to" modifies "uses" and "carries," but does not "extend all the way down to modify 'is discharged.'" *Dean*, 556 U.S. at 573, 575-77 ("in relation to" element does not require that the firearm be discharged intentionally; accidental discharge is sufficient). This reasoning in *Dean*, though, relied on *Harris* to characterize discharging a firearm as a sentencing enhancement limited in scope as a "'special feature[]' of how the 'basic [§924(c)] crime was carried out,'" rather than as limited by the "in relation to" language of the statute. *Id.* at 573 (quoting *Harris*, 536 U.S. at 553). But as just set forth, *Harris* is no longer good law.

Without the limitation from *Harris*, though, it is a federal crime simply to brandish a firearm without any connection to a federal crime of violence or drug crime. The requirement that brandishing be accomplished "during and in relation to" a crime "for which the person may be

prosecuted in a court of the United States" is therefore necessary to the constitutionality of the statute; without it, there is no jurisdictional hook to federalize the crime of brandishing a firearm. "Congress cannot punish felonies generally; it may enact only those criminal laws that are connected to one of its constitutionally enumerated powers . . . ." *Torres v. Lynch*, 136 S. Ct. 1619, 1624 (2016) (internal quotation marks and citation omitted).

Limiting brandishing as an offense committed "in relation to" the underlying drug offense is also what Congress intended. When Congress was considering adding the "in relation to" limitation to the statute, the Committee Report accompanying the bill where this language first appeared explained that the new "'in relation to' the [underlying] crime" requirement "would preclude" § 924(c)'s "application in a situation where [the firearm's] presence played no part in the crime." S. Rep. No. 98-225, at 314 n.10 (1983). And it described brandishing as a type of use, thus subject to the "in relation to" requirement. *Id.* at 313-14 ("using a gun" includes, "for example," "*pointing it*" at another person "or *otherwise displaying it*" (emphasis added)). And when the "brandished" subsection was first considered by Congress, the Committee Report that accompanied

that House bill explained that to "sustain a conviction for brandishing or discharging a firearm, the government must demonstrate that the firearm was used 'during and in relation to' the commission of the federal crime of violence or drug trafficking crime." H.R. Rep. No. 105-344, at 12 (1998), http://bit.ly/2rAEYQp. This evolution shows that Congress intended the "during and in relation to" requirement to continue to apply to the specific use of brandishing.

The upshot is that after *Alleyne*, the statute's interpretation must once again align with Congress's intent. Brandishing "constitutes an element of a separate" § 924(c) offense, 570 U.S. at 115, subject to the "in relation to" limitation of the provision.

2. The Rule 11 colloquy was insufficient to establish that Turner displayed his firearm "in relation to" a drug trafficking crime. Although the "phrase 'in relation to' is expansive," it requires, "at a minimum," that "the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence." *Smith v. United States*, 508 U.S. 223, 238 (1993).

Here, we know Turner's firearm was not displayed for any "purpose or effect with respect to the drug trafficking crime," but rather, was only

coincidentally proximate to the transaction. Imagine the CI had not joked about stealing the rims. Would Turner have brandished the weapon? Clearly not—he had not done anything of the sort during any of their previous transactions. And the prosecutor's colloquy with the district judge establishes as much—"all for the rims," the judge confirmed; "apparently," the government replied.

This Court has not hesitated to vacate a conviction of guilt on § 924(c) when the firearm does not "facilitate[] nor ha[ve] the potential to facilitate[e]" the drug crime. *United States v. Wilson*, 115 F.3d 1185, 1191 (4th Cir. 1997). In *Wilson*, the Court held that the no "rational jury could reasonably find" that the presence and sale of a firearm to a government CI, who had arranged to purchase marijuana from the defendant at the time, "facilitated" or "had the potential of facilitating" the drug crime, and thus failed to meet § 924(c)'s requirement that the use be "in relation to" an underlying drug offense. *Id.* The weapon had no relation to the underlying crime, this Court reasoned, and there was no evidence that the "presence of the firearm influenced" the CI's "decision or intimidated him into purchasing marijuana from" the defendant." *Id.* at 1191-92. It

was therefore, like here, "a completely independent, yet contemporaneous action." *Id.* at 1192.

Moreover, this Court has advised that when "the drug buyer" is a "government agent who ha[s] been directed to purchase drugs" from the defendant, no rational jury could find that the use of a firearm had even the *potential* to motivate the agent's participation in the drug transaction. *United States v. Lipford*, 203 F.3d 259, 268 & n.8 (4th Cir. 2000) (affirming on sole basis that rational jury could find *seller's* participation potentially enticed by prospect of selling CI both the firearm and drugs in a transaction). "Put simply," this Court reasoned, the agent "would have purchased the drugs . . . regardless of whether" the firearm was used. *Id.*

This does not mean, of course, that displaying a firearm to a CI can *never* facilitate or have the potential to facilitate a drug transaction. If a defendant pulls out the gun to ward off a suspicious third party while he is selling to the CI, for example, that would suffice. Or if there is any possibility that the defendant might not otherwise have engaged in the transaction had he not displayed the gun, that would also be enough under *Lipford*. *Id.* at 267-68 (rational jury could conclude that defendant

was enticed to sell the drugs because he would also be selling a gun along with them).

But on the particular facts here, the government cannot establish that Turner's display of the firearm facilitated or had the potential to facilitate the drug transaction. Contrast *Lipford*. There, the defendant "was the first to suggest a firearms deal," and, "*significantly*, . . . made this offer *before*" the CI "bought drugs directly from him." *Id.* at 267 (emphasis added). Here, though, Turner had previously sold drugs to the CI several times, and who was prompted to display his gun in jesting response to the CI's joke about stealing Turner's rims. And for the CI's part, he was "directed to purchase the drugs," so he "would have purchased the drugs" anyway. *Id.* at 268 n.8. Again, he had done so several times before. There is simply no evidence to support a finding that the firearm facilitated or had the potential to facilitate a transaction the two had engaged in multiple times previously. The district court erred in finding a sufficient factual basis to take the plea.

III. There is no procedural bar to reaching either of the above claims on the merits, because Turner is actually innocent of the crime and his trial counsel's ineffective assistance is also sufficient to set aside the default.

True, Turner's appellate lawyer on direct refused to argue that the brandishing conviction was invalid, even though Turner had urged his appellate counsel to do so and preserved the argument by objecting at his sentencing hearing. 16-4162 Turner Br. at 11 n.1 (noting that counsel asserted that he had "looked into" challenging "the seven-year mandatory minimum sentence for the brandishing charge," but did "not believe it to be meritorious" so "it would not be argued in the brief"). But the default can be set aside for two reasons: Turner can show that he is "actually innocent" of brandishing in violation of § 924(c)(1)(A)(ii); and, in any event, there is cause and prejudice to set aside the default due to trial counsel's ineffective assistance in failing to inform him of plausible defenses to the brandishing charge.

The district court only found Turner's brandishing claim procedurally defaulted, and reached the merits on ineffective assistance and the voluntariness of the plea. To the extent the district court dismissed Turner's pro se motion on default grounds, this Court makes its own determination de novo. *Woodfolk v. Maynard*, 857 F.3d 531, 539 (4th Cir.

2017) (district court's "denial of habeas relief" based on procedural default reviewed de novo); *Jones v. Virginia*, 989 F.2d 493, 493 (4th Cir. 1993) (per curiam) (same for dismissal of habeas claim).

A. For essentially the same reasons already stated, Turner's conduct could not support a jury's finding, beyond a reasonable doubt, that he displayed a firearm "in order to intimidate" another person, or that his display of the firearm was in relation to the drug transaction. In other words, Turner can establish "actual innocence," a well-established exception to procedural default. *Murray v. Carrier*, 477 U.S. 478, 496-97 (1986).

"The *Carrier* standard" requires a showing that the violation of the petitioner's rights "has probably resulted in the conviction of one who is actually innocent." *See Schlup v. Delo*, 513 U.S. 298, 327 (1995) (internal quotation marks omitted). "To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him" in the light of the evidence. *See id.* This is "a lower burden of proof than the 'clear and convincing standard.'" *See id.* (citation omitted).

Turner more than meets that threshold. In short, the only evidence we have concerning the transaction, as described by the prosecutor in the

plea hearing, is that the CI got into the car and joked that if he had a gun he would steal Turner's rims, and that Turner responded in kind by showing the CI his own, saying the CI would need a large one. A video recording of the transaction apparently shows the two men laughing and joking about the whole thing. JA79; *see* JA135 (PSR confirming that the interaction "was captured on video."). At the very least, it is more likely than not that no reasonable juror would find this sufficient to establish, beyond any reasonable doubt, that Turner displayed his firearm "in order to intimidate" the CI "during and in relation" to the drug offense.

And anyway, for the reasons given *supra* Part II.B.2, Turner is factually innocent for the related reason that he did not display his firearm "in relation to" the underlying drug offense, an element of the crime. If no "rational jury" could find that he displayed the gun in relation to the offense, *see, e.g.*, *United States v. Wilson*, 115 F.3d 1185, 1191-92 (4th Cir. 1997), he of course is actually innocent of brandishing. But even if this Court did not agree that no rational juror could so find, Turner more than meets the lower preponderance threshold of establishing that it is "more likely than not" that "no reasonable juror would have found [him] guilty beyond a reasonable doubt." *See Schlup*, 513 U.S. at 327.

Either of these reasons is sufficient, at the very least, to establish Turner's actual innocence for the purpose of setting aside the default.

B. There is also "cause and prejudice" to set aside the default, because trial counsel provided ineffective assistance in failing to inform Turner of an essential element of the crime or discuss plausible defenses, and those failures were prejudicial.

Ineffective assistance of counsel is "cause" to set aside a default. *Carrier*, 477 U.S. at 488. The familiar standard for establishing ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Second, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Setting aside a procedural default also requires a showing of prejudice, similarly described as "'a reasonable probability' that," but for the error, "the result" would have been different. *See Strickler v. Greene*, 527

U.S. 263, 289 (1999). A *reasonable probability* is less than a preponderance, sufficient to "undermine confidence" in the outcome.[5]

1. Trial counsel provided ineffective assistance of counsel during the plea process. Had he reasonably investigated the law and the facts, he would have discovered that Turner had strong defenses to brandishing on *both* the mens rea and also the "in relation to" elements of the crime.[6]

Most obviously, the specific intent requirement for brandishing is right there in the statute, 18 U.S.C. § 924(c)(4), and had been expressly

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[5] It seems this Court has not resolved whether the showing of prejudice required to excuse procedural default is identical to the showing of prejudice required to establish ineffective assistance of counsel. *See Richmond v. Polk*, 375 F.3d 309, 326 n.7 (4th Cir. 2004). Given that the Supreme Court uses the "reasonable probability" language for both, this Court should hold, as "[m]ost courts of appeals have concluded," that if the petitioner can meet the prejudice standard of *Strickland*, then that is enough for prejudice to set aside a default. *See Where Counsel's Ineffectiveness Constitutes The "Cause" For The Default*, Federal Habeas Manual § 9B:74 (May 2019) (collecting cases). In any event, the choice of standard is irrelevant—Turner meets either burden given the strength of his defenses to brandishing, and trial counsel's failure to discuss those defenses with him.

[6] This claim "implicates both counsel's duty to investigate the law and counsel's duty to discuss possible defenses with [his] client," but it does not matter here whether trial counsel failed to discover the available defense or discuss it with the defendant, because "the breach of either counsel's duty to research or h[is] duty to advise would have, in this case, led to the same inadequately informed decision by [Turner] to plead guilty and therefore unknowingly to waive his constitutional right to trial." *See Heard v. Addison*, 728 F.3d 1170, 1179 n.4 (10th Cir. 2013).

highlighted in *Dean*, 556 U.S. at 572-73. Any competent counsel would have known about the intent element and, especially in light of the video evidence, that Turner had a strong defense to brandishing. *See, e.g.*, *Heard*, 728 F.3d at 1180-81, 1183 (counsel deficient for failing to discover and discuss with defendant, before he pled, a defense based on two unpublished decisions of intermediate state court); *United States v. Juarez*, 672 F.3d 381, 387-88 (5th Cir. 2012) (counsel deficient for failing to discover and discuss with defendant, before he pled, a plausible defense on alienage element in statute); *Dando v. Yukins*, 461 F.3d 791, 798-99 (6th Cir. 2006) (counsel deficient for failing to investigate and discuss duress defense with defendant, before she pled).

Indeed, whether or not trial counsel knew about the mens rea requirement does not matter to the outcome. If he did not know, there is simply no excuse—that brandishing requires a specific intent to intimidate another in the text, and could only be missed if counsel neglected to conduct the minimal investigation necessary to see it. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (decision not to conduct investigation into mitigating evidence beyond PSR and social security records not reasonable).

If he was aware of the mens rea requirement, on the other hand, it is inexcusable that he did not discuss the possibility of putting the government to its burden on this charge, considering how the firearm was displayed. As "an element of [the] crime," Turner was "entitled to put the government to its proof on the issue." *Juarez*, 672 F.3d at 387-88; *see, e.g.*, *Heard*, 728 F.3d at 1180-81 (counsel deficient for failing to advise defendant of an available defense the state supreme court later abrogated *in petitioner's* state collateral proceedings). And "the prospect of asserting a viable defense" that Turner's conduct "fell outside" the ambit of § 924(c)(1)(A)(ii) "was an alternative[] available that [he] (or any reasonable defendant, for that matter) would have deemed important," "especially" given the mandatory minimum sentence required for a conviction on the charge. *See Heard*, 728 F.3d at 1182 (internal quotation marks omitted). This Court should thus "reject any notion that counsel's decision to advise" Turner "to plead guilty without mentioning viable defenses might have been justifiable on any strategic basis." *See id.*

The same goes for counsel's failure to discover and discuss a defense based on the "in relation to" element of § 924(c). Even setting aside the evidence that Congress intended the "in relation to" element to extend to

brandishing, a reasonable investigation into the law would have quickly revealed that *Alleyne* overturned the basis of limiting "brandished" as a "special feature" of the lesser using-a-firearm crime. *Alleyne* addressed the very brandishing provision at issue. And it would have been immediately apparent that something had to limit the "*separate*" offense of brandishing. *See* 570 U.S. at 115.

Not long ago, a sister circuit held that "minimally competent counsel would have discovered" two "*unpublished* opinions" of the state's *intermediate* court, which "would have provided [the defendant] with a powerful" defense. *Heard*, 728 F.3d at 1181. It must be the case that the failure to uncover *Alleyne*—a decision of the Supreme Court—fell below the standard of minimally competent counsel. *See also Juarez*, 672 F.3d at 389 (failure to discover "other reliable sources" such as out of circuit cases and treatises constitutionally deficient); *Yukins*, 461 F.3d at 798-99 (failure to investigate Battered Women's Syndrome as a duress defense constitutionally deficient).

"Quite apart from the failure to discover" *Alleyne*, though, "minimally competent counsel would have recognized a likely defense based on the statute's text" alone. *E.g. Heard*, 728 F.3d at 1180. As § 924(c)(1)(A)

reads, "in relation to" must limit "brandishing," which is a type of "use," or else the statute seems to criminalize merely brandishing a firearm—which no one believes is a federal crime in itself. *See supra* Part II.B.1; *e.g.*, *Heard*, 728 F.3d at 1180 (counsel should have recognized a defense from face of statute, which would otherwise have no limiting principle and have been "constitutionally suspect"). Then, having "reached such a conclusion, any minimally competent lawyer would have . . . turned to case law to determine whether . . . the statute's reach" was "somehow limited," *e.g.*, *Heard*, 728 F.3d at 1180, which would have led right back to *Alleyne*—and, indeed, well-established case law that had long pointed to brandishing as a type of "use" during and "in relation to" the underlying offense. *See, e.g.*, *Bailey*, 516 U.S. at 148; *Smith*, 508 U.S. at 231.

Even if this Court did not agree that the record, as it stands, is sufficient to show that Turner is factually innocent of brandishing for purposes of setting aside the default, it should remand to the district court so he can have the opportunity to develop the record and prove his actual innocence there. *See Bousley*, 523 U.S. at 623-24.

2. Trial counsel's failures prejudiced Turner. Had counsel discussed these defenses with Turner, Turner would not have pled guilty to brandishing.

In this context, a defendant establishes prejudice if he can show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). This "in large part" turns on objective factors such as whether a defense about which the defendant was not advised "likely would have succeeded at trial," *id.*, but a petitioner's statement that he would have gone to trial "carries some probative value" as well, *Hooper v. Garraghty*, 845 F.2d 471, 475 (4th Cir. 1988). *See also Heard*, 728 F.3d at 1184 ("[W]e see no reason to blind ourselves to the individual defendant's statements and conduct when ascertaining whether he has satisfied the . . . 'reasonable probability' threshold articulated in *Hill*.").

First and foremost, Turner would not have pled guilty had he known of these defenses. *See, e.g.*, *Juarez*, 672 F.3d at 389 (although there was "no controlling" precedent on whether the defendant could establish the defense, there was "a reasonable probability that [the defend-

ant] would have been dissuaded from pleading guilty" if counsel had discussed the *plausible* defense described in "other reliable legal authority"). Because trial counsel never discussed the mens rea requirement with Turner, he "was deprived of the *opportunity* to assert a viable defense to the charge[] against him." *See, e.g.*, *id.* (emphasis added). This is enough to show "a reasonable probability that," but for counsel's failure to discuss the intent element with him, Turner "would have elected to go to trial and put the government to the burden of proving" specific intent, and based "on the evidence, a reasonable juror could have found that the government did not prove this element." *See, e.g.*, *id.* at 389-90.

And here, as in *Heard*, the objective evidence shows that there "are several ways [trial counsel] credibly could have favorably 'changed the outcome' of" Turner's case had counsel considered and discussed these defenses with him. *See* 728 F.3d at 1184. It is "reasonably probable," for example, that pushing the government during negotiations on the specific intent or "in relation to" elements of the brandishing charge "could have resulted in a better bargain" or "lesser charges." *See id.* As it is, Turner pled guilty with *no bargain* at all—strong evidence that he was

ill-informed about the paucity of evidence to support a conviction on brandishing.

Moreover, had Turner gone to trial based on the facts in the record, he likely would not have been (in fact *could* not have been, *supra* Part II) convicted of brandishing. *See Hill*, 474 U.S. at 59 (standard is "large[ly]" whether petitioner "likely would have succeeded at trial"). And even had Turner "gone to trial and been convicted, he could have mounted several potentially meritorious challenges to his conviction on appeal." *See Heard*, 728 F.3d at 1185. For example, just as in *Heard*, "as a matter of statutory construction, the legislature must have intended a more limited" construction of the statute than would reach the facts of the case. *Id.*; *see supra* Part II.B.1 (discussing legislative history of § 924(c)).

Trial counsel's failure to do any of these things fell below the standard of representation required by the Sixth Amendment, and prompted Turner unknowingly and involuntarily to accept a plea he otherwise

would not have. Thus, there is cause and prejudice to set aside the default, and to reach Turner's substantive claims.[7]

At the very least, Turner is entitled to a hearing on his claims, because no objective evidence in the record conclusively shows that he was properly informed of the nature of brandishing, or that his counsel discussed viable defenses to the charge. *See* 28 U.S.C. § 2255(b) ("Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."). An evidentiary hearing in open court is required when a movant presents a colorable constitutional claim showing disputed facts beyond the record or when a credibility determination is necessary in order to resolve the issue. *See United States v. Witherspoon*, 231

[7] As stated early on in this brief, many of the issues overlap. The prejudice Turner suffered from counsel's deficient performance is also a reason why his plea was involuntary. *See, e.g.*, *Hill*, 474 U.S. at 56; *Heard*, F.3d at 1186 (because defendant received ineffective assistance when he accepted his plea, it was not voluntary and intelligent); *Juarez*, 672 F.3d at 390 (a defendant "who does not receive reasonably effective assistance of counsel in connection with his decision to plead guilty cannot be said to have made that decision either intelligently or voluntarily" (internal quotation marks omitted)).

F.3d 923, 926-27 (4th Cir. 2000); *see also, e.g.*, *United States v. Ray*, 547 F. App'x 343, 346 (4th Cir. 2013) (per curiam) (vacating and remanding dismissal of § 2255 motion, find that "district court abused its discretion in failing to conduct an evidentiary hearing" when "there is no evidence as to what transpired during the plea negotiations between [the defendant] and his counsel, what advice counsel gave [defendant] with respect to the Government's second plea offer, and on what basis").

* * *

This case can and should be resolved on the basis of one essential fact: Turner did not brandish a firearm within the meaning of 18 U.S.C. § 924(c)(1)(A)(ii), and the government could not prove every element of the crime beyond a reasonable doubt on the conduct as *they* describe it.

As is often the case when habeas relief is warranted, fundamental failures permeated every level. Had Turner known, before he pled, about all that the government would be required to show, he would not have agreed to plea, so the failure to apprise him of the nature of the crime renders the plea constitutionally unknowing and involuntary. The Rule 11 hearing was deficient for largely the same reason. And trial counsel's failure to discover and discuss these basic legal and factual issues with

Turner fell below the standard required by the Constitution, causing him to take a plea in violation of the Fifth Amendment.

It would be a substantial miscarriage of justice to look the other way and allow Turner to remain convicted of a crime he did not commit, thus subject to a significantly longer sentence than he would otherwise be serving.

CONCLUSION

This Court should grant the petition, vacate the brandishing conviction, and remand for further proceedings. Alternatively, the Court should remand for a hearing pursuant to 28 U.S.C. § 2255(b). At a minimum, the Court should remand to the district court to evaluate Turner's substantial claim that he is actually innocent.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests oral argument, which would aid this Court's decisional process.

Dated: December 12, 2019

Respectfully submitted,

By: /s/ Daniel Woofter

Daniel Woofter
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave., Ste. 850
Bethesda, MD 20814
(202) 362-0636
dhwoofter@goldsteinrussell.com

Counsel for Appellant

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I hereby certify that on December 12, 2019, 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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Daniel Woofter